



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (PLENARY)

CASE OF GASKIN v. THE UNITED KINGDOM

(Application no. 10454/83)

JUDGMENT

STRASBOURG

07 July 1989

In the Gaskin case*,

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 50 of the Rules of Court and composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr J. CREMONA,
Mr Thór VILHJÁLMSOON,
Mrs D. BINDSCHEDLER-ROBERT,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr B. WALSH,
Sir Vincent EVANS,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mr J.A. CARRILLO SALCEDO,
Mr N. VALTICOS,
Mr S. K. MARTENS,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 30 March and 23 June 1989,

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

PROCEDURE

1. The case was referred to the Court on 8 March 1988 by the Government of the United Kingdom of Great Britain and Northern Ireland ("the Government") and on 14 March 1988 by the European Commission of Human Rights ("the Commission"), within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 10454/83) against

* Note by the Registrar: The case is numbered 2/1988/146/200. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

the United Kingdom lodged with the Commission under Article 25 (art. 25) by Mr Graham Gaskin, a British citizen, on 17 February 1983.

2. The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request and of the Government's application was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 8 (art. 8) and, as far as the request was concerned, Article 10 (art. 10) of the Convention.

3. In response to the inquiry made in accordance with Rule 33 para. 3(d) of the Rules of Court, the applicant stated that he wished to participate in the proceedings pending before the Court and designated the lawyer who would represent him (Rule 30).

4. The Chamber to be constituted included, as ex officio members, Sir Vincent Evans, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3(b)). On 25 March 1988, the President of the Court drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr J. Pinheiro Farinha, Mr. B. Walsh, Mr C. Russo, Mr R. Bernhardt and Mr N. Valticos (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

5. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5). He ascertained, through the Registrar, the views of the Agent of the Government, the Delegate of the Commission and the lawyer for the applicant regarding the need for a written procedure (Rule 37 para. 1). Thereafter, in accordance with the Orders and directions of the President of the Chamber, the memorial of the Government was lodged at the registry on 30 August 1988 and the memorial of the applicant on 1 September 1988. Further memorials relating to the application of Article 50 (art. 50) were lodged at the registry, on 27 April and 24 May 1989 by the applicant and on 16 June by the Government.

6. After consulting, through the Registrar, those who would be appearing before the Court, the President directed on 6 December 1988 that the oral proceedings should open on 28 March 1989 (Rule 38).

7. On 23 February 1989, the Chamber decided to relinquish jurisdiction in favour of the plenary Court (Rule 50).

8. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. Immediately prior to its opening, the Court had held a preparatory meeting.

There appeared before the Court:

- for the Government

Mr I.D. HENDRY, Legal Adviser,

Foreign and Commonwealth Office,

Mr N. BRATZA, Q.C.,

*Agent,
Counsel,*

Mr E.R. MOUTRIE, Solicitor,
 Department of Health and Social Security,
 Mrs A. WHITTLE, Department of Health and Social Security,
 Mr R. LANGHAM, Department of Health and Social Security,
 Miss T. FULLER, City Solicitor's Department,
 Liverpool City Council,
 Mr A. JAMES, Liverpool City Council, *Advisers;*
 - for the Commission
 Mrs G.H. THUNE, *Delegate;*
 - for the applicant
 Mr R. MAKIN, Solicitor
 of the Supreme Court, *Counsel.*

9. The Court heard addresses by Mr Bratza for the Government, by Mrs Thune for the Commission and by Mr Makin for the applicant, as well as their replies to its questions.

AS TO THE FACTS

10. The applicant is a British citizen and was born on 2 December 1959. Following the death of his mother, he was received into care by the Liverpool City Council under section 1 of the Children Act 1948 ("the 1948 Act") on 1 September 1960. Save for five periods varying between one week and five months when he was discharged to the care of his father, the applicant remained in voluntary care until 18 June 1974. On that date the applicant appeared before the Liverpool Juvenile Court and pleaded guilty to a number of offences including burglary and theft. The court made a care order in respect of him under section 7 of the Children and Young Persons Act 1969. The applicant ceased to be in the care of the Liverpool City Council on attaining the age of majority (18) on 2 December 1977.

During the major part of the period while he was in care the applicant was boarded out with various foster parents, subject to the provisions of the Boarding-Out of Children Regulations 1955 ("the 1955 Regulations"). Under the terms of those regulations the local authority was under a duty to keep certain confidential records concerning the applicant and his care (see paragraph 13 below).

11. The applicant contends that he was ill-treated in care, and since his majority has wished to obtain details of where he was kept and by whom and in what conditions in order to be able to help him to overcome his problems and learn about his past.

12. On 9 October 1978, the applicant was permitted by a social worker in the employment of the Liverpool City Council to see the case records relating to him kept by the Social Services Department of the Council in

accordance with its statutory duty. He removed those records without the Council's consent, retaining them in his possession until he returned them to the Social Services Department on 12 October 1978.

I. THE APPLICANT'S CASE RECORDS AND THE APPLICATION FOR DISCOVERY THEREOF

13. It is the practice of the local authorities to keep a case record in respect of every child in care. In respect of children boarded out they were and are under a statutory duty to keep case records by virtue of the 1955 Regulations, which were made under section 14 of the 1948 Act. Regulation 10 of the 1955 Regulations, so far as relevant, provides that:

"10.-(1) A local authority shall compile a case record in respect of -

(a) every child boarded out by them;

(b) ...

(c) ... and the said records shall be kept up-to-date.

(2) ...

(3) Every case record compiled under this Regulation or a microfilm recording thereof shall be preserved for at least three years after the child to whom it relates has attained the age of eighteen years or has died before attaining that age, and such microfilm recording or, where there is none, such case record shall be open to inspection at all reasonable times by any person duly authorised in that behalf by the Secretary of State."

14. In 1979 the applicant, wishing to bring proceedings against the local authority for damages for negligence, made an application under section 31 of the Administration of Justice Act 1970 ("the 1970 Act") for discovery of the local authority's case records made during his period in care. Section 31 of the 1970 Act provides, inter alia, that the High Court shall have power to order such disclosure to a person who is likely to be a party to legal proceedings for personal injuries.

15. The application was heard by the High Court on 22 February 1980. The local authority objected to the grant of discovery of the records on the ground that disclosure and production would be contrary to the public interest. The principal contributors to those case records were medical practitioners, school teachers, police and probation officers, social workers, health visitors, foster parents and residential school staff. Their contributions to the case records were treated in the strictest confidence and it was in the interest of the effective conduct of the care system that such records should be as full and frank as possible. If discovery were ordered, the public interest in the proper operation of the child-care service would be

jeopardised since the contributors to the records would be reluctant to be frank in their reports in the future.

16. The applicant contended that the case records held by the local authority should be made available to him on the general principles of discovery, for the purpose of his proposed proceedings for personal injuries against the local authority. He further argued that it was also in the public interest that some measure of review of the standard of care provided by a local authority to a child in care be available.

17. The judge did not read the records in question, but balanced the public interest in maintaining an efficient child-care system with the applicant's private interest in receiving access to his case records for the purpose of the proposed litigation. After referring to the case of *Re D (infants)* [1970] 1 Weekly Law Reports ("WLR") 599, in which Lord Denning, Master of the Rolls, held that case records compiled pursuant to Regulation 10 of the 1955 Regulations were regarded as private and confidential, he concluded:

"I am left in no doubt that it is necessary for the proper functioning of the child care service that the confidentiality of the relevant documents should be preserved. This is a very important service to which the interests - also very important - of the individual must, in my judgment, bow. I have no doubt that the public interest will be better served by refusing discovery and this I do."

18. The applicant appealed from this decision to the Court of Appeal. On 27 June 1980 the Court of Appeal unanimously dismissed the appeal. In the Court of Appeal's view, the High Court, in its judgment, had correctly balanced the competing interests. It added that the inspection of a document is a course which it is proper for a court to take in certain cases, for example where grave doubt arises and the court cannot properly decide upon which side the balance of public and private interests falls without itself inspecting the documents. However, this was not a case in which such doubt arose as would make it proper for the court itself to inspect the documents. The High Court's decision was accordingly affirmed and leave to appeal to the House of Lords was refused (*Gaskin v. Liverpool City Council* [1980] 1 WLR 1549).

II. RESOLUTIONS OF LIVERPOOL CITY COUNCIL RELATING TO ACCESS TO PERSONAL FILES

19. On 21 October 1980, Liverpool City Council set up the Child Care Records Sub-Committee ("the Sub-Committee") to make recommendations on access to personal social services files and to investigate the allegations relating to the applicant.

20. On 17 June 1982, the Sub-Committee recommended making available case records to ex-clients of the social services, subject to certain safeguards and restrictions relating in particular to medical and police

information. As to the applicant, the Sub-Committee viewed with concern the number of placements which he had while in care, and which they recognised could be detrimental to a young person's development, but found no evidence to suggest that "the officers carried out their duties in other than a caring manner". The applicant was to be allowed access to, and to make photocopies of, his case records, subject however to the exclusion of medical and police information.

21. On 30 June 1982, the Sub-Committee's recommendations, subject to an amendment which would require the consent of members of the medical profession and police services to be sought to the disclosure of information which they had contributed, were embodied in a resolution of the Social Services Committee. However, Mr Lea, a dissenting member of the Sub-Committee, brought an action challenging the resolution and obtained an interlocutory court order preventing the City Council from implementing it until the trial of the action or until further order.

22. On 26 January 1983, Liverpool City Council passed a further resolution. As regards future records this reiterated the general terms of the resolution of 30 June 1982 and added certain further restrictions to protect information given in confidence and to provide for the non-disclosure of the whole or part of the personal record in particular cases, but as regards information obtained and compiled before 1 March 1983 it was resolved that this should be disclosed only with the consent of the suppliers thereof. Pursuant to this policy the resolution went on to instruct the Council's officers to contact the various suppliers of information to the Gaskin file immediately with a view to disclosure. The local authority's officers were, however, ordered not to implement this resolution pending the outcome of the legal action brought by Mr Lea. This action was discontinued on 13 May 1983 and on 29 June the local authority confirmed a further resolution to the effect that the resolution of 26 January would be implemented as from 1 September 1983.

23. On 24 August 1983 the Department of Health and Social Security issued Circular LAC (Local Authority Circular) (83) 14 to local authorities and health authorities pursuant to section 7 of the Local Authority Social Services Act 1970 setting out the principles governing the disclosure of information in social services case records to persons who were the subject of the records. The general policy laid down in paragraph 3 of the circular was that persons receiving personal social services should, subject to adequate safeguards, be able to discover what is said about them in social services records and with certain exceptions should be allowed to have access thereto. Paragraph 5 set out under five headings the reasons for withholding information. These included the protection of third parties who contributed information in confidence, protecting sources of information, and protecting social service department staff's confidential judgments. Paragraphs 6 to 9 set out in more specific terms the policy governing client

access to case records. Paragraph 7 in particular defined the considerations to be weighed on the other side of the balance whenever an application was made for access, the most relevant for the purposes of the present case being that "information shall not be disclosed to the client if derived in confidence from a third party without the consent of the third party". However, it was then provided in paragraph 9 that since existing records had been compiled on the basis that their contents would never be disclosed, material entered in the records prior to the introduction of the new policy should in no event be disclosed without the permission of the contributor of the information.

24. On 31 August 1983, the High Court granted the Attorney General leave to apply for judicial review of the resolution of 26 January 1983 as amended by that of 29 June 1983 on the ground that it went beyond what were considered to be the proper limits and, in particular, omitted certain important safeguards which were contained in Circular LAC (83) 14. Pending the trial of the action an injunction was granted restraining the local authority from implementing the resolution of 26 January 1983.

25. On 9 November 1983, Liverpool City Council confirmed a further resolution of its Social Services Committee of 18 October 1983 setting out certain additional grounds on which information should be withheld. The resolution provided that the information in the applicant's file should be made available to him if the contributors to the file (or as regards some information the Director of Social Services) consented and that the various contributors of the information contained in the file should be contacted for their permission before the release of that information. Following the passing of this resolution, which was in line with Government Circular LAC (83) 14 (see paragraph 23 above), the Attorney General withdrew his application for judicial review.

26. The applicant's case record consisted of some 352 documents contributed by 46 persons. On 23 May 1986 copies of 65 documents supplied by 19 persons were sent to the applicant's solicitors. These were documents whose authors had consented to disclosure to the applicant. The size of each contribution disclosed varied from one letter to numerous letters and reports.

27. Those contributors who refused to waive confidentiality, although not asked to give reasons, stated, *inter alia*, that third-party interests could be harmed; that the contribution would be of no value if taken out of context; that professional confidence was involved; that it was not the practice to disclose reports to clients; and that too great a period of time had elapsed for a letter or report still to be in the contributor's recollection.

Furthermore, in June 1986, one contributor refused his consent to disclosure on the ground that it would be detrimental to the applicant's interests.

28. In a letter of 15 July 1986, the Director of Social Services of Liverpool City Council wrote to the applicant's solicitors in the following terms:

"I refer to your letter dated 11 June 1986.

I would wish to be as helpful as possible to you, but at the end of the day suspect that we may have genuine differences of opinion. At least I take that to be the implication of the questions you asked.

I do not think therefore, that we can take this correspondence further in a profitable way because, as I have said, it is, in the last analysis, for the provider of information, retrospectively collected, to release or refuse to release, in their absolute discretion, the information supplied from the 'confidential' embargo originally accorded to it. The reasons for releasing or not releasing are irrelevant whether they are good, bad or indifferent.

I regret I do not feel able to help you further."

III. SUBSEQUENT LEGISLATIVE DEVELOPMENTS

29. On 1 April 1989 the Access to Personal Files (Social Services) Regulations 1989 came into force. These regulations, made under the Access to Personal Files Act 1987 and further explained in Local Authority Circular LAC (89) 2, impose upon social services departments a duty to give to any individual access to personal information held concerning him, except for personal health information which originated from a health professional and subject to the exceptions in Regulation 9. This latter provision exempts from the obligation of disclosure, inter alia, any information from which the identity of another individual (other than a social service employee), who has not consented to the disclosure of the information, would be likely to be disclosed or deduced by the individual who is the subject of the information or any other person who is likely to obtain access to it.

According to the Government, the effect of Regulation 9 (3) is that, in future, case records will be compiled on the basis that the information contained therein is liable to be disclosed, except in so far as disclosure would be likely to reveal the identity of the informant or another third party. However, by virtue of section 2 (4) of the Access to Personal Files Act 1987, the 1989 Regulations apply only to information recorded after the Regulations came into force, that is, after 1 April 1989. As in the case of Circular LAC (83) 14, which governed the adoption of the resolution mentioned in paragraph 25 above and the subsequent partial release of documents to Mr Gaskin, the Access to Personal Files (Social Services) Regulations 1989 do not have retrospective effect.

PROCEEDINGS BEFORE THE COMMISSION

30. The applicant applied to the Commission (application no. 10454/83) on 17 February 1983. He claimed that the refusal of access to all his case records held by the Liverpool City Council was in breach of his right to respect for his private and family life under Article 8 (art. 8) of the Convention and his right to receive information under Article 10 (art. 10) of the Convention. He also invoked Articles 3 and 13 (art. 3, art. 13) of the Convention and Article 2 of Protocol No. 1 (P1-2).

31. On 23 January 1986, the Commission declared admissible the applicant's complaint concerning the continuing refusal of Liverpool City Council to give him access to his case records but declared the remainder of the application inadmissible.

In its report of 13 November 1987 (Article 31) (art. 31), the Commission concluded, by six votes to six, with a casting vote by the acting President, that there had been a violation of Article 8 (art. 8) of the Convention by the procedures and decisions which resulted in the refusal to allow the applicant access to the file. It further concluded, by eleven votes to none with one abstention, that there had been no violation of Article 10 (art. 10) of the Convention.

The full text of the Commission's opinion and of the partly dissenting opinions contained in the report is reproduced as an annex to the present judgment.

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

32. At the public hearing on 28 March 1989, the Government maintained the concluding submissions set out in their memorial, whereby they requested the Court to decide and declare:

"(i) that the facts disclose no breach of the applicant's rights guaranteed by Article 8 (art. 8) of the Convention;

(ii) that the facts disclose no breach of the applicant's rights guaranteed by Article 10 (art. 10) of the Convention."

AS TO THE LAW

I. SCOPE OF THE CASE BEFORE THE COURT

33. The sole complaint declared admissible by the Commission was that of the applicant's continuing lack of access to the whole of his case-file held by Liverpool City Council (see paragraph 31 above). Although the question of access to the file was first posed in the context of Mr Gaskin's application for discovery of documents with a view to bringing legal proceedings against the local authority (see paragraphs 14-18 above), the only issues before the Court are those arising under Articles 8 and 10 (art. 8, art. 10) in relation to the procedures and decisions pursuant to which the applicant was refused access to the file subsequently to the termination of the proceedings for discovery (see paragraphs 93 and 104 of the Commission's report).

II. ALLEGED BREACH OF ARTICLE 8 (art. 8)

A. Applicability

34. The applicant alleges a breach of Article 8 (art. 8) of the Convention, which is worded 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."

35. Before the Commission, the Government claimed that the file as such, being information compiled for and by the local authority, did not form a part of the applicant's private life. Accordingly, in their submission, neither its compilation nor the question of access thereto fall within the scope of Article 8 (art. 8).

In the proceedings before the Court the Government did not revert specifically to this contention but rather concentrated on the questions whether there was any relevant interference with the applicant's right to respect for private life or alternatively whether there was any failure to comply with such positive obligations as are inherent in Article 8 (art. 8) to secure through its legal and administrative system respect for private life.

36. In the opinion of the Commission "the file provided a substitute record for the memories and experience of the parents of the child who is not in care". It no doubt contained information concerning highly personal aspects of the applicant's childhood, development and history and thus could constitute his principal source of information about his past and formative years. Consequently lack of access thereto did raise issues under Article 8 (art. 8).

37. The Court agrees with the Commission. The records contained in the file undoubtedly do relate to Mr Gaskin's "private and family life" in such a way that the question of his access thereto falls within the ambit of Article 8 (art. 8).

This finding is reached without expressing any opinion on whether general rights of access to personal data and information may be derived from Article 8 para. 1 (art. 8-1) of the Convention. The Court is not called upon to decide in abstracto on questions of general principle in this field but rather has to deal with the concrete case of Mr Gaskin's application.

B. Approach to Article 8 (art. 8) in the present case

38. As the Court held in the Johnston and Others judgment of 18 December 1986, "although the essential object of Article 8 (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" (Series A no. 112, p. 25, para. 55).

39. The Commission considered that "respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that in principle they should not be obstructed by the authorities from obtaining such very basic information without specific justification".

In its report, reference was made to the Court's Leander judgment of 26 March 1987, in which it was held that:

"Both the storing and the release of ... information, which were coupled with a refusal to allow Mr Leander an opportunity to refute it, amounted to an interference with his right to respect for private life as guaranteed by Article 8 para. 1 (art. 8-1)" (Series A no. 116, p. 22, para. 48).

The Commission noted that Mr Gaskin sought access to a file of a different nature from that in the Leander case. Nevertheless, since the information compiled and maintained by the local authority related to the applicant's basic identity, and indeed provided the only coherent record of his early childhood and formative years, it found the refusal to allow him access to the file to be an interference with his right to respect for his private life falling to be justified under paragraph 2 of Article 8 (art. 8-2).

40. The Government contended that, contrary to the Leander case, which was concerned with the negative obligations flowing from Article 8 (art. 8),

namely the guarantee against arbitrary interference by public authorities, the present case involved essentially the positive obligations of the State under that Article.

In their view, the applicant was complaining not about direct interference by a public authority with the rights guaranteed by Article 8 (art. 8), but of a failure by the State to secure through its legal or administrative system the right to respect for private and family life. In this connection, the Government conceded that neither the legal nor the administrative system in the United Kingdom provided an absolute and unfettered right of access to case records to a person in the applicant's situation. However, the existence of such positive obligations entailed a wide margin of appreciation for the State. The question in each case was whether, regard being had to that margin of appreciation, a fair balance was struck between the competing interests, namely the public interest in this case in the efficient functioning of the child-care system, on the one hand, and the applicant's interest in having access to a coherent record of his personal history, on the other.

41. The Court agrees with the Government that the circumstances of this case differ from those of the Leander case in which the respondent State was found to have interfered with Article 8 (art. 8) rights by compiling, storing, using and disclosing private information about the applicant in that case. Nevertheless, as in the Leander case, a file exists in this case concerning details of Mr Gaskin's personal history which he had no opportunity of examining in its entirety.

However, it is common ground that Mr Gaskin neither challenges the fact that information was compiled and stored about him nor alleges that any use was made of it to his detriment. In fact, the information compiled about Mr Gaskin served wholly different purposes from those which were relevant in the Leander case. He challenges rather the failure to grant him unimpeded access to that information. Indeed, by refusing him complete access to his case records, the United Kingdom cannot be said to have "interfered" with Mr Gaskin's private or family life. As regards such refusal, "the substance of [the applicant's] complaint is not that the State has acted but that it has failed to act" (see the Airey judgment of 9 October 1979, Series A no. 32, p. 17, para. 32).

The Court will therefore examine whether the United Kingdom, in handling the applicant's requests for access to his case records, was in breach of a positive obligation flowing from Article 8 (art. 8) of the Convention.

C. Compliance with Article 8 (art. 8)

42. In accordance with its established case-law, the Court, in determining whether or not such a positive obligation exists, will have regard to the "fair balance that has to be struck between the general interest

of the community and the interests of the individual ... In striking this balance the aims mentioned in the second paragraph of Article 8 (art. 8) may be of a certain relevance, although this provision refers in terms only to 'interferences' with the right protected by the first paragraph - in other words is concerned with the negative obligations flowing therefrom ..." (see the Rees judgment of 17 October 1986, Series A no. 106, p. 15, para. 37).

43. Like the Commission, the Court considers that the confidentiality of the contents of the file contributed to the effective operation of the child-care system and, to that extent, served a legitimate aim, by protecting not only the rights of contributors but also of the children in need of care.

44. As to the general policy in relation to the disclosure of information contained in case records, the Government relied on Local Authority Circular (83) 14 dated 24 August 1983 (see paragraph 23 above). The Government drew attention to paragraph 3 thereof, according to which, subject to certain exceptions, clients who wish to have access to child care records should be allowed to do so. The terms of the Circular were substantially followed in the resolution of the Liverpool City Council's Social Services Committee of 18 October 1983 (see paragraph 25 above).

The Government argued that both circular and resolution acknowledged the importance of access to the child-care records for those who are the subject of those records, and at the same time the importance of respecting the confidentiality of those who contributed to the records. That was not merely to protect the private interests of individual contributors but involved a much wider public interest. The proper operation of the child-care service depended on the ability of those responsible for the service to obtain information not only from professional persons and bodies, such as doctors, psychiatrists, teachers and the like, but also from private individuals - foster-parents, friends, neighbours and so on. The Government argued that, if the confidentiality of these contributors were not respected, their co-operation would be lost and the flow of information seriously reduced. This would have a serious effect on the operation of the child-care service.

In this connection, the Government attached particular importance to paragraph 5 of the Circular, which contained an express recognition of the rights of persons who had provided information on the clear understanding that it would not be revealed, and to paragraph 7, pursuant to which "information should not be disclosed to the client if derived in confidence from a third party without the consent of the third party". They also drew attention to paragraph 9 which stated that records existing prior to the introduction of the new policy had in general been prepared on the basis that their content would never be disclosed to clients and therefore should not be disclosed without the contributor's permission.

In this respect, the balance struck by both the circular and the resolution between the interests of the individual seeking access to the records on the

one hand and, on the other hand, the interests of those who have supplied information in confidence and the wider public interest in the maintenance of full and candid records, was said by the Government to be proper, rational, reasonable and consistent with their obligations under Article 8 (art. 8). There was thus no failure on the part of the United Kingdom to secure the applicant's right to respect for private life guaranteed by that provision.

45. The applicant, however, contested this. He emphasised the fundamental change which, according to him, has occurred in the Government's position since the issue in August 1983 of Circular LAC (83) 14. He pointed to that Circular as evidence of an "increasingly held view" that persons receiving personal social services should be able to discover what is said about them in case records. The Access to Personal Files Act 1987, and the Access to Personal Files (Social Services) Regulations 1989 made thereunder, illustrated the extent to which information of the kind sought by Mr Gaskin would in the future be made available by public authorities in the United Kingdom (see paragraph 29 above).

By way of example, Mr Gaskin explained in some detail that he wished to establish his medical condition, which was not possible without sight of all the records and expert advice.

46. As to the alleged confidentiality of the records, the applicant submitted that it was not clear precisely how or why the contributors to his case records contended that their contributions were made in confidence; whether a condition of confidence had been made a prerequisite of the contribution; and whether confidentiality was clearly expressed at the time of the contribution or had been implied *ex post facto*.

The Government explained to the Court, in reply to its question on this point, that all information contributed to a case record kept under the 1955 Regulations (see paragraph 13 above) was treated as supplied on the understanding that it was to be kept confidential, unless the contrary was clear either from the nature of the information supplied or from the fact that the contributor had waived confidentiality. The basis for this principle of confidentiality was to be found in Regulation 10 which provides that the case record shall be open to inspection by any person duly authorised in that behalf by the Secretary of State. As the Court of Appeal held in *Re D (infants)* [1970] 1 All England Law Reports 1089, in which that provision was applied in the context of wardship proceedings, "that shows that the case record is regarded as private and confidential" (see paragraph 17 above).

47. It should be noted that, in seeking in this context to reconcile the competing interests with which it was faced, Liverpool City Council contacted the various suppliers of information with a view to obtaining waivers of confidentiality. Out of forty-six contributors nineteen gave their

consent and 65 out of 352 documents were released. Mr Gaskin wishes however to have access to his entire file (see paragraph 26 above).

The Commission observed that the applicant had not had the benefit of any "independent procedure to enable his request to be tested in respect of each of the various entries in the file where consent is not forthcoming". It concluded that the "absence of any procedure to balance the applicant's interest in access to the file against the claim to confidentiality by certain contributors, and the consequential automatic preference given to the contributors' interests over those of the applicant," was disproportionate to the aim pursued and could not be said to be necessary in a democratic society.

48. In this connection, the Government maintained that the United Kingdom was not alone amongst European States in having no general independent procedure for weighing the competing interests. As in other member States, such procedure as does exist was confined to cases where legal proceedings are subsisting or in contemplation. Moreover, a balance between the competing interests was already provided for in Circular LAC (83) 14. There was no blanket refusal of access to case records. Access was given to information which was not provided in confidence and access was given even to confidential information in so far as the consent of the contributor could be obtained by the Local Authority concerned. As regards the alleged giving of "automatic preference to the contributors' interest over those of the applicant", it would, in the Government's view, be unreasonable and arbitrary to assume the right to dispense with a contributor's consent or to determine that a confidence should be overridden. The Government further relied on the statement contained in the partly dissenting opinion of one member of the Commission, that to do so would amount to a violation of a moral obligation on their part and would place at risk the effective operation of the child-care system.

For his part, the applicant pointed out that, under the procedure of obtaining the consent of contributors adopted by the Circular, there were always likely to be certain contributors whom it is impracticable to ask for consent, as it may not be possible to identify or trace them. In that case, there would always be an element of the documents which may never be released to someone in his situation. The example was also given of jointly prepared reports where one of the authors consents to disclosure but the other does not.

49. In the Court's opinion, persons in the situation of the applicant have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development. On the other hand, it must be borne in mind that confidentiality of public records is of importance for receiving objective and reliable information, and that such confidentiality can also be necessary for the protection of third persons. Under the latter aspect, a system like the

British one, which makes access to records dependent on the consent of the contributor, can in principle be considered to be compatible with the obligations under Article 8 (art. 8), taking into account the State's margin of appreciation. The Court considers, however, that under such a system the interests of the individual seeking access to records relating to his private and family life must be secured when a contributor to the records either is not available or improperly refuses consent. Such a system is only in conformity with the principle of proportionality if it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent. No such procedure was available to the applicant in the present case.

Accordingly, the procedures followed failed to secure respect for Mr Gaskin's private and family life as required by Article 8 (art. 8) of the Convention. There has therefore been a breach of that provision.

III. ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

50. The applicant further maintained that the same facts as constituted a violation of Article 8 (art. 8) also gave rise to a breach of Article 10 (art. 10), which reads:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

51. The Commission found that Article 10 (art. 10) did not, in the circumstances of the case, give the applicant a right to obtain, against the will of the local authority, access to the file held by that authority. The Government agreed.

52. The Court holds, as it did in its aforementioned *Leander* judgment, that "the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him." (Series A no. 116, p. 29, para. 74). Also in the circumstances of the present case, Article 10 (art. 10) does not embody an obligation on the State concerned to impart the information in question to the individual.

53. There has thus been no interference with Mr Gaskin's right to receive information as protected by Article 10 (art. 10).

IV. APPLICATION OF ARTICLE 50 (art. 50)

54. Mr Gaskin claimed just satisfaction under Article 50 (art. 50), which reads:

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

A. Pecuniary damage

55. First of all, Mr Gaskin claimed amounts in respect of past and future loss of earnings totalling in excess of £380,000. He alleged that his employment prospects had been damaged, owing to the loss of opportunities sustained by him.

The Government contended that no causal link had been shown to exist between the losses said to have been suffered and the alleged violations of the Convention.

56. The Court notes that, even if a procedure as described in paragraph 49 above had existed in Mr Gaskin's case, there is no evidence to show that the documents withheld would have been released and, if so, that this would have had a favourable effect on his future earnings. The claim for damages under this head should therefore be rejected.

B. Non-pecuniary damage

57. The applicant also sought compensation for non-pecuniary damage in respect of distress, humiliation and anxiety suffered by him. By reason of the failings in his upbringing, Mr Gaskin's status and dignity had been irreversibly damaged.

The Government contended that it could not be assumed that the applicant had sustained a real loss of opportunities such as to justify an award of just satisfaction in respect of non-pecuniary damage. Even if some loss of opportunities had been suffered, the applicant had not established any causal link between the damage claimed and any violation of the Convention found.

58. The Court acknowledges that Mr Gaskin may have suffered some emotional distress and anxiety by reason of the absence of any independent procedure such as that mentioned in paragraph 49 above.

Making a determination on an equitable basis, the Court awards to Mr Gaskin under this head the amount of £5,000.

C. Costs and expenses

59. The applicant claimed legal costs and expenses. His claim was calculated on the basis of 650 hours' work by his solicitor at the rate of £60 per hour, increased by a multiplier of 200% in order to reflect the importance and complexity of the case, whereby a total amount claimed of £117,000 was arrived at.

The Court will deal with this claim in accordance with the criteria it has established (see, among other authorities, the *Belilos* judgment of 29 April 1988, Series A no. 132, p. 33, para. 79).

1. Costs incurred at domestic level

60. According to the Government, the costs arising at domestic level were not incurred in order to remedy a breach of the Convention: it was solely in connection with a prospective claim for damages that the applicant had brought proceedings before the domestic courts for the discovery of his case records.

The Court agrees that only costs incurred subsequently to the termination of the domestic proceedings may be considered (see paragraph 33 above). It is therefore appropriate to include this aspect of the claim in the examination conducted in paragraphs 61 to 62 below.

2. Costs incurred in the European proceedings

61. The Government contested the amount claimed. It considered the number of hours stated to be excessive. In addition, according to them, appropriate hourly rates ranged between £36 and £60. In this connection, they also relied on paragraph 15 (d) of the Court's judgment of 9 June 1988 in *B v. the United Kingdom* (Series A no. 136-D, p. 34), which however indicated that an upper figure of £70 might be reasonable, depending on the nature of the case.

The Government did not dispute that the applicant had incurred liability to pay sums additional to those covered by the legal aid which he had received from the Council of Europe. If the Court were to make an award, it should not be greater than that awarded in comparable cases.

62. The Court is of the opinion that the total amount claimed is not reasonable as to quantum. Taking into account all the circumstances and making an equitable assessment, the Court considers that Mr Gaskin is entitled to be reimbursed, for legal fees and expenses, the sum of £11,000 less 8,295 French francs already paid in legal aid.

FOR THESE REASONS, THE COURT

1. Holds by eleven votes to six that there has been a violation of Article 8 (art. 8);
2. Holds unanimously that there has been no violation of Article 10 (art. 10);
3. Holds by nine votes to eight that the United Kingdom is to pay to the applicant, for non-pecuniary damage, £5,000 (five thousand pounds) and, for legal fees and expenses, £11,000 (eleven thousand pounds) less 8,295 FF (eight thousand two hundred and ninety-five French francs) to be converted into pounds sterling at the rate applicable on the date of this judgment, plus value added tax on the balance;
4. Rejects the remainder of the claims for just satisfaction.

Done in English and French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 7 July 1989.

Rolv RYSSSDAL
President

For the Registrar
Herbert PETZOLD
Deputy Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 52 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) Joint dissenting opinion of Mr Ryssdal, Mr Cremona, Mr Gölcüklü, Mr Matscher and Sir Vincent Evans;
- (b) Dissenting opinion of Mr Walsh.

R.R.
H.P.

JOINT DISSENTING OPINION OF JUDGES RYSSDAL,
CREMONA, GÖLCÜKLÜ, MATSCHER AND SIR VINCENT
EVANS

1. We accept the finding of the majority of the Court that the records contained in the local authority's file relate to Mr Gaskin's private and family life in such a way that the question of his access thereto raises an issue under Article 8 (art. 8) of the Convention. We do not, however, agree that a violation of Article 8 (art. 8) has been established in this case.

2. The confidential nature of the case records compiled under Regulation 10 of the Boarding-Out of Children Regulations 1955 at the time when Mr Gaskin was in care has been clearly affirmed by the English courts, particularly in the case of *Re D. (Infants)* [1970] 1 WLR 599, which was followed by the decisions of the High Court and the Court of Appeal in refusing Mr Gaskin's application for discovery of documents in 1980 (see paragraphs 14 to 18 of the Court's judgment). Boreham J in the High Court, whose finding on this point was accepted by the Court of Appeal, said that he was "left in no doubt that it is necessary for the proper functioning of the child care service that the confidentiality of the relevant documents should be preserved".

3. As both the Commission and the Court have recognised, the confidentiality of the contents of the file had a legitimate aim - or aims. It not only protected the rights of those who had provided information on a confidential basis, but by contributing to the efficient operation of the child-care system it also served to protect the rights of children in need of care.

4. Admittedly a more open policy as regards access to personal files has been followed in other Contracting States and this is now the approach adopted in Great Britain in the Access to Personal Files Act 1987 and Regulations made under it as to information recorded in the future. In our opinion, however, it would be wrong to alter retrospectively the basis on which existing case-records have been compiled. The question of access to them, including access to Mr Gaskin's file, must be considered with proper regard to the conditions of confidentiality under which information was contributed to them.

5. Mr Gaskin claims that his right to respect for his private and family life under Article 8 (art. 8) entitles him to access to the whole of his case-file. In determining whether the respondent Government are under a positive obligation to grant him access, the Court, in accordance with its established case-law, has had regard to the "fair balance that has to be struck between the general interest of the community and the interests of the individual" (see paragraph 42 of the judgment). The Court has also pointed out in its judgment in the case of *Abdulaziz, Cabales and Balkandali* (Series A no. 94, p. 33, para. 67) that the notion of "respect" is not clear-cut

especially as far as positive obligations inherent in Article 8 (art. 8) are concerned and accordingly that this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals.

6. It is implicit in the Court's judgment in the present case that it does not accept that the applicant should have access to his entire file irrespective of the confidentiality attaching to its contents, but that access can only be given on a selective basis.

7. The Government maintain that by writing a letter to each of the contributors to the file seeking his permission to disclose the information that he had contributed and then making available to the applicant documents supplied by persons who gave their consent, the authorities in the United Kingdom have gone as far as they properly could to meet the applicant's request for access. It is the Government's view that it would be entirely improper and a breach of good faith to disclose information supplied in confidence without the consent of the supplier.

8. The Court has taken the view that the final decision whether access should be granted in cases where a contributor fails to answer or withholds consent should be taken by an independent authority (see paragraph 49 of the judgment). Inasmuch as such a system envisages the disclosure of information received in confidence without the contributor's consent, we consider that it is open to serious objection as not fairly and adequately respecting and protecting his position.

9. In our opinion the procedure that has been followed by the United Kingdom authorities for determining what parts of Mr Gaskin's file could be made available to him should be accepted as representing a fair balance of interests in the circumstances.

10. Finally, we do not agree that the payment of non-pecuniary damage is justified in this case. The stress and anxiety which the applicant has no doubt suffered have been occasioned by the refusal to grant him access to his case-file and not to the lack of any review procedure, which may or may not result in the release of further documents to him. This therefore is, in our opinion, a case in which the finding of a breach of Article 8 (art. 8) constitutes adequate just satisfaction for the purpose of Article 50 (art. 50).

DISSENTING OPINION OF JUDGE WALSH

1. In my opinion Article 8 (art. 8) of the Convention is not applicable in the present case. The information sought by the applicant was for the purpose of furthering his legal action for damages against the Liverpool City Council. It was not sought in defence of or to further his right to respect for his private and family life. Furthermore the present application is, in effect, an appeal against the orders of the English courts which decided on the merits of the case not to permit the revelation of information imparted and received in confidence.

2. In my opinion Article 10 (art. 10) of the Convention is applicable. Prima facie the applicant's right to receive the information sought from the public authority falls within the guarantee contained in Article 10 para. 1 (art. 10-1) of the Convention. The information sought was relevant to his legal proceedings. The willingness of the Liverpool City Council to furnish the information was restrained by the English courts on the grounds that to do so would be to breach the undisputed confidentiality which covered the documents in question. In my view that fell within the qualification permitted by Article 10 para. 2 (art. 10-2) of the Convention. In fact nineteen of the forty-six informants agreed to waive the confidentiality and the relevant documents were furnished to the applicant. The applicant's freedom to pursue his legal proceedings is not impaired and he is free to exercise his rights guaranteed by Article 6 para. 1 (art. 6-1) of the Convention. He can furnish first-hand testimony of the alleged personal injuries suffered by him and examine and cross-examine witnesses in accordance with the rules of English procedural law. The fact that the English courts in their discretion might have given the applicant access to the documents sought does not affect the construction of Article 10 para. 2 (art. 10-2) of the Convention. The matter was decided in accordance with English law on grounds which, in my view, can in the circumstances of the case be justified as being necessary in a democratic society for preventing the disclosure of information received in confidence relating to a very sensitive area of social welfare.

3. In my opinion it has not been shown that there has been any breach of the Convention.