COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Or. English

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 9471/81

Maxine and Karen WARWICK
against
UNITED KINGDOM

Report of the Commission

(Adopted on 18 July 1986)

STRASBOURG

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9471/81

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 applicants, mother and daughter, are United Kingdom citizens. The first applicant, Maxine Warwick, was born in 1944 and is a social worker residing in London. At the relevant time, she was living apart from her husband with her four children. The second applicant, Karen Warwick, was born in March 1964 and is the first applicant's eldest child. From 1975 until 27 June 1980 she attended a school in Hereford. Another daughter of the first applicant, L., also attended the same school until June 1981.

3. In the proceedings before the Commission, the applicants are represented by Messrs. Wilford McBain, solicitors, London. The United Kingdom Government were initially represented by Mrs. Audrey Glover, and subsequently by Mr. Martin Eaton, Foreign and Commonwealth Office, as agents.

4. In June 1980, the second applicant, after having taken an examination, was seen by the headmaster smoking cigarettes together with two other girls in the street outside the school.

5. Thereupon, the second applicant and one other girl were brought back to the school and told that they were to be caned by the headmaster for smoking. The deputy headmaster was asked to witness these canings.

6. The second applicant was then given one stroke of the cane on her left hand by the headmaster, in the presence of the deputy headmaster and the other girl.

7. The caning caused two large bruises on the palm of the second applicant's hand, which were still visible when she was examined by a medical doctor eight days after the incident.

8. The second applicant complained to the police, but, after having interviewed the headmaster, they considered that the nature of the injury did not justify prosecution.

9. The first applicant complained about the punishment of her daughter to the Education Authorities but her complaints were rejected. She was also informed that no assurance could be given that her other daughter, L., attending the same school, would not be subjected to corporal punishment.

10. The first applicant then brought a civil action on behalf of the second applicant in the Hereford County Court, but this action was dismissed in April 1981 on the ground that the punishment was not "improper, inappropriate or disproportionate". The applicants were subsequently advised by counsel that there were no arguable grounds of appeal against this decision.

11. The first applicant claims to be the victim of a violation of Article 2 of Protocol No. 1 to the Convention. The second applicant claims to be the victim of a violation of Article 3 of the Convention. Both applicants invoke Article 13 of the Convention.

B. The proceedings

12. The application was introduced on 3 December 1980 and registered on 6 August 1981.

13. On 17 December 1981, the Commission decided, in accordance with Rule 42 para. 2 (b) of its Rules of Procedure, to give notice of the application to the respondent Government and to invite them to present, before 6 March 1982, their observations in writing on the applicants' complaints under Articles 3 and 13 of the Convention but not, pending the case of Campbell and Cosans before the European Court of Human Rights, on the applicants' complaints under Article 2 of Protocol No. 1 to the Convention. At the Government's request, the President extended the time-limit for the submission of the observations until 3 April 1982, and subsequently until 8 May 1982. The observations by the respondent Government were submitted on 7 May 1982.

14. The applicants were then requested to submit before 16 July 1982 any comments they might wish to make in the light of the Court's judgment in the case of Campbell and Cosans (delivered on 25 February 1982) as well as their submissions in reply to the Government's observations on the admissibility and merits of the complaints under Articles 3 and 13 of the Convention. At the applicants' request, the President extended the deadline for submission of these observations until 6 August 1982. The applicants' observations were submitted on 5 August 1982.

15. Subsequently, the Government were invited to submit before 5 February 1983 their observations on admissibility and merits of the first applicants' complaints under Article 2 of Protocol No. 1 to the Convention. At the request of the Government, the President of the Commission extended the time-limit for the submission of these observations until 19 March 1983. The Government's observations on admissibility and merits of the first applicant's complaint under Article 2 of Protocol No. 1 to the Convention were submitted on 11 March 1983, and supplementary observations by the Government on the reply by the applicants were submitted on 15 March 1983.

16. On 29 April 1983, the applicants submitted further observations in reply.

17. On 14 July 1983, the Commission decided to invite the parties to appear before it at a hearing on the admissibility and merits of the case. The hearing was held on 13 March 1984. The Government were represented by Sir Patrick Mayhew QC, MP, Solicitor-General, Mrs. Audrey Glover, Agent, Mr. Nicholas Bratza, Counsel, Mr. Richard Gardiner of the Law Officers' Department and Mr. Dudley Aries and Mr. John Walmsley of the Department of Education and Science. The applicants, who also attended the hearing in person, were represented by Mr. Anthony Lester QC and Mr. David Pannick of counsel, and Mrs. P. McBain, solicitor.

18. Following the hearing, the Commission declared the application admissible.

19. After declaring the case admissible, the Commission, acting in accordance with Article 28 (b) of the Convention, placed itself at the disposal of the parties with a view to securing a friendly settlement of the case. Active consultations with the parties took place between 27 March 1984 and 6 July 1985. In the light of the parties' reaction, the Commission now finds that there is no basis upon which such a settlement can be effected.

C. The present Report

20. The present report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM. C.A. NØRGAARD, President
G. SPERDUTI
J.A. FROWEIN
E. BUSUTTIL
G. JÖRUNDSSON
G. TENEKIDES
S. TRECHSEL
B. KIERNAN
A.S. GÖZÜBÜYÜK
J.C. SOYER
H.G. SCHERMERS
H. DANELIUS
G. BATLINER
J. CAMPINOS
H. VANDENBERGHE
Mrs G.H. THUNE
Sir Basil HALL

21. The text of this report was adopted on 18 July 1986 and is now transmitted to the Committee of Ministers of the Council of Europe in accordance with Article 31 para. 2 of the Convention.

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

(i) to establish the facts, and

(ii) to state an opinion as to whether the facts found disclose a breach by the respondent Government of its obligations under the Convention.

23. A schedule setting out the history of the proceedings before the Commission is attached hereto as APPENDIX No. I and the Commission's decision on the admissibility of the application as APPENDIX No. II.

24. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. Domestic Law and Practice

(a) The Administration of Education in the United Kingdom

25. The responsibility for the administration of education in England and Wales is shared between central government and local education authorities. Section 1 of the Education Act 1944 ("the 1944 Act") places upon the Secretary of State for Education and Science ("the Secretary of State") the duty -

> "to promote the education of the people of England and Wales and the progressive development of institutions devoted to that purpose and to secure the effective execution by local authorities, under his control and direction, of the national policy for providing a varied and comprehensive educational service in every area".

26. These functions are now exercised by the Secretary of State for Wales so far as they relate solely to primary and secondary education in Wales.

27. Whilst the main role of the Secretary of State is to formulate general policy in respect of educational matters, the task of securing the actual provision of education falls upon the local education authorities. The 1944 Act places various duties upon local education authorities including the duty (section 7) -

> "to contribute towards the spiritual, moral, mental and physical development of the community by securing that efficient education ... shall be available to meet the needs of the population of their area".

28. For the purpose of fulfilling their duties, the local education authorities are empowered under section 9 of the 1944 Act to establish primary and secondary schools and to maintain such schools whether or not established by them. Schools both established and maintained by a local education authority are known as "county schools" and schools established by another body but maintained by a local education authority are known as "voluntary schools".

29. As far as the general conduct of individual schools is concerned, the 1944 Act provides (section 17 (3)) that every county and voluntary school is to be conducted in accordance with Articles of Government (which are made in the case of voluntary secondary schools by the Secretary of State and in all other cases by the local education authority - with the approval of the Secretary of State in the case of county secondary schools). The articles determine the functions to be exercised in relation to the school by the local education authority, the governors and the headteacher. Matters relating to discipline in a particular school fall to be determined by the local education authority, the governors of the school and the headteacher in accordance with the general provisions of the school's Articles of Government.

30. The policy of Hereford and Worcester local education authority concerning corporal punishment as a means of discipline in schools is stated in their Handbook of Information for Schools. Formal rules have not been drawn up concerning corporal punishment, which is "left to the discretion of individual heads".

(b) The offences of assault under criminal and civil law

31. The use of corporal punishment in England and Wales is subject to control under both the criminal and civil law. As to the former, assault is punishable under the provisions of the Offences Against the Person Act 1861 as amended. An act does not constitute assault, however, if it is done in the course of lawful correction such as by a parent of a child. However, the correction must be reasonable and moderate and administered with a proper instrument and in a decent manner - (R v Miles (1842), 6 Jur, 243; R v Hopley (1860), 2 F F 202, Cleary v Booth (1893) 1 Q.B. 465). The exception for lawful correction extends to persons such as teachers who are in loco parentis.

32. The least serious form of assault in which no appreciable injury is caused, is known as "common assault". A prosecution for common assault is normally brought under section 42 of the 1861 Act which provides that a prosecution may only be brought "by or on behalf of the party aggrieved". The reason for this is that section 45 of the Act releases the defendant from civil liability in respect of an assault for which he has been prosecuted. Section 42, therefore, ensures that the choice between criminal and civil proceedings rests with the aggrieved party. Consequently, the police will not normally undertake a prosecution for common assault but will leave it to the aggrieved party to bring any proceedings himself unless he is prevented from doing so for exceptional reasons, for example, because of great age or infirmity. The maximum penalty for common assault under section 42 is a fine of £ 200 or two months' imprisonment. The 1861 Act also makes provision for more serious forms of assault. Under section 47 an assault "occasioning actual bodily harm" may be dealt with either by a Magistrates' Court (lower court) or a higher court; the maximum penalty is five years' imprisonment and there is no restriction on prosecutions by the police.

33. Under the civil law, physical assault is actionable as a form of trespass to the person giving the person assaulted the right to recovery of damages. It is a defence to such an action if the defendant is able to justify the assault on one of a number of grounds, including the ground that the defendant was administering reasonable chastisement in the exercise of parental or other authority. Again, this extends to persons such as teachers who are in loco parentis, but the punishment is unlawful if it is immoderate or administered with an improper instrument or in an indecent manner. An employer is liable for the torts of his employees committed in the course of their employment and it may often be possible to bring civil proceedings against the teacher's employers (usually the local education authority). Civil proceedings for assault may be heard by county courts (lower civil courts) as well as by higher courts.

B. Particular circumstances of the case

34. On the morning of 5 June 1980 the second applicant went to the school to sit one of her Certificate of Secondary Education examinations. She had been attending school since Whitsun 1980 solely for the purpose of taking these examinations.

35. After the examination had ended, between 11.30 a.m. and mid-day, she left the school premises to walk the short distance to her grandmother's house. She and two other 16-year-old girls, M. and J., were seen smoking cigarettes in the street outside the school by the headmaster, who then sent a subordinate teacher to summon the three girls to the headmaster's study. Only the second applicant and her friend M. returned to the school, however, the third girl having walked on some distance by the time the teacher arrived in the street.

36. When the two girls had been brought to his study, the headmaster told them they were to be caned for smoking. He asked the deputy headmaster to witness the canings, to which the deputy headmaster agreed. The headmaster took from a cupboard a cane approximately 10 millimetres in diameter and 800 millimetres in length and ordered the second applicant to put out her hand. Having put out her left hand, she received one stroke of the cane on this hand.

37. M. witnessed this caning of the second applicant who was then obliged to witness the caning of M., who was similarly punished.

38. A doctor who prepared a medical report to the applicants' solicitors of 24 December 1980 having seen the second applicant on 13 June 1980, i.e. eight days after the caning, stated that "she had a resolving bruise across the palm of her hand approximately 1" long, about 1/2" wide, with a few small bruised areas in line with the stroke of the cane. There was no deep injury, no treatment was necessary and I anticipated that she would have a full and uncomplicated recovery from the injury that had been sustained."

39. On the afternoon of 14 June 1980, the second applicant and her grandmother visited the local police headquarters in Hereford, intending to complain that the second applicant had been assaulted by the caning inflicted upon her. A photograph of the second applicant's hand, taken at the police headquarters on that occasion, has been submitted.

40. Two plain-clothes officers, one male and one female, took particulars of the incident. The officers told the second applicant that the local police would not prosecute a headteacher without first consulting the Director of Public Prosecutions, whose policy it then was to advise the police to leave any such criminal proceedings to a private prosecution at the expense of the injured party. The police, however, interviewed the headmaster on 15 July 1980, but finally considered that the nature of the injury did not justify prosecution.

41. On 12 June 1980 and 16 June 1980, the first applicant wrote to the County Education Officer for Hereford and Worcester, complaining about the treatment of the second applicant. On 3 July 1980 the first applicant wrote to the Chairman of the Hereford and Worcester County Council (by which local authority the school is maintained). On 3 July 1980 the Chairman replied to the first applicant, rejecting her complaints about the treatment of the second applicant and refusing to give an assurance that the first applicant's other daughter L. would not be subjected to corporal punishment while she was a pupil at a school maintained by the Hereford and Worcester local authority. He observed that, in the second applicant's case, the Headmaster had preferred punishment by cane to suspension.

42. On 2 July, 4 July and 8 July 1980, the first applicant wrote to the Department of Education and Science, complaining about the treatment of the second applicant. The letter of 8 July 1980 contained the first applicant's comments on the above letter from the Chairman of the Hereford and Worcester County Council of 3 July 1980. On 18 July 1980 the Department replied to the applicant. It was stated that the Education Committee of Hereford and Worcester had not laid down formal rules about punishment, so the maintenance of discipline in school rested primarily with the Headmaster and the Governors. The use of corporal punishment was not a matter in which the Secretary of State could intervene unless there was sufficient evidence to suggest that the Governors or the local education authority had acted "unreasonably" for the purpose of Section 68 of the Education Act 1944. On the basis of the information available to it, the Department of Education and Science did not consider that there were grounds on which the Secretary of State could intervene in the matter of the second applicant. Nor did the Department have power to overrule the local education authority in its refusal to give an assurance with regard to the future treatment of the first applicant's other daugther L.

43. The first applicant applied for legal aid to finance the costs of a civil action in the Hereford County Court for damages for assault occasioned by the corporal punishment of the second applicant. However, by a letter dated 29 September 1980, the Law Society Legal Aid Local Committee informed her that the application had been refused for the following reason :

> "The potential benefit to the applicant insufficient to justify the proceedings (and the effect of the statutory charge on what would be recovered or preserved in the proceedings)."

44. The first applicant's appeal against that decision was dismissed by the Law Society Legal Aid Area Committee which, in a letter dated 24 October 1980, gave the following ground :

> "Unlikely to succeed and doubtful benefit anyway."

45. Despite the refusal of legal aid the first applicant brought a civil action on behalf of the second applicant in the Hereford County Court against the Headmaster and the County Council of Hereford and Worcester, claiming damages for assault occasioned by the caning of the second applicant. This action was dismissed on 1 April 1981 on the ground that the punishment was not "improper, inappropriate or disproportionate".

46. The judge found that the second applicant had breached a school rule; he did not accept her submission that she considered herself entitled to smoke because she had come to the end of her school days.

47. The judge observed that, at the time of the caning, "there was some distance away, outside the window of the headmaster's study, the small 11-year-old brother of the Plaintiff, who had come to the school to meet his sister, and had entered into the school grounds, presumably to look for her. Whether he in fact witnessed anything of what was happening inside the headmaster's study, I have no idea. I am satisfied that the headmaster did not at the time see him, nor was he aware of his presence."

48. With regard to the headmaster's defence of "lawful correction by corporal punishment" the judge observed : "The corporal punishment of children in general and of girls in particular, and even more particularly corporal punishment of girls over the age of puberty - especially by a male teacher rather than a female - is a matter which has provoked public consideration and some controversy. It is not for this Court to decide whether corporal punishment is desirable or not... It is not for this Court to seek to change the common law nor, in my judgement, for this Court to purport to test the decisions and suggest that principles of law written down by authorities which are binding on me should be modified because of changing public morals or attitudes. To do that would... be for me to ignore the cases; and that I cannot do. If the common law is needing change in its essential principles, then it seems to me that only the House of Lords is entitled to do so. Standards, of course, change from time to time. As I indicated in argument, we would not now, I think, tolerate floggings in schools which we are at least led to believe happened in the middle of the last century. I am entitled to take account of changing views in deciding how the law should be applied to a particular case, but I have to accept the essential principles of the law; and the essential principle of the law in this case is that a parent has the right to chastise by physical punishment any child in his custody or care. When a child is sent to school, either voluntarily or compulsorily, that parental right passes to the schoolmaster save insofar as it is limited especially by the parent or by the school regulations which are within the knowledge of the parent - but no such suggestions have been expressed in this case, by the evidence or otherwise. There was no limitation on the right and authority of the schoolmaster, in an appropriate case, to use the appropriate corporal punishment. The only doubt for me to decide is whether the punishment inflicted in this case was appropriate within the bounds of English common law."

49. The judge referred to a number of authorities as to what is "appropriate and lawful physical correction" and stated that it must be "moderate", "reasonable in nature and degree", "usual in the school" and "such as to be expected by the parent". The headmaster must exercise his discretion "as would a conscientious and competent headmaster. But within that framework the choice of appropriate punishment is his. I do not sit here as a court of appeal over his judgment or to decide that I, or other teachers, would have come to a different choice of punishment." In the second applicant's case the headmaster had not sought to exercise his discretion capriciously.

"It was not a case... of a man inflicting corporal punishment for his own gratification. I am satisfied that he was over-wrought and indignant at what had happened, and that he became somewhat emotional because he was reluctant to use the cane upon girls, that being something which he had not done in the previous seven years (a matter, in his mind, of some pride). I am, however, satisfied that he did not sustain a loss of self-control, or reach his decision through ill-temper or over-hastiness." The headmaster had properly exercised his discretion when he had excluded the alternative punishments of detention after school hours (since the second applicant was no longer attending the school full-time) and suspension or expulsion (which would have prevented her from completing her examination) and decided that corporal chastisement was the appropriate form of punishment.

50. The judge did not accept the plaintiff's argument that the punishment applied was unusual. He considered that "usual" means "an accepted category of punishment, one that was of an ordinarily contemplated category in the school, notwithstanding that it was only used as a last resort and that it had not been found necessary in the past seven years. The evidence is, in my judgment, that it was within that contemplated sphere of punishment. There had been a conscious policy decision - taken by the headmaster and the three deputy heads (two men and one woman) - that corporal punishment for girls should be retained as an appropriate form of punishment; and that being so, it seems to me that it was - within the meaning of the test - a usual punishment in that school. 'Unusual' means a punishment going outside that contemplated type of correction. If somebody tied a child up, and made him stand in a corner, bound, for an hour, that would make it unusual. The mere fact that the punishment is not used did not make it unusual."

51. The judge also did not accept the plaintiff's argument that the corporal punishment inflicted on the second applicant was not such as to be expected by the parent. He considered that this was an objective test and that it would be unreasonable to infer from the evidence of such a diversion of views between schools, authorities and those having to deal with children that all parents are of one mind. "It seems to me that, if parents make no enquiry as to the range of punishment and impose no limitation on the punishment, they must be assumed to have knowledge of the common law which permits physical punishment; and I do not think ... that that test should be read as meaning what ought a parent to expect would be the likely punishment for the individual offence. It is what the parent should expect might happen if a child had committed some form of misdemeanour which in the judgment of a schoolmaster or even schoolmistress could call for that course of punishment."

52. The judge finally did not find that, as submitted by the plaintiff, her caning was, in its effect and in view of her age, her sex and the fact that she received the stroke from a man "improper, inappropriate and disproportionate". The second applicant had sustained a minor injury - a blood blister and some bruising. "The medical evidence is that there was no deep injury; it was merely superficial, though some bruises do last some time". The plaintiff's submission was not borne out by the evidence of a witness, who was called on her behalf : "He accepted that there are certainly two opinions in the matter ... The informed, enlightened opinion is that

such punishment is inappropriate and disproportionate. On the other hand, ... in the majority of schools - something like seventy to eighty per cent - the right to use corporal punishment is retained even for girls over the age of sixteen and even when inflicted by a male teacher; and ... in the twenty or thirty per cent of schools which by and large oppose corporal punishment only in some is there an express prohibition of it - whilst nevertheless leaving it to their discretion. In these circumstances, it seems to me that I cannot say that by modern standards this was improper, inappropriate or disproportionate."

53. On 19 May 1981, the applicants were advised in writing by Counsel that there were no arguable grounds of appeal against the above judgment which were likely to succeed as a matter of English law; a decision of this kind was only appealable if the judge had mis-stated or mis-applied the law and not simply because his appraisal of the facts was contrary to what others might have found. Counsel observed that the Court of Appeal, "like the rest of our courts, consists almost entirely of judges whose education involved the liberal use of corporal punishment and who have no aversion to it, which makes an argument that the mere occurrence of physical injury proves an excess of force a difficult one to make attractive."

III. SUBMISSIONS OF THE PARTIES

54. The parties' submissions on the merits of the application are summarised below. The submissions made at the admissibility stage are summarised in the decision on admissibility (Annex II).

A. The applicants

(a) Article 3

55. The second applicant submits that the treatment or punishment applied to her was degrading in all the circumstances.

56. As to the nature of the treatment, the applicants, referring to the Tyrer judgment (Eur. Court H.R., 25 April 1978, Series A, No. 26, para. 33), argue that the second applicant was treated as an object in the power of the authorities and that the punishment applied to her amounted to institutionalised violence.

57. The second applicant further refers to the age and sex of the second applicant and submits that it is degrading for a 16 years old woman to be physically punished by an adult male.

58. Next, the second applicant claims that the caning caused physical injury, pain and suffering and may have had adverse psychological effects.

59. In addition, it is submitted that the unacceptable nature of the punishment was aggravated by the absence of safeguards, as well as by the presence of witnesses and the publicly visible nature of the injury on the hand.

60. Moreover, the second applicant refers to the commonly accepted standards concerning corporal punishment of schoolchildren in the member States of the Council of Europe and submits that the United Kingdom now stands in unsplendid isolation in permitting this form of punishment.

61. Finally, the second applicant recalls that she gave evidence before the County Court judge that she felt degraded by the caning.

62. The applicant rejects the submission by the Government that the breach of school rules which led to the caning is a factor relevant to whether the punishment was degrading.

63. Similarly, the second applicant takes issue with the Government's claim that corporal punishment contrary to Article 3 would also be prohibited under English law. The second applicant argues that English law contains no suggestion that corporal punishment is unlawful simply because of its being degrading.

(b) Article 13 read in conjunction with Article 3

64. The second applicant claims that there exists no available and sufficient remedy for school corporal punishment under English law if this punishment is administered from no improper motive and causing no more than minor physical injury.

(c) Article 2 of Protocol No. 1

65. The applicants welcome the fact that the Government have introduced a bill in Parliament to guarantee respect for parents' rights under Article 2 of Protocol No. 1, but consider that this should not lead the Commission to refrain from finding that the first applicant's rights under this provision were infringed in the present case.

66. The applicants note in this respect that the Campbell and Cosans judgment was delivered in February 1982 but that, following the rejection of the above bill in the House of Lords, there is still no legislation to respect parents' rights under Article 2 of Protocol No. 1 to the Convention.

(d) Article 2 of Protocol No. 1 read in conjunction with Article 13

67. The first applicant submits that there was no effective remedy before a national authority for her claim that the United Kingdom denied her the right to ensure that her children were educated and taught in conformity with her religious and philosophical convictions.

B. The Government

(a) Article 3

68. The Government submit that in order to constitute a violation of Article 3 of the Convention treatment or punishment must exceed a level or threshold of humiliation which exceeds the "usual or perhaps almost inevitable element of humiliation resulting from punishment of a wrong-doing." Since the second applicant committed a flagrant and public act of indiscipline she herself raised the level of humiliation necessary to establish a breach of Article 3 of the Convention in the opinion of the Government. In addition, the Government consider it most unlikely that in giving evidence before the Hereford County Court the second applicant's expression that she felt "degraded" was used in the meaning of Article 3.

69. The Government deny that the second applicant was treated "as an object in the power of the authorities". It is submitted that the punishment was promptly carried out in familiar surroundings by a man known to the second applicant as the headmaster for some years. The punishment, thus, was carried out with a minimum of delay or formality. Furthermore, the Government do not consider one blow to the hand in isolation in this case to constitute an assault on the physical integrity of the second applicant.

70. As to the presence of other persons the Government notes that the applicants have failed to submit evidence that the second applicant was humiliated in these people's eyes.

71. The Government conclude that the second applicant's complaint under Article 3 is unfounded.

(b) Article 13 read in conjunction with Article 3

72. The Government observe that the law governing the administration of corporal punishment by school teachers is based upon the right of parents to use physical punishment on their children. Parents and teachers are protected by the law only when the punishment in a particular case is "reasonable" in the circumstances of the case. The concept of "reasonableness" permits the courts to apply standards prevailing in contemporary society with regard to the physical punishment of children.

73. The Government submit that a civil action for assault constituted an available and sufficient remedy for the second applicant's complaints. They argue that the County Court took the same factors into account as were identified by the European Court of Human Rights in the Tyrer Case as being relevant to the question whether the punishment was "degrading" in the sense of Article 3.

74. The Government accept that the mere degradation of a pupil is not a criminal offence under English law but contend that the criteria of reasonableness of the corporal punishment inflicted are close to the tests and criteria applicable to Article 3 of the Convention. The Government refer to the criteria laid down in R v Hopley (1860), 2 F 8 D 202, page 206, according to which corporal punishment is unlawful if

"It be administered for the gratification of passion or of rage or if it be immoderate and excessive in its nature or degree or if it be protracted beyond the child's powers of endurance or with an instrument unfitted for the purpose and calculated to produce danger to life and limb".

(c) Article 2 of Protocol No. 1

75. The Government accept that the refusal by the local education authority to give the first applicant the assurance she asked for gave rise to an issue under Article 2 of Protocol No. 1. However, pointing at the impending changes in the United Kingdom law which would fully respect philosophical convictions of parents concerning corporal punishment, the Government request the Commission to make no finding in this respect.

(d) Article 13 read in conjunction with Article 2 of Protocol No. 1

76. The Government accept that at the relevant time parents who expressed convictions against the use of corporal punishment of their children would not have had a remedy if moderate and reasonable corporal punishment was applied to their child.

77. The Government again refer to the proposed legislation in this respect which will clearly establish an effective remedy in a case in which a child is punished against the expressed wishes of the parents.

IV. OPINION OF THE COMMISSION

Points and issue

78. The principal points at issue under the Convention are as follows:

a) whether the caning of the second applicant constituted a breach of her rights under Article 3 of the Convention;

b) whether the refusal by the Local Education Authority to give an assurance that the first applicant's daughter L. would not be physically punished constituted a breach of the first applicant's rights under Article 2 of Protocol No. 1 to the Convention;

c) whether an "effective remedy before a national authority" as referred to in Article 13 of the Convention was available to the applicants in respect of the above-mentioned matters.

A. Article 3 of the Convention

79. The second applicant claims that the corporal punishment inflicted upon her on 5 June 1980 constituted degrading treatment or punishment, in breach of Article 3 of the Convention, which provides:

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

80. The respondent Government have contended that the punishment administered to the second applicant was not of such nature as to constitute degrading or inhuman treatment or punishment.

81. The European Court of Human Rights held that "in order for a punishment to be 'degrading' and in breach of Article 3, the humiliation and debasement involved must attain a particular level..." (Eur. Court H.R., Tyrer judgment of 25 April 1978, Series A No. 26 p. 15, para. 30).

82. The Court further stated that "the assessment is, in the nature of things, relative: it depends on all the circumstances of the case and, in particular, on the nature and content of the punishment itself and the manner and method of its execution" (ibid.).

83. Although the above case concerned judicial corporal punishment, the Commission recalls that the Court also considered these criteria to be applicable in a case concerning school corporal punishment (Eur. Court H.R., Campbell and Cosans judgment of 25 February 1982, Series A No. 48 p. 13 para. 29).

84. The Court also held in the Tyrer case that judicial corporal punishment was institutionalised violence, i.e. violence permitted by the law. The Court further held that the institutionalised character of this violence was further compounded by the whole aura of official procedure attending the punishment (Eur. Court H.R., Tyrer judgment, para. 33, p. 16).

85. The Commission is of the opinion that these considerations do not necessarily apply to school corporal punishment. Although the existence of particular rules may also have adverse effects in that context, the Commission considers it relevant that in the present case no formal rules on corporal punishment had been drawn up by the competent local education authority, but that its use was left to the discretion of the individual heads.

86. The Commission has had special regard to the distinctive circumstances surrounding the use of corporal punishment in the present case. It attaches particular importance to the fact that the punishment consisted of a physical injury inflicted by a man, in the presence of another man, on a 16-year-old girl, who under domestic legislation is a woman of marriageable age.

87. In addition, the injury sustained by the applicant, the effects of which remained clearly visible for at least over a week, cannot be said to have been of a merely trivial nature. Nor can it be excluded that the punishment also had adverse psychological effects.

88. Consequently, considering these circumstances as a whole, the Commission finds that the corporal punishment inflicted upon the second applicant caused her humiliation and attained a sufficient level of seriousness to be regarded as degrading within the meaning of Article 3 of the Convention.

89. The Commission concludes, by 12 votes to 5, that there has been a violation of Article 3 of the Convention with regard to the second applicant.

B. Article 2 of Protocol No. 1 to the Convention

90. The first applicant has complained that the refusal of the authorities to respect her philosophical conviction that her daughter L. should not be subjected to corporal punishment at school, amounted to a breach of Article 2 of Protocol No. 1 to the Convention which provides as follows:

> "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions".

91. The respondent Government have accepted that the refusal by the local education authority to give the first applicant the assurance she asked for concerning her daughter L. gave rise to an issue under the above provision.

92. The Commission recalls that parents' views on corporal punishment may under certain circumstances amount to philosophical convictions within the meaning of Article 2 of Protocol No. 1 to the Convention (cf. Eur. Court H.R., Campbell and Cosans judgment of February 1981, Series A No. 48, p. 16 para. 36). The Commission is satisfied that in the present case the first applicant's views on corporal punishment were indeed philosophical convictions within the meaning of Article 2 of Protocol No. 1 to the Convention, and finds that the refusal by the competent authority to give the first applicant the assurance that her daughter L. would not be subjected to corporal punishment amounted to a failure to respect her philosophical convictions.

93. The Commission concludes unanimously that there has been a violation of Article 2 of Protocol No. 1 to the Convention with regard to the first applicant.

C. Article 13 of the Convention in conjunction with Article 3 of the Convention

94. The second applicant has complained that she did not have an effective remedy before a national authority concerning her claim that she was subjected to degrading treatment or punishment and she has invoked Article 13 of the Convention in this respect.

95. 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".

96. The Government have submitted that a civil action for assault constituted an available and sufficient remedy for the second applicant's complaints under Article 3 of the Convention.

97. The Commission observes that the applicants did bring civil proceedings before a County Court, but that the action was dismissed on the ground that the punishment was not "improper, inappropriate or disproportionate".

98. The Commission does not accept the Government's contention that the criteria applied by the County Court were the same as those identified by the European Court of Human Rights in the Tyrer case. The Commission notes in this respect that the County Court did not examine the question of whether the punishment had humiliated the second applicant in her own eyes or in the eyes of others. The Commission observes that the applicants were advised by Counsel that there were no arguable grounds of appeal against the judgment of the County Court under English law. The Commission further notes that the Government have accepted that the mere degradation of a pupil is not a criminal offence under English law. Consequently, the Commission is of the opinion that the second applicant did not have an effective remedy before a national authority in respect of her complaint that she had become the victim of degrading treatment or punishment.

99. The Commission concludes, by 13 votes to 4, that there has been a violation of Article 13 of the Convention read in conjunction with Article 3 of the Convention with regard to the second applicant.

D. Article 13 of the Convention in conjunction with Article 2 of Protocol No. 1 to the Convention

100. The first applicant has alleged that she did not have an effective remedy before a national authority in respect of her complaint that her philosophical convictions concerning the education of her daughter L. were not respected.

101. The Commission notes that the Government have accepted that at the relevant time parents who expressed convictions against the use of corporal punishment of their children would not have had a remedy if moderate and reasonable corporal punishment was applied to their child.

102. The Commission concludes unanimously that there has been a violation of Article 13 of the Convention read in conjunction with Article 2 of Protocol No. 1 to the Convention with regard to the first applicant.

Recapitulation

103. The Commission concludes, by 12 votes to 5, that there has been a violation of Article 3 of the Convention with regard to the second applicant (para. 89).

The Commission concludes unanimously that there has been a violation of Article 2 of Protocol No. 1 to the Convention with regard the first applicant (para. 93).

The Commission concludes, by 13 votes to 4, that there has been a violation of Article 13 of the Convention read in conjunction with Article 3 of the Convention with regard to the second applicant (para. 99).

The Commission concludes unanimously that there has been a violation of Article 13 of the Convention read in conjunction with Article 2 of Protocol No. 1 to the Convention with regard to the first applicant (para. 102).

Secretary to the Commission

(H.C. KRÜGER)

President of the Commission

(C.A. NØRGAARD)

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Partially dissenting opinion* of MM. Schermers, Batliner, Vandenberghe and Sir Basil Hall

We cannot agree with the conclusions of the majority as to the application of Article 3 and of Article 13 read in conjunction with Article 3 of the Convention.

I. As to Article 3

1. While corporal punishment in schools may, under certain conditions, be considered to be degrading treatment in breach of Article 3, it follows nevertheless from the judgment in the Tyrer case "that 'treatment' itself will not be 'degrading' unless the person concerned has undergone ... humiliation or debasement attaining a minimum level of severity" (Eur. Court H.R., Campbell and Cosans judgment of 25 February 1982, Series A No. 48 p. 13 para. 28). Such "assessment is ... relative: it depends 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" (Eur. Court H.R., Tyrer judgment of 25 April 1978, Series A No. 26 p. 15 para. 30). The Court referred in that context to the "institutionalised character of this violence ... compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender (Tyrer judgment, l.c., p. 16 para. 33). Also the Court seems to attach some weight to the delay which occurred until the punishment was carried out (Tyrer judgment, l.c.). Finally, whilst "it may well suffice that the victim is humiliated in his own eyes" it is also true that publicity "may be a relevant factor in assessing whether a punishment is 'degrading' within the meaning of Article 3" (Tyrer judgment, l.c., p. 16 para. 32).

2. In the instant case the punishment by the headmaster did not take place publicly before the whole school class but only in the presence of the deputy headmaster and of the fellow pupil of the second applicant who was also to be punished because she too had been smoking cigarettes. In our view the presence of the deputy headmaster might well be seen not as a degrading element but as providing an essential measure of safeguard for the girl against an unreasonable, arbitrary or excessive use of corporal punishment. Alone with the

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*) Dissenting Opinion joined by Mr. Soyer as far as Article 3 is concerned.

headmaster a pupil could feel delivered to violence without protection. The fact that the other girl who was also to be punished because of smoking was present does not in itself constitute an aggravating element, on the contrary. The second applicant was thus not alone before the headmaster and his deputy but the two girls found themselves together in a certain situation of solidarity.

Compared with the Tyrer case the punishment in the present situation, apart from the authorisation by law and the essential safeguard of the presence of a second teacher, did not have such an institutionalised character and official aura. It was not inflicted by the police through which the State's authority and the public power manifestly appear and before such official person a person may easily feel defenceless. Whilst at the school the treatment was carried out by a person not wearing a state uniform and who was not a stranger to the girls but known to the second applicant for years. The caning did not take place in a prison but in the familiar surroundings of the school and of normal daily life. It further was done without any delay, immediately after the headmaster had seen the second applicant smoking cigarettes in the street outside the school. According to the assessment of the judge of the Hereford County Court the headmaster was "overwrought and indignant" but "did not sustain a loss of self-control, or reach his decision through ill-temper or over-hastiness" and had "properly exercised his discretion" (see para. 49 of the Report).

3. The majority attaches some importance to the fact that the physical injury was "inflicted by a man, in the presence of another man, on a 16 year-old girl who under domestic legislation is a woman of marriageable age". Although such elements may be of relevance, in the present case the punishment has not for those reasons been shown to have attained the particular level of a degrading treatment required by Article 3. The girl was still a minor under national law. We also note that according to English common law the teacher is - as far as education at school is concerned - considered to have a position and to act in "loco parentis", a concept taken from the father/mother-child relation. This seems to include for the teacher responsibility not only for imparting knowledge to the pupil but also as far as school is concerned for education in a wider sense, even if the minor has become 16 years old. This implies in our view the idea of a basic positive relationship between the generations, even if of different sexes. It also implies responsibility and care, of the older for the younger, and care may sometimes require strong measures. The headmaster seems to have used his disciplinary authority because he saw the girl smoking cigarettes and because he had the main responsibility for the school and its pupils. Also with regard to the one stroke on the girl's hand there is nothing to demonstrate that the kind of punishment or the way it was delivered made any difference because of the sex of the pupil. This is different from the circumstances considered by the Commission in the case of Application No. 7907/77 (Mrs. X against the United Kingdom, decision of the Commission of 12 July 1978, D.R. 14 p. 205, in particlar p. 206 para. 4).

4. In the Tyrer judgment (pp. 15-16 para. 31) the Court recalls that "the Convention is a living instrument which ... must be interpreted in the light of present-day conditions" and it cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field". This may also apply to questions of school discipline. On the other hand, as far as Article 3 of the Convention is concerned one has equally to look at the particular structure and quality of Article 3. The Court has recalled that the "prohibition contained in ... is absolute: no provision is made for exceptions" (Tyrer judgment, l.c., p. 15 para. 30). There is no possible justification for interference with that prohibition. Moreover according to Article 15 para. 2 "there can be no derogation from Article 3" (Tyrer judgment, l.c.). It is a great achievement in international law that Article 3 stands and resists absolutely, even in times of war and public emergency or under other difficult conditions. This achievement of absolute protection is also a feature of Article 7 (together with Article 4 para. 2) of the International Covenant on Civil and Political Rights.

There might be to some extent two dangers in weakening the protection of Article 3. The one would be to interpret it too flexibly in following changing social and political conditions which would result in the adverse effect that in difficult times the Article might loose a great deal of its protection. The other risk consists in overloading the content and of amplifying the Article with matters of a lesser degree of severity and thus weakening the very serious nature of a breach of Article 3. In the Tyrer judgment the Court held that "in order for a punishment to be 'degrading' and in breach of Article 3, the humiliation or debasement involved must attain a particular level" (l.c., p. 15 para 30). In our view this particular level is not reached in the present case.

II. As to Article 13 in conjunction with Article 3

It appears to us that the law of England provides a remedy if corporal punishment at schools is not moderate, reasonable in nature and degree, usual in the school and such as to be expected by a parent. At the level we consider to be necessary to constitute degrading treatment in violation of Article 3 any treatment in violation of that Article would also be likely to constitute a violation of the law of England which provides both criminal and civil remedies for such treatment.

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A P P E N D I X I

History of the Proceedings
before the Commission

Date	Item
a) **Examination of admissibility**	
3 December 1980	Introduction of the application
6 August 1981	Registration of the application
17 December 1981	Commission's deliberations and decision to give notice of the application to the respondent Government and to invite them pursuant to Rule 42 para. 2 sub-para. (b) of the Rules of Procedure to present their observations in writing on the admissibility and merits of the applicants' complaints under Articles 3 and 13 of the Convention, but not on Article 2 of Protocol No. 1 of the Convention pending the case of Campbell and Cosans before the European Court of Human Rights
7 May 1982	Observations of the respondent Government
2 August 1982	Observations of the applicants in reply as well as their comments in the light of the Court's judgment in the case of Campbell and Cosans
11 March 1983	Observations by the Government on Article 2 of Protocol No. 1 to the Convention
15 March 1983	Supplementary observations by the Government on the reply by the applicants
29 April 1983	Further observations in reply of the applicants

Date	Item
14 July 1983	Deliberations of the Commission and decision to invite the parties to appear before it at a hearing on admissibility and merits
13 March 1984	Hearing of the parties followed by Commission's deliberations and decision on admissibility
	The Government were represented by -Sir Patrick Mayhew QC, MP, -Mrs. Audrey Glover, -Mr. Nicholas Bratza, -Mr. Richard Gardiner -Mr. Dudley Aries -Mr. John Walmsley
	The applicants were represented by -Mr. Anthony Lester, QC -Mr. David Pannick -Mrs. P. McBain

b) Examination of the merits

6 July 1985	Commission's deliberations and decision to adjourn the application pending the outcome of the hearing of application No. 10592/83
7 March 1986	Commission's further deliberations
9 May 1986	Commission's further deliberations
18 July 1986	Commission's further deliberations on the merits and adoption of the present Report.