Application No. 13134/87

**Jeremy COSTELLO-ROBERTS**

against

**the UNITED KINGDOM**

REPORT OF THE COMMISSION

(adopted on 8 October 1991)

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# I. INTRODUCTION

1. The following is an outline of the case, as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

## A. The application

2. The applicant is a citizen of the United Kingdom, born in 1977 and resident in Newquay, Cornwall. He was represented before the Commission by Messrs. Binks Stern and Partners, Solicitors, London.

3. The application is directed against the United Kingdom. The respondent Government were represented by their Agent, Mr. M.C. Wood, succeeded by Mrs. A.F. Glover, both of the Foreign and Commonwealth Office.

4. The case concerns the corporal punishment of the applicant when he was seven years old by the headmaster of a private boarding school where he was a pupil. The application raises issues under Articles 3, 8 and 13 of the Convention.

## B. The proceedings

5. The application was introduced on 17 January 1986 and registered on 11 August 1987. It was originally lodged by the applicant and his mother.

6. After a preliminary examination of the case by the Rapporteur, the Commission considered the admissibility of the application on 5 May 1988. It decided to give notice of the application to the respondent Government and to invite the parties to submit their written observations on admissibility and merits, pursuant to Rule 42 para. 2 (b) of its Rules of Procedure (former version). The Government lodged their observations on 27 September 1988, to which the applicant replied on 3 January 1989.

7. On 9 May 1989 the Commission decided to adjourn examination of the application pending developments in a similar application, No. 14229/88, Y v. the United Kingdom. On 6 October 1990 the Commission decided to invite the parties to an oral hearing on admissibility and merits on the same day as a hearing in the other case.

8. The hearing was held on 13 December 1990. The Government were represented by Mrs. A. Glover, Agent, Foreign and Commonwealth Office, Mr. N. Bratza, QC, Counsel, and MM. A.D. Preston, L.B. Webb and A.W. Wilshaw, advisers from the Department of Education. The applicant was represented by Mr. M.D. Gardner, Solicitor, Messrs. Binks Stern and Partners, Ms. J. Beale, Counsel, and Mr. M. Rosenbaum, adviser. The applicant also attended the hearing together with his mother.

9. At the hearing an original complaint under Article 14 of the Convention was withdrawn by the applicant's representatives.

10. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

11. The present Report has been drawn up by the Commission in pursuance of Article 31 para. 1 of the Convention and after deliberations and votes in plenary session, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
E. BUSUTTIL
G. JÖRUNDSSON
A. WEITZEL
H.G. SCHERMERS
H. DANELIUS
Mrs. G.H. THUNE
Sir Basil HALL
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.C. GEUS
M.P. PELLONPÄÄ

12. The text of this Report was adopted by the Commission on 8 October 1991 and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

13. The purpose of the Report, pursuant to Article 31 para. 1 of the Convention, is

1) to establish the facts, and

2) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

14. A schedule setting out the history of the proceedings before the Commission is attached hereto as APPENDIX I and the Commission's decision on the admissibility of the application as APPENDIX II.

15. The pleadings of the parties, together with the documents lodged as exhibits, are held in the archives of the Commission.

## II. ESTABLISHMENT OF THE FACTS

### A. The particular circumstances of the case

16. In 1985 the applicant, then seven years old, was a pupil and boarder at an independent school in Barnstaple. The applicant's mother had made no inquiry about the school's disciplinary regime. She claimed not to have been aware at that stage that corporal punishment was widespread in private schools. The mother did not make known her opposition to corporal punishment at the outset and the school did not of its own initiative inform her of its disciplinary policy. It was the school's practice to inform parents who enquired about discipline that on rare occasions corporal punishment could be used as a punishment of last resort. When applying for entry to the school, parents were required to complete a form which indicated, inter alia, that "Parents and others 'in loco parentis' are required to abide by the rules and regulations in force at the school". Furthermore, the school prospectus included in the school's aims the following section:

> "In a well ordered boarding community the need for discipline and self discipline is apparent to the normal child. Thus a high standard of discipline is maintained ..."

17. There was, however, no mention made of corporal punishment.

18. The headmaster considered the applicant undisciplined and lacking in self control, not helped by his home background. This led to him being a disruptive influence for he refused to accept the authority of senior children or members of staff.

19. On 3 October 1985 the applicant was reprimanded by a teacher for talking in the corridor. This earned him a demerit mark. He had already acquired four such demerit marks for similar conduct and for being a little late for bed on one occasion. The penalty for collecting five demerit marks was corporal punishment. The headmaster discussed the matter with his colleagues and it was decided that, as other sanctions had proved ineffective, three "whacks" with a gym shoe were the final and only possible answer to the boy's lack of discipline. The applicant was informed of this decision. He alleged that he was told not to inform his parents about his punishment, an allegation denied by the Government.

20. Three days later, the headmaster called the applicant into his study and hit him three times on his bottom, through his shorts, with a rubber soled gym shoe. No other persons were present. The staff were said to have noticed an almost immediate improvement in the boy's behaviour, but considered that the subsequent contact that he had with his parents during the half term holiday caused him to revert. The headmaster was of the opinion that the applicant "strung his parents along", taking home stories about bullying and the like "which he has clearly made up but which equally clearly his parents believe". The school also considered that the applicant had been corporally punished in accordance with the disciplinary code and with the prior consent given, on behalf of the applicant, by his mother when applying to enter her son at the school.

21. The mother first heard of the punishment when the applicant wrote to her from school. She contacted the school immediately and she alleged that on 14 October 1985 she was informed by the headteacher that no such event had taken place. The Government deny this allegation.

22. The applicant continued to write in some distress to his mother about the "slippering". On 4 November 1985 the school confirmed that the applicant had been slippered some four weeks earlier.

23. The mother wrote to the headteacher and the governors of the school stating that she did not wish her son to be corporally punished again.

24. The mother made a complaint to the police some time between 4 and 16 November 1985, but she was told that there was no action they could take since there was no longer any visible bruising on the child's bottom. She also made a complaint to the National Society for the Prevention of Cruelty to Children, but received the same response as that from the police.

25. On 16 November 1985 the headteacher wrote to the mother stating that "in view of your obvious dissatisfaction with the education being offered... to your son..., and your desire for him to be exempt from the framework of discipline and punishment that is acceptable to all other parents at the school, it seems best if (he) is removed from (the school) at the end of the present term".

26. It was claimed that the applicant was extremely disturbed as a result of his slippering, which turned him from a confident, outgoing seven year old into a nervous and unsociable child. The Government refuted this claim. The school reports at the time noted no change in the applicant's attitude or otherwise. According to the Government's information any modification in the child's behaviour (if any) was more likely caused by his inability to adjust to the constraints of boarding school life. The correspondence between the mother, the school governors and the headmaster reflects the boy's adaptation difficulties. The Government contended that there is no evidence to show that any change in the applicant's character during his time at the school was caused by the punishment of which complaint was made.

27. The applicant was moved to a new school in January 1986, which reported in July 1986 that the boy had "calmed down considerably" since arriving there.

## B. The relevant domestic law and practice

28. The lawful bounds of corporal punishment were as generally described for all English schools prior to 15 August 1987 in Halsbury's Laws of England (Fourth Edition Volume 15) as follows:

> "66. Position of school-teachers. The authority of a school-teacher is, while it exists, the same as that of parent. When a parent sends his child to a school he

delegates to the head teacher his own authority so far as is necessary for the child's welfare and so far as is necessary to maintain discipline with regard to the child in the child's interests and those of the school as a whole. The head teacher's right to punish a child extends to a responsible assistant teacher.

67. Corporal punishment. As delegate of the parental authority, a headteacher and a responsible assistant teacher have the right to inflict moderate and reasonable corporal punishment, using a proper instrument. If, however, the punishment administered does not satisfy these criteria the teacher is liable in criminal proceedings and he or his employers are liable to a civil action for damages."

29. The criminal law of assault sanctions corporal punishment which is not reasonable, moderate or administered with a proper instrument in a decent manner. The least serious offence is common assault pursuant to section 42 of the Offences against the Persons Act 1861. Prosecutions are usually left to the aggrieved party. The maximum penalty for common assault is a £400 fine or two months' imprisonment. The 1861 Act provides for more serious offences of assault occasioning actual or grievous bodily harm. The maximum penalty for causing actual bodily harm is five years' imprisonment.

30. Physical assault is actionable in civil law as a form of trespass to the person for which damages may be recovered. Parents are however entitled to use reasonable physical punishment on their children and at the material time in the present case teachers were deemed to be "in loco parentis" and thereby had a defence to civil claims involving the moderate corporal punishment of children. Since the coming into force of sections 47 and 48 of the Education (No. 2) Act 1986 on 15 August 1987 this defence no longer avails teachers in State schools. The present case, however, involves an independant school, whose teachers may still administer reasonable corporal punishment to pupils. The concept of reasonableness permits the courts to apply prevailing contemporary standards.

31. An independent (or private) school is one at which full-time education is provided for five or more pupils of compulsory school age, not being a special school (i.e. one specifically organised to provide education for pupils with learning difficulties) or a school maintained by a public authority (section 114 (1) Education Act 1944).

32. Independent schools must apply for registration to the Registrar of Independent Schools, an officer of the Department of Education and Science. Registration is subject to the provision of suitable safety, health and educational standards, but, the Government contend, generally the State has no power to permit or prevent the operation of independent schools. Such schools are not subject to such strict maintenance standards as State subsidised schools; nor need they employ qualified teachers, follow the State teachers' salary scales or prepare pupils for particular examinations. They are free to use corporal punishment within the bounds of the civil and criminal

law, except, since 1986, on pupils whose place is paid for by the State under the Assisted Places Scheme. Excessive corporal punishment (involving successful criminal prosecutions) may provoke the Secretary of State to use his powers under section 71 (1) of the Education Act 1944 to initiate a complaints procedure which may result in an independent school being struck off the register, whereupon it becomes a criminal offence to continue running the school. No such issue has arisen in the past ten years.

33. The State provides little direct funding to independent schools, except for three out of 2,341 schools, and the payment of certain pupils' school fees in full or in part in some 226 independent schools. A total of 33,336 places are thus offered out of a total of 533,977 full time pupils in independent schools (January 1988 statistics). However such schools enjoy charitable status and are thereby relieved from the payment of certain rates and taxes. Many independent schools could not operate without such tax relief. The school in question, whilst having charitable status, receives no direct financial support from the Government and has no pupils whose fees are paid out of public funds.

34. Parents have a duty under the Education Act 1944 to educate their children, a duty reinforced by criminal sanctions. They have the choice whether to provide suitable education at home or in private or State schools. The Secretary of State has a duty under the same Act to ensure certain educational standards.

## III. OPINION OF THE COMMISSION

### A. Complaints declared admissible

35. The Commission declared admissible the applicant's complaints that his corporal punishment at school constituted breaches of his rights under Articles 3, 8 and 13 of the Convention.

### B. Points at issue

36. The following are the points at issue in the present application:

- whether the corporal punishment of the applicant was degrading treatment in violation of Article 3 of the Convention;

- whether that punishment also constituted an unjustified interference with the applicant's right to respect for his private life and family life in violation of Article 8 of the Convention;

- whether the applicant had effective domestic remedies for his Convention claims pursuant to Article 13 of the Convention.

### C. State responsibility

37. The Commission recalls that the punishment of the applicant was administered by the headmaster of a private school for whose disciplinary regime the Government had declined responsibility under the Convention. The Commission held in its decision on admissibility in the present case that the United Kingdom was responsible under the Convention, Articles 1, 3 and 8 of which having imposed a positive obligation on High Contracting Parties to ensure a legal system which provides adequate protection for children's physical and emotional integrity (see below pp. 29-30):

> "The Commission considers that Contracting States do have an obligation under Article 1 of the Convention to secure that children within their jurisdiction are not subjected to torture, inhuman or degrading treatment or punishment, contrary to Article 3 of the Convention. This duty is recognised in English law which provides certain criminal and civil law safeguards against assault or unreasonable punishment. Moreover, children subjected to, or at risk of being subjected to ill-treatment by their parents, including excessive corporal punishment, may be removed from their parents' custody and placed in local authority care. The Commission also notes that the State obliges parents to educate their children, or have them educated in schools, and that the State has the function of supervising educational standards and the suitability of

teaching staff even in independent schools. Furthermore, the effect of compulsory education is that parents are normally obliged to put their children in charge of teachers. If parents choose a private school, the teachers assume the parental role in matters of discipline under the national law while the children are in their care, by virtue of the 'in loco parentis' doctrine. In these circumstances the Commission considers that the United Kingdom has a duty under the Convention to secure that all pupils, including pupils at private schools, are not exposed to treatment contrary to Article 3 of the Convention. The Commission considers that the United Kingdom's liability also extends to Article 8 of the Convention in order to protect the right to respect for private life of pupils in private schools to the extent that corporal punishment in such schools may involve an unjustified interference with children's physical and emotional integrity."

D. As regards Article 3 of the Convention

38. Article 3 of the Convention provides as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

39. The applicant contended that the punishment inflicted on him by the headmaster at his school constituted degrading treatment contrary to Article 3 of the Convention. He relied on the Court's condemnation of the judicial corporal punishment of a teenager in the Tyrer case as a precedent for his claim (Eur. Court H.R., Tyrer judgment of 25 April 1978, Series A No. 26). Much emphasis was placed on the applicant's age at the time. He was only seven years old and a sensitive boy, away from home for the first time. He had been at the school only a short time (four or five weeks) when, for trivial disciplinary matters such as talking in the corridor, his teachers apparently despaired of his conduct and decided to administer a "slippering". However, this kind of punishment was allegedly institutionalised violence, being unrelated to the seriousness of the disciplinary offence and its administration being postponed for an anxious-making three days and executed by the school's highest authority, the headmaster, who the boy hardly knew. A seven year old child would be half the size, height and force of the adult and consequently seriously intimidated. The punishment was administered on the buttocks, adding indignity and humiliation to the act. Whilst it was mild in comparison with the birching meted out to Anthony Tyrer, its negative psychological effects were serious and long lasting, given the applicant's age and the surrounding factual context. A distinction was made between this kind of allegedly institutionalised violence in the school and physical chastisement administered in the home where the parent might punish the child for some immediate piece of naughtiness, but in the context of a loving relationship with continuous physical contacts.

40. The Government contended that the punishment in this case was moderate and reasonable and did not attain the high level of severity condemned by the Court in the Tyrer case (ibid p. 15, para. 30). They denied that the punishment administered to the applicant constituted any kind of institutionalised violence like judicial corporal punishment. The present case had none of the aggravating features of judicial corporal punishment, such as the long delay between the sentence and the administration of the punishment by a person who was a total stranger to the offender. The punishment of the present applicant was mild. He was hit three times on the bottom over his shorts with a soft-soled shoe with no one else present. No injury was sustained. The psychological troubles alleged were apparently not due to the punishment but had already manifested themselves beforehand. The Government submitted that the chastisement was administered with the minimum of formality, without any of the official aura of judicial corporal punishment, by a teacher within a school community as a disciplinary measure for a breach of the disciplinary rules of the community.

41. The Commission recalls that the Court held in the aforementioned Tyrer case that for corporal punishment to be degrading, within the meaning of Article 3 of the Convention, the humiliation and debasement involved must attain a particular level of severity over and above the usual element of humiliation involved in any kind of punishment. The assessment of such matters is necessarily relative: it depends upon all the circumstances of the case and, in particular, on the nature and context of the punishment itself and the manner and method of its execution (ibid p. 15, para. 30). Similar considerations were deemed to be relevant in a case concerning corporal punishment in Scottish State schools (Eur. Court H.R., Campbell and Cosans judgment of 25 February 1982, Series A no. 48, p. 13, para. 29). However, the Commission, to date, has not found that moderate corporal punishment in schools constitutes, as a general principle, institutionalised violence of the kind observed in the Tyrer case which would be in breach of Article 3 of the Convention. The Commission, like the Court, has always assessed claims of the present kind on the basis of the particular circumstances of the individual case (cf. No. 9471/81, Maxine and Karen Warwick v. the United Kingdom, Comm. Report 18.7.86, in which the Commission expressed the opinion that the hand caning and injury of Karen Warwick, then 16 years of age, by her school headmaster in the presence of another male teacher, had been in breach of Article 3 of the Convention).

42. The Commission has had regard to the factual circumstances of the present case. It finds that the punishment inflicted on the applicant, although probably pedagogically undesirable given his age and sensitivity, could not be said to have reached the level of severe ill-treatment proscribed by Article 3 of the Convention. Three smacks on the buttocks, through shorts, with a soft-soled shoe, apparently causing no visible injury, cannot be compared to the thrashing suffered by Anthony Tyrer when he was birched as a form of judicial corporal punishment. Nor can the applicant's situation be compared to

that of a teenage girl being punished by a man in the presence of another man, by having her hand caned so hard that it caused bruising, as in the case of Karen Warwick. The Commission considers, therefore, that the mild punishment of the present applicant did not constitute degrading treatment within the meaning of Article 3 of the Convention.

*Conclusion*

43. The Commission concludes, by 9 votes to 4, that there has been no violation of Article 3 of the Convention.

E. As regards Article 8 of the Convention

44. The relevant part of Article 8 of the Convention provides as follows:

> "1. Everyone has the right to respect for his private and family life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the protection of health or morals, or for the protection of the rights and freedoms of others."

45. The applicant submitted that the corporal punishment which he suffered constituted an unjustified interference with his right to respect for private and family life. It was conceded that a child's right to respect for private life will depend on his or her age and maturity and the ability to give informed consent to what, for an adult, might otherwise be an interference with private life. There may be an interference with the integrity of a child's person for his or her own health, safety or well-being or that of others, irrespective of the child's consent. Nevertheless the applicant alleged that the chastisement he received was unacceptable, being an interference with his physical integrity, in respect of which the state of English law left him powerless by providing a lawful defence to the headmaster for what would otherwise have been an unlawful physical assault which no adult would have tolerated.

46. The applicant also contended that his punishment unjustifiably interfered with his family life as it undermined the parent/child relationship, revealing the parents to be incapable of protecting the applicant. It also proved disruptive as the applicant had to leave the school in question and showed that his parents' wishes and beliefs were not considered worthy of respect by the school. Insofar as the parents may be thought to have consented to the applicant's punishment, it was submitted that no such consent can be implied and that the school should have made an unequivocal statement to the parents of its disciplinary policies.

47. The Government conceded that the concept of private life is a broad one, embracing all aspects of physical and moral integrity. However, they considered that in the domain of corporal punishment Article 3 of the Convention is the lex specialis and no more extensive interpretation should be given to Article 8 as the lex generalis in this sphere than is given to Article 3. The concept of respect for private life in Article 8 is a flexible one and questions of interference depend on the circumstances of the individual case, which in the present instance include the reasons for the punishment, its severity, the manner of its execution, whether corporal punishment was an established and accepted part of the school's disciplinary procedures and the express or implied consent of the parents to those procedures. As regards a positive obligation to ensure Article 8 rights, the Government emphasised that a fair balance has to be struck between the general interests of the community and individual interests. By permitting a wide diversity of types of private education, a fair balance is preserved between the legitimate interests of those parents who are in favour and those who are against the inclusion of moderate and reasonable corporal punishment as part of a school's disciplinary arrangements. In the light of these general principles, the Government submitted that there had been no failure, for which the United Kingdom was responsible, to protect the applicant's right to respect for private life. The existence of corporal punishment at the school in question was or ought to have been known to the applicant's parents when they enrolled him and the punishment in question was mild in nature and effect with no aggravating features surrounding its administration.

48. The Government could find no concrete evidence of any interference with the applicant's right to respect for family life.

49. The Commission recalls the constant case-law of the Convention organs that the concept of private life covers the physical and moral integrity of a person. Article 8 of the Convention is not only concerned with protecting the individual against arbitrary interference by public authority, but also extends to certain positive obligations upon the State, which "may involve the adoption of measures designed to secure respect for private life even in the sphere of relations of individuals between themselves" (Eur. Court H.R., X and Y v. the Netherlands judgment of 26 March 1985, Series A no. 91, p. 11, paras. 22 and 23). The Commission considers that the protection afforded by Article 8 to an individual's physical integrity may be wider than that contemplated by Article 3 of the Convention, depending on the facts of the particular case. Accordingly, although the Commission has found that the punishment in the present case was not in violation of Article 3 of the Convention (paras. 41 and 42 above), the Commission is not precluded from examining whether that same punishment infringed the applicant's rights under Article 8 of the Convention.

50. Corporal punishment of an individual would, at first sight, constitute an obvious interference with the individual's physical integrity and a lack of respect for private life. This is recognised in English law and protection is afforded against it by the criminal and civil law of assault in the regulation of relations between individuals. However, this protection is qualified by recognised defences for parents and people acting in loco parentis, like private school teachers, who may administer moderate and reasonable corporal punishment to the children in their care. The United Kingdom's positive measures have not so far been extended to protect children from certain forms of moderate chastisement in private schools and at home.

51. Consent to an interference with private life may result in no lack of respect with the Article 8 right. For young persons that consent may be given by parents. (The sending of a child to school necessarily results in an interference with his private life, particularly if disciplinary measures are imposed on the child which are thought to be an integral part of the youngster's education.) However, the scope of parental consent cannot be unlimited and it is incumbent on the State to provide safeguards against abuse (cf. mutatis mutandis Eur. Court H.R., Nielsen judgment of 28 November 1988, Series A no. 144, p. 26, para. 72). The Commission finds that, on enrolling the applicant at the private school in question, the applicant's parents cannot be said to have generally waived the applicant's right under Article 8 to respect for his physical integrity, an interference with which, in the absence of parental consent, would have constituted a violation of the provision. Nor in the circumstances of the case can they be said to have consented to the particular interference with the applicant's private life by the "slippering" to which he was subjected. Accordingly the Commission finds that the corporal punishment inflicted on the applicant constituted an interference with his right to respect for private life, guaranteed by Article 8 of the Convention. The Commission must, therefore, proceed to examine whether that interference was justified, i.e. whether it was in accordance with the law and necessary for one or more of the reasons specified in the second paragraph of Article 8 of the Convention.

52. There is no dispute between the parties that the corporal punishment of the applicant was in accordance with the law, within the meaning of Article 8 para. 2 of the Convention, the domestic law being the common law of assault, qualified by the defence of the moderate and reasonable punishment of children by their parents or persons in loco parentis, like private school teachers.

53. The Government have not put forward any social, educational, health or moral justification for the punishment of the applicant and no explanation was provided by the school to the parents, other than the fact that the applicant had accumulated five demerit marks, which, according to the school's disciplinary practice, would normally result in a pupil being physically chastised. The Commission, therefore, finds no basis on which the interference with the applicant's right to respect for private life could be said to be necessary in a democratic society for one or more of the reasons laid down in Article 8 para. 2

of the Convention. In these circumstances the Commission is of the opinion that the corporal punishment of the applicant constituted an unjustified interference with his right to respect for private life for which the State is responsible insofar as the English legal system authorised such interference and provided no effective redress.

54. The Commission finds no evidence that the corporal punishment of the applicant interfered with his right to respect for family life within the meaning of Article 8 para. 1 of the Convention. If anything the incident seems to have strengthened the family ties between the applicant and his parents, who rallied to his defence and took care to protect him from further such treatment during his education.

Conclusion

55. The Commission concludes, by 9 votes to 4, that there has been a violation of Article 8 (private life) of the Convention.

F. As regards Article 13 of the Convention

56. Article 13 of the Convention provides as follows:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

57. The applicant submitted that, contrary to Article 13 of the Convention, he had no effective domestic remedies for his claim of breaches of Articles 3 and 8. The treatment he received was lawful under English law, as was shown by the County Court decision of 28 July 1986 in No. 14229/88, Y v. the United Kingdom (Comm. Report 8.10.91, paras. 22 to 24 and para. 55), in which a severer punishment inflicted on a private school pupil was deemed lawful. The applicant also relied on the Commission's conclusion that Article 13 had been breached in the similar circumstances of Application No. 9471/81, Maxine and Karen Warwick v. the United Kingdom (Comm. Report 18.7.86, paras. 94-102).

58. The Government contended that the applicant had no arguable claim of any breach of Articles 3 or 8 of the Convention which necessitated a remedy under Article 13. They submitted that in any event the English law of assault provided an effective remedy in substance, matching the Articles 3 and 8 rights and adequately guaranteeing them. An action for assault will lie in respect of any punishment which is not both moderate and reasonable in nature and degree, irrespective of whether any actual physical injury has been caused.

59. The Commission refers to the aforementioned Warwick case in which a more severe punishment than that inflicted on the present applicant was considered lawful by a County Court and the Commission concluded that the English law of assault had not provided Maxine and Karen Warwick with an effective remedy under Article 13 of the Convention for their Convention claims. This is further borne out by the negative County Court decision referred to in the aforementioned case of Y v. the United Kingdom. It is clear, therefore, that the present applicant would have had no prospect under English law of bringing a successful assault claim against his headmaster and yet, in the Commission's view, he had an arguable claim that his rights under Articles 3 and 8 of the Convention had been violated. Accordingly, the Commission is of the opinion that the applicant did not have an effective remedy before a national authority in respect of his complaints that he suffered degrading treatment or punishment and an unjustified interference with his right to respect for private life.

Conclusion

60. The Commission concludes, by 11 votes to 2, that there has been a violation of Article 13 of the Convention.

G. Recapitulation

61. The Commission concludes, by 9 votes to 4, that there has been no violation of Article 3 of the Convention (para. 43 above).

62. The Commission concludes, by 9 votes to 4, that there has been a violation of Article 8 (private life) of the Convention (para. 55 above).

63. The Commission concludes, by 11 votes to 2, that there has been a violation of Article 13 of the Convention (para. 60 above).

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)

**Dissenting opinion of Mr. Frowein**

I regret that I am unable to share the view of the majority of the Commission. A private school is not an agent of the Government. There is no direct responsibility of the United Kingdom for acts of teachers in private schools. Although I accept that States have an obligation to guarantee by law, be it legislation or common law, the rights under Articles 3 and 8 of the Convention to pupils in private schools, no failure by the United Kingdom in this respect has been established. The existence, in 1985, before the abolition of corporal punishment in State schools, of legal rules providing for corporal punishment in private schools cannot, in my view, create a violation of the Convention.

**Dissenting opinion of Mr. Schermers**

In the present case I disagree with the majority of the Commission for much the same reasons I have elaborated in my dissenting opinion in the case of Y v. the United Kingdom (No. 14229/88 Comm. Report 8.10.91).

The main difference between these two applications is that in the present case the majority of the Commission endorses my view that the corporal punishment inflicted on the applicant was not of such a serious nature that it infringed Article 3 of the Convention.

The question then arises whether corporal punishment falling short of the severe ill-treatment proscribed by Article 3 can nevertheless be in violation of Article 8 of the Convention. At first sight I would hesitate to apply Article 8 in cases of school corporal punishment. Article 8, and in particular the notion of private life, is so wide that any violation of human rights can at the same time be seen as a violation of Article 8. It is questionable whether it would be appropriate to apply Article 8 as a lex generalis in a case where a clear lex specialis exists under Article 3 of the Convention.

On further reflection, however, I find the following construction not without logic: Article 3, the lex specialis, applies only to acts which are of such a serious nature that they can be seen as torture, inhuman or degrading treatment. No justification for such acts is possible. Acts of a less serious nature can be infringements of private life, prohibited by Article 8, unless they can be justified on one of the grounds expounded in the second paragraph of Article 8. This would bring all corporal punishment under the Convention and would at the same time offer the possibility of some flexibility. An act such as the one in the present case (three "whacks" with a gym shoe), not prohibited by Article 3, could then be seen as a breach of the Convention if committed without any legal basis or without being necessary in a democratic society for one of the purposes enumerated in Article 8 para. 2. This would enable the Convention organs to supervise the proportionality of the measure in an individual case. Three "whacks" with a gym shoe may be disproportionate if administered by a policeman in the street merely because a person did not use the pedestrian crossing; whilst it could be justified when administered by a parent or by a school teacher acting in loco parentis for some more serious reason. Such limited use of Article 8 for minor cases of maltreatment makes sense only if some justificatioon could be found for it in the second paragraph of the provision.

I find it difficult to accept that corporal punishment could ever be necessary in a democratic society for any of the purposes enumerated in Article 8 para. 2, as no other Western European State practices it, most schools in Britain now reject it and the House of Lords supported its total abandonment since this case corporal punishment has been abolished in State schools. Now that State schools are no longer permitted to use corporal punishment any proposition that corporal punishment might be necessary in a private school will be even more difficult to defend. But that is not the question before the Commission. The applicant does not submit that any United Kingdom authority may use corporal punishment. The applicant's claim is that the United Kingdom were in breach of their Convention obligations because they have failed to interfere with private school policies regarding corporal punishment.

In order for Article 8 para. 2 to apply it must therefore be demonstrated that it was provided for by law and necessary in a democratic society that private schools are entitled to organise the education they provide in such a way that corporal punishment could be resorted to within the specific limits.

With respect to the present case my view would be that, if Article 8 can be applied, the second paragraph of the article would require a balance between, on the one hand, the legitimate interests of those private schools and parents who consider discipline with corporal punishment important and acceptable, and, on the other hand, the legitimate interests of children to obtain Government protection against school corporal punishment which, although condoned by their parents, violates their right to respect for private life.

One can accept that in the present case the respect for the applicant's private life has been infringed, but such infringement could be justified by the fact that the laws on education allow private schools to organise their teaching and discipline, and that it is necessary in a democratic society, in the interests of the economic well-being of the country and for the protection of the rights and freedoms of others, for the Government to abstain from interfering in cases as mild as the present one. In balancing the interest of the applicant for State interference against the general interest of society to have private schools free to organise themselves, the conclusion may well be that there was no obligation to interfere in the present case.

As in the application of Y v. the United Kingdom, I conclude that there has been no violation in the present case, partly for the reason that the Government cannot be held responsible for the acts committed by the management of a private school, and partly because of my position that, if Article 8 para. 1 is applicable, Article 8 para. 2 also applies and provides sufficient justification for the interference with the applicant's right to respect for private life.

As regards the applicant's complaint under Article 13, I refer to my opinion in the case of Y v. the United Kingdom. In my view remedies were available under English law.

**Dissenting opinion of Mrs. Thune, joined by Mr. Geus**

Unfortunately I am unable to agree with the majority of the Commission that Article 3 of the Convention has not been violated in the present case.

I refer to the Court's finding in the Tyrer case, namely that corporal punishment may be contrary to Article 3 if the conditions of humiliation and debasement attain a particular level of severity. The Court added that the assessment is relative - depending on all the circumstances of the case and, in particular, on the nature and context of the punishment itself and the manner and method of its execution. This cannot be understood otherwise than a requirement to make a wide assessment of all the factual circumstances, extending beyond the amount of force that has been applied. The level of severity should thus be decided on the basis of an assessment of the situation as a whole as it appeared to the pupil concerned. When applying this principle in the case of Maxine and Karen Warwick (No. 9471/81 Comm. Report 18.7.86), the Commission found the hand-caning and injury of a 16 year old girl by a male teacher in the presence of another male teacher amounted to a breach of Article 3. In my view, the facts of the present case, when taken together, amount to treatment of a similar severe nature, seen through the applicant's eyes.

The punishment as such, if one only looks at the force applied, might well be considered moderate. This however cannot be decisive, given the other features of the case: We are faced with a very young boy - only 7 years old - who just a few weeks before being punished had been sent to boarding school by his parents. One must assume that he felt lonely and deceived by his parents for having been separated from them and his home. The level of maturity of a boy of that age, regardless of whether he lives away from home or not, affects how one assesses acceptable standards of behaviour and what may be considered misconduct. The punishment of young Jeremy was awarded in an institutionalised manner after the accumulation of 5 demit marks for trivial breaches of discipline. He had to wait 3 days before the punishment was administered. That is a long time in the life of a 7 year old. The Government have, in my opinion, not been able to show any convincing pedagogical justification for this approach to school disciplinary problems.

As I interpret the reasons of the majority of the Commission on this question, at paragraph 42 of the Report, they have not sufficiently identified the boy's situation or given sufficient weight to his young age. On the contrary, too much emphasis seems to have been put on the amount of force applied. Unlike the majority of the Commission, I think the applicant's situation is easily comparable to that of Karen Warwick, a 16 year old teenager when she was punished. A boy of 7 in the applicant's situation could very well have been just as sensitive and vulnerable to any infringement of his physical integrity as she was. The obvious imbalance in strength and authority between a teacher and such a young pupil implies that any use of physical force, purportedly for disciplinary purposes, is by its very nature questionable. Having regard to the case as a whole, I consider that the applicant has been subjected to inhuman and degrading treatment within the meaning of Article 3. Accordingly I conclude that Article 3 of the Convention has been violated.

**Partly concurring, partly dissenting opinion of Mrs. Liddy**

I agree that there has been no violation of Article 3.

With regard to Article 8 I share the thinking in the following two passages of Mr. Schermers' dissenting opinion, which I have had the benefit of reading:

> "With respect to the present case my view would be that, if Article 8 can be applied, the second paragraph of the article would require a balance between, on the one hand, the legitimate interests of those private schools and parents who consider discipline with corporal punishment important and acceptable, and, on the other hand, the legitimate interests of children to obtain Government protection against school corporal punishment which, although condoned by their parents, violates their right to respect for private life.
>
> One can accept that in the present case the respect for the applicant's private life has been infringed, but such infringement could be justified by the fact that the laws on education allow private schools to organise their teaching and discipline, and that it is necessary in a democratic society, in the interests of the economic well-being of the country and for the protection of the rights and freedoms of others, for the Government to abstain from interfering in cases as mild as the present one. In balancing the interest of the applicant for State interference against the general interest of society to have private schools free to organise themselves, the conclusion may well be that there was no obligation to interfere in the present case."

In reaching the same conclusion, that there has been no violation of Article 8, I have been particularly influenced by the considerations that (i) the parents may be taken to have implicitly waived the right of the child not to be chastised physically as in the climate of the time the references in the school prospectus to the need for discipline were sufficient notice of the possibility of corporal punishment and (ii) the law only permits "moderate and reasonable" corporal punishment and contains sanctions for punishment exceeding these limits.

I am also of the opinion that there has been no violation of Article 13. The majority of the Commission consider that the existing legal remedy of assault "would have had no prospect" of success, but the effectiveness of a remedy does not depend on the certainty of a favourable outcome (see Eur. Court H.R., Soering judgment of 7 July 1989, Series A no. 161, p. 48, para. 122).

**Dissenting opinion of Mr. Loucaides**

I am unable to agree with the opinion of the majority of the Commission that Article 3 of the Convention has not been violated in this case.

In principle I believe that any school corporal punishment amounts to a breach of Article 3 bearing in mind present day values regarding human dignity and human personality. Corporal punishment is nothing less than a deliberate assault on a person's dignity and physical integrity in an organised manner. Beating any person as a method of punishment for whatever wrong doing on his part, be that a criminal offence or otherwise, is nowadays generally an unacceptable form of punishment and it amounts, in my view, to inhuman and degrading treatment. This is all the more so when such punishment is applied to children by adults in authority like the present case. The inferior and helpless position of children in such circumstances, as well as their sensitivity, aggravates the inhuman and degrading elements of this kind of punishment. The number, intensity or hardness of the strokes, or the fact that they do or do not cause physical injuries are, in my view, immaterial factors in determining whether corporal punishment amounts to inhuman and degrading treatment. The nature of such punishment in itself is a sufficiently severe blow to and degradation of the personality of the individual as to amount to such treatment.

In any case, my conclusion that there has been a breach of Article 3 is further strengthened by the particular factual context of the present application. The punishment was awarded in an institutionalised manner after the accumulation of five demerit marks for trivial breaches of discipline. It was not related to any serious matter. No account seems to have been taken of the applicant's young age or the difficulties he had coping with being away from home for the first time. Moreover he had only been at the school a few weeks. He had to wait three days before the punishment was administered, which for such a young boy is a long time and must have created further anxiety. I think that in these circumstances the applicant required greater protection from physical punishment.

For all the above reasons I conclude that there has been a violation of Article 3 of the Convention in the present case.