

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 16424/90

Antony and Margaret McMichael

against

the United Kingdom

REPORT OF THE COMMISSION

(adopted on 31 August 1993)

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I.        INTRODUCTION

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

A.        The application

2.        The applicants are Antony and Margaret McMichael, British citizens born in 1938 and 1954 respectively and resident in Glasgow. They are represented by Peter McCann, a solicitor practising in Glasgow.

3.        The application is directed against the United Kingdom. The Government are represented by their Agent, Mrs. Audrey Glover of the Foreign and Commonwealth Office, London.

4.        The case, insofar as declared admissible, concerns the applicants' complaints that they were unable to see the confidential reports and other documents submitted before the Children' Hearings and the complaints of the first applicant that as a natural father (prior to his marriage to the second applicant) he had no right to legal custody of A. or to participate in the proceedings and that he was discriminated against in these respects. It raises issues under Articles 6, 8 and 14 of the Convention.

B.        The proceedings

5.        The application was introduced on 11 October 1989 and registered on 10 April 1990.

6.        On 3 December 1990, the Commission decided to communicate the application to the respondent Government for their observations on the admissibility and merits of the application.

7.        The Government submitted their written observations on 16 May 1991. The applicants submitted their written observations in reply on 5 August and 25 September 1991.

8.        On 7 April 1992, the Commission decided to invite the parties to a hearing on the admissibility and merits of the application.

9.        On 23 July 1992, the Commission granted the applicants legal aid.

10.        At the hearing, which was held on 8 December 1992, the applicants were represented by Mr. Peter McCann, solicitor. The Government were represented by Ms. Diana Brookes, Acting Agent, Mr. T. Dawson, Solicitor General for Scotland, Mr. D. Ogg, counsel and Mr. J. W. Sinclair and Mr. J.L. Jamieson as advisers.

11.        On 8 December 1992, the Commission declared the application partly admissible, partly inadmissible.

12.        The parties were then invited to submit any additional observations on the merits of the application.

13.        On 27 January 1993, the applicants made further submissions. The Government's further observations on the merits were submitted on 25 May 1993.

14.        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. Consultations with the parties took place between February and May 1993. In the light of the parties' reactions, the Commission now finds that there is no basis on which a friendly settlement can be effected.

C. The present Report

15. 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  
F. ERMACORA  
A. WEITZEL  
E. BUSUTTIL  
A.S. GØZÜBÜYÜK  
J.C. SOYER  
Mrs. G.H. THUNE  
Sir Basil HALL  
Mr. F. MARTINEZ  
Mrs. J. LIDDY  
MM. L. LOUCAIDES  
J.-C. GEUS  
M.P. PELLONPÄÄ

16. The text of the Report was adopted by the Commission on 31 August 1993 and is now transmitted to the Committee of Ministers in accordance with Article 31 para. 2 of the Convention.

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

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

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

19. 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. Particular circumstances of the case

20. The second applicant gave birth to a son A. on 29 November 1987. The first applicant, who was living with the second applicant, was later named as the father on the birth certificate.

21. The second applicant had a history of recurrent mental illness. She was first ill in or about 1973 and was admitted to psychiatric hospital on a number of occasions. There was a recurrence of her illness shortly after A.'s birth. As a result, the Social Services of Strathclyde Regional Council ("the Council") took A. into care on 11 December 1987 under a Place of Safety Order.

22. On 17 December 1987, the case was brought before a Children's Hearing. The second applicant was present.

23. The ground of referral to the Children's Hearing was -

"that a lack of parental care is likely to cause <A.> unnecessary suffering or seriously to impair his health or development"- Section 32 (2)(c) of the Social Work (Scotland) Act 1968 ("the 1968 Act").

24. The statement of facts given in support of the ground of referral stated inter alia:

(1) That <A.> ... was born on 29 November 1987 (as far as can be ascertained), and presently is in the Special Baby Care Unit of the Southern General Hospital, Glasgow...

(2) that the <second applicant> suffers from a major psychiatric illness.

(3) that the <second applicant> refuses to take medication to stabilise her condition when not an in-patient at psychiatric hospital.

(4) that the <second applicant> has required to be admitted to psychiatric hospital on emergency basis under the Mental Health (Scotland) Act 1984 on <5 June 1986, 5 December 1986 and 31 December 1986>.

(5) that due to her psychiatric condition the <second applicant> is unlikely to be able to care adequately for the child."

25. At the hearing on 17 December 1987 the ground of referral and statement of facts were put to the second applicant. She denied the ground of referral. The Children's Hearing accordingly instructed the Reporter to apply to the Sheriff for a finding on whether the ground of referral was established.

26. The Children's Hearing on 17 December 1987 also issued a warrant for continued interim detention of A. in a place of safety pending determination of the merits of the case. Subsequent warrants for continued detention were granted by a further Children's Hearing on 5 January 1988 and by the Sheriff Court at Glasgow on 21 January 1988.

27. On 23 December 1987, A. was discharged from hospital and taken to foster parents at Greenock. The second applicant discharged herself from hospital. Arrangements were made for her to be taken 3 times a week for access visits to A. at the foster home, under the supervision of the Council.

28. It was decided by the Council at this stage that the first applicant should not be included in the access arrangements. The principal reason for this was that at this time the second applicant still denied that the first applicant was the father. Other reasons were his aggressive and threatening attitude and his refusal to give information about his background.

29. 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 it. The second applicant failed to appear for four of the access visits between 31 December 1987 and 18 January 1988.

30. On 21 January 1988 the Reporter's application for a finding on the grounds of referral was heard in the Glasgow Sheriff Court. The second applicant was present and represented. The first applicant was also present. Evidence was heard from medical, nursery and social

work witnesses and the first and second applicants both gave evidence. At the conclusion of the hearing the Sheriff found the grounds of referral established. He remitted the case to the Reporter for him to arrange a Children's Hearing to consider and determine the case. The second applicant did not appeal to the Court of Session.

31. On 27 January 1988, the Council held a child care review of the case, at a meeting at which the applicants were both present. A consultant psychiatrist advised that the second applicant was seriously mentally ill and would not accept treatment. It was decided that in view of this, access should be terminated, though this decision would be reviewed if the second applicant had treatment and her mental state improved. The first applicant had also requested access at the meeting, claiming that he was A.'s father. Access was refused since the second applicant maintained that he was not the father and in light of his aggressive and threatening attitude.

32. In February 1988, the applicant was admitted to hospital where she remained until June 1988.

33. On 4 February 1988, the Children's Hearing met to consider the case. The second applicant attended, with the first applicant as her representative. The Panel had a number of documents before it, including a report on the child compiled by the Social Work Department dated 28 January 1988 reviewing the history of the case and proposing that A. continue to reside in the foster home. These documents were not produced to the applicants but the Chairman informed them of their substance.

34. At the conclusion of the hearing it was decided that it would not be appropriate in the interests of A. to commit him to the care of the applicants and 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. The decision was based, inter alia, on the mental health of both applicants and the aggressive and hostile nature of both applicants. This decision did not make any provision as to access. In such circumstances the presumption is that parents get 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.

35. The second applicant lodged an appeal, which was due to be heard at the Sheriff Court on 29 February 1988. She attended court, with two nurses, apparently heavily sedated. Following discussion, the Sheriff asked if 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.

36. A review was held by the Council on 27 April 1988 and was attended by both applicants. In view of the second applicant's improved mental state it was decided to allow her supervised access visits. By this time, the second applicant had agreed that the first applicant was A's father and on 18 February 1988, the first applicant's name had been added to the birth certificate. This did not give the first applicant any parental rights. 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.

37. On 24 August 1988, the first applicant's solicitors applied to the Scottish Legal Aid Board for legal aid for an action in the Court of Session to obtain custody or access. The Board refused legal aid on the ground that the action was incompetent since the Court of Session had no power to lift the supervision requirement and would not intervene in access disputes. Counsel then advised the first applicant that this decision was correct but that the best method of obtaining

access would be to get the Children's Hearing to review the supervision requirement.

38. On 20 September 1988, the Council held a further review. They had held meetings with the first applicant to obtain background information and made inquiries with his doctor and the police. It was decided at the review to allow both applicants access of 3 visits per week at a Special Centre and give the applicants assistance in learning parenting skills. It was also intended that there should be access for one 24 hour period. This intensive access was to last for 3 months after which an assessment would be made.

39. On 13 October 1988, the Children's Hearing held a review of the supervision requirement. The second applicant was present and the first applicant was present, as her representative. It had before it a report by the Social Work Department dated 20 September 1988 updating information on A. and outlining the proposed access arrangements. This report was not disclosed to the applicant's though the Chairman informed them of its substance. The applicants had submitted a statement alleging inter alia that they had never had an opportunity to show that they could care for A.

40. After the hearing, it was decided to continue the supervision requirement and to approve the access proposals. The Hearing considered that only time would show if rehabilitation was a viable prospect and that the second applicant's mental health should be closely monitored.

41. The second applicant did not appeal to the Sheriff Court.

42. The access period lasted from 4 October 1988 to 19 December 1988, during which the applicants had approximately 23 access visits. 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 1988 by a doctor, 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.

43. On 19 December 1988, a child care review was held, at which the applicants were present. It was decided to terminate access visits in view of concern about the long-term effects on A. and the fact that no obvious progress had been made in the applicants' ability to care for A. The Council 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.

44. Following the second applicant's application, the Children's Hearing carried out a review on 20 June 1989. The second applicant was present with the first applicant as her representative. A report by the Social Work Department was before the Hearing further updating the case. It described the access period and reported that A. was happy and developing well and that prospective adopters were being sought.

45. The applicants applied for access to be re-established. The Hearing considered that there was a conflict of interest between the Council and the second applicant, and probably between parent and child and decided that a safeguarder should be appointed to represent the child's interests.

46. The Safeguarder, appointed by the Hearing, interviewed, inter alia, the applicants, the social workers, the foster-parents and the police. His report of 18 August 1989 stated, inter alia, 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 mental state.

47. The adjourned Children's Hearing reconvened on 5 September 1989. The applicants were present and the second applicant represented by a solicitor. The Safeguarder's report and other documents before the Hearing were not disclosed to the applicants, but the Chairman informed them of the substance. 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 the suggestion of obtaining an independent psychiatric report on the second applicant.

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

- (a) that the applicants had not been informed of the substance of the documents produced at the hearing,
- (b) that 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) that an adjournment for the purpose of obtaining a psychiatric report had been refused.

49. Ground (a) was apparently not pursued at the appeal hearing, which took place on 4 October 1989. The Sheriff decided that it would have been appropriate to obtain a psychiatric report and remitted the case to the Children's Hearing.

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

51. A Children's Hearing to consider the report was to be convened on 9 January 1990 but neither applicant attended or was represented, the Hearing being informed that the second applicant had been declared insane and admitted to 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.

52. On 1 February 1990, the Council lodged with the Sheriff Court a petition for freeing A. for adoption.

53. The applicants were married on 24 April 1990. The first applicant thereby obtained parental rights in respect of A.

54. The petition was heard between 18 June 1990 and 27 July 1990. The applicants refused to give their consent to adoption. They were present at the hearing and the second applicant represented by a solicitor. The documentary evidence before the Court had been disclosed to the applicants. Witnesses were heard and the applicants given the opportunity to cross-examine them and lead their own evidence.

55. On 12 August 1990 the second applicant was re-admitted to hospital. On 14 October 1990 the Sheriff decided that the applicants were withholding their consent unreasonably. He decided to dispense

with their consent and granted the order freeing A. for adoption. He stated:

"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. [The second applicant] 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. and Mrs. M., whose testimonies support the findings in fact I have made relating to what happened on the access visits. The child, now nearly three, has in fact, as an infant, rejected both his parents ...

The [applicants] are objecting to the child being freed for adoption in order, and only in order, that they can have custody of him. Such a conclusion can only be viewed with the utmost misgiving for the future of this child. He is presently reared in a house by foster parents who have enabled him to withstand the traumas of these access visits by the [applicants]. It would be wholly contrary to his welfare for this present state which is one of uncertainty, to be prolonged and the possibility of his parents having his custody contemplated. Neither his mother, nor [the first applicant], are interested in the welfare of the child. They are incapable of distinguishing between the child's interests and their having possession of him. A reasonable parent would give great weight to the welfare of the child. The welfare of this child clearly does not lie with his being with his parents, and their opposition to the present application is, in my view, unreasonable. Any objective view of their attitude and of their conduct, in my view, discloses its unreasonableness. Mrs. K., whose experience as a Health Visitor is extensive and impressive, and whose experience of the [applicants] in the course of this case was considerable and whose testimony I accept, gave her opinion of [the first applicant] at the end of the penultimate paragraph of her report produced and of the risks she feared to the child if he was involved with him. Standing such a censure from such a source, which I accept as valid, his present attitude, viewed objectively, can, in my view, only be regarded as unreasonable ..."

56. In December 1990 the applicants lodged an appeal to the Court of Session. They applied for legal aid and appear to have been granted legal aid for the purposes of obtaining counsel's opinion. Counsel advised that an appeal had no prospect of success and legal aid was not extended. The applicants continued their appeal representing themselves.

57. Their 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 properly to care for a child, it would have been contrary to the best interests of A. to return him to the applicants' custody.

B. Relevant domestic law and practice

## Rights of parents

58. 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*,

- (1) 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;
- (2) 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 upbringing;
- (3) the right to access.

59. The persons who may exercise parental rights are governed by the Law Reform (Parent and Child) (Scotland) Act 1986 ("the 1986 Act").

Section 2 (1) provides:

"Subject to sections 3 and 4 of this Act -

- (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."

60. Under Section 3, any person claiming an interest may make an application to the court for an order relating to parental rights and where it is in the interests of the child the court may make such an order. A father of a child born out of wedlock may obtain parental rights under this procedure by applying either to the Court of Session or the local Sheriff Court.

## Compulsory Measures of Care

61. The rules regarding compulsory measures of care in respect of children are set out in Part III of the Social Work (Scotland) Act 1968 ("the 1968 Act") supplemented by subordinate legislation.

62. Under Section 20 of the 1968 Act, the local authority has a general responsibility for promoting social welfare in its area. It has the duty to inquire into and tell the Reporter of cases of children who may need compulsory measures of care.

63. 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 the Children's Hearing and arranging such hearings when they are necessary.

## Children's Hearings

64. Children's Hearings are the sittings of members of the children's panel which decide whether a child requires compulsory measures of care and if so, they may order such measures. Pursuant to Section 34 of the 1968 Act, a Children's Hearing consists of a chairman and 2 other members drawn from the children's panel constituted under Section 33

of the 1968 Act.

65. Section 33 and Schedule 3 provide for constitution of 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, but may be removed by him at any time.

66. 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 court decision.

#### The grounds of referral

67. The Children's Hearing may only decide if compulsory measures of care are appropriate where one of the "grounds of referral" applies to the child, either by being accepted by the child and his parent or by being established by a decision of the Sheriff. 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".

68. 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.

69. 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. A parent may be represented by any person of his or her choice. 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.

#### Procedure

70. The Reporter is under a duty to notify the parents of a child of a Children's Hearing giving at least 7 days' notice. He also must provide before the first hearing a statement of the grounds of referral.

71. At the first Children's Hearing, they must ascertain if the grounds of referral are accepted by the child and his parents. If they accept, the hearing may proceed. If not, they 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 7 days and heard within 28 days of that application. The parents may appear as parties and be represented. Following a 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, pursuant to S. 42(6) of the 1968 Act arranges for consideration and determination of the case by the Children's Hearing.

72. At this stage, the Children's Hearing must consider what arrangements would be in the best interests of the child (Section 43 of the 1968 Act).

73. They may, inter alia,

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

(2) adjourn pending further investigations, including directing that a child attend a clinic or hospital;

(3) make a supervision requirement under Section 44, requiring the child to submit to supervision in accordance with such conditions as they may impose or to reside in a named establishment.

74. 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. (Children's Hearing Rules, Rules 19(4) and 20.)

75. The mode of operation of a Children's Hearing is intended to differ from that of a court. The Children's Hearing is intended to determine what is in the child's best interest. Its aim is to achieve this by informal discussion, not by an adversarial procedure. Nevertheless, the child and his parent, and any safeguarder appointed to look after the child's interests, must be fully involved in the discussion.

#### Reports and documents considered at the Children's Hearing

76. The Children's Hearings are required to consider all the information supplied (Children's Hearings Rules, Rule 19(2)(a). Apart from the statement of grounds of referral this information (reports, documents etc.) is not usually supplied to the child or his parents, but the chairman is required at the hearing to inform the child and his parents of their substance 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 (Children's Hearing Rules, Rule 19(3) ).

#### Supervision requirements

77. Supervision requirements are the orders of the Children's Hearing imposing compulsory measures of care. They may be of two kinds:

(a) Requirements to submit to supervision in accordance with such conditions as the Children's Hearing may impose. (Section 44(1) (a) of the 1986 Act). The conditions may include for example conditions requiring the child to reside in a particular place other than a residential establishment or with particular persons.

(b) Requirements to reside in a named residential establishment and to be subject to such conditions as the Children's Hearing may impose. (Section 44(1)(b) of the 1968 Act).

78. The effect of supervision requirements has been clarified in court decisions, in particular the decisions of the Court of Session in the cases of Aitken v. Aitken 1978 SC 297, Dewar v Strathclyde Regional Council 1984 SC 102 and Kennedy v. A 1986 SLT 358. 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 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.

79. As regards access, the Children's Hearing are entitled to attach conditions as to access when making or continuing a supervision requirement. This was made clear in the case of Kennedy v. A. In the absence of any express condition as to access, 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.

80. The Court of Session have made it clear in the case of Dewar v. Strathclyde Regional Council, 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, the Court of Session have indicated that it is appropriate for him to apply to the Children's Hearing to regulate the matter by attaching a condition as to access to the supervision requirement.

81. A parent has the right to request a review of a supervision requirement every 6 months after the last review (Section 48 (4) of the 1968 Act) and can use this right to obtaining a ruling on access.

#### Duration and review of supervision requirements

82. 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 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 parent, after the expiry of these periods -

(i) 3 months from imposition of the requirement;

(ii) 3 months from any variation of the requirement of review;

(iii) 6 months from any other review.

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

#### Appeal against decision of a Children's Hearing

84. Within 3 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.

85. 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 Hearing 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.

86. The appeal is heard in chambers. 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, then unless the facts are admitted by the Reporter, the Sheriff must hear evidence tendered by or on behalf of the appellant and Reporter as to the irregularity.

87. 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 this may help him. The child and parents and safeguarder are normally entitled to be present throughout.

88. The Sheriff looks at the merits of the case. Where he decides the appeal has failed, he confirms the decision of the Children's Hearing. Where he is satisfied that the decision is not justified in all the circumstances of the case, he may remit the case to the Children's Hearing for consideration or discharge the child from any further proceedings arising from those grounds of referral (Section 49(5) of the 1986 Act).

#### Adoption procedure

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

90. Under the 1978 Act, an order declaring the child free for adoption may be made by the Court of Session or Sheriff Court.

91. 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 one of the grounds specified in Section 16(2) of the 1978 Act.

92. There are a number of grounds for dispensing with the parents' or guardians' consent. These include the ground that the parent or guardian is withholding his agreement unreasonably.

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

94. The effect of an order freeing the child for adoption is to vest parental rights and duties in the adoption agency and to extinguish existing parental rights.

95. 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 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.

### III. OPINION OF THE COMMISSION

#### A. Complaints declared admissible

96. The Commission declared admissible the applicants' complaints that they were unable to see confidential reports and documents submitted to the Children' Hearings and the first applicant's complaints that as a natural father he had no legal rights to the custody of A. or to participate in the care proceedings and that he has been discriminated against in this respect.

#### B. Points at issue

97. The issues to be determined are :

- whether, in respect of both applicants, there has been violation of Article 8 (Art. 8) of the Convention in that they were unable to see the confidential reports and documents submitted before the Children' Hearings;
- whether, in respect of the first applicant, there has been violation of Article 6 (Art. 6) of the Convention as regards his inability to see the confidential reports and documents in the course of the proceedings;
- whether, in respect of the second applicant, there has been violation of Article 6 (Art. 6) of the Convention as regards her inability to see the confidential reports and documents in the course of the proceedings;
- whether the first applicant has been discriminated against as a natural father contrary to Article 14 of the Convention in conjunction with Article 6 and/or Article 8 (Art. 14+6,14+8) of the Convention in that he had no legal right to the custody of A. or to participate in the proceedings.

#### C. Article 8 (Art. 8) of the Convention

98. Article 8 (Art. 8) of the Convention 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."

99. The applicants complain that in the proceedings before the Children Hearings the confidential reports and documents submitted by the social services to the Panel were not disclosed to them. Since these proceedings were part of the decision-making process which determined what was to happen to their son A. they submit that the reports should have been disclosed in order that they might be able properly to answer the criticisms made against their parenting capacity and if necessary to seek advice or experts with a view to rebutting those criticisms.

100. The respondent Government point out that though the documents are not disclosed to parents the Chairman of the Hearing is under an obligation to inform them of the substance of the documents if it appears to him that this is material to the manner in which the case should be disposed and that its disclosure would not be detrimental to the interests of the child (see para. 76 above). They submit that this is adequate to protect the interests of the parents and in some cases may be a fairer and more comprehensible way of explaining the significance of a report, in particular in such a case as the present where the second applicant's emotional and mental state gave cause for concern. Furthermore any decision of the Hearing could be appealed to the Sheriff's Court which had full jurisdiction to examine the issues, including any alleged failure to convey the substance of a report.

101. The Commission notes first that the case falls within the scope of the protection of Article 8 (Art. 8) of the Convention in respect of both applicants. Though there was some initial doubt as to the first applicant's relationship to A., his name was added to the birth certificate as being the father on 18 February 1988. The mutual enjoyment by parent and child of each other's company is an established and fundamental element of family life. Consequently, the Commission must therefore examine whether the procedures before the Children's Hearing, which reached decisions relating to custody and access, complied with the requirements of Article 8 (Art. 8) of the Convention.

102. While there are no explicit procedural requirements contained in Article 8 (Art. 8), the case-law of the Commission and Court establish that in this area, where decisions may have a drastic effect on the relations between parent and child and become irreversible, there is particular need for protection against arbitrary interferences. In a case where it was alleged that the local authority had not consulted the parents of a child in its care before taking crucial decisions as to its future, the Court adopted the following approach:

"In the Court's view, what therefore 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)." (Eur. Court H.R., W. v. United Kingdom judgment of 8 July 1987, Series A no. 121, p. 29, para. 64.)

103. In the present case there is no doubt as to the importance of what was at stake for the applicants. The Children Hearings were taking decisions which determined the future of their relationship with A. The Commission notes the informal nature of the Children' Hearings which are intended to provide a non-contentious and constructive approach to dealing with questions relating to a child's welfare. Nonetheless it is open to question the effectiveness of a parent's participation in this process if he or she has no sight of reports and documents which are presumably relevant to the proceedings and contain matters at least indirectly relating to the welfare of their child and their own capacities in that respect. The opportunity of appealing to the Sheriff Court either for an alleged failure to give the substance of a document or on any other ground suffers from the basic defect that the parent has no knowledge of the material's contents to begin with. Further the Commission notes that even before the Sheriff Court the parents are not provided with copies of reports or other documents. Without the documents in question, it must also be difficult for a parent to seek

independent advice as to their significance or as to the existence of a ground of appeal, advice which takes on added importance where as in this case the parent suffers from emotional or mental problems.

104. The Commission is not called upon to consider whether there are reports or other documents which may contain material which should not be disclosed to parents either because it is detrimental to the child or to their own interests. It has not been alleged in this case that there were any special reasons for withholding the reports from the applicants.

105. Having regard to the above considerations, the Commission finds that the procedure whereby the confidential reports and other documents, which were before the Children' Hearings when they took decisions relating to A. and the applicants' relationship with him, were not disclosed to the applicants, failed to afford them the requisite protection of their interests. Consequently, there has in that regard been a failure to respect the applicants' family life. Even having regard to the State's margin of appreciation, the fair balance which has to be struck between the interests of the applicants and other legitimate interests has not been attained (cf. *mutatis mutandis* Eur. Court H.R., *B. v. France* judgment of 25 March 1992, Series A no. 232, p. 47, para. 44 and pp. 53-54, para. 63).

#### Conclusion

106. The Commission concludes, unanimously, that there has been a violation of Article 8 (Art. 8) of the Convention.

D. Article 6 para. 1 (Art. 6-1) of the Convention

107. This provision, as relevant, states :

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."

The first applicant

a. Applicability of Article 6 para. 1 (Art. 6-1)

108. The Commission has first examined whether Article 6 para. 1 (Art. 6-1) is applicable to the first applicant's complaint that he was unable to see the confidential reports and documents submitted in the proceedings before the Children's Hearings.

109. The Government have submitted that the first applicant cannot in effect complain of the fairness of the proceedings before the Children's Hearings since, having failed to apply for parental rights, he did not participate in the proceedings as a party but only in the capacity of representative of the second applicant. The first applicant has not met this argument.

110. The Commission recalls that the second applicant was the only party before the Hearings though the first applicant played an active role as her representative. He had not instituted proceedings to obtain an order for parental rights which would have given him the status of party in the proceedings (see paras. 59-60). Further the appeals from the hearings to the Sheriff were by the second applicant alone. In these circumstances, even assuming that the first applicant as natural father enjoyed any "civil" rights under domestic law in respect of the child, the Commission finds that these proceedings cannot be said to have involved the determination of any of those rights. Consequently, Article 6 (Art. 6) is not applicable to his complaint. It notes that

this complaint does not relate to the adoption proceedings before the Sheriff Court and the Court of Session subsequent to the applicants' marriage, by which the first applicant obtained parental rights in request of A. In the adoption proceedings the first applicant was a party and the documents before the courts were disclosed.

#### Conclusion

111. The Commission concludes, by eleven votes to two, that there has been no violation of Article 6 para. 1 (Art. 6-1) of the Convention in respect of the first applicant.

The second applicant

a. Applicability of Article 6 para. 1 (Art. 6-1)

112. The Commission refers to the principles and case-law above (see paras. 109-110).

113. The second applicant as the natural mother of A. enjoyed under domestic law parental rights in his respect. She had the right to participate in the Children's Hearing as a parent and to appeal from its decisions to the Sheriff Court. In the course of these proceedings she contested the decisions placing A. in the care of the local authority and the subsequent decision to terminate access maintaining throughout that A. should be returned to her care. In these circumstances, the Commission finds that there was a "genuine" and "serious" dispute over the first applicant's rights within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention. These rights, relating to family life, are "civil" in character (see eg. Eur. Court H.R., *W. v. the United Kingdom* judgment of 8 July 1987, Series A no. 121, p. 35, para. 78).

b. Compliance with Article 6 para. 1 (Art. 6-1)

aa) Before the Children's Hearing

114. The Commission finds that the Children's Hearing is not a tribunal or court within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention. It is not intended to be by the relevant legislation and its members fail to offer the necessary guarantees of independence (see para. 65 above). Consequently the proceedings before the Children's Hearing did not comply with Article 6 (Art. 6) of the Convention

bb) Before the Sheriff Court

115. The Commission finds that the Sheriff Court was a tribunal within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

116. Article 6 para. 1 (Art. 6-1) does not require that the procedure which determines civil rights and obligations is conducted at each of its stages before tribunals meeting the requirements of Article 6 para. 1 (Art. 6-1). A procedure not complying with Article 6 para. 1 (Art. 6-1) may thus precede the determination of civil rights by a tribunal which has full jurisdictional control over the prior procedure and itself provides the requisite guarantees of Article 6 para. 1 (Art. 6-1) (see eg. Eur. Court H.R., *Albert and Le Compte* judgment of 10 February 1983, Series A no. 58, p. 16, para. 29).

117. The second applicant submits in this respect that she did not have sight of the confidential reports and other documents submitted before the Children's Hearing nor was that material disclosed on appeal to the Sheriff Court. The obligation on the Chairman of the Children's Hearing to convey the substance of reports was not sufficient since

that would not necessarily give the full significance or tenor of those reports. She should have had prior knowledge of the details of such material to enable her to rebut any allegations and if necessary cite experts or witnesses on her behalf. The non-disclosure was in conflict with all normal procedural rules and it deprived her of a possibility of a fair hearing within the meaning of Article 6 para. 1 (Art. 6-1).

118. The Government submit that the second applicant was given a fair opportunity of presenting her views and that the Chairman of the Children's Hearing was under an obligation to inform her orally of the substance of any documents supplied to them. There was also a very wide right of appeal to the Sheriff Court. Having regard to the special nature of the Children's Hearings system, which seeks to achieve its ends by collaboration and co-operation rather than by an adversarial and confrontational procedure, the Government submit that in the circumstances the second applicant received a fair hearing.

119. The Commission notes that the second applicant had a possibility of appealing from decisions of the Children's Hearing to the Sheriff Court which had jurisdiction to examine the matter on the merits and any alleged procedural improprieties eg a failure to convey the substance of reports to the applicant. While however the reports and documents before the Children's Hearing are lodged by the Reporter before the Sheriff Court these remain undisclosed to a parent such as the second applicant even though they are of relevance to the determination of the issues.

120. The Commission finds that this reveals a basic inequality vis-a-vis the other parties and places the parent at a substantial disadvantage both in respect of his or her lodging of the appeal and in the subsequent presentation of the appeal. In these circumstances, the Commission considers that the second applicant's right to a fair hearing was impaired (see eg. Eur. Court H.R., Ruiz-Mateos judgment of 23 June 1993, Series A no. 262, p. 19, para. 63).

#### Conclusion

121. The Commission concludes unanimously that there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention in respect of the second applicant.

E. Article 14 of the Convention in conjunction with Article 6 and/or Article 8 (Art. 14+6,14+8)

122. Article 14 (Art. 14) provides:

"The enjoyment of the rights and freedoms set forth in this 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."

123. The first applicant submits that he was the subject of discrimination since as a natural father prior to his marriage to the second applicant he had no right to the legal custody of A. or to participate in the care proceedings.

124. The Commission recalls that initially the second applicant denied that the first applicant was A.'s father (see paras. 28 and 31 above). It further notes that pursuant to relevant provisions of the Law Reform (Parent and Child) (Scotland) Act 1968 (see paras. 59-60 above) a child's father automatically acquires parental rights only where he is married to the mother. While a parent has the right to attend all stages of a Children's Hearing, this term excludes the father of a child born out of wedlock.

125. The Commission recalls however that whether a difference in treatment constitutes a discrimination in the sense of Article 14 (Art. 14) depends on whether or not there exists an objective and reasonable justification. To be compatible with this provision, the difference must pursue a legitimate aim and there must be a reasonable proportionality between the means employed and the aim sought to be realised (see eg. Eur. Court H.R., Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, Series A no. 94, p. 35, para. 72 and Inze judgment of 28 October 1987, Series A no. 126, p. 17-18, paras. 36-40).

126. 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. The Commission therefore considers that there is objective and reasonable justification for a Contracting State to exclude the natural father from automatically enjoying full parental rights under domestic law. A procedure exists in Scotland whereby natural fathers may obtain recognition of their parental role and thus obtain parental rights, namely, an application for parental rights under section 3 of the 1986 Act (see para. 60 above). The principle of proportionality is thereby respected. The Commission consequently finds that the difference in treatment complained of the present case does not disclose any discrimination contrary to Article 14 of the Convention in conjunction either with Article 6 or 8 (Art. 14+6,14+8).

#### Conclusion

127. The Commission concludes, unanimously, that there has been no violation of Article 14 of the Convention in conjunction with Article 6 or Article 8 (Art. 14+6,14+8) in respect of the first applicant.

#### RECAPITULATION

128. The Commission concludes, unanimously, that there has been a violation of Article 8 (Art. 8) of the Convention (see para. 106 above).

129. The Commission concludes, by eleven votes to two, that there has been no violation of Article 6 para. 1 (Art. 6-1) of the Convention in respect of the first applicant (see para. 111 above).

130. The Commission concludes, unanimously, that there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention in respect of the second applicant (see para. 121 above).

131. The Commission concludes, unanimously, that there has been no violation of Article 14 (Art. 14) of the Convention in respect of the first applicant (see para. 127 above).

Secretary to the Commission

President of the Commission

(H.C. KRUGER)

(C.A. NØRGAARD)

#### CONCURRING OPINION OF MR. LOUCAIDES

As regards the complaints of the first applicant under Article 6 para. 1 of the Convention, while I agree with the conclusion - that there has been no violation - I do so for different reasons.

As established in the case-law of the Commission and Court, Article 6 para. 1 applies only to disputes ("contestations") over "rights and obligations" which can be said, at least on arguable grounds, to be recognised under domestic law. It does not in itself

guarantee any particular content for "rights and obligations" in the substantive law of the Contracting States (cf. Eur. Court H.R., Lithgow and Others judgment of 8 July 1986, Series A no. 102, p. 70, para. 192). On the other hand, it is not decisive whether a certain benefit, or possible claim, is characterised as a "right" under the domestic legal system. This is so since the term "right" must be given an autonomous interpretation in the context of Article 6 para. 1 (see eg. Lithgow and Others judgment loc. cit. para. 192).

It is also established case-law that Article 6 para. 1 guarantees to everyone who claims that an interference with his "civil rights" is unlawful the right to submit that claim to a tribunal satisfying the requirements of that provision (see Eur. Court H.R., Le Compte, Van Leuven and De Meyere judgment of 23 June 1981, Series A no. 43, p. 20, para. 44). The claim or dispute must be "genuine and of a serious nature" (see e.g. Eur. Court H.R., Bentham judgment of 23 October 1985, Series A no. 97, p. 15, para. 32). The dispute may relate not only to the actual existence of a right but also to its scope or the manner in which it may be exercised. The dispute may concern both questions of fact and questions of law (see e.g. Eur. Court H.R., Van Marle and Others judgment of 26 June 1984, Series A no. 101, p. 11, para. 32).

In the present case, the first applicant prior to his marriage to the second applicant enjoyed under domestic law no parental rights in respect of his son A. (see paras. 59-60 above). The second applicant initially denied that the first applicant was the father (see paras. 28 and 31 above). While he did have the possibility of applying to domestic courts for a parental rights order under section 3 of the 1986 Act, I consider that this limited procedural provision confers no substantive rights of custody or access capable of falling within the concept of civil rights. I recall that in the Keegan case (Keegan v. Ireland, Comm. Report 17.2.93, pp. 13-14, paras. 60-67) the Commission found that the relationship of the applicant, the natural father with his child born out of wedlock had sufficient recognition in Irish domestic law to base a claim to enjoyment of "civil rights". In my view however the present case can in this respect be distinguished from the Keegan case in that in the Irish case the applicant had applied for guardianship and it had been established in the Irish courts that in such proceedings regard must be had to the wishes and desires of the natural father to enjoy the society of his child, subject to other overriding considerations. There was in the event in that case a "serious" and "genuine" dispute over the applicant's rights.

Consequently, my conclusion is that Article 6 para. 1 of the Convention is not applicable to the first applicant's complaint concerning the Children's Hearings. I note that this complaint does not relate to the adoption proceedings before the Sheriff Court and the Court of Session subsequent to the applicants' marriage, by which the first applicant obtained parental rights in request of A. In the adoption proceedings the first applicant was a party and the documents before the courts were disclosed.

PARTIALLY DISSENTING OPINION OF MRS. LIDDY  
joined by Mr. J. C. SOYER

The majority of the Commission has concluded that there was no violation of Article 6 para. 1 in relation to the first applicant who complained that he was unable to see the confidential reports and documents submitted in the proceedings before the children's hearings. I have reached a different conclusion because I cannot see how this issue can be distinguished, in its essentials, from the issues under Article 6 para. 1 in the case of Keegan v. Ireland ( No. 16969/90, Comm. Report 17.2.93).

The applicant in Keegan v. Ireland had no standing before the

Adoption Board because he had not obtained a court order appointing him guardian of a child. The first applicant in the present case had no standing before the Children's Hearings, dealing with questions of access, because he had not obtained a parental rights order. It cannot be assumed that he would have been successful had he applied for one. In Keegan v. Ireland there was no dispute as to whether the applicant was the father of the child. In the present case there was no dispute after 18 February 1988 as to whether the applicant was the father of the child.

If the Commission was right in its unanimous conclusion in Keegan v. Ireland that there was a violation of Article 6 para. 1, then it must be the case that there is also a violation of the first applicant's rights under that provision in the present case, at least in the period following 18 February 1988.

#### APPENDIX I

##### HISTORY OF THE PROCEEDINGS

Date	Item
11.10.90	Introduction of the application
10.4.90	Registration of the application
Examination of admissibility	
03.12.90	Commission's decision to invite the parties to submit observations on the admissibility and merits
16.05.91	Government's observations
05.08.91	Applicants' reply
25.09.91	Applicants' further comments
07.04.92	Commission's decision to hold an oral hearing
23.07.92	Commission's grant of legal aid
08.12.91	Hearing on the admissibility and merits
08.12.92	Commission's decision to declare the application partly admissible, partly inadmissible
Examination of the merits	
08.12.92	Commission's deliberations on the merits
27.01.93	Applicants' submissions on the merits
03.04.93	Consideration of the state of proceedings
25.05.93	Government's submissions on the merits
31.08.93	Commission's deliberations on the merits, final votes and adoption of the Report