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Wetingang
EVRM art. 6 lid 1; EVRM art. 8; EVRM art. 13

Essentie

Omgang van ouders met kinderen die aan ouderlijke macht zijn onttrokken. Gevolgde procedures en beschikbare rechtsmiddelen. Schending van recht op eerbiediging van gezinsleven (art. 8 Verdrag tot bescherming van de rechten van de mens en de fundamentele vrijheden (EVRM)) en recht op toegang tot rechterlijke instantie (art. 6 lid 1 EVRM).

Samenvatting

Arresten I, II en III: Het genieten van elkaars gezelschap door ouder en kind vormt een fundamenteel element van 'gezinsleven'. De natuurlijke gezinsband gaat niet verloren door ontzetting van ouders uit ouderlijke macht. I.c. komen besluiten om omgang tussen ouders en kind te beperken en te beeindigen neer op een inbreuk op recht op eerbiediging van het gezinsleven, welke 'bij de wet voorzien' was en als legitiem doel had de bescherming van de gezondheid of van de rechten en vrijheden van anderen. Vraag of inbreuk 'nodig in een democratische samenleving' was (I par. 59–61). Maatregelen met betrekking tot de omgang tussen ouders en kinderen betreffen een gevoelig terrein, waarop plaatselijke autoriteiten enige discretionaire bevoegdheid en procedurele flexibiliteit moeten worden gelaten. Voorop dient echter te staan dat zulke besluiten zeer wel onomkeerbaar kunnen blijken te zijn, doordat een uit huis geplaatst kind met zijn nieuwe verzorgers banden ontwikkelt welker verbreking — door een opheffing van de omgangsbeperkingen voor de ouders — niet in zijn belang hoeft te zijn. Hoewel art. 8 EVRM geen procedurele eisen bevat, is onmiskenbaar dat het gevolgde besluitvormingsproces invloed kan hebben op de inhoud van de beslissing, welke op relevante overwegingen moet berusten, niet eenzijdig mag zijn en geen (schijn van) willekeur mag opleveren. Hof derhalve bevoegd vast te stellen of gevolgde procedure eerlijk was en recht doet aan belangen, beschermd door art. 8 (Ipar. 62).

De voor het besluitvormingsproces relevante overwegingen omvatten uit de aard der zaak ook de meningen en belangen van de ouders, die daarin dan ook in voldoende mate betrokken moeten worden om hen de vereiste bescherming van hun belangen te bieden. Als dit niet het geval is, is er een gebrek aan eerbiediging van hun gezinsleven en kan de genomen maatregel niet als nodig in een democratische samenleving worden beschouwd (I par. 63–64).
Arresten I + III: Bij toetsing aan art. 8 EVRM mag het Hof acht slaan op de duur van het besluitvormingsproces en van verwante procedures aangezien procedurele vertraging in dit soort zaken kan neerkomen op een de facto bepaling van de uitkomst van de procedure nog voordat er een zitting van de rechter is geweest. Daadwerkelijke eerbiediging van gezinsleven vereist dat toekomstige relaties tussen ouder en kind niet louter door het verstrijken van de tijd bepaald worden (I par. 65).
Arresten I, II en III: Toepassing van deze uitgangspunten op onderhavige zaak. Klager is i.c. onvoldoende in besluitvormingsproces met betrekking tot zijn omgang met zijn kind betrokken geweest; hij was niet van tevoren geraadpleegd over besluit om ouderlijke macht over kind over te dragen aan de plaatselijke autoriteiten noch over besluit het kind voor lange tijd bij pleeggezin onder te brengen met het oog op uiteindelijke adoptie noch over besluit om omgang tussen de natuurlijke ouders en het kind te beeindigen. Laatstgenoemde twee beslissingen waren desalniettemin van cruciaal belang voor de toekomst van het kind (I par. 66–68).
Arrest I: De lengte van de procedure tot het onder toezicht van de rechter stellen van het kind is een relevante, zij het subsidiaire, factor. De vertraging was voor een aanzienlijk deel te wijten aan de plaatselijke autoriteiten (I par. 69).
Arresten I, II en III: I.c. is er een schending van art. 8 EVRM geweest, niettegenstaande de nationale beoordelingsvrijheid op onderhavig gebied (I par. 70).
Arrest IV: Hetgeen naar voren is gebracht over de betrokkenheid van O. in de procedures welke leidden tot de maatregelen met betrekking tot zijn kinderen is onvoldoende om een schending van art. 8 EVRM te kunnen vaststellen (IV par. 65–66).
Arresten I, II, III en IV: Vraag of klager kwestie van omgang heeft kunnen laten bepalen in een met art. 6 EVRM strokende procedure. Lengte van procedure tot ondertoezichtstelling van de rechter. Art. 6 alleen van toepassing op geschillen over (burgerlijke) rechten en verplichtingen waarvan op verdedigbare gronden gezegd kan worden dat zij in het nationale recht erkend worden (I par. 71–73).
Vraag of dit het geval is voor het omgangsrecht. Ontzetting uit ouderlijke macht ontneemt ouder niet automatisch het recht op omgang maar betekent dat al of niet voortzetting van de omgang binnen de discretionaire bevoegdheid van de plaatselijke autoriteit komt te vallen. Maatregelen als die welke i.c. zijn toegepast komen niet neer op totale beeindiging van de ouderlijke rechten en plichten tegenover het kind: voor adoptie is in het algemeen ouderlijke toestemming vereist; de ouder kan bovendien, in het belang van het kind, de rechter om opheffing van de maatregelen vragen. Volgens het Hof is er eveneens sprake van de vaststelling van een ouderlijk recht indien de ouder claimt dat voortzetting of hernieuwing van de omgang met het aan zijn macht onttrokken kind in het belang van het kind is. Dit wordt in de tegenwoordige Britse wetgeving ook erkend. De volledige vernietiging van elk omgangsrecht van de ouder zou bovendien nauwelijks te rijmen zijn met fundamentele aspecten van gezinsleven en met de gezinsbanden welke art. 8 EVRM beoogt te beschermen. Aldus kan op verdedigbare gronden worden volgehouden dat klager zelfs na de ontzetting uit de ouderlijke macht een recht op omgang met zijn kind kon claimen. Art. 6 EVRM i.c. van toepassing (I par. 76–79).
In zaken als de onderhavige kan er geen sprake zijn van een vaststelling van het burgerlijke recht op omgang in overeenstemming met de eisen van art. 6 lid 1 EVRM als de ouder geen mogelijkheid had de omgangsbeperkende maatregel ten gronde te laten beoordelen door een rechterlijke instantie i.c. was dit niet het geval; schending van art. 6 lid 1 EVRM (I par. 80–83).
Arrest V: Art. 6 EVRM is i.c. van toepassing aangezien de nationale procedure in kwestie niet alleen verband hield met klaagsters omgang met haar kind maar ook met de adoptie van het kind, zodat de procedure tot de totale opheffing van hun natuurlijke banden zou kunnen leiden, hetgeen ook is geschied. Dergelijke banden vormen de kern van het gezinsleven, zodat de procedure een vaststelling van een 'burgerlijk recht' van klaagster inhield (V par. 68–69).
Vraag of door lengte van de procedure (twee jaar en zeven maanden) de redelijke termijn als bedoeld in art. 6 lid 1 EVRM overschreden is. Verschillende factoren: procedures als de onderhavige zijn van groot belang voor de toekomstige relatie tussen ouder en kind; zij zijn bovendien onomkeerbaar als gevolg van de adoptiebeslissing. Extra voortvarendheid vereist aangezien procedurele vertraging kan resulteren in de facto beslissing van de zaak nog voordat de rechter dit heeft kunnen doen. Schending van art. 6 lid 1 EVRM (V par. 70–86).
Dezelfde overwegingen leiden tot de conclusie dat er een schending van art. 8 EVRM heeft plaatsgevonden wegens een gebrek aan daadwerkelijke eerbiediging van klaagsters gezinsleven (V par. 89–90).

Partij(en)

I. W. (Hieronder volgen alleen van het eerste arrest de rechtsoverwegingen. (Zie de aantekening van de bewerkers onder het arrest).),
tegen
Verenigd Koninkrijk.

tegen:
Verenigd Koninkrijk

III. R. (Hieronder volgen alleen van het eerste arrest de rechtsoverwegingen. (Zie de aantekening van de bewerkers onder het arrest).),
tegen:
Verenigd Koninkrijk.

IV. O. (Hieronder volgen alleen van het eerste arrest de rechtsoverwegingen. (Zie de aantekening van de bewerkers onder het arrest).),
tegen:
Verenigd Koninkrijk.

V. H. (Hieronder volgen alleen van het eerste arrest de rechtsoverwegingen. (Zie de aantekening van de bewerkers onder het arrest).),
tegen:
Verenigd Koninkrijk.

Feiten

W.

Klager, een Brits onderdaan, is getrouwd en heeft drie kinderen. De onderhavige zaak betreft zijn jongste kind, geboren op 31 okt. 1978.

Vanaf 1 maart 1979 was klagers jongste kind met enige onderbrekingen onder toezicht van de plaatselijke autoriteit geplaatst. De ouders, die te maken hadden met huwelijksâ€¦n alcoholproblemen, hadden met deze tijdelijke ontheffing uit de ouderlijke macht ingestemd. Vanwege het voortduren van de echtelijke problemen besloot de plaatselijke autoriteit op 16 aug. 1979, kennelijk zonder de ouders van tevoren hierover te informeren, de ouderlijke macht over S. formeel aan zich te trekken. In februari 1980 gebeurde hetzelfde met betrekking tot de andere twee kinderen.

In het begin van 1980 kwamen de bij het gezin betrokken maatschappelijk werkers tot de conclusie dat terugkeer van S. naar het gezin, hetgeen met de ouders aanvankelijk was afgesproken, niet verantwoord zou zijn. Op onbekende datum werd door de plaatselijke autoriteit het besluit genomen dat S. voor lange tijd bij een pleeggezin geplaatst zou worden met het oog op uiteindelijke adoptie. De ouders zouden beperkte omgangsmogelijkheden krijgen. Van een formele beslissing door de plaatselijke autoriteit lijkt geen sprake te zijn geweest.

Klager en zijn vrouw vernamen het besluit in maart 1980 door mondelinge mededelingen van maatschappelijk werkers. Zij waren tevoren niet op de hoogte gesteld van de mogelijkheid dat een dergelijk besluit zou worden genomen. Het besluit werd op 31 maart 1980 door het Adoption and Foster Care Committee goedgekeurd, waarbij het committee niet inging op de positie van de ouders.

Op 9 mei 1980 werd S. in een pleeggezin geplaatst met het oog op adoptie door de pleegouders. Kort daarvoor was besloten klager en zijn vrouw geen omgang met S. te laten hebben teneinde de opbouw van een bevredigende relatie tussen S. en de pleegouders niet in gevaar te brengen. De verblijfplaats van S. werd niet aan klager of zijn vrouw meegedeeld.

Kort na mei 1980 kwamen de problemen tussen klager en zijn echtgenote tot een einde. Na eerdere vergeefse pogingen konden zij hun kind eenmaal, op 25 juli 1980, bezoeken. Zij verzochten de kinderrechter een einde te maken aan de onttrekking van hun kind aan hun ouderlijke macht, hetgeen geschiedde op 16 jan. 1981. Op dezelfde dag ging de plaatselijke autoriteit hiertegen in beroep en verzocht tevens het High Court het kind onder toezicht van de rechter te stellen (‘ward of court’), waardoor de verantwoordelijkheid voor het welzijn van het kind bij de rechter zelf zou komen te liggen. Na enige onzekerheid over de vraag welke van de twee genoemde procedures door de plaatselijke autoriteit doorgezet zou gaan worden, werd op 25 maart 1981 duidelijk dat men er alleen naar zou streven S. onder toezicht van de rechter te stellen.

De rechter in het High Court stelde op 22 juni 1981 vast, op basis van bewijsmateriaal met betrekking tot het welzijn van S. en de gezinsomstandigheden van klager (o.a. een rapport van een onafhankelijke maatschappelijk werker), dat er geen praktisch alternatief was voor voortzetting van het verblijf van S. bij het pleeggezin, nu er zoveel tijd was verlopen sinds het kind zijn ouders voor het laatst had gezien (op 25 juli 1980). Voorts werd bepaald dat de ouders geen omgang met S. mochten hebben. De rechter erkende wel dat de tot dusver gevolgde procedure zowel qua duur als qua inbreng van de ouders uiterst ongelukkig was geweest.

Een door klager ingesteld beroep werd op 6 okt. 1981 door het Court of Appeals verworpen op de grond dat het belang van het kind beter werd gediend met het voortduren van zijn verblijf in het pleeggezin dan met een terugkeer naar zijn ouders, bij wie hij het grootste deel van zijn leven niet had gewoond.

Op 5 okt. 1984 kwam de adoptie van S. door het pleeggezin tot stand. Daarbij verleende het High Court dispensatie voor het vereiste van toestemming door de natuurlijke ouders.
Op 28 febr. 1983 oordeelde de door klager ingeschakelde plaatselijke ombudsman dat de plaatselijke autoriteit nalatig was geweest in het voldoende betrekken van klager en zijn vrouw in het besluitvormingsproces met betrekking tot hun kind.
Op 30 jan. 1984 werd in het Verenigd Koninkrijk nieuwe wetgeving van kracht als gevolg waarvan de ouders vooraf op de hoogte gesteld moeten worden van besluiten tot beperking of beeindiging van de omgang met hun kind. De ouders kunnen vervolgens de kinderrechter verzoeken hun een omgangsrecht toe te kennen onder door de rechter te bepalen voorwaarden.
W. diende op 18 jan. 1982 een klacht in bij de Europese Commissie voor de rechten van de mens. Hij stelde dat de procedures die hadden geresulteerd in beperking en beeindiging van zijn omgang met zijn kind en de beschikbare rechtsmiddelen neerkwamen op schendingen van de art. 6 lid 1, 8 en 13 EVRM.
Na ontvankelijkheidsverklaring van de klacht oordeelde de Commissie in haar rapport van 15 okt. 1985 dat art. 6 lid 1 geschonden was in verband met ontbreken van toegang tot de rechter ter zake van klagers omgangsrecht (met elf stemmen tegen twee en een onthouding), en dat er een schending was van art. 8 EVRM (met dertien stemmen tegen een). De Commissie meende dat de zaak geen afzonderlijke vragen met betrekking tot art. 6 lid 1 EVRM (lengte van procedure tot ondertoezichtstelling door de rechter) en art. 13 EVRM opriep.
Op 28 jan. 1986 legde de Commissie de zaak voor aan het Hof.
B., R. en O.
Deze klachten (arresten II, III en IV) hebben eveneens betrekking op de procedures welke gevolgd waren bij de ontzetting van de ouder uit de ouderlijke macht en f het onder toezicht van de rechter stellen van het kind. De klachten komen grotendeels overeen met die in de zaak-W.
H.

H. klaagde voornamelijk dat haar verzoek om omgang met haar onder toezicht van de rechter gestelde dochter niet binnen een redelijke termijn was behandeld: er lagen twee jaren en zeven maanden tussen aanvang en einde van de ingestelde procedures.

As to the law

I. Scope of the issues before the Court

57.

The background to the instant case is constituted by certain judicial or local authority decisions regarding the applicant's child S. The Court finds it important to emphasise at the outset that the present judgment is not concerned with the merits of those decisions; this issue was not raised by the applicant before the Commission and did not form part of the application which it declared admissible.
Since the Commission's admissibility decision delimits the compass of the case brought before the Court (see, as the most recent authority, the Johnston and Others judgment of 18 Dec. 1986, Series A no. 112 (nog te publiceren), p. 23, par. 48), the latter is not in the circumstances competent to examine or comment on the justification for such matters as the taking into public care or the adoption of the child or the restriction or termination of the applicant's access to him.

II.

Alleged violation of Art. 8<

58.

The applicant alleged that he had been the victim of a violation of Art. 8 Convention, which reads as follows:

‘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.’

The violation was claimed to have arisen by reason of the procedures followed by the Authority in reaching its decisions to restrict and terminate the applicant's access to S, of the absence of remedies against those decisions and of the length of certain related judicial proceedings.
These allegations were contested by the Government, but the Commission concluded that there had been a violation.

A. General principles

59.

The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life. Furthermore, the natural family relationship is not terminated by reason of the fact that the child is taken into

public care. It follows — and this was not contested by the Government — that the Authority's decisions resulting from the procedures at issue amounted to interferences with the applicant's right to respect for his family life.

60.

According to the Court's established case-law;

a.

an interference with the right to respect for family life entails a violation of Art. 8 unless it was 'in accordance with the law', had an aim or aims that is or are legitimate under Art. 8 par. 2 and was 'necessary in a democratic society' for the aforesaid aim or aims (see notably, mutatis mutandis, the Gillow judgment of 24 Nov. 1986, Series A no. 109, p. 20, par. 48):

b.

the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued (see, inter alia, the Leander judgment of 26 March 1987, Series A no. 116, p. 25, par. 58);

c.

although the essential object of Art. 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective 'respect' for family life (see, amongst other authorities, the above-mentioned Johnston and Others judgment, Series A no. 112 (nog te publiceren), p. 25, par. 55);

d.

in determining whether an interference is 'necessary in a democratic society' or whether there has been breach of a positive obligation, the Court will take into account that a margin of appreciation is left to the Contracting States (see, for example, the above-mentioned Leander judgment, p. 25, 59, and the above-mentioned Johnston and Others judgment, loc. cit.).

61.

The applicant did not assert that the Authority's decisions were not 'in accordance with the law' or lacked a legitimate aim. The material before the Court contains nothing to suggest that the first of these requirements, as interpreted in the Court's case-law (see, for example, the Malone judgment of 2 August 1984, Series A no. 82 (*NJ* 1988, 534), p. 31–33, par. 66–68), was not satisfied. Neither is there any evidence that the measures taken were not designed to achieve a legitimate purpose, namely the protection of health or of the rights and freedoms of others.

Debate centred on the question whether the procedures followed had respected the applicant's family life or constituted an interference with the exercise of the right to respect for family life which could not be justified as 'necessary in a democratic society'. The applicant and the Commission took the view that the procedures applicable to the determination of issues relating to family life had to be such as to show respect for family life; in particular, according to the Commission, parents normally had a right to be heard and to be fully informed in this connection, although restrictions on these rights could, in certain circumstances, find justification under Art. 8par. 2. The Government, as their principal plea, did not accept that such procedural matters were relevant to Art. 8 or that the right to know or to be heard were elements in the protection afforded thereby.

62.

The Court recognises that, in reaching decisions in so sensitive an area, local authorities are faced with a task that is extremely difficult. To require them to follow on each occasion an inflexible procedure would only add to their problems. They must therefore be allowed a measure of discretion in this respect.

On the other hand, predominant in any consideration of this aspect of the present case must be the fact that the decisions may well prove to be irreversible: thus, where a child has been taken away from his parents and placed with alternative carers, he may in the course of time establish with them new bonds which it might not be in his interests to disturb or interrupt by reversing a previous decision to restrict or terminate parental access to him. This is accordingly a domain in which there is an even greater call than usual for protection against arbitrary interferences.

It is true that Art. 8 contains no explicit procedural requirements, but this is not conclusive of the matter. The local authority's decision-making process clearly cannot be devoid of influence on the substance of the decision, notably by ensuring that it is based on the relevant considerations and is not one-sided and, hence, neither is nor appears to be arbitrary. Accordingly, the Court is entitled to have regard to that process to determine whether it has been conducted in a manner that, in all the circumstances, is fair and affords due respect to the interests protected by Art. 8. Moreover, the Court observes that the English courts can examine, on an application for judicial review of a decision of a local authority, the question whether it has acted fairly in the exercise of a legal power.

63.

The relevant considerations to be weighed by a local authority in reaching decisions on children in its care must

perforce include the views and interests of the natural parents. The decision-making process must therefore, in the Court's view, be such as to secure that their views and interests are made known to and duly taken into account by the local authority and that they are able to exercise in due time any remedies available to them. In fact, the 1983 Code of Practice stresses the importance of involving parents in acces decisions.

64.

There are three factors which have a bearing on the practicalities of the matter. Firstly, as the Commission pointed out, there will clearly be instances were the participation of the natural parents in the decision-making process either will not be possible or will not be meaningful — as, for example, where they cannot be traced or are under a physical or mental disability or where an emergency arises. Secondly, decisions in this area, whilst frequently taken in the light of case reviews or case conferences, may equally well evolve from a continuous process of monitoring on the part of the local authority's officials. Thirdly, regular contacts between the social workers responsible and the parents often provide an appropriate channel for the communication of the latter's views to the authority.

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 Art. 8.

65.

Contrary to the Government's submission, the Court considers that in conducting its review in the context of Art. 8 it may also have regard to the lenght of the local authority's decision-making process and of any related judicial proceedings. As the Commission has rightly pointed out, in cases of this kind there is always the danger that any procedural delay will result in the de facto determination of the issue submitted to the court before it has held its hearing. And an effective respect for family life requires that future relations between parent and child be determined solely in the light of all relevant considerations and not by the mere effluxion of time.

B. Application in the instant case of the foregoing principles

66.

The course of events concerning the applicant's children is set out at paragraphs (…) above. For the present purposes, it may be summarised as follows.

a.

For most of the period between March and August 1979 S was, on his parents’ own initiative, in the voluntary care of the Authority and placed with short-term foster parents.

b.

On 16 August 1979, the Authority assumed parental rights in respect of S, but in September it reached agreement with the natural parents with a view to returning S to them in February 1980 if they overcame their domestic difficulties.

c.

In January or February 1980, the Authority came to the conclusion that its original plan to return S to his natural parents was unworkable because of deterioration in the family circumstances and decided that he should be placed with long-term foster parents with a view to adoption. This decision was approved by the Authority's Adoption and Foster Care Committee on 31 March 1980.

d.

Until April 1980 the applicant and his wife had access to S, but the Authority then decided that such access be terminated. The child was placed for adoption in the following month.

e.

After May 1980, the applicant's wife recovered to such an extent as to permit their two older children — in respect of whom the Authority had assumed parental rights in February 1980 — to be returned home on 1 August 1980, where they have remained ever since.

f.

Appications, made by the applicant and his wife in November 1980, for the discharge of the Authority's parental rights resolutions in respect of S were granted by the juvenile court in January 1981. However, wardship proceedings instituted by the Authority immediately thereafter led to a High Court decision on 22 June 1981, confirmed by the Court of Appeal on 6 Oct. 1981, that in S’s best interests and in view of the time that had elapsed he should remain with the foster parents with whom he had been placed in May 1980 and that the applicant and his wife should not have access to him.

g.

The child was adopted by the long-term foster parents in October 1984, the High Court having decided to

dispense with the applicant's consent.

67.

As regards the degree to which the applicant was involved in the taking of the relevant decisions of the Authority, the Court has noted the following.

a.

The Government did not deny that the applicant and his wife were not informed or consulted in advance about the proposal to adopt the parental rights resolutions of 16 August 1979.

Yet, since S had previously been in voluntary care, those resolutions altered the whole basis of the legal relationship between him, his parents and the Authority. However, the applicant did not object to the resolution affecting him, seemingly because, albeit after the event, he reached an agreement with the Authority that S would be returned home within a few months.

b.

There is no evidence that the applicant and his wife were duly informed or consulted in advance concerning the decision to place S with long-term foster parents with a view to adoption or its subsequent approval by the Authority's Adoption and Foster Care Committee; furthermore, although the initial decision was taken in January or February 1980, they were not advised of it until the end of March 1980, and even then its full implications may not have been brought home to them. On the other hand, there may well have been some discussion between them and the social workers about the possibility of placement with long-term foster parents, since on 31 March 1980 the latter told the above-mentioned Committee that the parents disagreed with it; to this extent, therefore, their views were before the Authority, at least at that point of time. The applicant's wife had also been warned as early as 22 Jan. 1980 of the possibility that S might be placed in long-term care; however, the warning apparently did not refer to the prospect of adoption, was given when S's return home was still envisaged and was not repeated at subsequent meetings between the parents and the social workers on 31 Jan. and 14 Febr. 1980.

c.

Finally, the Government did not deny that the applicant and his wife were not in any way consulted in advance regarding the decision of April 1980 to terminate their access to S. Nor apparently were they advised of that decision until the following month. This absence of involvement is all the more striking because the decision does not appear reconcilable with the Adoption and Foster Care Committee's view that access should be restricted but not terminated.

68.

The foregoing reveals, in the opinion of the Court, an insufficient involvement of the applicant in the Authority's decision-making process. The decisions of January or February 1980 and of April 1980 were crucial for the future of S, who was then not more than one and a half years old and whose placement with long-term foster parents and subsequent lack of contact with his natural parents were critical stages on the road to his adoption. They were thus patently decisions in which the applicant should have been closely involved if he was to be afforded the requisite consideration of his views and protection of his interests (see par. 63 above).

It is true that at the relevant time the condition of the applicant's wife still gave cause for concern. However, the Court discerns no reason — and none has been advanced by the Government — for not involving the applicant himself more closely. Indeed, ‘the failure to put the parents properly in the picture before firm decisions were taken’ by the Authority was the main foundation for the Local Ombudsman's finding of maladministration.

69.

The Commission also took account, in the context of Art. 8, of the duration of the wardship proceedings (16 Jan. to 22 June 1981 at first instance and then to 6 Oct. 1981 on appeal). The Court considers that this is a relevant, though subsidiary, factor. It notes, in this connection, the view of the High Court that it was ‘extremely unfortunate’ that the case was not heard within a week or so after 16 January, thereby increasing by some four months the period during which relations had been developing between S and his foster parents. Whilst it is true that the applicant appears to have taken no steps to expedite the matter, a considerable part of the delay was due to the fact that the Authority instituted concurrently both appeal and wardship proceedings and did not elect between them until 25 March 1981.

70.

The Court thus concludes that, in the circumstances and notwithstanding the United Kingdom's margin of appreciation in this area, there has been a violation of Art. 8.

In view of this conclusion, the Court does not find it necessary to examine in this context the question of the remedies available to the applicant.

III.

Alleged violation of Art. 6par. 1

71.

The applicant alleged that he had been the victim of a violation of Art. 6par. 1 Convention, which, so far as is

relevant, reads:

'In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by (a) ... tribunal ...'

This violation was claimed to have arisen on two grounds:

a.

the applicant had been unable, during the currency of the parental rights resolution affecting him, to have the question of his access to his child S determined in proceedings that complied with this Article; and

b.

the subsequent wardship proceedings in respect of S had not been concluded within a 'reasonable time'.

The Government contested these submissions; the Commission accepted the first but did not find it necessary to examine the second.

A. Applicability of Art. 6par. 1

72.

The Government maintained as their principal plea that Art. 6par. 1 was not applicable in the present case, since no 'right' was in issue. In support of this proposition, they advanced the following arguments.

a.

The concept of a 'civil right' within the meaning of Art. 6par. 1 was admittedly an autonomous one. However, that Article had no application unless the matter at issue constituted a legal right in the context of domestic law, to which it was therefore necessary to have regard.

b.

The notion of parental 'rights' over children was outmoded; furthermore, according to dicta of English judges, the so-called 'right' of access by a parent to his child was preferably described as a right in the child.

c.

In any event, the said right was a 'rhetorical' and not a legal one.

d.

Even if there were such a parental right at the outset, it ceased to have a separate existence on the making of a care order or the passing of a parental rights resolution: the effect of these measures was to transfer to the local authority, subject to limited exceptions, all the rights, powers and duties of the parent with respect to the child. The mere possibility or expectation that the authority might, in its discretion, subsequently allow the parent to have access to the child did not constitute a 'right'.

73.

It is true that Art. 6par. 1 extends only to 'contestations' (disputes) over (civil) '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 (civil) 'rights and obligations' in the substantive law of the Contracting States (see, amongst other authorities, the Lithgow and Others judgment of 8 July 1986, Series A no. 102, p. 70, par. 192). The Court is not, however, persuaded by the Government's argument that no 'right' of the aforementioned kind was at issue in the present case.

74.

Underlying the Government's description of the notion of parental rights as outmoded was the view that those rights are derived from parental duties and responsibilities and exist only so long as they are needed for the protection of the person or the property of the child. The main thrust of this view seems to be not to deny the existence of parental rights but rather to stress that they are not absolute and may be overridden if not exercised in accordance with the welfare of the child; indeed, the 1948 Act and the 1980 Act both refer expressly to parental 'rights' and the Children Act 1975 even mentions specifically a parental 'right of access'. Again, when the English courts spoke of access as being a right in the child, they appear not to have been asserting the absence of any parental right of access whatsoever, but to have been expressing the principle that in the event of a conflict between concurrent rights of parent and child it is the welfare of the child which should be treated as the paramount consideration.

75.

In the normal and natural course parent and child will live together and no problem will arise as regards the parental right of access. It is on the occurence of some event that disturbs the ordinary pattern of family life by separating them — for example, matrimonial proceedings or the taking of a child into public care — that parental entitlement to access wil become an issue in practice. It is therefore more important to focus on the position that obtains in English law in this respect once the relevant legislation has been brought into play.

76.

The raison d'etre of the legislation concerning the taking of a child into public care is that, having regard to the background circumstances, the interests of the child may require that the local authority shall have parental powers for certain purposes. This result is achieved either by the making of a care order committing the child to

the care of the local authority, in which event it will have nearly all the same powers and duties with respect to the child as his parent would have apart from the order, or by the adoption of a parental rights resolution, in which event there will vest in the authority nearly all the rights and duties which by law the parent has in relation to the child.
It is true that, in the case of a parental rights resolution, the rights which vest in the authority are specifically stated to include ‘a right of access’, but neither for that measure nor for a care order does the legislation stipulate in terms that there shall thenceforth be no contact between parent and child. The position in English law is that the taking of a child into public care by one of these means does not automatically deprive the parent of access to him; its effect is that the continuation of access becomes a matter within the discretionary power of the local authority.

77.

The existence of a power on the part of the authority to decide to allow only restricted or even no visits to the child by his parent does not, in the Court's understanding, necessarily mean that there is no longer any parental right in regard to access once one of the measures in question has been taken.
As the Government accepted, the statutes clearly recognise the continuation of parental access as generally desirable. Moreover, the Code of Practice on Access to Children in Care issued in December 1983 expressly acknowledges that for most children there will be no doubt that their interests will best be served by efforts to sustain links with their natural families. It would be inconsistent with this aim if the making of a care order or the adoption of a parental rights resolution were automatically to divest a natural parent of all further rights and duties in regard to access.
The effect of these measures is not to extinguish all rights and responsibilities of the natural parent in respect of the child. Thus, for example, subject to the power of the court — and not the local authority — to dispense with his consent, he retains the right to agree or refuse to agree to the child's adoption. Again, and even more importantly for the present purposes, he enjoys a continuing right to apply to the courts for the discharge of the order or resolution on the ground that such a course is in the child's interests. The issue for determination in such proceedings is the restoration of parental rights in regard to custody and control of the child. It would appear to the Court that the determination of a parental right is equally in issue where, during the currency of the order or resolution, a parent claims that the continuance or renewal of access is in the child's interests. That this is so is now confirmed by the provisions of Part IA of the 1980 Act, inserted by the Health and Social Services and Social Security Adjudications Act 1983, which are founded on the existence of just such a right on behalf of the parent. Moreover, the extinction of all parental right in regard to access would scarcely be compatible with fundamental notions of family life and the family ties which Art. 8 Convention is designed to protect (see, amongst other authorities, the Marckx judgment of 13 June 1979, *NJ* 1980, 462).
The Court thus concludes that it can be said, at least on arguable grounds, that even after the adoption of the parental rights resolution affecting him the applicant could claim a right in regard to his access to S.

78.

According to the Court's established case-law, Art. 6par. 1 will not be applicable unless two further conditions are satisfied: the right at issue must have been the object of a ‘contestation’ (dispute) and must be ‘civil’.
That there was a dispute between the applicant and the Authority on the access question is clear and, indeed, this was not denied by the Government. They also accepted that if there was a parental ‘right’ of access, it was a ‘civil’ right. Since access forms an integral part of family life, the Court entertains no doubts on this latter point.

79.

Art. 6par. 1 is therefore applicable in the present case.
In reaching this conclusion, the Court has not been unmindful of the arguments advanced by the Government in favour of leaving discretion as to access to the local authority rather than to the courts, such as the large number of children in public care and the need to take decisions urgently and without delay, through specialised social workers and as part of a continuous process. On the other hand, this is an area in which it is essential to ensure that the rights of individual parents are protected in accordance with Art. 6par. 1. Furthermore, Art. 6 par. 1 does not require that all access decisions must be taken by the courts but only that they shall have power to determine any substantial disputes that may arise.
B. Compliance with Art. 6par. 1

1.

Entitlement to a hearing by a tribunal

80.

The Government pleaded in the alternative that even if the applicant had retained some residual right of access, he enjoyed in domestic law judicial protection of that right of a kind which satisfied the requirements of Art. 6par. 1. They referred in this connection to the possibility of challenging the parental rights resolution, of applying for

judicial review or of instituting wardship proceedings. The applicant contended — and the Commission concluded — that in none of these proceedings would the scope of the court's review be such that those requirements were met.

81.

It is open to a parent to challenge a parental rights resolution, either by entering an objection, or by lodging a subsequent appeal, or by applying for its discharge at a later date.

It is true that a successful challenge would resolve the access issue indirectly, and in fact proceedings to discharge the resolutions were successfully taken in the instant case (see par. 18 above). However, as the Government accepted, proceedings of this kind are directed to the parental rights resolution as such and not to the isolated issue of access. Yet whether a child should be in public care and whether his parent should have access to him are matters to which different considerations may well apply. Again, the parent may have no desire to challenge the resolution, being content for the time being at least to see his contacts with his child maintained. Yet again, he may be able to adduce reasons warranting a continuation or restoration of access but not of his care of the child. Furthermore, a challenge of the resolution by the parent may prompt, on the part of the local authority, opposition which would not be forthcoming if the proceedings were confined to the access issue. If proceedings relating to access alone had been available to the applicant, he might have had recourse to them at a date earlier than that on which he actually instituted proceedings to challenge the resolution or with less opposition on the part of the Authority and thereby changed the whole future complexion of his relationship with S.

82.

An application for judicial review or the institution of wardship proceedings does enable the English courts to examine a local authority's decision in the matter of access by a parent to his child who is in public care. These two remedies provide valuable safeguards against exercise by the authority of its discretion in an improper manner.

Nevertheless, on an application for judicial review, the courts will not review the merits of the decision but will confine themselves to ensuring, in brief, that the authority did not act illegally, unreasonably or unfairly. Where a care order or a parental rights resolution is in force, the scope of the review effected in the context of wardship proceedings will normally be similarly confined.

In a case of the present kind, however, there will in the Court's opinion be no possibility of a ‘determination’ in accordance with the requirements of Art. 6par. 1 of the parent's right in regard to access, as analysed in par. 77 above, unless he or she can have the local authority's decision reviewed by a tribunal having jurisdiction to examine the merits of the matter. And it does not appear from the material supplied by the Government or otherwise available to the Court that the powers of the English courts were of sufficient scope to satisfy fully this requirement during the currency of the parental rights resolution.

83.

There was accordingly a violation of Art. 6par. 1.

2.

Reasonableness of the length of the wardship proceedings

84.

Since it took the length of the wardship proceedings into account under Art. 8 (see par. 69 above), the Court, like the Commission, finds that it is not necessary to examine this issue separately under Art. 6par. 1.

IV.

Alleged violation of Art. 13

85.

The applicant alleged that no effective remedies were available to him in the matter of access to his child S and that he had on that account been a victim of a violation of Art. 13 Convention, which reads as follows:

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

The Commission expressed the opinion that no separate issue arose under Art. 13. The Government agreed, but submitted in the alternative that effective remedies were available.

86.

Having regard to its decision on Art. 6par. 1, the Court considers that it is not necessary to examine the case under Art. 13; this is because its requirements are less strict than, and are here absorbed by, those of Art. 6 par. 1 (see, notably, the Sporrong and Lonnroth judgment of 23 Sept. 1982, Series A no. 52 (*NJ* 1988, 290), p. 32, par. 88).

For these reasons, the Court

1

Holds unanimously that there has been a violation of Art. 8 Convention;

2

Holds unanimously that Art. 6par. 1 is applicable in the present case;

3

Holds unanimously that Art. 6par. 1 was violated during the currency of the parental rights resolution;

4

Holds by fourteen votes to three that it is not necessary to decide whether the duration of the subsequent wardship proceedings gave rise to a further violation of the same Article;

5

Holds unanimously that it is not necessary also to examine the case under Art. 13;

6

Holds unanimously that the question of the application of Art. 50 is not ready for decision.
Joint separate opinion of Judges Lagergren, Pinheiro Farinha, Pettiti, Macdonald, De Meyer and Valticos
As far as Art. 6par. 1 Convention is concerned, we feel that the Court should not have repeated once again that this provision 'extends only to 'contestations' (disputes) over (civil) 'rights and obligations' which can be said, at least on arguable grounds, to be recognised under domestic law'. (Par. 73 of the judgment.)
This dictum is unnecessarily restrictive and might have the result of emptying of all content what the Court has previously said about the 'autonomous' interpretation of the notion of 'civil rights and obligations'. In our view, it is self-evident that, merely by deciding not or no longer to recognise a certain right, a State cannot avoid, as regards that right, the application of the principles enshrined in Art. 6par. 1. (See the concurring opinion of Judge Lagergren annexed to the Ashingdane judgment of 28 May 1985, Series A no. 93, p. 27, and his separate opinion, joined by Judge Macdonald, annexed to the Lithgow and Others judgment of 8 July 1986, Series A no. 102, p. 80. See also, mutatis mutandis, the Golder judgment of 21 Febr. 1975, Series A no. 18 (*NJ* 1975, 462), p. 16–18, 34–36, and the Ozturk judgment of 21 Febr. 1984 (nog te publiceren), Series A no. 73, p. 17–18, par. 49.)
Joint separate opinion of Judges Pinheiro Farinha, Pettiti, De Meyer and Valticos

I. As far as Art. 6par. 1 Convention is concerned, the important thing, in the present case, was simply to state that the applicant was invoking rights essentially inherent in the position of a father or a mother.

II. As far as Art. 8 Convention is concerned, the Court might have stated more explicitly:

i.

that, at every stage of a procedure concerning their parental rights, and in particular access to their children, a father and a mother have the right to be effectively consulted, heard and informed, and to have their observations duly taken into account;

ii.

that that right may not be disregarded on account of the 'practicalities of the matter' and their requirements, and may be the subject of derogation only when its exercise is really impossible.

Joint separate opinion of Judges Pinheiro Farinha and De Meyer

I. Having found that Art. 8 Convention was violated in the applicant's case since he was not sufficiently involved in the taking of the local authority's decisions (Par. 66–68 of the judgment.) and on account of the length of the judicial proceedings (Par. 69 of the judgment.), the Court did not find it necessary also to consider under that Article the question of the remedies available to the applicant. (Par. 70 of the judgment.)
Again, the Court found that there was, in the applicant's case, a violation of the entitlement to a hearing by a tribunal within the meaning of Art. 6par. 1 Convention (Par. 80–83 of the judgment.), but did not find that it was necessary also to consider under that provision the length of the judicial proceedings, since it had already taken that matter into account under Art. 8. (Par. 84 of the judgment and point 4 of the operative provisions.)
We feel that a finding that a provision of the Convention has been violated in one particular respect does not dispense the Court from examining whether that provision has also been violated in some other respect. We also feel that a finding that a certain fact amounts to a violation of one particular provision of the Convention does not dispense the Court from examining whether that fact also amounts to a violation of some other provision of the Convention.
In the present case, it was, in our view, necessary to examine each of the questions mentioned in para. 58 and

para. 71 of the judgment: since each of them, with the possible exception of the one concerning the procedures followed by the local authority, fell within the ambit of both Art. 6par. 1 and Art. 8, it was necessary to examine all of them, perhaps with that single exception, under each of these provisions.

II. As regards cases like the applicant's, the judgment may, particularly in para. 79, give the impression of leaving too much discretion to the local authorities and of not making their decisions sufficiently subject to judicial review. In our view, the courts should have power to determine any disputes that may arise in this field.

III. It was only with some hesitation that we concurred in the decision that it was not necessary to examine the case under Art. 13 Convention. (Par. 86 of the judgment and point 5 of the operative provisions.)

We are not quite sure that such examination was made superfluous by the finding of a violation, in the case of the applicant, of the entitlement to a hearing by a tribunal within the meaning of Art. 6par. 1. (Par. 80–83 of the judgment and point 3 of the operative provisions.)

Are the ‘less strict’ requirements of Art. 13 truly ‘absorbed’ by those of Art. 6par. 1? (Par. 86 of the judgment.) Do these provisions really ‘overlap’? (Airey judgment of 9 Oct. 1979, Series A no. 32, p. 18, par. 35 (vgl. *NJ* 1980, 376).)

It appears to us that the relationship between the right to be heard by a tribunal, within the meaning of Art. 61, and the right to an effective remedy before a national authority, within the meaning of Art. 13, should be considered more thoroughly.

Partly concurring and partly dissenting opinion of Judge Gersing

In my view, the length of the wardship proceedings falls to be considered only under Art. 6par. 1, which in this respect is the lex specialis. I cannot accept the extensive interpretation of Art. 8 which the majority of the Court has applied as regards those proceedings in para. 65 and 69 of the judgment.

The wardship proceedings were instituted on 16 Jan. 1981 and judgment was given at first instance on 22 June 1981. The High Court judge found it ‘extremely unfortunate’ that the proceedings were not heard within a very short period. Taking into account the serious consequences which a delay of five months at this stage might — and in fact did — have for the applicant, I find that in these special circumstances, of which the court was aware, the duration of the first-instance proceedings entailed a violation of Art. 6par. 1. The appeal was dismissed on 6 Oct. 1981 and that lapse of time cannot in itself give rise to criticism.

Individual separate opinion of Judge De Meyer

At para. 57 of the judgment it is stated that ‘Since the Commission's admissibility decision delimits the compass of the case brought before the Court ..., the latter is not in the circumstances competent to examine or comment on the justification for such matters as the taking into public care or the adoption of the child or the restriction or termination of the applicant's access to him’.

I have very serious doubts as to that statement.

I feel rather that once a ‘case’ is referred to the Court in accordance with Art. 44, 45, 47 and 48 Convention, the Court's jurisdiction extends to all questions of fact and of law arising in the case concerned. This appears already to have been recognised in the judgment in the De Wilde, Ooms and Versyp cases. (Judgment of 18 June 1971, Series A no. 12, p. 29–30, par. 47–52: see especially 49.)

Moreover, since within the Council of Europe the protection of human rights and fundamental freedoms concerns ordre public, I believe that, as the Court decided in the same judgment, ‘a scrupulous supervision by the organs of the Convention of all measures capable of violating the rights and freedoms which it guarantees is necessary in every case’. (Ibid., p. 36, par. 65.)

I regret that the Court appears to deviate from this course.

Aantekening van de bewerkers: hiervoor zijn alleen uit het arrest in de zaak W. tegen het Verenigd Koninkrijk de rechtsoverwegingen weergegeven. Van dit arrest stemmen de par. 59–65, 70–73, 76–83 en 85–86 vrijwel geheel overeen met paragrafen in een of beide van de arresten B. en R. tegen het VK; hetzelfde geldt met betrekking tot par. 71–73, 76–83 en 85–86 ook voor het arrest inzake O. Het arrest inzake H. heeft een ander karakter doordat daarin het accent ligt op de duur van de gevolgde procedures, in verband met de grote ruimte die in beslag zou worden genomen door integraal opnemen van de rechtsoverwegingen is volstaan met een samenvatting in het cursieve gedeelte dat voorafgaat aan bovenstaand arrest.

De integrale teksten in het Engels en Frans zijn gepubliceerd in de serie A van de publikaties van het Hof als vols. 120 en 121.

Noot

Auteur: E.A. Alkema

Noot

1

Kinderbeschermingsmaatregelen kunnen diep ingrijpen in het gezinsleven. Ook al zijn zij ingegeven door het belang van het kind, toch maken zij soms tegelijkertijd ernstig inbreuk op fundamentele rechten. Dat ondervond het Verenigd Koninkrijk, dat blijkens bovenstaande arresten het EVRM had geschonden (en intussen op 9 juni 1988 tot schadeloosstelling is veroordeeld), maar geldt ook voor andere verdragsstaten, zoals Zweden (zie het arrest Olsson van 24 maart 1988, NJCM-Bulletin 1988, p. 362, m.nt. J.G.C. Schokkenbroek) en de BRD: Mariane Dunkel (10812/84).
De kern van de hierboven weergegeven arresten is betrekkelijk eenduidig (zie ook *NJ* 1987, 957 nt. par. 4): ontzetting uit of ontheffing van de ouderlijke macht ontneemt aan ouders niet noodzakelijkerwijze het recht op omgang met hun kinderen; met betrekking tot bepaalde beslissingen over ouderlijke macht of omgangsregeling behoort er een rechterlijke voorziening te zijn.

2

De uitwerking van deze kerngedachte laat evenwel te wensen over — vooral in het hier in extenso afgedrukte arrest (vgl. het genoemde arrest Olsson). Dat komt, omdat het Hof in wezen een en dezelfde grief inzake de beslissingen over de ouderlijke macht, het omgangsrecht en de desbetreffende rechterlijke voorzieningen onder de noemer van zowel art. 8, het recht op gezinsleven, als art. 6, het recht op een eerlijke berechting, brengt. Juist waar het Hof abstraheert van de feitelijke inhoud van de kinderbeschermingsmaatregelen (par. 57), had men mogen verwachten dat het zich zou hebben geconcentreerd op de rechtsvragen en deze wat stelselmatiger zou hebben behandeld.
Nu wordt eerst vastgesteld, dat het recht op gezinsleven door de Kinderbeschermingsmaatregelen kan worden geraakt in het bijzonder wanneer die maatregelen in hun effecten onomkeerbaar blijken te zijn. Bij de besluitvorming over zodanige maatregelen behoren de ouders, aan wie de ouderlijke macht ontnomen wordt of welke die al verloren hebben, te worden betrokken opdat voldoende met hun belangen rekening kan worden gehouden.
In dit verband gaat het Hof zo ver, dat het — ofschoon het erkent dat art. 8 geen procedurele garanties inhoudt — toch onderzoekt of de besluitvorming binnen een ‘redelijke termijn’ heeft plaatsgehad. Zo wordt inderdaad uit art. 8 de vermaledijde ‘whole code of family law’ afgeleid (zie de tirade in de dissenting opinion van Fitzmaurice bij het arrest Marckx van 13 juni 1979, CEDH-A vol. 31, p. 45). Terecht wijst de — intussen overleden — Deense rechter Gersing er in zijn partly concurring and partly dissenting opinion op, dat hier art. 6 (de waarborg voor een eerlijke berechting) als lex specialis toegepast had behoren te worden.

3

Na deze extensieve uitleg van art. 8 gaat het arrest vervolgens in op art. 6. Daartoe moet worden onderzocht of hier sprake is van een ‘burgerlijk recht’ in de zin van die bepaling. De Britse regering had aangevoerd, dat het eigenlijk niet om rechten van de ouder maar om die van het kind ging; art. 6 zou dus niet van toepassing zijn. Subs. werd gesteld, dat een ouder na ontzetting al helemaal geen ouderlijke rechten zou hebben.
Het Hof heeft heel wat woorden van node (par. 73–77) om die toch niet bijster sterke argumenten te weerleggen. Het arrest maakt duidelijk, dat i.c. bij de verschillende beslissingen over ouderlijke macht (ook wanneer die aan de ouders is ontnomen) en omgangsregeling ouderlijke rechten op het spel staan, zodat art. 6 wel in acht moet worden genomen. Dat houdt in dat er dan tevens een voorziening behoort te zijn, waarin de rechter niet slechts bevoegd is tot een toetsing aan wettigheid, redelijkheid en billijkheid, maar de zaak ten gronde moet kunnen beoordelen (par. 82).

4

Kennelijk probeert het Hof de indruk te vermijden, dat toepassing van art. 6 een automatisme zou zijn: dat er telkens wanneer over bijv. het omgangsrecht wordt beslist een volledige rechterlijke voorziening verlangd wordt. Zulks zou immers betekenen, dat alle bemoeienissen van de kinderbescherming — ook kleine aanpassingen in de beschermingsmaatregelen — worden onderworpen aan de strenge eisen van art. 6. Naar mijn mening is die consequentie te voorkomen door terug te grijpen op vroegere rechtspraak waarin impliciete beperkingen van het recht van toegang tot de rechter (‘access to the courts’) toelaatbaar worden geacht (arrest Golder 21 febr. 1975, *NJ* 1975, 462par. 38). Voorziet het nationale recht niet in rechtsbescherming dan zou m.i. art. 6 die bescherming kunnen bieden, doch niet vanzelf en in alle gevallen, maar slechts voor wezenlijke wijzigingen in de rechtsverhouding tussen ouder en kind.
Het Hof volgt evenwel een andere redenering. Het knoopt aan bij het nationale recht om te bepalen of een recht een ‘burgerlijk recht’ is. Anders gezegd: burgerlijke rechten zijn die rechten waarvan redelijkerwijs kan worden volgehouden dat zij als zodanig in het nationale recht worden erkend (par. 73). Op deze benadering wordt al gezinspeeld in het arrest Ashingdane van 28 mei 1985, CEDH-A vol. 93 (zie de waarschuwing in de concurring opinion van Lagergren op p. 27). Op de gevaren ervan wijzen nog eens zes rechters (onder wie Lagergren) in de eerste separate opinion. Hierdoor wordt huns inziens aan de uitdrukking ‘burgerlijke rechten’ zijn autonome betekenis ontnomen; zo kunnen verdragsstaten in hun eigen rechtsstelsels de garantie van art. 6 uithollen en zelfs teniet doen. Ook de belangrijke vraag, wat te verstaan onder het begrip ‘burgerlijk’ in diezelfde uitdrukking, een vraag die centraal stond in o.a. het arrest Benthem van 23 nov. 1985, *NJ*

1986, 102, komt in de lucht te hangen (zie over dat begrip o.a. P. van Dijk in de bundel voor G.J. Wiarda, Protecting Human Rights: The European Dimension, Koln 1988, p. 131 e.v. en P. Lemmens, Geschillen over burgerlijke rechten en verplichtingen: toepassingsgebied van de art. 6 lid 1 EVRM en 14 lid 1Internationaal Verdrag inzake burgerrechten en politieke rechten (IVBP), Antwerpen 1988).

5

Wanneer in een zaak belangrijke vragen rijzen met betrekking tot de uitleg van het Verdrag kan deze worden voorgelegd aan het voltallige Hof (Regl. art. 50, Trb. 1985, 68, p. 45). Die situatie deed zich hier voor, hetgeen wordt weerspiegeld in de vijf toegevoegde afzonderlijke meningen van een of meer rechters. Daaruit blijkt niet slechts, dat, zoals gezegd, het Hof nog verdeeld is over de uitleg van art. 6 maar ook dat er twijfels zijn over art. 13 en de omvang van 's Hofs rechtsmacht. Op dat laatste punt wordt de vinger gelegd door de Belgische rechter De Meyer. Hij is dan ook degene die zelf — als agent van de Belgische regering — in 1971 met succes de uitspraak aan het Hof ontlokte, dat diens rechtsmacht niet strikt gelimiteerd is tot datgene wat de Commissie voorlegt.

EAA