COURT (CHAMBER)

CASE OF McMICHAEL v. THE UNITED KINGDOM

(Application no. 16424/90)

JUDGMENT

STRASBOURG

24 February 1995

In the case of McMichael v. the United Kingdom[1],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A[2], as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr F. GÖLCÜKLÜ,
Mr L.-E. PETTITI,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr A. SPIELMANN,
Mrs E. PALM,
Mr I. FOIGHEL,
Sir John FREELAND,

and also of Mr H. PETZOLD, *Registrar*,

Having deliberated in private on 22 September 1994 and 25 January 1995,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court on 10 December 1993 by the European Commission of Human Rights ("the Commission"), within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 16424/90) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under Article 25 (art. 25) on 11 October 1989 by two British citizens, Mr Antony and Mrs Margaret McMichael.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 6 para. 1, 8 and 14 (art. 6-1, art. 8, art. 14) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 30).

3. The Chamber to be constituted included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 28 January 1994, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr L.-E. Pettiti, Mr R. Macdonald, Mr C. Russo, Mr A. Spielmann, Mrs E. Palm and Mr I. Foighel (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government of the United Kingdom ("the Government"), the applicants' lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the orders made in consequence, the Registrar received the applicants' and the Government's memorials on 2 and 16 May 1994 respectively, a supplementary memorial from the applicants on 2 August 1994 and comments from the applicants in connection with the application of Article 50 (art. 50) of the Convention on 13 September 1994. Revised versions of the applicants' memorial and supplementary memorial were filed at the registry on 31 August 1994. On 22 August the Secretary to the Commission informed the Registrar that the Delegate would be submitting her observations at the hearing.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights

Building, Strasbourg, on 20 September 1994. The Court had held a preparatory meeting beforehand.
There appeared before the Court:
- for the Government
Mrs S.J. DICKSON, Foreign and Commonwealth Office, *Agent*,
Mr T.C. DAWSON, QC, Solicitor General for Scotland,
Mr R. REED, Advocate, *Counsel*,
Mr J.L. JAMIESON, Solicitor, Scottish Office,
Mr D. MACNAB, Administrator, Scottish Office, *Advisers*;
- for the Commission
Mrs G.H. THUNE, *Delegate*;
- for the applicants
Mr P.T. MCCANN, Solicitor, *Counsel*,
Mr T. RUDDY, Trainee Solicitor, *Adviser*.

The Court heard addresses by Mrs Thune, Mr McCann and Mr Dawson as well as replies to its questions.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

A. Events up to and during 1987

6. The first applicant, Antony McMichael, and the second applicant, Margaret McMichael, live in Glasgow. They were born in 1938 and 1954 respectively and were married on 24 April 1990.

7. On 29 November 1987 the second applicant gave birth to a son, A. The first applicant, who was then known as Antony Dench, and the second applicant, were living together, although at that time each had their own home. At the time the second applicant expressly denied that the first applicant was A.'s father. The child's father was not identified on the birth certificate.

8. The second applicant had a history of severe and recurrent mental illness, diagnosed as manic depressive psychosis. She had first been ill in or about 1973 and had thereafter been compulsorily admitted to psychiatric hospitals on a number of occasions. While she and A. were still in hospital after the birth, Dr R., the consultant psychiatrist who had treated her since 1985, found that she was suffering from a recurrence of her mental illness. He considered that if she were to go home with A., the child would be at risk. As a result, on 11 December 1987 the social work department of Strathclyde Regional Council ("the Council") - this being the local government body having statutory responsibilities relating to the welfare of children in Glasgow and the surrounding area - applied for and were granted an order known as a "place-of-safety order", in accordance with section 37 (2) of the Social Work (Scotland) Act 1968 ("the 1968 Act") (see paragraph 50 below for an explanation as to such orders). The effect of this order was to authorise the Council to keep A. in the hospital for a period not exceeding seven days. The second applicant was informed and advised to seek legal advice.

9. The Reporter to the Children's Panel for Strathclyde Region, being of the view that A. might be in need of compulsory measures of care, arranged for a "children's hearing" to be convened, in accordance with section 37 (4) of the 1968 Act (as to the functions of the Reporter and the nature of children's hearings, see paragraphs 46, 47, 50 and 51 below). The ground of referral of the case to the children's hearing was that "a lack of parental care [was] likely to cause [A.] unnecessary suffering or seriously to impair his health or development", this being one of the statutory grounds provided for under section 32 of the 1968 Act (see paragraph 48 below). In support of the ground of referral, the following statement of facts was given:

"(1) ...

(2) That the parent suffers from a major psychiatric illness.

(3) That the parent refuses to take medication to stabilise her condition when not an in-patient at psychiatric hospital.

(4) That the parent has required to be admitted to psychiatric hospital on emergency basis ... on 5 June 1986, 5 December 1986 and 31 December 1986.

(5) That due to her psychiatric condition the parent is unlikely to be able to care adequately for the child."

10. At the children's hearing on 17 December 1987 the chairman explained to the second applicant the reasons stated by the Reporter for the referral of the case. She indicated that she did not accept the ground of referral and, in particular, disputed paragraphs 2, 3 and 5 of the statement of facts. The children's hearing accordingly instructed the Reporter to apply to the Sheriff Court (the local court) for a finding as to whether the ground of referral was established, in accordance with section 42 of the 1968 Act (see paragraph 54 below).

The children's hearing also issued a warrant under section 37 (4) of the 1968 Act for A.'s continued detention in a place of safety until 6 January 1988 (see paragraph 50 below). A subsequent warrant was granted by a further children's hearing on 5 January 1988.

11. On 23 December 1987 A. was discharged from hospital and taken to foster parents at Greenock, twenty-four miles from Glasgow. He has remained with them since then. On the same day the second applicant discharged herself from hospital. Arrangements were made for her to be taken three times a week for access visits to A. at the foster home, under the supervision of the social work department.

The first applicant, who also has a history of mental illness, was not included at this stage in the access arrangements. The principal reason for this was that the second applicant continued to deny that he was A.'s father and he did not himself make any claim to be the father. Other reasons were his aggressive and threatening attitude and his refusal to give information about his background.

B. Events during 1988

12. The second applicant complained about the placement in Greenock and inadequacy of access arrangements. At first she accepted the exclusion of the first applicant, but she and the first applicant subsequently complained about that also. She failed to appear for four of the access visits between 31 December 1987 and 18 January 1988.

13. On 21 January 1988 the Reporter's application for a finding on the ground of referral was heard in the Glasgow Sheriff Court. The second applicant was present and represented by a solicitor. The first applicant also attended. The Reporter led oral evidence from medical, nursery and social work witnesses, including Dr R. The first and second applicants both gave evidence. There was no documentary evidence before the court other than the ground of referral and statement of facts (referred to above in paragraph 9). At the conclusion of the hearing the Sheriff found the ground of referral established. He remitted the case to the Reporter for him to arrange a children's hearing to dispose of the case. The second applicant did not appeal to the Court of Session (the supreme civil court in Scotland).

On an application by the Reporter and after hearing submissions on behalf of the Reporter and the second applicant, the Sheriff also granted a warrant for A.'s continued detention in a place of safety for a further period not exceeding twenty-one days.

14. On 27 January 1988, the social work department held a meeting known as a "child care review", to consider the case. Both applicants were present. The consultant psychiatrist, Dr R., advised that the second applicant was seriously mentally ill but was unwilling to accept treatment. It was decided that access should be terminated, though this decision would be reviewed if the second applicant's mental state improved. The first applicant had also requested access at the meeting, claiming for the first time that he was A.'s father. Access was refused since the second applicant continued to maintain that he was not the father. The social work department also took into account his aggressive and threatening attitude and his continuing refusal to provide information about himself.

15. On 4 February 1988 a children's hearing was held to consider the need for compulsory measures of care for A. The second applicant attended, with the first applicant as her representative. The hearing

had a number of documents before it, including a report of 28 January 1988 on the child compiled by the social work department, reviewing the history of the case and proposing that A. continue to reside in the foster home. In accordance with the relevant procedural rules (as contained in the Children's Hearings (Scotland) Rules 1986 - "the 1986 Rules"; see paragraph 57 below), these documents were not produced to the applicants, but the chairman informed them of their substance.

The children's hearing decided that A. did need compulsory measures of care. They therefore made a supervision requirement under section 44 (1) (a) of the 1968 Act, placing A. under the supervision of the Council subject to the condition that he reside with the foster parents in Greenock (as to supervision requirements, see paragraphs 58 to 60 below). The decision was based, inter alia, on the mental health of both applicants, their aggressive and hostile behaviour and the second applicant's refusal to seek psychiatric help and treatment. This decision did not make any provision as to access. In such circumstances the presumption is that parents will be given reasonable access, subject to section 20 (1) of the 1968 Act which empowers a local authority to deny access where necessary for the child's welfare.

16. On 6 February 1988 the second applicant was admitted to a psychiatric hospital, initially as a voluntary patient and, as from 10 February, on an involuntary basis. She returned home in June 1988.

17. The second applicant (while in psychiatric hospital) appealed to the Sheriff Court against the decision of the children's hearing. All the documents that had been before the children's hearing were lodged with the Sheriff Court. It would appear that, in accordance with the normal procedure (as to which, see paragraph 61 below), they were not made available to the second applicant. She attended the appeal hearing on 29 February 1988, accompanied by two nurses. She was obviously under heavy sedation and was unrepresented. Following discussion, the Sheriff enquired whether she would prefer to ask for a review by a children's hearing of the supervision requirement, rather than pursue her appeal. The second applicant agreed. The appeal was accordingly held to have been abandoned.

18. A review was held by the social work department on 27 April 1988. Both applicants attended, the second applicant having been allowed home on leave from the psychiatric hospital. In view of the second applicant's improved mental state, it was decided to grant her supervised access to A. By this time, the second applicant had agreed that the first applicant was A.'s father. On 18 February 1988 his name had been added to the birth certificate. This did not, however, give him parental rights (as to which, see paragraph 43 below). At the review, the Council decided not to grant him access until he gave them information about his background, which he had so far refused to do.

Visits by the second applicant to A. at the foster home, under the supervision of a social worker, began on 26 May 1988 and continued until September 1988.

19. On 24 August 1988, solicitors acting for the first applicant applied to the Scottish Legal Aid Board for legal aid for an action against the Council in the Court of Session to obtain custody of A. or, failing that, access to him. The Board refused legal aid on the basis that it was unreasonable that he should receive legal aid in the particular circumstances and that it had not been shown that there was a probable cause of action. Counsel then advised the first applicant that the proposed action was incompetent and that it would be appropriate to pursue the question of access by seeking a children's hearing to review the supervision requirement.

20. On 20 September 1988 the social work department held a further child care review. Neither applicant attended but the second applicant was represented by a clergyman. The department had previously held meetings with the first applicant to obtain background information about him and, with his consent, made inquiries with his doctor and the police. It was decided to allow both applicants access of three supervised visits per week at a special centre and to give assistance to them in learning parenting skills. The position was to be reassessed after three months.

Access at the centre began on 4 October 1988.

21. On 13 October 1988 the children's hearing held a review of the supervision requirement. The second applicant was present and the first applicant attended as her representative. The hearing had before it a report by the social work department dated 20 September 1988, updating information on A. The report also contained a statement that the second applicant was refusing to take the medication

prescribed for her, an account of the proposed arrangements for access and a recommendation that the supervision requirement should continue pending assessment of the proposed access for the next three months. In accordance with the relevant procedural rules (see paragraph 57 below), this report was not disclosed to the applicants, though the chairman informed them of its substance. The applicants had submitted a statement maintaining that in their view the ground of referral was not justified, as they had never had an opportunity to show that they could care for A.

The children's hearing decided to continue the supervision requirement and to approve the access proposals. The hearing considered that only time would show if A.'s return to the care of the applicants was a viable prospect and that the second applicant's mental health should be closely monitored.

The second applicant did not appeal to the Sheriff Court.

22. Between 4 October and 19 December 1988, the applicants made approximately twenty-three access visits to A. The social workers did not consider the visits to be a success. In reports dated 22 November 1988 by a health visitor and 23 November by a medical officer, it was stated that the applicants frequently argued before A. and displayed aggression to the staff, with the result that they were excluded from two child care centres. They appeared to be unable to accept or follow advice on child care.

23. On 19 December 1988 a child care review was held, at which the applicants were present. The meeting noted that no obvious progress had been made in the applicants' ability to care for A. It was decided to terminate access visits in view of concern about the long-term effects on A. if access were to continue without any real prospect of his returning to the care of his natural parents. It was also decided to investigate the option of freeing A. for adoption. The applicants appealed internally to the District Manager of Social Services, who confirmed the decision by letter of 28 December 1988 in which he recommended them to obtain legal advice.

C. Events during 1989

24. Following a request by the second applicant, a children's hearing carried out a review of the supervision requirement on 20 June 1989. The second applicant was present with the first applicant as her representative. The Reporter provided the hearing with a further report by the social work department, updating the information on A. It described the problems experienced during the access period, and reported that A. was happy and developing well in his foster home and that prospective adopters were being sought. Also presented to the hearing were the documents that had been before previous hearings.

The applicants asked for access to be re-established. The hearing considered that there might be a conflict of interest between the second applicant and A. They therefore adjourned the hearing to allow for the appointment of a "safeguarder", that is an independent person to represent the interests of the child (as to which, see paragraph 53 below).

25. The safeguarder, once appointed, interviewed the applicants, the social workers, the foster parents and the police. His report of 18 August 1989 stated, amongst other things, that A. was being adequately cared for by the foster parents and that it was desirable that the second applicant should obtain a doctor's opinion on her present psychiatric condition.

26. The adjourned children's hearing reconvened on 5 September 1989. The applicants were present, the second applicant being represented by a solicitor. In accordance with the relevant procedural rules (see paragraph 57 below), the safeguarder's report and the other documents before the hearing were not disclosed to the applicants, but the chairman informed them of the substance. Also before the hearing were written submissions by the applicants stating their ability to care for A. and the unfairness of judging them on the basis of three months' intensive access. The safeguarder attended the hearing and confirmed his view that A.'s best interests would be served by his remaining in care.

The hearing concluded that the supervision requirement should continue and that there was nothing in what they had heard to convince them that they should grant access. They did not take up a suggestion by the second applicant's solicitor to grant a further adjournment in order to obtain an independent psychiatric report on the second applicant.

27. The second applicant appealed to the Sheriff Court on the grounds that:

(a) the applicants had not been informed of the substance of the documents produced at the hearing;

(b) the refusal of access was based on inadequate information, in particular the lack of up-to-date information as to the second applicant's mental health; and

(c) the refusal to adjourn the hearing for the purpose of obtaining a psychiatric report on the second applicant's current mental health was manifestly unreasonable.

In the event ground (a) was withdrawn. At the appeal hearing on 4 October 1989 the Sheriff decided that it would have been appropriate to obtain a psychiatric report. He therefore allowed the appeal and remitted the case to the children's hearing.

28. In the meantime, a psychiatric report, dated 29 September 1989, had been produced at the request of the second applicant's solicitors. This report stated that the second applicant suffered from a recurrent mental illness, which was however in remission and which, if it recurred, would respond satisfactorily to treatment as in the past. The psychiatrist considered that access should be re-established and that A. could eventually be returned to the applicants.

29. A children's hearing was held on 12 December 1989 to reconsider the case, as directed by the Sheriff (see paragraph 27 above). The hearing was adjourned at the request of the solicitor representing the second applicant, in order to allow the psychiatrist to submit a fuller report.

D. Events during 1990

30. A children's hearing was held on 9 January 1990, but neither applicant attended or was represented. The hearing was told that the second applicant had been declared insane and admitted to a psychiatric hospital.

A further hearing was held on 18 January 1990. Neither applicant attended or was represented. The hearing concluded that the second applicant was not well enough to have access to A. and that they could not see any future for A. with her. A condition was added to the supervision requirement that there be no access by the second applicant. The second applicant did not appeal to the Sheriff Court.

31. On 1 February 1990 the Council lodged with the Sheriff Court a petition to free A. for adoption.

32. The applicants were married on 24 April 1990. The first applicant thereby obtained parental rights in respect of A. (as to which, see paragraphs 42 and 43 below).

33. The petition was heard between 18 June 1990 and 27 July 1990. The applicants, as parents, refused to give their consent to adoption. They were present at the hearing. The first applicant conducted his own case, whereas the second applicant was represented by a solicitor. The documentary evidence before the court had been disclosed to the applicants. Witnesses were heard. The applicants had the opportunity to cross-examine all witnesses led by the Council, as well as to lead their own evidence.

34. The Sheriff delivered his judgment on 14 October 1990, the second applicant having in the meantime been re-admitted to hospital on 12 August. He decided that the applicants were withholding their consent unreasonably and that, accordingly, their consent should be dispensed with. He therefore granted the order freeing A. for adoption. His judgment contained a detailed description of the second applicant's history of mental illness and of the problems that had occurred during access visits. His findings included the following:

> "Mrs McMichael is incapable of having permanent care of the child [A.] because of the severity and unpredictability of her illness. When she is actively ill it would be unsafe for the child to be in her care.
>
> ...
>
> The natural parents have no understanding of what is meant by loving and caring for a child and have demonstrated an inability either to learn such skills, or to want to learn them.
>
> It is in the interests of the child's welfare that he be freed for adoption. The natural parents are both emotionally and intellectually incapable of giving the child a secure and stable environment. If he were in their care he would be liable to suffer emotional deprivation and, because of their inability physically to care for him, could be in situations of danger."

The Sheriff concluded:

> "In my view, there is no escaping from the conclusion that both these parents are withholding their agreement

unreasonably. They are withholding their agreement because they are not parents who have begun to demonstrate their capacity to have custody. Mrs McMichael suffers from a grave mental illness which may at any time, unless appropriate medical treatment is taken, incapacitate her from looking after, not only a child, but herself. Even when her illness is not to the degree at which hospitalisation is required, she has been demonstrated as incapable of the most elementary physical and emotional capacities in parenting. The one capacity she does have, I accept, is the desire to be a parent, to have the child, but the accomplishment of that ambition is, I fear, demonstrated to be beyond her. The incapacity of the father to behave normally as a parent to the child is established by the evidence of Mrs [K. (the health visitor)] and Mrs [M. (from the social work department)], whose testimonies support the findings in fact I have made relating to access visits ..."

35. In December 1990 the applicants appealed to the Court of Session against the Sheriff's decision.

E. Events during 1991 and 1992

36. The applicants were granted legal aid. Counsel and solicitors' advice was that an appeal had no prospects of success at all and should be abandoned. The applicants did not accept this advice and continued with the appeal, without legal assistance.

37. The appeal was dismissed by the Court of Session on 1 November 1991. The court held that the Sheriff was justified in concluding that, because of the mental health of the second applicant and the first and second applicants' lack of understanding how to care properly for a child, it would have been contrary to the best interests of A. to return him to the applicants' custody.

38. In the meantime, on 18 July 1991, a children's hearing had decided that the supervision requirement should continue. A similar decision was made subsequently by another children's hearing on 9 June 1992.

F. Events during 1993

39. At a children's hearing held on 4 May 1993 it was announced that the foster parents with whom A. had been living since 23 December 1987 intended to adopt him. The children's hearing decided that the supervision requirement should continue, with a condition that A. should reside with the foster parents.

40. On 25 May 1993 the application by the foster parents to adopt A. was granted by the Sheriff. The effect of the adoption order was to vest in the adoptive parents all parental rights and duties relating to A.

41. On 21 September 1993 a children's hearing decided that the supervision requirement should be terminated, as A. had been adopted and all reports on his welfare were favourable.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Rights of parents

42. Under Scots law the nature of the rights enjoyed by parents in relation to their children is governed by the common law. In respect of girls under 12 and boys under 14, parents enjoy, inter alia,

(a) the right of tutory, which can be described as the right to administer the child's property and to act legally on behalf of the child;

(b) the right of custody, which can be described as the right of the parent to have the child living with him or her, or otherwise to negotiate the child's residence and to control the child's day-to-day upbringing;

(c) the right to access.

43. The position as to the persons who may exercise parental rights is regulated by the Law Reform (Parent and Child) (Scotland) Act 1986 ("the 1986 Act"). In general the 1986 Act abolished the legal distinctions between children born in and out of wedlock. However, in relation to parental rights a distinction persists, as appears from section 2 (1) which provides:

"(a) a child's mother shall have parental rights whether or not she is or has been married to the child's father;

(b) a child's father shall have parental rights only if he is married to the child's mother or was married to her at the

time of the child's conception or subsequently."

Section 2 (1) is in turn subject to section 3, which enables any person claiming an interest to make an application to court for an order relating to parental rights (subsection (1)). The court, which is bound to regard the welfare of the child as the paramount consideration, may not make such an order unless satisfied that to do so would be in the interests of the child (subsection (2)). The natural father of a child born out of wedlock (who is not automatically entitled under section 2 (1)) may obtain parental rights (including tutory, custody or access) under this procedure by applying to either the Court of Session or the local Sheriff Court. Where the mother consents, the matter will be dealt with expeditiously.

B. Compulsory measures of care

44. The arrangements in Scotland for dealing with children who may need compulsory measures of care are set out in Part III of the 1968 Act, as supplemented by subordinate legislation and, in particular, the 1986 Rules governing conduct of children's hearings.

1. The institutional framework

(a) The local authority

45. Under section 20 of the 1968 Act the local authority (in the present case, Strathclyde Regional Council) has a general responsibility for promoting social welfare in its area. More specifically, it has the duty to inquire into and tell the Reporter of cases of children who may need compulsory measures of care, to provide reports on children for children's hearings and to implement supervision requirements imposed by children's hearings.

(b) The Reporter

46. The Reporter is appointed under section 36 of the 1968 Act by the local authority. Though employed by the local authority, he is expected to exercise his judgment independently and is separate from the local authority's social work department. He may not be removed from office without the consent of the Secretary of State. His duties include deciding whether a case should be referred to a children's hearing and arranging such hearings when they are necessary.

(c) Children's hearings

47. Children's hearings decide whether a child requires compulsory measures of care and, if so, which measures are appropriate. Pursuant to section 34 of the 1968 Act, a children's hearing consists of a chairman and two other members drawn from the children's panel. The Secretary of State appoints a children's panel for each local authority area. The members hold office for such period as the Secretary of State specifies; they may be removed by him at any time, but only with the consent of the most senior judge in Scotland, the Lord President of the Court of Session (section 33 of and Schedule 3 to the 1968 Act, and section 7 (1) of the Tribunals and Enquiries Act 1992). In practice members are initially appointed for a period of two years and are then usually reappointed for a further period, normally of five years. They would be removed only in wholly exceptional circumstances.

Under domestic law a children's hearing is regarded as a tribunal. It comes under the statutory system applicable to tribunals in Scotland (paragraph 61 of Schedule 1 to the Tribunals and Inquiries Act 1992). Its members are considered to enjoy judicial immunity from proceedings for wrongful detention and defamation, in the same way as judges of the lower courts.

48. The children's hearing may only consider the case of a child where it has been referred to them by the Reporter and where certain "grounds of referral" are established, either by agreement with the child and his parent or by a decision of the Sheriff Court. The grounds, as set out in section 32 of the 1968 Act, include the following:

"(c) lack of parental care is likely to cause him unnecessary suffering or seriously to impair his health or development."

Thus, in the absence of agreement, a decision by a judge on the grounds of referral, after hearing appropriate evidence, is essential before the children's hearing can consider the case.

(d) The Sheriff

49. The Sheriff, that is any judge of the local Sheriff Court, has the following main roles in the process:

(a) to grant a warrant for continued detention of a child in a place of safety, pending a hearing, in certain circumstances;

(b) to adjudicate on whether the grounds of referral to the children's hearing are established, where the child or his parent does not accept them;

(c) to hear appeals against decisions of children's hearings.

2. The procedure

(a) Urgent measures

50. As an urgent measure to protect a child before he or she can be brought before a children's hearing, a person may be authorised by a judge to take a child to "a place of safety", as defined in the 1968 Act, in cases where there is believed to be lack of parental care (sections 37 (2) and 94 (1) of the 1968 Act). Such detention may not in any case last more than seven days. The Reporter must be notified immediately. If he then considers that compulsory care may be needed, he must arrange a children's hearing to consider the case (section 37 (4)). If the children's hearing cannot dispose of the case, they may issue a warrant, renewable once, requiring detention for up to twenty-one days (section 37 (4) and (5)). Thereafter the Reporter may ask the Sheriff for a warrant for further detention for a period of up to twenty-one days (section 37 (5A)). The child and his or her parents have a right to be heard before any such warrant is issued by a children's hearing or a Sheriff.

(b) Duties of the Reporter

51. The Reporter is under a duty to notify the parents of a child of a children's hearing giving at least seven days' notice. He also must provide before the first hearing a statement of the grounds of referral. He must also request from the local authority a report on the child and his or her social background, and the local authority must supply it (section 39 (4) of the 1968 Act).

(c) Persons entitled to attend at children's hearings

52. A parent has the right to attend at all stages of a children's hearing. "Parent" excludes the father of a child born out of wedlock but includes a person who has been granted parental rights under section 3 of the 1986 Act (sections 4 (1) and 30 (2) of the 1968 Act). A parent may be represented by any person of his or her choice (Rule 11 of the 1986 Rules).

(d) The safeguarder

53. Where the chairman of the children's hearing considers that there is a conflict of interest between child and parent, he has the power to appoint a person known as a safeguarder to represent the child (section 34A of the 1968 Act).

(e) Establishment of grounds of referral

54. At the first children's hearing it must be ascertained if the grounds of referral are accepted by the child or his or her parent. If both child and parent accept, the hearing may proceed. If not, the hearing must direct the Reporter to apply to the Sheriff Court for a decision as to whether the grounds are established. Such application must be made within seven days and heard within twenty-eight days of its being lodged. The parents may appear as parties and be represented. The hearing is conducted in chambers, that is in private, in the interest of the child. Following the hearing, the Sheriff may either

discharge the referral or, where he is satisfied that the grounds are established, remit the case to the Reporter. The Reporter will then make arrangements for a further children's hearing for consideration and determination of the case (section 42 (6) of the 1968 Act).

(f) Determination of the case by the children's hearing

55. At this stage, after discussing the case with the child, the parent or parents, any safeguarder and any representative attending the hearing, the children's hearing must consider what arrangements would be in the best interests of the child (section 43 of the 1968 Act). They may, amongst other things,

(1) decide that no further action is required and discharge the referral;

(2) adjourn the case pending further investigations;

(3) if they consider that the child is in need of compulsory measures of care, make a supervision requirement (as to which, see paragraph 58 below).

56. Before the conclusion of the hearing the chairman must inform the child, parent or parents, safeguarder (if any) and representatives (if attending the hearing) of the decision of the children's hearing, the reasons for the decision, the right of the child or parent to appeal to the Sheriff against the decision and the right of the child and parent to receive a statement in writing of the reasons for the decision. Such a written statement must then be given if requested. Any parent, child or safeguarder who did not attend must be notified in writing of the decision, the right to receive a statement of reasons and the right to appeal (Rules 19 (4) and 20 of the 1986 Rules).

57. Children's hearings are required to consider any relevant information made available to them (Rule 19 (2) (a) of the 1986 Rules). Apart from the statement of grounds of referral, this information (which would include any report, document or information submitted by the Reporter) is not usually supplied to the child or his parents. However, the chairman is required at the hearing to inform the child and his parents of the substance of such reports, documents or information if it appears to him that this is material to the manner in which the case should be disposed of and that its disclosure would not be detrimental to the interests of the child (Rule 19 (3) of the 1986 Rules).

(g) Supervision requirements

58. Supervision requirements are the orders of the children's hearing imposing compulsory measures of care. One kind of requirement that may be ordered is to submit to supervision in accordance with such conditions as the children's hearing may impose, which may include a condition that the child reside in a particular place other than a residential establishment - for example, with foster parents (section 44 (1) (a) and (b) of the 1968 Act).

A supervision requirement makes the local authority responsible for the care of the child in accordance with the requirement and gives them the necessary powers to exercise this responsibility. It does not, however, formally vest in them any parental rights of custody and does not take away parental rights. Those rights are subject to the supervisory requirements and, so far as inconsistent with those requirements, they cannot be exercised.

Thus, the right of custody cannot be exercised where a supervision requirement has required a child to live in foster care. The Court of Session has indicated in the case of Aitken v. Aitken ([1978] Session Cases 297) that while such a supervision requirement subsists it would be possible for them to award a person custody of the child, but this award would have effect subject to the supervision requirement and the person could not exercise actual custody while the supervision requirement subsisted.

As regards access, the children's hearing is entitled to attach conditions as to access when making or continuing a supervision requirement (see Kennedy v. A. [1986] Scots Law Times 358). In the absence of any express condition, the parents will be given reasonable access. However, a local authority has the competence to terminate access where that is appropriate in pursuance of their duty under section 20 of the 1968 Act (see paragraph 45 above). The Court of Session has made it clear, in the case of Dewar v. Strathclyde Regional Council ([1984] Session Cases 102), that the courts will not adjudicate on questions of access between the parents and the local authority. If a parent is dissatisfied with the decision of a local authority as to access, it is appropriate for him or her to apply to a children's hearing

to regulate the matter by attaching a condition as to access to the supervision requirement. An appeal to the courts will then lie against the decision of the children's hearing.

59. A parent has the right to request a review of a supervision requirement every six months after the last review (section 48 (4) of the 1968 Act) and can use this right to obtain a ruling on access.

60. The 1968 Act prescribes that a child should not continue to be subject to a supervision requirement for any longer than is necessary for his or her interest. The requirement must be reviewed by a children's hearing -

(a) at any time if the local authority consider that it should cease to have effect or be varied;

(b) within one year, otherwise it will cease automatically to have effect;

(c) at the request of the child or his or her parent, after the expiry of these periods -

(i) three months from imposition of the requirement;

(ii) three months from any variation of the requirement of review;

(iii) six months from any other review (section 48 (4) of the 1968 Act).

The Reporter must make the necessary arrangements for such revision hearings. On review the children's hearing may terminate, continue or vary the requirement (sections 47 (1) and 48 of the 1968 Act).

(h) Appeal against a decision of a children's hearing

61. Within three weeks of a decision of a children's hearing a child or parent or both may appeal against it to the Sheriff (section 49 (1) of the 1968 Act). This applies to all decisions.

The Reporter has the duty to ensure that all reports and statements available to the children's hearing along with reports of the proceedings of the children's hearings and their reasons for their decisions are lodged with the clerk to the Sheriff Court. These documents are not made available to the parents as a matter of practice.

The appeal is heard in chambers, in the interest of the child. The Sheriff must first hear the appellant or his representative and any safeguarder appointed. Where an irregularity in the conduct of the case is alleged, unless the facts are admitted by the Reporter, the Sheriff must hear evidence tendered by or on behalf of the appellant and the Reporter as to the irregularity. The Sheriff will then proceed to question, if he thinks fit, the Reporter and the authors or compilers of any reports and statements before him. He can call for further reports and statements where he thinks that this may help him. The child and parents and safeguarder are normally entitled to be present throughout.

62. The Sheriff will allow the appeal if he finds that there was a flaw in the procedure adopted by the children's hearing, or that the children's hearing did not give proper consideration to some factor in the case. Where he decides the appeal has failed, he confirms the decision of the children's hearing. Where he allows the appeal, he may act as follows:

(a) where the appeal is against a warrant for detention, he may recall the warrant;

(b) in any other case, he has the choice of remitting the case to the children's hearing for reconsideration or else of discharging the child from any further proceedings arising from those grounds of referral (section 49 (5) of the 1968 Act).

63. Pending an appeal, the child or his parents may make an application to a children's hearing for suspension of the supervision requirement in question. The Reporter must then arrange for a hearing, which may grant or refuse the application (section 49 (8) of the 1968 Act).

C. Adoption procedure in Scotland

64. The legislation governing adoption procedure is the Adoption (Scotland) Act 1978 ("the 1978 Act").

65. Under the 1978 Act an order declaring the child free for adoption may be made by the Court of Session or Sheriff Court. The procedure of freeing for adoption makes it possible for the child to live with the prospective adopters in the period prior to adoption without the risk of his or her being reclaimed by the natural parents.

Before making the order the court must be satisfied as regards each parent or guardian of the child that either

(a) he or she freely, and with full understanding of what is involved, agrees generally and unconditionally to the making of an adoption order; or

(b) his or her agreement to making the adoption order should be dispensed with on a number of specified grounds, which include the ground that the parent or guardian is withholding agreement unreasonably (section 16 (2) of the 1978 Act).

For the purposes of the 1978 Act the natural father of a child born out of wedlock would not be a "parent" or "guardian" except where he has subsequently married the mother or has a parental-rights order in his favour.

The effect of an order freeing the child for adoption is to vest parental rights and duties in the adoption agency (that is, a local authority or an approved adoption society) and to extinguish existing parental rights. After freeing for adoption, the child will normally live for a time with the prospective adopters and then they will seek an adoption order.

66. An order of the Sheriff Court freeing a child for adoption is subject to appeal to the Court of Session. On such an appeal the Court of Session can decide on the whole merits of the action. The Court of Session will normally proceed on the basis of the Sheriff's findings of fact but is not obliged to do so. It may, where appropriate, take evidence itself or remit the case to the Sheriff with instructions as to how he should proceed.

PROCEEDINGS BEFORE THE COMMISSION

67. Mr and Mrs McMichael lodged their application (no. 16424/90) with the Commission on 11 October 1989. They complained that they had been deprived of the care and custody of their son A., and thereby of their right to found a family, as well as of access to the child who had ultimately been freed for adoption. They alleged that they had not received a fair hearing before the children's hearing and not had access to confidential reports and other documents submitted to the hearing. The first applicant also submitted that, as a natural father, he had no legal right to obtain custody of A. or to participate in the custody or adoption proceedings and that, accordingly, he had been discriminated against.

68. On 8 December 1992 the Commission declared inadmissible, on the ground of being manifestly ill-founded, the applicants' complaints directed against the taking of A. into care, the termination of access to A. and the freeing of A. for adoption. The remainder of the application was declared admissible. In its report of 31 August 1993 (Article 31) (art. 31), it expressed the opinion:

(a) unanimously, that there had been a violation of Article 8 (art. 8) of the Convention;

(b) by eleven votes to two, that there had been no violation of Article 6 para. 1 (art. 6-1) in respect of the first applicant;

(c) unanimously, that there had been a violation of Article 6 para. 1 (art. 6-1) in respect of the second applicant;

(d) unanimously, that there had been no violation of Article 14 (art. 14) in respect of the first applicant.

The full text of the Commission's opinion and of the two separate opinions contained in the report is reproduced as an annex to this judgment[3].

FINAL SUBMISSIONS TO THE COURT

69. At the hearing on 20 September 1994 the Government maintained in substance the concluding submission set out in their memorial, whereby they accepted that there had been a violation of Article 6 para. 1 (art. 6-1) in respect of the second applicant but invited the Court to hold

"(1) that there has been no violation of Article 6 para. 1 (art. 6-1) of the Convention in respect of the first applicant;

(2) that there has been no violation of Article 8 (art. 8) of the Convention in respect of the first applicant;

(3) that no separate issue arises under Article 8 (art. 8) of the Convention in respect of the second applicant; and

(4) that there has been no violation of Article 14 (art. 14) of the Convention in respect of the first applicant".

70. On the same occasion the applicants likewise maintained in substance the conclusions formulated at the close of their memorial, in which they relied on

"(primo) Article 6 para. 1 (art. 6-1) of the European Convention on Human Rights, whose terms are referred to and founded upon and are to effect that in this case the non-access to information contravenes said Article (art. 6), et

(secundo) Article 8 (art. 8) of said Convention, whose terms are referred to and founded upon in respect of private [and] family life et cetera, [and which] in this case is also contravened".

AS TO THE LAW

I. SCOPE OF THE CASE BEFORE THE COURT AND ADMISSIBILITY OF EVIDENCE

71. In their memorial to the Court the applicants reiterated claims, made in their application to the Commission (see paragraph 67 above), that the removal of their son A. from their care and custody, the termination of their access to him and the order freeing him for adoption were in contravention of Article 8 (art. 8) of the Convention. The compass of the case before the Court is delimited by the Commission's decision on admissibility (see, inter alia, the Powell and Rayner v. the United Kingdom judgment of 21 February 1990, Series A no. 172, p. 13, para. 29). Accordingly, since the grievances in question were declared inadmissible by the Commission as being manifestly ill-founded (see paragraph 68 above), the Court has no jurisdiction to entertain them.

72. Before the Court the applicants made a further complaint not dealt with in the Commission's report or admissibility decision, namely that the ultimate decision of the Sheriff Court and the Court of Session freeing A. for adoption was arrived at unfairly as a consequence of the insufficient opportunity for them to refute all the evidence presented in the earlier care proceedings.

By the time the local authority's petition was heard by the Sheriff Court (between 18 June and 27 July 1990) the first applicant had obtained parental rights in respect of A. by virtue of his marriage on 24 April 1990 to the second applicant (see paragraphs 31 to 33 above). The documentary evidence before the Sheriff Court was disclosed to the applicants, who both participated in the proceedings as parties, the second applicant being represented by a solicitor (see paragraph 33 above). The order of the Sheriff freeing A. for adoption was upheld by the Court of Session on appeal by the applicants, who had persisted in their appeal despite legal advice that it had no prospects of success at all (see paragraphs 34 to 37 above).

In the light of the Court's finding in relation to the care proceedings (see paragraph 84 below) and to the fact that full disclosure of relevant documents was made in the later adoption proceedings themselves, the Court does not consider it necessary to rule whether the scope of the case as referred to the Court also extends to this complaint.

73. The applicants submitted that in their memorial to the Court the Government were seeking "to proffer new evidence never presented to the Commission" and that such inclusions were not permissible.

The Court notes that such "new" material as is included in the Government's memorial takes the form either of further particulars as to the facts underlying the complaints declared admissible by the Commission or of legal argument relating to those facts. The Court is not precluded from taking cognisance of this material in so far as it is judged to be pertinent (see Rule 41 para. 1 of Rules of Court A).

II. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1) OF THE CONVENTION

74. The applicants argued that their inability to see certain confidential reports and other documents submitted to the children's hearings and then the Sheriff Court gave rise to a violation of Article 6 para. 1 (art. 6-1) of the Convention, which, in so far as is relevant, provides:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law ..."

A. Applicability of Article 6 para. 1 (art. 6-1)

1. Second applicant

75. The Government accepted the Commission's conclusion that in respect of the second applicant, Mrs McMichael, Article 6 para. 1 (art. 6-1) was applicable to the care proceedings before the children's hearings and the Sheriff Court.

On the basis of its established case-law, the Court likewise sees no cause to differ from the Commission's conclusion (see, for example, the W. v. the United Kingdom judgment of 8 July 1987, Series A no. 121-A, p. 35, para. 78).

2. First applicant

76. However, the Commission, with whom the Government agreed, took the view that Article 6 para. 1 (art. 6-1) had no application to the complaint of the first applicant, Mr McMichael, that he was unable to see the confidential reports and documents submitted in the care proceedings.

77. Under Scots law Mr McMichael, as the natural father of a child born out of wedlock, did not automatically have parental rights in relation to the child such as the rights of tutory, custody and access (see paragraphs 42 and 43 above). Nor did he make an application for an order for parental rights, as he could have done - an application which, at least as from 18 February 1988 (when his name was added to A.'s birth certificate), would have been dealt with in a speedy manner, given the mother's consent (see paragraph 43 above).

As a consequence, as noted by the Commission, although the first applicant played an active role as the second applicant's representative, he was not, and could not be, a party along with her in the care proceedings before the children's hearings in the period before their marriage in April 1990 (see paragraphs 10, 15, 21, 24, 26, 29 and 32 above). Similarly, the appeals from the children's hearing to the Sheriff Court were, and could only be, brought by the second applicant (see paragraphs 17, 27 and 61 above).

In these circumstances, the Court agrees with the Commission's reasoning: even to the extent that the first applicant could claim "civil rights" under Scots law in respect of the child A. (see, inter alia, the above-mentioned W. v. the United Kingdom judgment, pp. 32-35, paras. 72-79), the care proceedings in question did not involve the determination of any of those rights, since he had not taken the requisite prior step of seeking to obtain legal recognition of his status as a father. In this respect the present case is to be distinguished from the case of Keegan v. Ireland (judgment of 26 May 1994, Series A no. 290).

B. Compliance with Article 6 para. 1 (art. 6-1)

1. The children's hearing

78. One issue canvassed before the Court was whether the children's hearing could be regarded as a "tribunal" within the meaning of Article 6 para. 1 (art. 6-1) in view of the manner of appointment and removal of its members (see paragraph 47 above). The Commission expressed the opinion that the members did not enjoy sufficient independence from the administrative authorities, whereas the Government argued the contrary.

The Court for its part does not consider it necessary to resolve this disputed issue in the present case, having regard to the conclusions at which it has arrived as concerns the compliance with Article 6 para. 1 (art. 6-1) of the care proceedings taken as a whole (see paragraph 84 below).

79. Even though in their view the children's hearing did constitute an independent "tribunal" for the purposes of Article 6 para. 1 (art. 6-1), the Government conceded that in two instances (on 4 February and 13 October 1988) the proceedings did not ensure a "fair" trial as required by that provision (art. 6-1) by reason of the inability of the second applicant or her representative to see certain documents considered by the hearing.

80. The Court notes that on these two dates, in accordance with the relevant procedural rules, documents before the hearing, in particular social reports updating the information on the child A., reviewing the history of the case and making recommendations, were not disclosed to the second applicant or the first applicant acting as her representative, although the chairman of the hearing did inform them of the substance of the documents (see paragraphs 15, 21 and 57 above). On 4 February 1988 the children's hearing decided that A. did need compulsory measures of care, notably because of the mental health of both applicants, and a supervision requirement was made placing A. under the supervision of the local authority subject to the condition that he reside with foster parents; this supervision requirement being continued at the following hearing on 13 October 1988 (see paragraphs 15, 21 and 58 to 60 above). These were the two sole occasions of such non-disclosure when the second applicant had participated in the proceedings and a decision affecting her civil rights had been taken - other than the decision on 5 September 1989, which was quashed on appeal (see in addition paragraphs 26 and 27 above).

As explained by the Government, the function of determining what measures of care would be in the best interest of the child has been conferred on the children's hearing rather than the ordinary courts because the legislature believed that this function is likely to be exercised more successfully by an adjudicatory body of three specially trained persons with substantial experience of children, following a procedure which is less formal and confrontational than that of the ordinary courts. The Court accepts that in this sensitive domain of family law there may be good reasons for opting for an adjudicatory body that does not have the composition or procedures of a court of law of the classic kind (see, mutatis mutandis, the X v. the United Kingdom judgment of 5 November 1981, Series A no. 46, p. 23, para. 53). Nevertheless, notwithstanding the special characteristics of the adjudication to be made, as a matter of general principle the right to a fair - adversarial - trial "means the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party" (see the Ruiz-Mateos v. Spain judgment of 23 June 1993, Series A no. 262, p. 25, para. 63). In the context of the present case, the lack of disclosure of such vital documents as social reports is capable of affecting the ability of participating parents not only to influence the outcome of the children's hearing in question but also to assess their prospects of making an appeal to the Sheriff Court.

2. The Sheriff Court

81. Whilst not contesting the Commission's conclusion that there had been a violation of Article 6 para. 1 (art. 6-1) in relation to the appeal procedure followed before the Sheriff Court, the Government recalled that the relevant facts were as follows: Mrs McMichael had appealed to the Sheriff Court against the initial decision taken by the children's hearing on 4 February 1988, but that appeal had been abandoned by Mrs McMichael, who was unrepresented and mentally unwell at the time (see paragraphs 15 to 17 above); she had not appealed against the subsequent decision taken by the children's hearing on 13 October 1988 (see paragraph 21 above); her appeal against the next decision taken by the (adjourned) children's hearing on 5 September 1989 had been successful (see paragraphs 24 to 27 above).

82. The Commission, citing the Court's case-law, accepted that a procedure which did not comply with Article 6 para. 1 (art. 6-1) (such as that before the children's hearing) could, consistently with the Convention, precede the determination of civil rights by an independent judicial body that exercised full jurisdictional control over the prior procedure and did itself provide the safeguards required by Article 6 para. 1 (art. 6-1) (see the Albert and Le Compte v. Belgium judgment of 10 February 1983, Series A no. 58, p. 16, para. 29). The Commission found the Sheriff Court to be a "tribunal" within the meaning of Article 6 para. 1 (art. 6-1). It noted that the second applicant had a right of appeal from the children's hearing to the Sheriff Court, which had jurisdiction to examine both the merits and alleged procedural

irregularities (see paragraphs 49, 61 and 62 above). Nonetheless it considered that the second applicant's right to a fair trial had been impaired because, as a matter of practice, documents lodged with the Sheriff Court by the Reporter, in particular reports previously before the children's hearing, were not made available to an appellant parent (see paragraph 61 above). In its view, this practice revealed a basic inequality and placed the parent at a substantial disadvantage both in respect of bringing an appeal and in the subsequent presentation of any appeal.

83. The Court, like the Commission, is satisfied that, in relation to disputes (contestations) between a parent and a local authority over children taken into care, the Sheriff Court satisfies the conditions of Article 6 para. 1 (art. 6-1) as far as its composition and jurisdiction are concerned (see paragraphs 49, 61 and 62 above). However, the requirement of an adversarial trial was not fulfilled before the Sheriff Court, any more than it had been on the relevant occasions before the children's hearing (see paragraphs 17 and 27 above).

3. Conclusion

84. This being so, Mrs McMichael did not receive a "fair hearing", within the meaning of Article 6 para. 1 (art. 6-1), at either of the two stages in the care proceedings concerning her son A. There has accordingly been a breach of Article 6 para. 1 (art. 6-1) in her respect.

III. ALLEGED VIOLATION OF ARTICLE 8 (art. 8) OF THE CONVENTION

85. The applicants further claimed that, by reason of their inability to see confidential reports and documents submitted before the children's hearings, there had been a violation of Article 8 (art. 8) of the Convention, which provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 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 in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

86. According to the Court's well established case-law, "the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life" and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 (art. 8) (see, inter alia, the above-mentioned W. v. the United Kingdom judgment, p. 27, para. 59). It would appear undisputed that in relation to both applicants the care and custody measures resulting from the procedures complained of not only came within the scope of paragraph 1 of Article 8 (art. 8-1) but also involved an "interference" within the meaning of paragraph 2 (art. 8-2).

87. Whilst Article 8 (art. 8) contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8 (art. 8):

> "[W]hat ... has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as 'necessary' within the meaning of Article 8 (art. 8)." (see the above-mentioned W. v. the United Kingdom judgment, pp. 28 and 29, paras. 62 and 64)

88. The Commission and the applicants concluded that in this regard the contested proceedings before the children's hearings - at which, despite non-disclosure of relevant documents, decisions concerning the applicants' relationship with A. were taken - did not comply with Article 8 (art. 8). The Commission noted that no special reasons for withholding the reports in question had been advanced.

89. The Government, however, argued firstly that there had been no violation of Article 8 (art. 8) in relation to the first applicant. They pointed to the fact that he had no entitlement under domestic law to

be associated as a party in the care proceedings before the children's hearing because he had not sought recognition of his parental rights as a natural father, as he could have done. In the Government's submission, assuming that the resultant exclusion of the first applicant from full involvement in the care proceedings can be said to have had a reasonable and objective justification (as to which, see paragraph 98 below), it would be inconsistent to find that any interference with his family life resulting from those proceedings was contrary to Article 8 (art. 8).

In the second place, the Government maintained that in so far as the non-disclosure to the second applicant of documents before the children's hearing was held to have rendered the procedure unfair and infringed her rights under Article 6 para. 1 (art. 6-1), it was unnecessary to examine the same complaint under Article 8 (art. 8) as no separate issue arose.

90. As regards the Government's first submission, it is true that at the outset, in late 1987 and early 1988, the second applicant denied the first applicant's paternity of A. and that the initial relevant instance of non-disclosure of documents at a children's hearing occurred two weeks before the first applicant's name had been added to A.'s birth certificate (4 and 18 February 1988 respectively) (see paragraphs 7, 11, 14, 15 and 18 above). However, the first applicant had claimed paternity on 27 January 1988; and even at the time of this initial children's hearing he was living with the second applicant and was, especially in his capacity as her representative, closely associated in the attempt to obtain access to A. (see paragraphs 7, 13, 14 and 15 above). Thereafter the two applicants acted very much in concert in their endeavour to recover the custody of and have access to A., not only in the framework of the legal proceedings before the children's hearing and the Sheriff Court but also in their dealings with the social work department of the local authority (see paragraphs 18 and 20 to 25 above). During the relevant period taken as a whole they were living together and leading a joint "family life", to the extent that that was possible in the light of the second applicant's periodic hospitalisation (see paragraphs 16 and 30 above).

In the particular circumstances, the Court considers that it would not reflect the reality of the situation to draw the distinction advocated by the Government between the two members of the applicant couple.

91. As to the Government's second submission, the Court would point to the difference in the nature of the interests protected by Articles 6 para. 1 and 8 (art. 6-1, art. 8). Thus, Article 6 para. 1 (art. 6-1) affords a procedural safeguard, namely the "right to a court" in the determination of one's "civil rights and obligations" (see the Golder v. the United Kingdom judgment of 21 February 1975, Series A no. 18, p. 18, para. 36); whereas not only does the procedural requirement inherent in Article 8 (art. 8) cover administrative procedures as well as judicial proceedings, but it is ancillary to the wider purpose of ensuring proper respect for, inter alia, family life (see, for example, the B. v. the United Kingdom judgment of 8 July 1987, Series A no. 121-B, pp. 72-74 and 75, paras. 63-65 and 68). The difference between the purpose pursued by the respective safeguards afforded by Articles 6 para. 1 and 8 (art. 6-1, art. 8) may, in the light of the particular circumstances, justify the examination of the same set of facts under both Articles (art. 6, art. 8) (compare, for example, the above-mentioned Golder judgment, pp. 20-22, paras. 41-45, and the O. v. the United Kingdom judgment of 8 July 1987, Series A no. 120-A, pp. 28-29, paras. 65-67).

As regards the instant case, the facts complained of had repercussions not only on the conduct of judicial proceedings to which the second applicant was a party, but also on "a fundamental element of [the] family life" of the two applicants (see paragraph 86 above). In the present case the Court judges it appropriate to examine the facts also under Article 8 (art. 8).

92. The Government have already conceded, in the context of Article 6 para. 1 (art. 6-1), the unfair character of the care proceedings on specified occasions by reason of the inability of the second applicant or the first applicant acting as her representative to have sight of certain documents considered by the children's hearing and the Sheriff Court (see paragraphs 79 and 81 above).

The Court, taking note of this concession, finds that in this respect the decision-making process determining the custody and access arrangements in regard to A. did not afford the requisite protection of the applicants' interests as safeguarded by Article 8 (art. 8). Having regard to the approach taken in the present judgment in regard to the treatment of the applicants' complaint under Article 8 (art. 8) (see

paragraph 90 above), the Court does not deem it appropriate to draw any material distinction between the two applicants as regards the extent of the violation found, despite some differences in their legal circumstances.

93. In conclusion, there has been a breach of Article 8 (art. 8) in respect of both applicants.

IV. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN TOGETHER WITH ARTICLE 6 PARA. 1 AND/OR ARTICLE 8 (art. 14+6-1, art. 14+8)

94. Finally, the first applicant claimed that he had been a victim of discriminatory treatment in breach of Article 14 (art. 14) of the Convention, which provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

In his submission, he had been discriminated against as a natural father contrary to Article 14 taken in conjunction with Article 6 para. 1 and/or Article 8 (art. 14+6-1, art. 14+8), in that prior to his marriage to the second applicant he had no legal right to custody of A. or to participate in the care proceedings.

95. The Commission, with whom the Government agreed, expressed the opinion that the difference in treatment complained of by the first applicant did not disclose any discrimination contrary to Article 14, whether taken in conjunction with Article 6 para. 1 or Article 8 (art. 14+6-1, art. 14+8).

96. Under Scots law a child's father automatically acquires the parental rights of tutory, custody and access only if married to the child's mother (see paragraphs 42 and 43 above). Further, only a "parent", that is a person having parental rights, is entitled to attend at all stages of a children's hearing (see paragraph 52 above). The natural father of a child born out of wedlock may obtain parental rights by making an application to a court; such an application will be dealt with speedily if the mother consents (see paragraph 43 above).

Mr McMichael was therefore in a less advantageous position under the law than a married father. It is to be noted however that, even after the mother had recognised him as the father of A. in February 1988 (see paragraph 18 above), he never sought an order for parental rights, which would have allowed him the status of a party, together with Mrs McMichael, in the care proceedings.

97. According to the Court's well established case-law, a difference of treatment is discriminatory if it has no reasonable and objective justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see, amongst numerous authorities, the Marckx v. Belgium judgment of 13 June 1979, Series A no. 31, p. 16, para. 33).

98. The first applicant's complaint is essentially directed against his status as a natural father under Scots law.

As the Commission remarked, "it is axiomatic that the nature of the relationships of natural fathers with their children will inevitably vary, from ignorance and indifference at one end of the spectrum to a close stable relationship indistinguishable from the conventional matrimonial-based family unit at the other" (paragraph 126 of the report). As explained by the Government, the aim of the relevant legislation, which was enacted in 1986, is to provide a mechanism for identifying "meritorious" fathers who might be accorded parental rights, thereby protecting the interests of the child and the mother. In the Court's view, this aim is legitimate and the conditions imposed on natural fathers for obtaining recognition of their parental role respect the principle of proportionality. The Court therefore agrees with the Commission that there was an objective and reasonable justification for the difference of treatment complained of.

99. In conclusion, there has been no violation of Article 14 taken in conjunction with Article 6 para. 1 or Article 8 (art. 14+6-1, art. 14+8) in respect of the first applicant.

V. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

100. Under the terms of Article 50 (art. 50),

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Non-pecuniary damage

101. The applicants, who were legally aided, did not make any claim for reimbursement of costs and expenses. Their lawyer did however seek "adequate financial compensation to both applicants in proportion to each for distress, sorrow and injury to health suffered". He asked for an award of "considerable damages".

102. In the Government's main submission, having regard to the facts of the case, it was impossible to maintain that the outcome of the care proceedings before the three children's hearings in question (on 4 February 1988, 13 October 1988 and 5 September 1989 - see paragraphs 15 to 17, 21 and 24 to 27 above) might have been different if the second applicant had actually seen all the relevant documents instead of having their contents explained to her. She could not, so they argued, be said to have suffered a loss of real opportunities; nor was the present case comparable to other cases concerned with children in which damages had been awarded for feelings of frustration and helplessness (such as O. v. the United Kingdom, judgment of 9 June 1988, Series A no. 136-A, or Keegan v. Ireland, loc. cit., p. 23, paras. 66-68). They invited the Court to hold that, in the event of the finding of a violation, any non-pecuniary damage suffered by the first and second applicants would be adequately compensated by that finding.

In the alternative, they submitted that a reasonable award should be appreciably less than that made in the other children cases referred to.

103. Whilst the present applicants may not have suffered a loss of real opportunities to the same extent as previous applicants who had been denied access to a proper remedy, it cannot be affirmed with certainty that no practical benefit could have accrued to them if the procedural deficiency in question had not existed. More importantly, the Court accepts that some, although not the major part, of the evident trauma, anxiety and feeling of injustice experienced by both applicants in connection with the care proceedings is to be attributed to their inability to see the confidential documents and reports in question. An award of financial compensation is therefore warranted. Making an assessment on an equitable basis, as it is required to do under the terms of Article 50 (art. 50), the Court awards the applicants jointly the sum of £8,000.

B. Other relief

104. The lawyer for the applicants also invited the Court to make a number of declarations and orders, notably instructing the Government to specify the arrangements they propose to take to remedy the admitted violation of the Convention and decreeing that A. had been legalised "per subsequens matrimonium" and that both applicants share in equal measure the rights safeguarded under Articles 6 para. 1 and 8 (art. 6-1, art. 8) of the Convention.

105. The two applicants' respective rights under Articles 6 para. 1 and 8 (art. 6-1, art. 8) of the Convention in relation to the claims made are as stated in the present judgment. Beyond that, the Court is not empowered under the Convention to make the orders and declarations sought (see, inter alia, the W. v. the United Kingdom judgment of 9 June 1988, Series A no. 136-C, p. 26, para. 14).

FOR THESE REASONS, THE COURT

1. Holds unanimously that it has no jurisdiction to entertain the applicants' complaints directed against the taking of A. into care, the termination of access to A. and the freeing of A. for adoption;

2. Holds unanimously that it is not necessary to rule whether it has jurisdiction to entertain the applicants' complaint relating to the fairness of the adoption proceedings;

3. Holds unanimously that Article 6 para. 1 (art. 6-1) of the Convention has no application to the first applicant's complaint;

4. Holds unanimously that there has been a violation of Article 6 para. 1 (art. 6-1) of the Convention in respect of the second applicant;

5. Holds by six votes to three that there has been a violation of Article 8 (art. 8) of the Convention in respect of the first applicant;

6. Holds unanimously that there has been a violation of Article 8 (art. 8) of the Convention in respect of the second applicant;

7. Holds unanimously that there has been no violation of Article 14 of the Convention, whether taken together with Article 6 para. 1 or Article 8 (art. 14+6-1, art. 14+8), in respect of the first applicant;

8. Holds unanimously that the respondent State is to pay to the applicants jointly, within three months, £8,000 (eight thousand pounds sterling) in respect of non-pecuniary damage;

9. Rejects unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 February 1995.

Rolv RYSSDAL
President

Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of Rules of Court A, the joint partly dissenting opinion of Mr Ryssdal, Mrs Palm and Sir John Freeland is annexed to this judgment.

R. R.
H. P.

JOINT PARTLY DISSENTING OPINION OF JUDGES RYSSDAL, PALM AND Sir John FREELAND

1. We are unable to subscribe to our colleagues' conclusion that there has been a violation of Article 8 (art. 8) of the Convention in respect of the first applicant, Mr McMichael (point 5 of the operative provisions of the judgment).

2. The Court has held that the lack of access to certain documents considered by the competent adjudicatory bodies when determining the care and custody arrangements in regard to the child A. violated the right to respect for family life of both Mr and Mrs McMichael. This conclusion was reached "despite some differences in their [that is, the two applicants'] legal circumstances" (see paragraphs 90 and 92 of the judgment). In our view, however, these differences in legal circumstances cannot be overlooked. They are crucial for the purposes of Article 8 (art. 8), in that it is precisely because of the significant difference in legal status of the two applicants that the incidence of the admitted procedural deficiency in the care proceedings is not the same for each of them.

3. It is undeniable that even before their marriage in April 1990 (see paragraph 32 of the judgment) the two applicants were leading a joint "family life" and that, at least as from Mrs McMichael's acceptance of Mr McMichael's paternity (18 February 1988 - see paragraph 18 of the judgment), that joint family life included their shared parental relationship with A. To this extent, therefore, Article 8 (art. 8) was applicable to Mr McMichael as well as Mrs McMichael. Where we part company with our colleagues is in relation to the finding that there was an unjustified interference with Mr McMichael's family life as a result of his not being granted access to certain documents submitted in legal proceedings to which he was not a party and had not even asked to be a party.

It is true that, unlike the mother of A., he could not automatically become a party to the care proceedings despite her recognition of him as the father of the child. However, the requirement for natural fathers, even ones in circumstances such as those of Mr McMichael, to obtain recognition of their parental rights before being able to take part in care proceedings has an objective and reasonable justification; the aim of the relevant legislative provisions is legitimate and the conditions imposed on natural fathers for obtaining recognition of their parental role respect the principle of proportionality. These were the Court's conclusions when unanimously rejecting Mr McMichael's claim of discrimination under Article 14 (art. 14) of the Convention (see paragraph 98 of the judgment). Indeed in his case this requirement would not appear to have been onerous. As the judgment points out in the context of his claim under Article 6 para. 1 (art. 6-1), at least as from 18 February 1988 an application by him for an order for parental rights would have been dealt with speedily - and presumably without difficulty - given the mother's consent (see paragraph 77 of the judgment).

4. The above-mentioned conclusions on the facts must be equally applicable in the context of Article 8 (art. 8). We find it inconsistent and contrary to the logic of the Convention system that the constraints of a legal status which are judged, in terms of possible discrimination under Article 14 (art. 14), to have an objective and reasonable justification should not be similarly justified in relation to enjoyment of the right to respect for family life under Article 8 (art. 8) (see, mutatis mutandis, the Klass and Others v. Germany judgment of 6 September 1978, Series A no. 28, p. 31, para. 68). Furthermore, as far as access to documents in the care proceedings to which Mrs McMichael was a party are concerned, we do not perceive why, if Mr McMichael chose not to seek recognition of his rights under Scots law as a natural father, as he could have done, he should be more deserving of protection under Article 8 (art. 8) than under Article 6 para. 1 (art. 6-1). Even if the domestic law and practice concerning the procedural position of parents taking part in care proceedings had been in conformity with the standards of the Convention, in the absence of a parental order in his favour Mr McMichael would still have had no entitlement to access to the documents. Article 8 (art. 8) should not be so construed as to prevent the imposition of reasonable conditions, in the interests of the mother and child, on participation by natural fathers, even when recognised as such, in care proceedings with consequent entitlement for them to have

access to sensitive material such as social and medical reports.

5. Even assuming that Mr McMichael can claim to be a victim of a violation of Article 8 (art. 8) in relation to the care proceedings to which he had not sought to become a party or that Article 8 (art. 8) has any application to his claim in that respect, we consider that any interference with the enjoyment of his right to respect for family life resulting from the non-disclosure to him of certain documents in those proceedings was justified on the facts. For the foregoing reasons we have therefore voted against a violation of Article 8 (art. 8) in respect of the first applicant, Mr McMichael.

[1] The case is numbered 51/1993/446/525. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[2] Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

[3] Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 307-B of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

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