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

SECOND SECTION

CASE OF P., C. AND S. v. THE UNITED KINGDOM

(Application no. 56547/00)

JUDGMENT

STRASBOURG

16 July 2002

FINAL

16/10/2002

In the case of P., C. and S. v. the United Kingdom,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Sir Nicolas BRATZA,
Mr GAUKUR JÖRUNDSSON,
Mr L. LOUCAIDES,
Mr C. BÎRSAN,
Mr M. UGREKHELIDZE, *judges*,
and Mr T.L. EARLY, *Deputy Section Registrar*,

Having deliberated in private on 26 March and on 2 July 2002,

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

PROCEDURE

1. The case originated in an application (no. 56547/00) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three United States and/or United Kingdom nationals, Mrs P., Mr C. and Ms S. ("the applicants"), on 23 December 1999 and 25 December 2000 respectively.

2. The applicants, who had been granted legal aid, were represented by Mr R. Stein, a solicitor practising in London. The United Kingdom Government ("the Government") were represented by their Agent, Mr H. Llewellyn of the Foreign and Commonwealth Office, London. The President of the Chamber acceded to the applicants' request not to have their names disclosed (Rule 47 § 3 of the Rules of Court).

3. The applicants alleged that the measures taken by the authorities in removing S. at birth from her parents, placing her in care and freeing her for adoption breached Article 8 of the Convention and that the procedures followed were in breach of Article 6 of the Convention. They also relied on Article 12 of the Convention.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section.

6. By a decision of 11 December 2001, the Chamber declared the application admissible.

7. The applicants and the Government each filed observations on the merits (Rule 59 § 1).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 26 March 2002 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*

Mr H. LLEWELLYN, *Agent*,
Mr A. McFARLANE QC,
Mr T. EICKE, *Counsel*,
Ms L. HARRISON,
Ms J. RIDGWAY,
Ms J. GRAY,
Ms C. McCRYSTAL, *Advisers*;

(b) *for the applicants*

Ms B. HEWSON,
Mr D. CASEY, *Counsel*,
Mr R. STEIN, *Solicitor*,
Ms N. MOLE,
Mr C. STOCKFORD,
Ms K. WEED, *Advisers*.

The applicants P. and C. were also present.

The Court heard addresses by Ms Hewson and Mr McFarlane.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. P., born in 1958, is a citizen of the United States of America; C., the husband of P., was born in 1962 and is a United Kingdom citizen; S., their daughter was born in 1998 and is a United Kingdom and American citizen. They are all resident in the United Kingdom.

A. Events in the United States of America 1976-96

10. In January 1976 P., then living in the United States of America, gave birth to a son A. shortly before her eighteenth birthday. In 1980 P. married her first husband and had a second son B. in February 1985. In 1992 she and her husband separated. Both parents contested custody of B.

11. Between December 1990 and January 1994 B. was referred to his general practitioner for some forty-seven complaints.

12. In March/April 1993 B. was taken for examination to hospital on numerous occasions for complaints of diarrhoea and fever, and on each occasion he was found to be in a normal condition. When on 18 April 1994 B. was admitted to hospital, a laboratory stools test indicated the presence of phenolphthalein (a laxative). The doctor was satisfied that P. had been responsible for laxative poisoning and reported the matter.

13. On the same date the Californian authorities took B. into protective custody, alleging that P. was harming her son, then aged 9, by administering laxatives to him inappropriately. He was suspected of being a victim of induced-illness abuse, the syndrome known variously as Munchhausen syndrome by proxy ("MSBP"), fabricated or induced illness, illness-induction syndrome or paediatric falsified condition. MSBP is a label sometimes used to describe a form of psychiatric illness, mainly found in women, who seek attention by inducing illness in their children or inventing accounts of illness in their children, and by repeatedly presenting their children to the medical authorities for investigation and treatment.

14. On 23 August 1994 a Californian court ordered that B. live with his father. Following this placement, B. did not suffer from any acute or abnormal diarrhoea. At a hearing in September 1995, the court approved supervised contact between P. and her son B. once a month for two to four hours for the following three years. P. was informed that, if she wished increased contact, it could be envisaged in a supervised, therapeutic context.

15. P. was charged with cruelty towards B. and endangering B.'s health, a felony offence under section 273A(a) of the Californian Penal Code. A report prepared by Dr Schreier stated that P. suffered from MSBP and that she had victimised B. over several years, causing him severe diarrhoea, possibly vomiting, weight loss and multiple non-trivial procedures and hospitalisations. On 4 October 1995, after a five-week trial before a jury in the Superior Court of California, she was convicted of a misdemeanour under section 273A(b), a lesser offence, and acquitted of the felony. On 17 November 1995 she was sentenced to three years' probation and three months in custody, subsequently suspended. She was also ordered to enter and complete a "psychological and psychiatric treatment programme".

16. During the divorce proceedings, P. was required to have therapy as a condition for getting custody of B. and saw a therapist from 1992 until the end of 1993. From late 1992 she was prescribed an antidepressant by a psychiatrist whom she saw regularly to review the medication. She also

consulted with psychiatrists during the criminal trial. From about April to December 1995, she saw a psychologist twice a month for therapy.

17. On 2 May 1996 the Californian family court reduced contact to one supervised occasion per month. It was ordered that any additional contact visits would have to occur in a therapeutic setting with a doctor present. Her appeal against this was dismissed.

18. During 1996 P. met her present husband, C., a qualified social worker who was studying for a doctorate in philosophy and researching into cases of women wrongly accused of MSBP.

B. P.'s pregnancy and first contacts with the social services in the United Kingdom: Rochdale 1996

19. In November 1996, in breach of the probation order, P. came to visit C. in the United Kingdom. P. and C. were married in September 1997 in the United Kingdom. P. discovered shortly afterwards that she was pregnant.

20. Rochdale Metropolitan Borough Council ("the local authority") became aware of the pregnancy after P. had taken steps with a view to obtaining an annulment of her previous marriage and her ex-husband had informed the district attorney in California who in turn made contact with the authorities in the United Kingdom, giving information about P.'s conviction for harming her son B. The local authority was informed of the pregnancy by P.'s doctor and commenced an investigation.

21. Social workers were in contact with P. and C. from January 1998. A letter was sent to arrange a meeting. Prior to the proposed meeting, there were several exchanges on the telephone. C. considered that the social services should provide more detailed information before a meeting took place and made a list of requirements regarding access to files and copies of documents. Tension arose when the social worker requested that P. give her date of birth in order to confirm that she was the person concerned in the information from the United States. P. initially refused to give this information. The proposed meeting was cancelled.

22. On 21 January 1998 the applicants' solicitors wrote to the social services requesting that they provide information to both themselves and P. directly, concerning, *inter alia*, the reason for the proposed meeting, details of any information in their possession, forms for applying for access to social-work files, specific details of child protection concerns in the case and a list of every person with whom P. had been discussed.

23. On 28 January 1998 a meeting took place attended by P. and C., social workers and the police.

24. There was further correspondence between the local authority and the applicants' solicitors concerning the appointment of an expert to assess the risk to the unborn child, pursuant to section 47 of the Children Act 1989 ("the section 47 assessment"). By letter dated 17 February 1998, the local

authority's solicitors noted that the applicants were not happy with the proposed expert, Dr Bentovim, and requested further details of any objections. They pointed out that the person suggested by the applicants was not an expert in MSBP and requested details of the other proposed experts.

25. On 18 February 1998 the local authority made contact with Dr Eminson, a consultant child and adolescent psychiatrist who had been proposed by the applicants, with a view to her undertaking an assessment.

26. By letter dated 13 March 1998, the local authority's solicitor referred to a letter of 11 March 1998 by the applicants' solicitors. It was pointed out that, as there were no care proceedings in train, there was no obligation on the local authority to agree a letter of instruction for the expert with the applicants. At that stage, all that was required was P.'s agreement to see the expert. The view was expressed that it was for the local authority to decide what documents to submit to the expert, although they would have no objection to the applicants' providing extra documentation. Although they wished to work in cooperation with P., they could not allow her to dictate the course and conduct of the section 47 assessment.

27. On 2 March 1998 a case conference was held by the local authority attended, *inter alia*, by social workers, P.'s general practitioner, a health visitor, a midwife, P. and C., P.'s solicitor and the paternal grandmother of the unborn child. The minutes of the meeting state that the reason for the conference was that P. had a conviction which led to concern that her child might be at risk of induced illness/injury after it was born. It was noted that P. disputed details of the background to her conviction, claiming, *inter alia*, that there was evidence of her son B. having had diarrhoea as she alleged. C. was noted as accepting that the existence of a conviction could give rise for concern but not that it automatically meant his wife suffered from MSBP, alleging that there was no direct evidence of any harm having been inflicted by her. Due to the concern that P. suffered from MSBP, it was decided to place the child on the Child Protection Register at birth and to undertake a full risk assessment.

28. On about 16 March 1998 Dr Eminson agreed to act as expert in the assessment to take place.

29. On 18 March 1998 the applicants' solicitors wrote to the local authority, pointing out that their request for an agreed letter of instruction and the list of documents given to the expert was based on good practice and procedure and that, although there were no care proceedings, they had assumed the same principles would be applied. They stated that P. could not be expected to go into a meeting blind to the specific points the doctor had been asked to address and that they needed a list of documents in order to assess whether they wished to provide the expert with anything further.

30. By reply of the same date, the local authority's solicitor stated that a section 47 assessment procedure was at the entire discretion of the local authority and that different principles applied than in care proceedings.

However, they were prepared to disclose the list of documents sent to Dr Eminson and set out the questions which they would ask her to address.

31. On 25 March 1998, in discussions between the applicants' solicitors and the local authority, it was indicated that the applicants were no longer happy with Dr Eminson.

32. On 1 April 1998 the local authority held a case conference to review the situation. It was found that the parents had not cooperated with the local authority assessment, or that their cooperation was superficial. A combination of excuses and evasiveness had made it impossible to hold more than one meeting. There still appeared to be a complete denial about events in the United States. The local authority's solicitor had spoken with the district attorney involved in the case in California and reported a number of allegations, including the concern that P. suffered from MSBP as shown by her own medical history, that C. had impersonated a therapist in trying to convince P.'s probation officer that she was complying with an order and that P. had harassed Dr Shreier and the district attorney by telephone calls. It was noted that P. and C. were unwilling to see the expert proposed by the local authority. It was decided to take out an emergency protection order at the child's birth as there was

> "reason to believe that the baby would be at risk of significant harm if left in the care of his/her parents; there has been no genuine cooperation from the parents and it would be impossible for the Social Services... to manage the risk without legal jurisdiction which includes removal in the first instance. An application for interim care proceedings would require notice and [there were] reasons to believe that the parents would evade the authorities".

The address of the foster placement was to be kept secret to avoid harassment or an attempt to remove the child. The parents were to be told about the intention to take legal action in general terms.

33. On 7 April 1998 the applicants' solicitors confirmed that P. and C. would see Dr Eminson. They attended an appointment on 28 April 1998.

34. On 8 April 1998 Dr Schreier wrote to the local authority, expressing grave concern and recommending the removal of the baby at birth and strict supervision of contact as there was a high level of risk of harm from P.

35. On 30 April 1998 the local authority was approached by C.'s mother, asking whether the child could be placed with her. The local authority decided to raise the matter with Dr Eminson as part of her assessment.

36. Notes dated 6 May 1998 of a discussion between the assistant director (social services) and Dr Eminson included the doctor's view that the basis upon which to work with the parents was extremely limited given the absence of acceptance/agreement about concerns over the unborn baby or the past history in America. She had found that the parents were not prepared to discuss the real issues with her, that C. was mainly interested in the battle with the authorities and that the couple showed little concern for or awareness of the key issue, that of the safety of the unborn baby.

Although a definitive conclusion was difficult, the risk factors were not in her view sufficiently worrying to justify not telling the parents about the proposed application for an emergency protection order at birth. While the possibility of further assessment with the couple and newborn baby at a residential facility was not ruled out, this was not possible at that time due to the limited degree of cooperation and commitment of the parents.

37. By 30 April 1998 it was becoming likely that, due to the lie of the baby, P. would have to have a Caesarean section instead of the planned delivery at home. The midwife reported that the consultant Dr Maresh wanted P. to be admitted on 6 May 1998 for an elective Caesarean, but that P. had refused and gone home. The midwife was noted in the social-work records as having become very angry with P. and C. for resisting medical advice and, later, for having claimed that they had been lucky to get a live baby.

C. The birth of S. and the emergency and care proceedings

38. On 7 May 1998, at 4.42 a.m., S. was born by Caesarean surgery. C. had brought P. to the hospital when her waters broke at home.

39. The local authority applied for an emergency protection order at about 10.30 a.m. They contacted the hospital concerning the possibility of staff supervising the baby at the hospital. After discussions, it was confirmed to the local authority by the hospital management that, even with security measures, they could not guarantee the baby's safety. The Government stated that the hospital was concerned by the difficult behaviour of a friend of P.'s who demanded to be present during the operation and had to be threatened with removal by security guards, and the aggressive attitude of P.'s friends and family towards staff after the birth. The applicants have stated that there is no evidence for these allegations in the records. Notes in the hospital records indicated that at 3.30 p.m. Dr Maresh had stated that he would prefer the visit of the social workers to be deferred, as the news might upset P. and cause a rise in blood pressure.

40. At about 4 p.m. it was decided to serve the emergency protection order on the applicants with a view to removing S. to foster care. According to the Government, C.'s mother refused to allow S. to be removed and C.'s father threatened to follow the social workers and the baby. Safe departure from the hospital was only achieved with the assistance of the hospital staff. The applicants stated that there was no evidence for this in the records, although they accepted that the family were very upset when S. was removed, and C.'s mother pleaded with the social workers not to let S. go to strangers.

41. A contact visit was arranged on 8 May 1998, attended by C. and his parents. While social services had considered taking S. back to the hospital for visits while P. was an inpatient, it was felt that it was not in the interests

of S. as a newborn baby to be transported on a trip of some twenty-five to thirty miles.

42. P. remained in the delivery unit due to concerns about her blood pressure. It was noted by her consultant that she was very clearly distraught about events. She was prescribed drugs to suppress lactation and anti-hypertensive medication. She was discharged on 10 May 1998.

43. The local authority meanwhile applied to the court for a care order under the Children Act 1989.

44. P. and C. were allowed supervised contact with S., initially three times a week. The first visit occurred on 11 May 1998. P. and C. applied for more access and were supported by the guardian *ad litem* appointed by the court to represent S. Contact increased to four times a week from 15 June 1998. S. also had contact with her maternal and paternal grandparents.

45. P. and C. developed an excellent relationship with their baby daughter S. The notes made by the supervising officials were positive and complimentary. The paternal grandparents were also observed to have a caring and attentive relationship with her.

46. On 13 May 1998 the local authority suspended the assessment of the paternal grandparents which had commenced after their approach to the local authority on 30 April 1998. This was to await the directions of the court, as advised by their counsel. The grandparents were advised of this on 14 May 1998.

47. On 14 May 1998 the case was transferred from the county court to the High Court on grounds of complexity.

48. Dr Eminson issued her report on 29 June 1998, stating that in order to assess the risk to S. it would be necessary to obtain, *inter alia*, a psychiatric assessment of P. and her capacity to change and a comprehensive social work assessment of each family member, including the grandparents, as regards their capacity to care for and protect S.

49. On 31 July 1998 the timetable for the proceedings was set by a circuit judge and the hearing date fixed for February 1999. It was directed that the assessment of the grandparents should be undertaken by an expert but that the local authority should provide the factual background.

50. In a report dated 21 September 1998, a social worker recorded the factual investigation into the paternal grandparents.

51. In his report dated 28 September 1998 for the guardian *ad litem* appointed by the court to represent S., Dr Davis, a consultant paediatrician, found, *inter alia*, a clear and chronic pattern including unexplained symptoms suggesting that P. suffered from a severe illness; a definitive episode of poisoning; non-appearance of symptoms when the child was supervised by others and resolution of the health problems in the child after separation from the mother; extensive inaccuracies and inconsistencies by P. when repeating her history to different doctors; and exceptionally frequent medical attendance by mother and children. His opinion was that B., and to

lesser extent A., had been victims of child abuse on the fabricated illness spectrum. The tendency to fabricate appeared to be ongoing (references were made to P.'s conduct during her pregnancy with S.: she had, for example, complained of ulcer symptoms but no ulcer was found, and she had referred to a stomach tumour which was presumably a besore [A condition caused by the swallowing of hair and the biting of hair and nails] removed in 1994). His view, strongly expressed, was that the risks to S. of rehabilitation with P. outweighed the advantages.

52. On 17 and 18 November 1998, the local authority informed P. and C. of their intention to apply for a freeing for adoption order under the Adoption Act 1976.

53. On 26 November 1998 Dr Maresh, P.'s obstetrics consultant, gave a statement indicating that it was clear to him that P. was aware that there was a strong possibility that her baby would be taken away from her at birth and that this made it difficult for her to stay at the hospital. He noted that during her pregnancy the number of assessments that P. was undergoing had sometimes interfered with the making of ante-natal appointments.

54. On 10 December 1998 Dr Bentovim issued his psychiatric report.

(i) It was noted that, during his meetings with P., she had been superficially cooperative. She had considered that the test which found a laxative in B.'s stools could have been a false positive. She accepted that B. had been hospitalised too often and that she had allowed emotional harm to come to him. Her explanation was that she had been a victim of the divorce process and suffered considerable financial stress. The only statement by P. in which she appeared to take responsibility for exaggerating B.'s illness was when she said that she had exaggerated the number of loose stools that he had had. There was a sense of evasiveness and minimisation, even a degree of trivialisation of what was discussed. It was difficult to tell whether some events referred to by P. were a constructed reality or had really happened.

(ii) As regards C., his research attempted to show that health practitioners sometimes developed a perspective where they created the notion that the parent was inducing illness in a child, thus demonstrating the misuse and fallibility of medical authority. C. had stated that there was nothing to suggest that P. would harm S. He was prepared to look after S. alone if necessary. Together, P. and C. had stated that they would undertake any therapeutic work with a view to obtaining care of S. without, however, acknowledging that there was a problem as far as P. was concerned.

(iii) As regards the paternal grandparents, they tended to agree with the parents' analysis of the situation and found it hard to face up to the fact that P.'s actions had given rise to major concerns about her potential to harm. There were positive factors in their favour (such as their commitment and desire to protect S.). However, the main problem if S. were placed with

them would be their age when S. reached her adolescent phase of development.

(iv) The report found that P. had a personality disorder, including a factitious disorder, as disclosed by her gross exaggeration of having had ovarian cancer and statements about miscarriages as well as the fabrication and exaggeration of B.'s symptoms. While P. had indicated a willingness to accept therapeutic work, which would have to be prolonged and required considerable motivation to change, she had not accepted how extensive such change needed to be. As regarded a possible referral to the Cassell Hospital, it was noted that this would require considerable commitment on the part of both parents. Although the couple had indicated a willingness to enter such a therapeutic setting, P.'s level of motivation was limited. It might, however, be advantageous for P. to be admitted to a special clinic for a further detailed assessment of whether a referral to Cassell Hospital would be appropriate.

(v) The report concluded that C. was not himself a direct risk to S. but was so indirectly. He embraced his wife's views and had a limited understanding of the local authority's concerns. Similarly, the grandparents would be protective of S. if she were placed in their care but, as they would be in their 70s when S. was 14 years old, they would have increasing difficulties in meeting her growing emotional needs. It was therefore difficult to consider them as possible long- or short-term carers because S. needed to be in a secure long-term placement by her first birthday. As regards contact, the fact that the fabrication of symptoms was not life-threatening meant that contact would need less rigorous supervision than in the case of more life-threatening abuse.

55. On 16 December 1998 the local authority made an application to free S. for adoption.

56. The local authority care plan dated 13 January 1999 stated that placement of S. with both parents would pose a serious risk to her. As the circumstances in which C. intended to offer to care for S. on his own were unclear, the concerns about her protection remained. Regarding the paternal grandparents, it was noted that they had not shared the concerns in respect of the risk to S. if she were placed with her parents, and that Dr Bentovim did not support placement with them, particularly because of their age. The local authority's view was that the care plan for S. should be permanent, secured by adoption, and that she needed to be placed with an adoptive family as soon as possible.

D. The hearing of the application for a care order in the High Court, February-March 1999

57. At a hearing, which began on 2 February 1999 and ended on 1 March 1999, the High Court heard the local authority's application for a care order in respect of S. The local authority informed the judge that there were nine families available and wanting to adopt S. P. and C. were parties, as were S.'s paternal grandparents, while S. was represented by a professional guardian *ad litem*, solicitors and both senior and junior counsel.

58. On 4 February 1999 C. applied for leave to withdraw from the proceedings, on the ground that he saw no prospect of success in obtaining custody of S. and that the stress of the proceedings was likely to lead to a breakdown in his health. On 5 February 1999 the judge granted him leave to withdraw. C.'s parents also withdrew from the proceedings.

59. On the same date P.'s legal representatives (leading counsel and solicitors) withdrew from the case, informing the judge that her legal aid had been withdrawn. It was later stated by the judge that they had withdrawn because P. was asking them to conduct the case unreasonably. In fact, her legal aid had not withdrawn, as the judge made clear in his judgment. The legal-aid certificate could not be formally discharged until P. had been given the opportunity to show why that should not happen.

60. P. asked for an adjournment until 9 February 1999, which was granted. On that date P. asked for a further adjournment in order to apply for the reinstatement of her legal-aid certificate.

61. The judge refused the adjournment. As a result of this decision, P. conducted her own case, assisted by a "McKenzie friend", Mrs H. The applicant stated that she found conducting her own case immensely difficult. At one stage, she told the judge that she simply could not continue because she was so distressed. That was after cross-examining her own husband C., which she found very painful. However, the judge said that she should carry on. The solicitor for the guardian *ad litem* and a social worker visited P. that evening to persuade her to carry on.

62. In his judgment, the judge explained his refusal of an adjournment:

> "In the first place I was satisfied that the mother had a very clear grasp of the voluminous documentation, at least as good and if not better a grasp than the lawyers in the case. Secondly, it was clear to me from the documents that the mother, who is an intelligent woman, was fully able to put her case in a clear and coherent way, an assessment that has been amply borne out by the hearing itself.
>
> Thirdly, I was confident that the Bar, in the form of leading and junior counsel for the local authority and the guardian *ad litem*, would not only treat the mother fairly but in the tradition of the Bar would assist her in the presentation of any points she wished to advance, in so far as it would be professionally proper for them to do so. Once again that assessment has been fully justified by the conduct of counsel during the hearing. As examples, the local authority both facilitated and paid for the attendance of Dr Toseland, consultant toxicologist, to attend as part of the mother's case. Junior counsel for the local authority ... struggled manfully to ensure that the mother had a complete set of the ever growing documentation. There were other examples.

Fourthly, the outcome of the case seemed to me to hinge or be likely to hinge substantially on the mother's cross-examination, an area of the case in which the ability of lawyers to protect her was limited.

Finally, and most importantly, I was concerned about the prejudice to [S.] of what would have had to have been a very lengthy adjournment. Section 1(2) of the Children Act expresses the general principle that delay in resolving a child's future is prejudicial to that child's welfare. In this particular case intensive preparation for the hearing had been going on effectively since [S.'s] birth in May 1998 and up until the outset of the hearing before me the mother had had the benefit of advice from her lawyers, latterly of course from leading counsel. An adjournment would have involved a very substantial delay in resolving [S.'s] future.

The hearing was estimated to last, and did indeed, last something in the order of twenty working days. A fresh legal team, assuming legal aid was restored, would have needed a substantial amount of time to master the voluminous documentation and to take instructions. Twenty days of court time simply cannot be conjured out of thin air.

Furthermore the evidence of Dr ... Bentovim, the consultant child psychiatrist jointly instructed to advise me, amongst other things, on [S.'s] placement, was that a decision on her long-term future needed to be both made and if possible implemented before her first birthday.

The consequence of the events I have described was that the mother has been obliged to conduct her case in person with the assistance of a McKenzie friend, Mrs [H.]. In their closing submissions Mr David Harris QC and Miss Roddy for the guardian *ad litem* paid tribute to the manner in which the mother had conducted her case. They described her as fighting bravely, resourcefully and skilfully for the return of her daughter. I would like to echo that tribute. I would also like to express my gratitude to the mother's McKenzie friend ... who was clearly a considerable support to the mother throughout the case.

If the mother had been represented by counsel her case would, I think, have been conducted differently, but I am entirely satisfied that the result would have been the same. As so often happens the mother was given a latitude which would not be given to a litigant who was legally represented. For example, I allowed her to call a witness, Professor Robinson, who had not provided a statement prior to the hearing. I was also prepared for her to call a consultant psychologist who had given evidence in the American proceedings, Dr [P.], who in the event was unable to attend. I also allowed the mother to cross-examine witnesses twice ... I have throughout the hearing endeavoured to ensure that the mother was treated fairly. ....

I am the first to acknowledge that the courtroom is not a friendly environment and ... that those who are not used to it find it difficult. However much experience the mother may have had of the legal system in the United States of America, I accept ... that she is not a lawyer. Further, the hearing has had in [S.'s] interests to delve into matters which were highly distressing to the parents and which are normally intensely private and would have remained private.

It is my judgment that the mother's case has been fully heard and that the hearing has been fair ... I reject any suggestion that had the mother been legally represented the result would have been different."

63. On 8 March 1999 the judge made a care order. In reaching his decision, he did not consider himself bound by the American conviction and reached his own findings of fact on the available material, which included a

substantial volume of documents from the United States and expert reports. He concluded beyond reasonable doubt that B.'s diarrhoea had been caused by laxative abuse on the part of P. on one occasion and, on a balance of probabilities, that abuse was the most likely cause of B.'s diarrhoea on two further occasions. He went on:

> "I am therefore in no doubt and so find that [B.] did suffer harm in the care of his mother. In my judgment that harm was not limited to his physical health. I accept the argument of the local authority that he also suffered serious psychological harm. ..."

64. While the judge accepted that P. had not put S. at risk during her pregnancy and that the parents' treatment of S. during contact sessions had been exemplary, he found that P. suffered from a personality disorder, and that such people were very difficult to treat and did not change easily. He considered that P. was in a state of deep denial about what had happened to her son B. and the potential risk that she posed to her daughter S. He referred to the expert evidence "that to receive help P. would need to accept that she remains a potentially dangerous person to S." and "that is impossible even to start where the mother is in denial to the extent that this mother plainly is". He noted that Dr Bentovim had found a small acknowledgment about her role in B.'s illness, but that P. had challenged the accuracy of his report on this point and embarked on a high-risk strategy of launching an outright attack on the American evidence.

> "At the end of a very careful and thorough cross-examination by the guardian *ad litem*, Dr Bentovim agreed ... that given the depth and longevity of the mother's state of denial, and given that the father had embraced it fully, the time scale for any therapeutic work with the mother designed to bring her to a state of understanding of and ability to address the risk posed to S. was way outside the time scale during which S. could be kept waiting for a permanent placement. Dr Bentovim's conclusion, reached I think with some regret, was that in the circumstances there could be no question of reunification of S. with her mother."

65. The judge found that C. was incapable of altering his emotional perception of P. or of accepting that she was responsible for harming her son B., although with a different woman as a partner he would have been able to bring up and care for a child. The direction of the case could have been altered if C. had acknowledged that there was a serious risk to be guarded against. C. was dominated by the mother and unable to put S.'s interests and the need to protect her first. The judge concluded that S.'s moral or physical health would be endangered by leaving her with her parents.

E. The hearing in the High Court of the application to free S. for adoption and subsequent appeals

66. On 15 March 1999 the same High Court judge heard the application to free S. for adoption. The transcript of his previous judgment was not yet

available. The final order of 15 March 1999 listed P., C. and S. as respondents. According to the applicants, C. was present throughout and was specifically asked in court if he consented to a freeing for adoption order being made, and C. indicated that he was not.

67. At the commencement of the hearing, P. informed the court that without legal representation she was significantly disadvantaged and was being deprived of a proper opportunity to advance her case. Both P. and C. had valid legal-aid certificates. The judge declined to defer the proceedings, finding that P. was capable of representing her interests and that she would have been put on notice by her lawyers at an earlier stage that the freeing for adoption application would follow the care order. Although he noted that there might appear to be "an element of railroading", on balancing the parents' interests against the need for S. to have her future decided at the earliest possible opportunity, he considered that S.'s interests prevailed. On the issue of the freeing for adoption application, the judge concluded that the parents were withholding their consent to adoption unreasonably as they should have accepted, in the light of the previous proceedings, that there was no realistic prospect of the rehabilitation of S. to their care. He therefore issued an order freeing S. for adoption. That permanently severed legal ties between S. and her parents. As regards contact, he stated:

> "I'm assured by [the local authority] that there will be conventional letter-box contact. But it will in due course (if an adoption order is made) be essentially a matter for the adoptive parents as to precisely what contact [S.] has with her natural family."

68. The judge refused P. leave to appeal against the order. Her renewed application before the Court of Appeal was refused after a hearing on 5 July 1999, where she and C. appeared in person. Although the Court of Appeal noted that C. was not a party to the appeal, it referred to the fact that C. had addressed the court at some length on the issues. It noted that that the trial was of exceptional complexity, with enormous documentation, much expert evidence and lasting twenty days. It found, however, that the judge had carefully and thoroughly weighed all the issues of fact and that he had been meticulous throughout in ensuring fairness. No error of law or any failure of procedural fairness had been demonstrated.

F. Adoption and arrangements for contact

69. The last contact visit by P. and C. with S. was on 21 July 1999.

70. On 2 September 1999 S. was placed for adoption with a family. On 13 October 1999 the local authority informed P. and C. that S. had been placed with adopters.

71. S. was adopted by an order made on 27 March 2000. P. and C. were informed on 27 April 2000.

72. The adoption order made no provision for future direct contact between S. and her parents. Any such contact was now at the discretion of the adoptive parents. By letter dated 6 July 2000, the local authority informed P. and C. that they could have limited indirect contact with S., namely, through Christmas and birthday cards, and presents. By letter dated 17 November 2000, the local authority informed them that contact was reduced at the request of the adopters to a letter from the parents once a year.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The local authority's duty to investigate

73. Section 47 of the Children Act 1989 provides:

> "(1) Where a local authority
>
> ...
>
> (b) have reasonable cause to suspect that a child who lives, or is found, in their area is suffering, or is likely to suffer, significant harm,
>
> the authority shall make, or cause to be made, such enquiries as they consider necessary to enable them to decide whether they should take any action to safeguard or promote the child's welfare."

B. Other provisions of the Children Act 1989

74. Whenever a court determines any matter in relation to the upbringing of a child, it must have regard to the provisions of the Children Act 1989, section 1, which requires that the court's paramount consideration must be the welfare of the child. The court is empowered to make care orders or supervision orders where it is satisfied that

(a) the child concerned is suffering, or is likely to suffer, significant harm;

(b) the harm, or likelihood of harm, is attributable to the care given to the child, or likely to be given to him/her if the order were not made; and

(c) that care is not what it would be reasonable to expect a parent to give to him/her (section 31).

75. Where an application is made for a care order, the local authority which is to take over the care of a child must set out the plan by which it intends to meet the welfare needs of the child (including details of contact) – the "care plan". Government guidance at the time emphasised:

> "Where a child is in the care of a local authority, the Children Act 1989 places a duty on them to make all reasonable efforts to rehabilitate the child with his or her family whenever possible unless it is clear that the child can no longer live with his

family or that the authority has sufficient evidence to suggest that further attempts at rehabilitation are unlikely to succeed." (LAC(98)20 Appendix 4)

76. The courts' approach was similar:

"The principle has to be that the local authority works to support, and eventually to reunite, the family, unless the risks are so high that the child's welfare requires alternative family care" (Lady Justice Hale in *Re C and B (Children) (Care Order: Future Harm)* [2000] 1 Family Law Reports 611)

C. The Adoption Act 1976

77. Adoption is the primary avenue in the United Kingdom by which permanent alternative care is provided for children who cannot be brought up within their own family. An adoption order, which is effectively irrevocable, gives parental responsibility to the adopters and extinguishes the pre-existing parental responsibility.

78. By virtue of section 16, an adoption order may not be made unless the child is free for adoption, or both parents have consented or their consent had been dispensed with on specified grounds.

79. Before a local authority can apply for an application to free a child for adoption, the plan for adoption must be placed before an adoption panel. In the absence of parental consent, a local authority may apply for a freeing for adoption order where the child is in the care of the local authority. The test to be applied by the courts in determining whether or not to dispense with parental consent includes the ground that the parent is withholding agreement unreasonably (section 16(2)(b)). A recent judicial approach to that test suggested that the judge should consider whether, having regard to the evidence and applying the current values of society, the advantages of adoption for the welfare of the child appeared sufficiently strong to justify overriding the views and interests of the objecting parent (*Re C (A Minor) (Adoption: Parental Agreement: Contact)* [1993] 2 Family Law Reports 260).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

80. The relevant part of Article 6 of the Convention provides:

> "1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ..."

A. The parties' submissions

1. The applicants

81. The first applicant, P., submitted that the interests of justice required that she be legally represented in proceedings which had such serious consequences for her. When her legal team withdrew from the care proceedings, the judge could have granted her an adjournment to obtain fresh representation, avoiding unnecessary delay by setting a time-limit or directing the parties to narrow the issues. The judge could also have given directions for an expedited date to bring the case back within a reasonable time. Further, the unusual speed with which the case was dealt with was not made necessary by S.'s welfare, as she had been happy where she was and was not involved in the proceedings. The judge did not take into account the impact on P. of the stress which she had been suffering. She was unable to conduct her own case adequately and it was unrealistic to suppose that she could be assisted by counsel for the other parties, who were completely opposed to her submissions. The decision to refuse an adjournment was therefore not proportionate.

82. P. submitted that, in any event, she had not changed her approach to the case, her legal team had acted bizarrely in withdrawing at the last moment and the judge could have refused their application to do so. The decision to hear the freeing for adoption proceedings within a week was also unnecessary, and the lack of adjournment to allow P. and C. to find legal representation deprived them of an adequate opportunity to take advice and to decide what submissions to make on contact. The transcript of the judgment in the care proceedings was not yet available at the time of the freeing for adoption application, although any lawyer would have needed it in order to act in the case. This area of law was complex and the applicants did not know how to address the court on the legal test for freeing for adoption. Nor did they understand that they were entitled to seek an order for contact in the freeing for adoption proceedings under section 8 of the

1989 Act or that, after a freeing for adoption order was made, they could not apply for contact without the leave of the court, which was in practice impossible to obtain at that stage.

83. As a result, without legal representation, the applicants P. and C. were left at a severe disadvantage, P. in the care proceedings and both P. and C. during the freeing for adoption proceedings.

2. The Government

84. The Government submitted that P. had been provided with legal aid but her lawyers withdrew as they were being asked to conduct the case unreasonably. The judge carefully considered the applicant's application for an adjournment to allow her to instruct new lawyers and balanced all the relevant factors. The judge found that she was able to conduct her own case adequately and would be assisted by counsel for the other parties, while he himself allowed her considerable leeway. He concluded that the result of the proceedings was not affected by any lack of legal representation. In the circumstances and with particular regard to the expert evidence that, in order to prevent damage to S., any decision on her long-term future had to be both made and if possible implemented before her first birthday, the applicant was not deprived of fair and effective access to a court.

85. The Government argued that, as a matter of domestic law, in dealing with child cases it was necessary to avoid delays that were likely to prejudice the welfare of the child. Any adjournment of the case would inevitably have meant a significant delay, having regard to the difficult task of bringing together the numerous experts involved in the case and the need to find another period of four consecutive weeks during which any High Court judge (let alone Mr Justice Wall) was available. To take an example, if a decision to adjourn had been taken on 1 March 2002, it would not have been possible to accommodate another trial of such length before a High Court judge until December 2002. If the case had been adjourned to be re-listed before an experienced circuit judge, which due to the difficult and sensitive nature of the case would not have been the parties' choice, the delay would have been about three months.

86. The Government disputed that it was always necessary for parents in child-care cases to be represented in order for the proceedings to be fair. In this case, everyone involved in the proceedings (save the applicants) were agreed that the mother had had a fair hearing and had been able to present her case properly and satisfactorily, including leading counsel for the guardian *ad litem* who was now a judge. Although it was never asserted that P. would have derived no benefit from legal representation, any such benefit would have been limited, particularly as the outcome of the case hinged to a significant degree on the cross-examination of P., where her lawyers would not have been able to give her much assistance.

87. As regards the freeing for adoption proceedings, the applicants would have had advice from their legal representatives in preparation for both sets of proceedings. C. had withdrawn from the care proceedings but, if he had not done so, continuing legal representation would have been available. The speed with which the freeing for adoption proceedings followed the care order was not unusual in the light of the need to avoid any unnecessary delay that might have a negative impact on S.'s welfare. The issues which arose would have been clear from the evidence submitted in the care proceedings and there is no indication, despite the lack of legal representation, that P. and C. were unable to participate effectively in the freeing for adoption proceedings.

B. The Court's assessment

1. General principles

88. There is no automatic right under the Convention for legal aid or legal representation to be available for an applicant who is involved in proceedings which determine his or her civil rights. Nonetheless, Article 6 may be engaged under two interrelated aspects.

89. Firstly, Article 6 § 1 of the Convention embodies the right of access to a court for the determination of civil rights and obligations (see *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, p. 18, § 36). Failure to provide an applicant with the assistance of a lawyer may breach this provision where such assistance is indispensable for effective access to court, either because legal representation is rendered compulsory as is the case in certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or the type of case (see *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, pp. 14-16, §§ 26-28, where the applicant was unable to obtain the assistance of a lawyer in judicial separation proceedings). Factors identified as relevant in *Airey* in determining whether the applicant would have been able to present her case properly and satisfactorily without the assistance of a lawyer included the complexity of the procedure, the necessity to address complicated points of law or to establish facts, involving expert evidence and the examination of witnesses, and the fact that the subject matter of the marital dispute entailed an emotional involvement that was scarcely compatible with the degree of objectivity required by advocacy in court. In such circumstances, the Court found it unrealistic to suppose that the applicant could effectively conduct her own case, despite the assistance afforded by the judge to parties acting in person.

90. It may be noted that the right of access to a court is not absolute and may be subject to legitimate restrictions. Where an individual's access is limited either by operation of law or in fact, the restriction will not be

incompatible with Article 6 where the limitation did not impair the very essence of the right and where it pursued a legitimate aim, and there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Ashingdane v. the United Kingdom*, judgment of 28 May 1985, Series A no. 93, pp. 24-25, § 57). Thus, although the pursuit of proceedings as a litigant in person may on occasion not be an easy matter, the limited public funds available for civil actions renders a procedure of selection a necessary feature of the system of administration of justice, and the manner in which it functions in particular cases may be shown not to have been arbitrary or disproportionate, or to have impinged on the essence of the right of access to a court (see *Del Sol v. France*, no. 46800/99, ECHR 2002-II, and *Ivison v. the United Kingdom* (dec.), no. 39030/97, 16 April 2002). It may be the case that other factors concerning the administration of justice (such as the necessity for expedition or the rights of others) also play a limiting role as regards the provision of assistance in a particular case, although such restriction would also have to satisfy the tests set out above.

91. Secondly, the key principle governing the application of Article 6 is fairness. In cases where an applicant appears in court notwithstanding lack of assistance by a lawyer and manages to conduct his or her case in the teeth of all the difficulties, the question may nonetheless arise as to whether this procedure was fair (see, for example, *McVicar v. the United Kingdom*, no. 46311/99, §§ 50-51, ECHR 2002-III). There is the importance of ensuring the appearance of the fair administration of justice and a party in civil proceedings must be able to participate effectively, *inter alia*, by being able to put forward the matters in support of his or her claims. Here, as in other aspects of Article 6, the seriousness of what is at stake for the applicant will be of relevance to assessing the adequacy and fairness of the procedures.

2. Application to the present case

92. The Court observes that the applicant P. was awarded legal aid for representation by a lawyer in the proceedings brought by the local authority in applying for a care order and a freeing for adoption order in respect of her daughter S. This reflected the position in the domestic legal system that in such proceedings as a general rule the interests of justice require a parent to be given legal assistance. Initially, therefore, P. was represented by senior and junior counsel and solicitors, who prepared her case and advised her up until the hearing of the application for a care order which commenced on 2 February 1999. However, on 5 February 1999, her lawyers applied to the judge to withdraw from the proceedings, alleging that P. was asking them to conduct the case in an unreasonable manner. The judge allowed them to withdraw. He allowed P. an adjournment of four days until 9 February 1999, at which point he refused any further adjournment, giving detailed

reasons for that decision which obliged the applicant to conduct her own case over the bulk of the trial. After making the care order on 8 March 1999, the judge fixed the hearing of the application for the freeing of S. for adoption for one week later on 15 March 1999. On that date, he refused the application of P. for the proceedings to be deferred to allow her to obtain legal representation. He then proceeded after the hearing of the application to issue an order freeing S. for adoption without any provision for continued direct contact. There can be no doubt therefore of the seriousness of the outcome of the proceedings for P. and C., which deprived them of the possibility of bringing S. up in their family and of any future contact with her and which severed their legal relationship with her.

93. The applicants' complaints about the lack of legal assistance during these proceedings were met by the Government's arguments largely based on the reasoning given by the judge for the procedural decisions which he took. In the care proceedings, the judge considered that P. was well able, and had shown herself able, to present her own case, with assistance from counsel representing other parties in court and with considerable leeway given by himself. He gave great weight to the opinion given by Dr Bentovim that the future of S. should be settled by her first birthday and considered that any adjournment would inevitably jeopardise her welfare due to the delay factor. The Government have emphasised the difficulties which would have been attached to re-listing a trial of this length.

94. The Court has paid careful attention to the reasons given by the trial judge in this case, whose long judgment received merited praise in the Court of Appeal for the thoroughness of his analysis and who had first-hand experience of the events and participants. It also notes that the Court of Appeal considered that the proceedings had been fair, an opinion shared by counsel for the guardian *ad litem*, who represented S.

95. Nonetheless, P. was required as a parent to represent herself in proceedings which, as the Court of Appeal observed, were of exceptional complexity, extending over a period of twenty days, in which the documentation was voluminous and which required a review of highly complex expert evidence relating to the applicants P. and C.'s fitness to parent their daughter. Her alleged disposition to harm her own children, together with her personality traits, were at the heart of the case, as was her relationship with her husband. The complexity of the case, along with the importance of what was at stake and the highly emotive nature of the subject matter, lead this Court to conclude that the principles of effective access to a court and fairness required that P. receive the assistance of a lawyer. Even if P. was acquainted with the vast documentation in the case, the Court is not persuaded that she should have been expected to take up the burden of conducting her own case. It notes that at one point in the proceedings, which were conducted at the same time as she was coping with the distress of the removal of S. at birth, P. broke down in the courtroom

and the judge, counsel for the guardian *ad litem* and a social worker, had to encourage her to continue (see paragraph 61 above).

96. The Court notes that the judge himself commented that if P. had been represented by a lawyer her case would have been conducted differently. Although he went on in his judgment to give the opinion that this would not have affected the outcome of the proceedings, this element is not decisive as regards the fairness of the proceedings. Otherwise, a requirement to show actual prejudice from a lack of legal representation would deprive the guarantees of Article 6 of their substance (see *Artico v. Italy*, judgment of 13 May 1980, Series A no. 37, pp. 17-18, § 35). Similarly, while the judge considered that the case would turn on the cross-examination of P., where a lawyer would have been able to give only limited assistance, that assistance would nonetheless have furnished P. with some safeguards and support.

97. While it is also true that P. and C. were aware that the freeing for adoption application was likely to follow the care application within a short time, this does not mean that they were in an adequate position to cope with the hearing when it occurred. This hearing also raised difficult points of law and emotive issues, in particular since the issuing of the care order, and the rejection of the applicants' claims to have S. returned home, must have had a significant and distressing impact on the parents.

98. Nor is the Court convinced that the importance of proceeding with expedition, which attaches generally to child-care cases, necessitated the draconian action of proceeding to a full and complex hearing, followed within one week by the freeing for adoption application, both without legal assistance being provided to the applicants. Although it was doubtless desirable for S.'s future to be settled as soon as possible, the Court considers that the imposition of one year from birth as the deadline appears a somewhat inflexible and blanket approach, applied without particular consideration for the facts of this individual case. S. was, according to the care plan, to be placed for adoption and it was not envisaged that there would be any difficulty in finding a suitable adoptive family (eight couples were already identified by 2 February 1999). Yet, although S. was freed for adoption by the court on 15 March 1999, she was not in fact placed with a family until 2 September 1999, a gap of over five months for which no explanation has been given, while the adoption order which finalised matters on a legal basis was not issued until 27 March 2000, that is, more than a year later. S.'s placement was therefore not achieved by her first birthday in May in any event. It is not possible to speculate at this time as to how long the adjournment would have lasted had it been granted in order to allow the applicant P. to be represented at the care proceedings, or for both parent applicants to be represented at the freeing for adoption proceedings. It would have been entirely possible for the judge to place strict time-limits on any lawyers instructed, and for instructions to be given for re-listing the

matter with due regard to priorities. As the applicants have pointed out, S. was herself in a successful foster placement and unaffected by the ongoing proceedings. The Court does not find that the possibility of some months' delay in reaching a final conclusion in those proceedings was so prejudicial to her interests as to justify what the trial judge himself regarded as a procedure which gave an appearance of "railroading" her parents.

99. Recognising that the courts in this matter were endeavouring in good faith to strike a balance between the interests of the parents and the welfare of S., the Court is nevertheless of the opinion that the procedures adopted not only gave the appearance of unfairness but prevented the applicants from putting forward their case in a proper and effective manner on the issues which were important to them. For example, the Court notes that the judge's decision to free S. for adoption gave no explanation of why direct contact was not to be continued or why an open adoption with continued direct contact was not possible, matters which the applicants apparently did not realise could, or should, have been raised at that stage. The assistance afforded to P. by counsel for other parties and the latitude granted by the judge to P. in presenting her case was no substitute, in a case such as the present one, for competent representation by a lawyer instructed to protect the applicants' rights.

100. The Court concludes that the assistance of a lawyer during the hearing of these two applications which had such crucial consequences for the applicants' relationship with their daughter was an indispensable requirement. Consequently, the parents did not have fair and effective access to a court as required by Article 6 § 1 of the Convention. There has, therefore, been a breach of this provision as regards the applicant parents, P. and C.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

Article 8 of the Convention provides in its relevant parts:

> "1. Everyone has the right to respect for his ... family life ...
>
> 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 ... for the protection of health ... or for the protection of the rights and freedoms of others."

A. The parties' submissions

1. The applicants

101. The applicants P. and C. complained that the domestic law and practice on child care and adoption was contrary to this provision, in particular the practice of instituting adoption proceedings together with care proceedings in respect of babies, and the use of freeing for adoption orders which are draconian and irreversible. In practice, no alternatives to adoption were offered.

102. While they accepted that there was a duty on the local authority to investigate, they submitted that the measures taken in this case were harsh and excessive and failed to involve the parents sufficiently in the decision-making process or even to give proper forewarning. Since P. was in bed in hospital following a Caesarean section, they questioned the necessity of seizing the baby at once, in particular in an *ex parte* emergency procedure. As she was very weak after a difficult birth and had drips in her arms and was catheterised, she was in no physical state to abscond with S. or cause her harm. The removal of the child also went against S.'s own interests as it deprived her of the possibility of breast-feeding which had recognised health benefits, as it did for P. as her mother. It was never acknowledged that such a harsh measure was bound to cause severe shock and, in the proceedings that followed, exacerbate P.'s defensive reaction. Further, the local authority would not bring S. to the hospital for contact visits, a fact which led P. to discharge herself as early as possible in order to see her baby with C. on supervised visits outside.

103. These measures taken together deprived P. and C. of any further family life with S. and were inconsistent with the aim of reuniting them with their daughter. The local authority, whose attitude was unremittingly negative towards them, ignored the parents' excellent record of contact with S., their stable marriage and the fact that S. was placed with experienced foster parents. They failed to give any consideration to the possibility of long-term supervised contact or future rehabilitation, or to carry out a comprehensive social-work assessment of the family as a whole, as recommended by Dr Eminson. The applicants contrasted the approach of the Californian court, which never terminated P.'s ties with her son B. No steps were taken, despite expert recommendation, to obtain an assessment to see if P. would be suitable for family therapy. They disputed that the reason given, namely P.'s highly defensive response to the litigation, was sufficient for that failure, as the authorities were aware that P. was undergoing an exceptionally traumatic experience. Nor was any assessment made of the family together, despite the very positive relationship that had developed on contact visits. In the absence of alternative proposals from the local authority, the judge had no alternative but to make a care order.

104. The way in which the care proceedings and the freeing of S. for adoption were combined, decreased any possibility of exploring future rehabilitation and reunification. S.'s welfare did not require the authorities to move so quickly, most adoptions taking place within two, rather than one

year. Even assuming that P. and C. were not able to care for S. at that stage, this did not justify the freeing for adoption order which severed all legal ties. S. could have been placed for adoption under the care order without this step. There had already been a degree of natural bonding through contact visits which was brought to an end without any sufficient reasons to show why this drastic course was in S.'s best interests. P. and C. had never harmed S. and there was no suggestion that C. posed a risk to S. The possibility of long-term fostering with continued direct contact, or adoption with continued direct contact, was never properly investigated, assessed or examined. The applicants denied the Government's assertion that such an arrangement would not have been sufficiently stable or secure. It would have allowed S. to retain the comfort and security of knowing her parents loved her, avoided any damaging sense of abandonment and reinforced S.'s sense of family and personal identity.

105. The complaints that there were insufficient steps taken to provide for direct contact after the adoption were made on behalf of themselves and their daughter S. The authorities had shown an inflexible approach on this matter. The applicants denied that such contact would have been detrimental to S., pointing out that, notwithstanding the proceedings, they had always put aside their personal feelings in contact sessions to concentrate on S. and her needs, and it could not be assumed that P. and C. would tell her anything harmful in the future. As regards any alleged risk to S., it would not have been onerous to ensure that a responsible carer supervised the visits and, to the extent that the Government appear to rely on the adopters' opposition to contact, no reasons for this were given and, in view of the research on the subject, the adopters' opposition to contact was probably influenced by the negative views of the local authority.

2. The Government

106. The Government denied that the domestic child-care system in any way failed to respect the requirements of Article 8 of the Convention, pointing out that the child's welfare and need for secure placement was at the heart of the authorities' concerns and that the importance of safeguarding the link between a child and the family of origin was recognised. Adoptions could provide for contact, where such was in the child's interests.

107. They submitted that while the care order and freeing for adoption order amounted to interferences with rights protected under Article 8 § 1, any such interference complied with the second paragraph as being necessary in a democratic society for protecting the health and rights of S. The two key factors were the exceptional threat to S. in terms of the nature of the risk posed by MSBP and the vigorous and unwavering position of P. and C., which led the experts, the local authority and the judge all to conclude that there was no alternative but to rule out any realistic prospect of safely reuniting S. with either or both of her parents.

108. As regards the emergency protection order, the measure was justified by the exceptional circumstances of the case. Article 3 of the Convention imposed an obligation to protect the new-born baby from serious harm. They pointed to the fact that the parents did not accept the need to protect S. from P. and that the local authority had firm advice from Dr Schreier that the baby should be removed at birth, supported by the opinions of Dr Eminson and later Dr Bentovim. The hospital authorities had stated that they could not guarantee the baby's safety, the very nature of the risk (poisoning) making it extremely difficult to ensure effective supervision in a hospital setting. Despite P.'s incapacity, S. might have been removed by C. or his parents. In addition, the decision not to give notice of the emergency application was justified to prevent the family taking action before or after the birth to keep S. from the care of the authorities. Furthermore the authorities had been waiting for Dr Eminson's report, which had been delayed due to the parents' prevarication over her appointment.

109. The Government submitted that the care order was supported by relevant and sufficient reasons, pointing to the findings of fact reached by the judge regarding P.'s actions in causing her son B. significant physical and psychological harm; the fact that P. suffered from a personality disorder; the fact that P.'s position held over a period of years was that she was not guilty of intentionally harming B., a view which C. supported; the unanimous psychiatric opinion that in order to receive help P. would need to accept that she remained a potentially dangerous person to her children; the inability of both parents to acknowledge any risk to S.; and the fact that the time scale for any therapeutic work with P. was far outside the period during which S. could be kept waiting for a permanent placement. They argued that cases involving MSBP were particularly difficult to evaluate and that the authorities should be allowed the widest possible margin of appreciation in assessing the risks and the appropriate measures.

110. The Government denied that there was any lack of regard for the prospect of keeping the family together, stating that adoption and long-term fostering were a last resort and only occurred when placement with the family was precluded. The practice of contingency planning whereby the local authority ran twin-track options – rehabilitation within a limited time framework or adoption outside the family – pursued the interests of the child in ensuring a secure future. It was not the case that the court had no option but to make a care order or that it could not question the care plan. If it had considered that other measures were possible, it could have refused a final care order and made interim care orders pending further assessments. Nor was there any failure to give proper consideration to rehabilitation. Dr Bentovim, for example, had considered that there was a possible opening for therapeutic work with P. on the basis of her partial acceptance of responsibility, but P. had immediately challenged his evidence on this point

and maintained a total denial. Similarly, if C. had been able to accept the existence of risk, the outcome might also have been different.

111. As regards the freeing for adoption order, the Government emphasised the importance of avoiding delay once the plan for a child has been identified and the fact that damage can be done to children who linger in temporary care. The hearing of the freeing for adoption application in tandem with, or shortly after, the care order was fully justified in the interests of the child and fair to the parents and the child. Once the decision was taken that the best interests of S. were served by placement for adoption away from her family, the priority was to achieve that at the earliest opportunity to allow her the best prospect of settling in an adoptive home. Any other arrangements which were not definitive, would inevitably have been significantly less stable and secure than adoption, with the potential risk of confusion in S.'s relationships. Given the finding that the applicants could not provide a safe and satisfactory upbringing for S., the measures taken, although they involved a permanent and irrevocable legal separation, were proportionate to the pressing social need of protecting S. and providing her with a secure and stable family life.

112. As regards contact, it would have been possible for the court to make an order for contact at the same time as the freeing for adoption order. However, once S. was placed with her adoptive family, the priority from her perspective was the establishment and reinforcement of her new home. Notwithstanding the positive contact with the applicants, it was assessed that further direct contact was not in her interests as neither parent accepted the outcome of the proceedings or the validity of the reasons; at any direct contact meeting it was likely that their views on this would be communicated, causing confusion and possibly undermining the placement; and, furthermore, the adopters were opposed to direct contact. In so far as complaint was made of the reduction in the indirect contact since adoption, they pointed out that the local authority no longer had any parental responsibility and the decision lay with the adoptive parents.

B. The Court's assessment

1. General principles

113. The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 of the Convention (see, *inter alia*, *Johansen v. Norway*, judgment of 7 August 1996, *Reports of Judgments and Decisions* 1996-III, pp. 1001-02, § 52). Any such interference constitutes a violation of this Article unless it is "in accordance with the law", pursues an aim or aims that

are legitimate under paragraph 2 and can be regarded as "necessary in a democratic society".

114. In determining whether the impugned measures were "necessary in a democratic society", the Court will consider whether, in the light of the case as a whole, the reasons adduced to justify these measures were relevant and sufficient for the purpose of paragraph 2 of Article 8 (see, *inter alia*, *Olsson v. Sweden (no. 1)*, judgment of 24 March 1988, Series A no 130, p. 32, § 68).

115. It must be borne in mind that the national authorities have the benefit of direct contact with all the persons concerned (see *Olsson v. Sweden (no. 2)*, judgment of 27 November 1992, Series A no. 250, pp. 35-36, § 90). It follows from these considerations that the Court's task is not to substitute itself for the domestic authorities in the exercise of their responsibilities for the regulation of the public care of children and the rights of parents whose children have been taken into care, but rather to review under the Convention the decisions taken by those authorities in the exercise of their power of appreciation (see, for instance, *Hokkanen v. Finland*, judgment of 23 September 1994, Series A no. 299-A, p. 20, § 55; and *Johansen*, cited above, pp. 1003-04, § 64).

116. The margin of appreciation so to be accorded to the competent national authorities will vary in the light of the nature of the issues and the seriousness of the interests at stake. While the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care, in particular where an emergency situation arises, the Court must still be satisfied in the particular case that there existed circumstances justifying the removal of the child, and it is for the respondent State to establish that a careful assessment of the impact of the proposed care measure on the parents and the child, as well as of the possible alternatives to taking the child into public care, was carried out prior to implementation of such a measure (see *K. and T. v. Finland* [GC], no. 25702/94, § 166, ECHR 2001-VII, and *Kutzner v. Germany*, no. 46544/99, § 67, ECHR 2002-I). Furthermore, the taking of a new-born baby into public care at the moment of its birth is an extremely harsh measure. There must be extraordinarily compelling reasons before a baby can be physically removed from its mother, against her will, immediately after birth as a consequence of a procedure in which neither she nor her partner has been involved (see *K. and T.*, cited above, § 168).

117. Following any removal into care, a stricter scrutiny is called for in respect of any further limitations by the authorities, for example on parental rights of access, as such further restrictions entail the danger that the family relations between the parents and a young child are effectively curtailed (see *Johansen*, pp. 1003-04, § 64, and *Kutzner*, § 67, both cited above). The taking into care of a child should normally be regarded as a temporary measure to be discontinued as soon as circumstances permit, and any

measures of implementation of temporary care should be consistent with the ultimate aim of reuniting the natural parent and child (see *Olsson (no. 1)*, cited above, pp. 36-37, § 81; *Johansen*, cited above, pp. 1008-09, § 78; and *E.P. v. Italy*, no. 31127/96, § 69, 16 November 1999). In this regard a fair balance has to be struck between the interests of the child remaining in care and those of the parent in being reunited with the child (see *Olsson (no. 2)*, cited above, pp. 35-36, § 90, and *Hokkanen*, cited above, p. 20, § 55). In carrying out this balancing exercise, the Court will attach particular importance to the best interests of the child which, depending on their nature and seriousness, may override those of the parent (see *Johansen*, cited above, pp. 1008-09, § 78).

118. As regards the extreme step of severing all parental links with a child, the Court has taken the view that such a measure would cut a child from its roots and could only be justified in exceptional circumstances or by the overriding requirement of the child's best interests (see *Johansen*, cited above, p. 1010, § 84, and *Gnahoré v. France*, no. 40031/98, § 59, ECHR 2000-IX). That approach, however, may not apply in all contexts, depending on the nature of the parent-child relationship (see *Söderbäck v. Sweden*, judgment of 28 October 1998, *Reports* 1998-VII, pp. 3095-96, §§ 31-34, where the severance of links between a child and father, who had never had care and custody of the child, was found to fall within the margin of appreciation of the courts which had made the assessment of the child's best interests).

119. The Court further reiterates that, whilst Article 8 contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to afford due respect to the interests safeguarded by that Article:

> "[W]hat ... has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as 'necessary' within the meaning of Article 8." (see *W. v. the United Kingdom*, judgment of 8 July 1987, Series A no. 121, pp. 28-29, §§ 62 and 64)

120. It is essential that a parent be placed in a position where he or she may obtain access to information which is relied on by the authorities in taking measures of protective care or in taking decisions relevant to the care and custody of a child. Otherwise the parent will be unable to participate effectively in the decision-making process or to put forward in a fair or adequate manner those matters militating in favour of his or her ability to provide the child with proper care and protection (see *McMichael v. the United Kingdom*, judgment of 24 February 1995, Series A no. 307-B, p. 57, § 92, where the authorities did not disclose to the applicant parents reports

relating to their child, and *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, ECHR 2001-V, where the applicant mother was not afforded an early opportunity to view a video of an interview of her daughter, crucial to the assessment of abuse in the case; see also *Buchberger v. Austria*, no. 32899/96, 20 December 2001).

2. The state of domestic law

121. The applicants have complained that the law governing adoption in the United Kingdom is in breach of the Convention, in that it permits, if not facilitates, the removal of very young babies from their parents with subsequent adoption and severance of all legal links.

122. It is not however the Court's role to examine domestic law in the abstract. In any event, since there are circumstances which may be envisaged where a young baby might be adopted in conformity with Article 8 of the Convention, it cannot be considered that the law *per se* is in breach of this provision. The Court will examine rather whether the measures taken in this particular case complied with the guarantees of Article 8 of the Convention.

3. The removal of S. at birth

123. The Court notes that S. was born on 7 May 1998, at 4.42 a.m., after P. was brought into hospital for an emergency Caesarean. The local authority obtained an emergency protection order at about 10.30 a.m. which placed S. under their care. At about 4 p.m., the social workers took S. from the hospital and placed her with foster parents. It is uncontested that these matters constituted interferences with the applicants' rights under the first paragraph of Article 8 and that it falls to be determined whether they complied with the requirements of the second paragraph. As it is also not in dispute that the measures taken were in accordance with the law and pursued the legitimate aim of the protection of health and the rights of others, namely of S., the Court's examination will concentrate on the necessity of the measures as that term has been interpreted in its case-law (see paragraphs 114-19 above).

124. The applicants have argued that these measures were not necessary for S.'s protection and were disproportionate, pointing, *inter alia*, to P.'s weakened state, the draconian step for both mother and baby of removal so soon after birth and the possibility that S. could have remained in the hospital with her mother under supervision. They have also criticised the decision-making process before the birth, alleging that they were not properly involved or informed and that it should have been possible to take the matter before a court for a fair examination of the issues before the birth.

125. Firstly, as regards the procedures adopted by the local authority prior to the birth, the Court would note that the applicants accept that there

was legitimate cause for concern when the social services discovered that P., who was about to have a baby, had a conviction for harming one of her other children. The local authority was under a duty to investigate under section 47 of the Children Act 1989, and they commenced that investigation in January 1998 once they became aware of the situation. The Court is not persuaded that there was any failure to involve the applicants in the investigative procedure which followed. The local authority consulted them about the nomination of an expert in MSBP to assess the risk, and invited them to an initial meeting in January 1998, and to a case conference on 2 March 1998 where the situation was discussed with the professionals involved in the case. There were further meetings between the social workers and the parents and, once Dr Eminson was instructed, she saw both parents with a view to drawing up her report.

126. While the applicants complain that they were not properly informed that the local authority were going to take the baby away at birth, and indeed Dr Eminson had advised the local authority to be frank and open with the applicants, the Court notes that it appears that the applicants were nonetheless aware that removal at birth was one of the options which the local authority was considering – Dr Maresh, P.'s consultant obstetrician, stated that P. knew that this was a strong possibility, and Dr Bentovim in his report stated, after interviewing P., that she knew that the baby would be removed at birth. While the local authority appears to have taken the view from 1 April 1998 that it would be necessary to take the baby away, it would seem that no final decision was taken until the day of the birth, which occurred earlier than foreseen. The Government stated that the social services obtained the order in the morning and then discussed the possibility of leaving the baby in the hospital with the hospital personnel. It was only when they came to the conclusion that this was not an option that they decided to implement the removal in the afternoon. This does not disclose, in the Court's view, any failure of consultation or information *vis-à-vis* the parents.

127. Nor does the Court consider that in the circumstances the local authority can be criticised for not attempting to have the matter of the emergency removal decided in an *inter partes* hearing in court before the birth. The report of Dr Eminson was not ready before the birth and it is highly unlikely that sufficient evidence would have been available to a court for it to have reached a position on the difficult issues of MSBP arising out of the evidence from the United States or on the applicants' parental capabilities and psychological states. Furthermore, the birth occurred early, and it cannot be excluded that the stress of court appearances before the birth would have been highly deleterious to P., who showed problems with high blood pressure, and thus also potentially harmful to the unborn child.

128. Questions of emergency care are, by their nature, decided on a highly provisional basis and on an assessment of risk to the child reached on

the basis of the information, inevitably incomplete, available at the time. The Court considers that it was within the proper role of the local authority in its child-protection function to take steps to obtain an emergency protection order. It finds that there were relevant and sufficient reasons for this measure, in particular the fact that P. had been convicted for harming her son B. and had been found by an expert in those proceedings to suffer from a syndrome which manifested itself in exaggerating and fabricating illness in a child, with consequent significant physical and psychological damage to the child.

129. There has been much argument between the parties concerning the other suspicions and allegations raised by the local authority: for example, that P. had been harassing the expert doctor and the district attorney in California, that C. had pretended to be P.'s therapist and that P. was showing signs of conduct harmful to the foetus. It is true that these matters were not proved or upheld in the later care proceedings. Nonetheless, the local authority had been receiving information both from the authorities in the United States and from health professionals in the case, which added to their concerns. The local authority also considered that the applicants were not cooperative and had been evasive. The applicants disputed this hotly, countering that the local authority was hostile and over-reacting to the MSBP label. The Court observes that both sides viewed matters from markedly different perspectives. The applicants, on the one hand, influenced *inter alia* by C.'s own social-work experience and his research into MSBP, were insistent on obtaining as much information as possible on the local authority's approach to this crucial matter, which they regarded as misguided, and they safeguarded their position by instructing solicitors. This gave their attitude a certain litigious appearance from an early stage. The local authority, on the other hand, was receiving information from the United States which placed P. in a very suspicious light, the significance of which information P. and C. seemed to be refusing to accept. This gave the local authority the firm impression that P. and C. were not focusing on the real concern in the case, the risk to S., and that there was little room for manoeuvre. This was supported by the opinion of Dr Schreier who wrote in April 1998 that there was a high level of risk to the child, and the preliminary views of Dr Eminson, noted on 6 May 1998, who had found that the basis on which to work with the parents at that stage was very limited.

130. In the circumstances, the Court considers that the decision to apply for the emergency protection order after S.'s birth may be regarded as having been necessary in a democratic society to safeguard the health and rights of the child. The local authority had to be able to take appropriate steps to ensure that no harm came to the baby and, at the very least, to obtain the legal power to prevent C. or any other relative from removing the

baby with a view to foiling the local authority's actions, and thereby placing the baby at risk.

131. It has nonetheless given consideration to the manner of implementation of the order, namely, the steps taken under the authority of the order. As stated above (see paragraph 116), the removal of a baby from its mother at birth requires exceptional justification. It is a step which is traumatic for the mother and places her own physical and mental health under a strain, and it deprives the new-born baby of close contact with its natural mother and, as pointed out by the applicants, of the advantages of breast-feeding. The removal also deprived the father, C., of being close to his daughter after the birth.

132. The reasons put forward by the Government for removing the baby from the hospital, rather than leaving her with her mother or father under supervision, are that the hospital staff stated that they could not ensure the child's safety and alleged tensions with the family. No details or documentary substantiation of this assertion are provided. P., who had undergone a Caesarean section and was suffering the after-effects of blood loss and high blood pressure, was, at least in the first days after the birth, confined to bed. Once she had left the hospital, she was permitted to have supervised contact visits with S. It is not apparent to the Court why it was not at all possible for S. to remain in the hospital and to spend at least some time with her mother under supervision. Even on the assumption that P. might be a risk to the baby, her capacity and opportunity for causing harm immediately after the birth must be regarded as limited, considerably more limited than once she was discharged. Furthermore, on the information available to the authorities at that stage, the manifestation of P.'s syndrome, sometimes known as MSBP, was that she showed a tendency to exaggerate symptoms of ill health in her children and that she had gone so far as to use laxatives to induce diarrhoea. Although the harm which such conduct causes to a child, particularly if continued over a long period of time, cannot be underestimated, there was in the present case no suspicion of life-threatening conduct. This made the risk to be guarded against more manageable and it has not been shown that supervision could not have provided adequate protection against this risk, as was the case in the many contact visits over the months leading up to the care proceedings, when both parents were allowed to feed the baby (see Dr Bentovim's report, paragraph 54 above).

133. The Court concludes that the draconian step of removing S. from her mother shortly after birth was not supported by relevant and sufficient reasons and that it cannot be regarded as having been necessary in a democratic society for the purpose of safeguarding S. There has therefore been, in that respect, a breach of the applicant parents' rights under Article 8 of the Convention.

4. The care and freeing for adoption proceedings

134. The Court notes that on 8 March 1999, after a hearing lasting about twenty days and involving numerous witnesses, the judge issued a care order placing S. in the care of the local authority, finding that her moral and physical health would be endangered by leaving her with her parents. On 15 March 1999 the judge freed S. for adoption, thereby severing the links between the parents and S., who was adopted on 27 March 2000. No provision for future direct contact was made, reference only being made to indirect contact at the discretion of the future adoptive parents, who as events turned out reduced contact to one letter-box contact per year. It is also not in dispute that these measures interfered with the applicants' rights under the first paragraph of Article 8 of the Convention and that they were in accordance with the law and pursued the legitimate aim of protecting S. Issues arise, however, as to whether they were justified as necessary within the meaning of the second paragraph (see paragraphs 114-19 above).

135. The applicants have made numerous criticisms about the procedures, which emphasise their conviction that the local authority made no effort to explore the rehabilitation of S. with themselves, but rather were determined to place S. for adoption from the beginning, and that insufficient consideration was given to providing for some form of continued contact with S. after the care order, whether by placing her in long-term foster care or by arranging an open adoption. The Government have relied, *inter alia*, on the findings of the trial judge as to the absence of any possibility of rehabilitation with S. due to the parents' lack of acceptance of any risk (the precondition for any hope of progress). They contended that adoption, which would give S. a secure place in a family, was in S.'s best interests and that an open adoption was not possible where the natural parents opposed the adoption (as their opposition would inevitably undermine the security of the child's placement).

136. The Court does not propose to attempt to untangle these opposed considerations, which raise difficult and sensitive issues concerning S.'s welfare. It considers rather that the complexity of the case, and the fine balance which had to be struck between the interests of S. and her parents, required that particular importance be attached to the procedural obligations inherent in Article 8 of the Convention. It was crucial for the parents in this case to be able to put forward their case as favourably as possible, emphasising for example whatever factors militated in favour of a further assessment of a possible rehabilitation, and for their viewpoints on the possible alternatives to adoption and the continuation of contact even after adoption to be put forward at the appropriate time for consideration by the court.

137. The lack of legal representation of P. during the care proceedings and of P. and C. during the freeing for adoption proceedings, together with the lack of any real lapse of time between the two procedures, has been

found above to have deprived the applicants of a fair and effective hearing in court. Having regard to the seriousness of what was at stake, the Court finds that it also prevented them from being involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests under Article 8 of the Convention. Emotionally involved in the case as they were, the applicant parents were placed at a serious disadvantage by these elements, and it cannot be excluded that this might have had an effect on the decisions reached and eventual outcome for the family as a whole.

138. In the circumstances of this case, the Court concludes that there has been in this regard a breach of P., C. and S.'s rights under Article 8 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 12 OF THE CONVENTION

139. Article 12 of the Convention provides:

> "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

A. The parties' submissions

140. The applicants P. and C. argued that having children was an essential part of the right guaranteed under this provision. On the facts of this case, the authorities' actions have had such an invasive and deterrent effect as also to infringe this provision. Due to P.'s age, it was unlikely that she would be able to have another child by their marriage.

141. The Government submitted that measures which were justified under Article 8 of the Convention could not raise separate issues under this provision. In any event, Article 12 did not in their view guarantee a separate right to have children or to retain contact with those children.

B. The Court's assessment

142. The Court has found above that the removal of S. after birth and the lack of legal representation during the care and freeing for adoption proceedings disclosed violations of Article 8 of the Convention. Observing that Article 12 relates to the right to found a family and does not concern, as such, the circumstances in which interferences with family life between parents and an existing child may be justified, where Article 8 may be regarded as the *lex specialis*, the Court finds that no separate issue arises under this provision in the present case.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

143. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

1. The parties' submissions

144. The applicants P. and C. claimed 7,510 pounds sterling (GBP) for their own costs and expenses arising out of the domestic proceedings and the proceedings before this Court. This included items such as travel to court, car parking, telephone and photocopying costs, research costs and the cost of travelling on twelve occasions to meet with their legal representatives for the Convention proceedings.

145. The applicants P. and C. also claimed that they had sustained non-pecuniary damage from the breaches of Articles 8 and 6 of the Convention, emphasising the extreme grief and frustration which they had experienced and their lasting distress at being irreversibly separated from S. They also invited the Court to conclude that S. had suffered an appreciable loss. They referred to the previous awards made by the Court in other child-care cases, and proposed that they should hold any amount awarded to S. on trust for S., which would allow them to apply income for S.'s benefit. She would inherit the capital when she was 18 years old.

146. The Government considered that the costs claimed by the applicants for their own expenses were not recoverable as such because no causal link had been established between the alleged losses and the alleged violations. These costs would have been incurred irrespective of whether the proceedings in issue had violated the Convention or not.

147. As regards non-pecuniary damage, the Government submitted that while the applicants P. and C. may well have suffered some distress and frustration from events, the local authority had done everything possible to ascertain the risk of harm posed to S. by P., and the advice was unanimous in concluding that P. posed a significant risk to S.'s health. Also the applicants, through their uncooperative stance, to a very large extent contributed to the distress and frustration that they may have experienced, *inter alia*, by denying Dr Bentovim's account of his interview with P. and by challenging the evidence from the United States. In those circumstances, a finding of a violation of the Convention would be sufficient just satisfaction in this case. In any event, they considered that any award in excess of GBP 5,000 for each adult applicant would be excessive and inappropriate,

pointing to awards in cases where the parents concerned had not been considered a risk to their children.

2. The Court's assessment

148. As regards the applicants' claims for pecuniary loss, the Court's case-law establishes that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention (see, among other authorities, *Barberà, Messegué and Jabardo v. Spain* (Article 50), judgment of 13 June 1994, Series A no. 285-C, pp. 57-58, §§ 16-20, and *Çakıcı v. Turkey* [GC], no. 23657/94, § 127, ECHR 1999-IV). In this case, the Court has found violations of Article 6 and 8 in respect of the lack of legal representation of P. and C. during the procedures and the shortness of time between the two key hearings, as well as a breach of Article 8 in respect of the removal of S. at birth. There is no causal link between these violations and the costs claimed for attending and preparing for the domestic proceedings, in which the applicants would have participated in any event. Nor do the costs of travel by the applicant parents to meet with their legal representatives in these proceedings constitute a head of recoverable damage, the ordinary incidents in pursuing individual applications being regarded as an intrinsic and inevitable part of the process. Where an applicant was unrepresented through part or all of the proceedings, the Court has on occasion made awards under the heading of legal costs and expenses, to reflect reasonable sums necessarily incurred in the course of submitting an application (see, for example, *Scarth v. the United Kingdom*, no. 33745/96, 22 July 1999, and *McLeod v. the United Kingdom*, judgment of 23 September 1998, *Reports* 1998-VII). The present applicants, as appears below, were represented by a number of lawyers, who have presented quite substantial claims. In the circumstances, the Court makes no award for pecuniary damage.

149. Turning to the claims for non-pecuniary damage, the Court does not consider that it can be asserted that S. would not have been adopted if the flaws identified in the procedures had not occurred, although it cannot be excluded that the situation of the family might have been different in some respects. They thereby suffered a loss of opportunity. In addition, the applicants P. and C. certainly sustained non-pecuniary damage through distress and anxiety.

150. The Court thus concludes that the applicants P. and C. sustained some non-pecuniary damage which is not sufficiently compensated by the finding of a violation of the Convention (see, for example, *Elsholz v. Germany* [GC], no. 25735/94, §§ 70-71, ECHR 2000-VIII). While S. might also be regarded as having lost an opportunity of contact with her natural parents, she was, to the knowledge of the Court, protected from the trauma of the court proceedings. Having regard to the fact that P. and C. have no legal ties with S. or any direct contact, it considers it inappropriate

to make any award to them to hold on trust for S. or to make any award to S. who is settled in her adoptive family and unaware of these proceedings.

151. Making an assessment on an equitable basis, it awards the sum of 12,000 euros (EUR) each to the applicants P. and C.

B. Costs and expenses

152. The applicants claimed a total of EUR 113,173, inclusive of value-added tax (VAT), for legal costs and expenses in the Convention proceedings. This included EUR 43,125 for Ms B. Hewson, counsel, who pleaded at the hearing, EUR 14,188 for Mr D. Casey, counsel, who assisted at the hearing, EUR 22,440 for Ms N. Mole of the Aire Centre, for research and liaising with the applicants and counsel, and EUR 35,420 for the solicitors instructed by the applicants, for which no detailed breakdown was provided.

153. The Government submitted that the costs claimed were neither necessarily incurred nor reasonable as to quantum. The case, though unusual, did not require the applicants to be represented in effect by four lawyers (two counsel, the Aire Centre and a solicitor). They disputed the usefulness of the research carried out by the Aire Centre, while the sums claimed for the solicitor were unparticularised and not reasonable in amount, exceeding the fees of Ms Hewson who had been instructed on behalf of the applicants since the beginning of the case. Any more than EUR 60,000 would, in their view, be excessive and inappropriate.

154. The Court reiterates that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, among other authorities, *Nikolova v. Bulgaria* [GC], no. 31195/96, § 79, ECHR 1999-II). It observes that the present case involved important and complex issues, both concerning the facts and the law. Nonetheless, the number of qualified representatives in this case, each of whom has made substantial claims, would not appear justified by the complexity of the case. An unnecessary amount of overlapping and duplicating of work emerges from the submitted claims. Nor, when compared to the sums claimed in other family-law cases from the United Kingdom, do the sums claimed here appear reasonable as to quantum. A further reduction has been made in respect of the unsubstantiated claims put forward by the solicitor.

155. Accordingly, the Court awards the sum of EUR 60,000, inclusive of VAT.

C. Default interest

156. Having regard to the fact that the award is expressed in euros, the Court finds it appropriate to apply a rate of 7.25%.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention in respect of the applicants P. and C.;

2. *Holds* unanimously that there has been a violation of Article 8 of the Convention in respect of the applicants P. and C. as regards the removal of S. at birth;

3. *Holds* by six votes to one that there has been a violation of Article 8 of the Convention in respect of all the applicants as regards the subsequent procedures concerning the applications for care and freeing for adoption orders;

4. *Holds* unanimously that no separate issue arises under Article 12 of the Convention;

5. *Holds* unanimously
   (a) that the respondent State is to pay the applicants, P. and C., within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts to be converted into pounds sterling at the date of settlement:
      (i) EUR 12,000 (twelve thousand euros) each to applicants P. and C. in respect of non-pecuniary damage;
      (ii) EUR 60,000 (sixty thousand euros) in respect of costs and expenses;
   (b) that simple interest at an annual rate of 7.25% shall be payable from the expiry of the above-mentioned three months until settlement;

6. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 16 July 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence EARLY	Jean-Paul COSTA
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Sir Nicolas Bratza;

(b) partly dissenting opinion of Mr Baka.

J.-P.C.
T.L.E.

CONCURRING OPINION OF JUDGE Sir Nicolas BRATZA

I am in full agreement with the view and reasoning of the Chamber that there has been a violation of the rights of P. and C. under Article 6 of the Convention and that the removal of S. from her mother shortly after birth gave rise to a violation of her parents' rights under Article 8. Where I have certain hesitations is as to the view of the majority of the Chamber that there was a further violation of Article 8 in respect of the care and freeing for adoption proceedings.

The Chamber, correctly in my view, has not found a substantive breach of Article 8 in relation to the decisions of the national courts to take S. into care or to free her for adoption. In the domestic proceedings Mr Justice Wall had the inestimable advantage not only of a detailed knowledge of the voluminous documentation in the case but of seeing and hearing the witnesses, including P. and C. themselves, as well as the several experts who gave oral evidence. In his two fully and cogently reasoned judgments, he reached the clear conclusion that it was in the best interests of S. that she should be taken into care and freed for adoption with the minimum delay. In the light of these judgments, I can find no basis for concluding that these measures violated the substantive provisions of Article 8 of the Convention.

The majority's finding of a violation is instead founded on the lack of legal representation of the applicant parents during the two sets of proceedings in which, as the judgment states, it was crucial for them to be able to put forward their case effectively and for their viewpoints on the possible alternatives to adoption, as well as on the continuation of contact even after adoption, to be persuasively presented. In the view of the majority, this lack of legal representation, in addition to founding a breach of Article 6 by depriving the applicants of a fair and effective hearing, violated their Article 8 rights by preventing them from being sufficiently involved in the decision-making process.

It is well established by the case-law of the Court that there are inherent in Article 8 of the Convention certain procedural requirements, entitling parents to be involved in any decision-making process concerning the care of their children to a degree sufficient to provide them with the requisite protection of their interests. It is further established that the different purpose pursued by the respective procedural safeguards afforded by Articles 6 and 8 may, in the light of the particular circumstances, justify the examination of the same set of facts under both Articles (see, for example, *McMichael v. the United Kingdom*, judgment of 24 February 1995, Series A no. 307-B, p. 57, § 91).

In *McMichael* the facts complained of (the inability of the applicants to have sight of certain documents considered by the children's hearing and the Sheriff Court) were found by the Court to have had repercussions not only on the conduct of judicial proceedings to which the second applicant was a

party, but also on a fundamental element of the family life of the two applicants. In these circumstances, the Court considered it appropriate to examine the facts also under Article 8.

In the present case the circumstances are in my view different and it is these differences which have caused me to hesitate. The procedural failings identified by the Court in the present case relate not to the denial of access to documents nor to the failure of the authorities to consult the applicants or involve them fully in the decision-making process, but to the fact that the applicants were not legally represented in the care or freeing for adoption court proceedings. Moreover, in his judgment in the former proceedings, Mr Justice Wall expressly concluded that, even if P. had been represented by counsel at the hearing, he was entirely satisfied that the result would have been the same. While this conclusion does not affect the question whether the procedural safeguards under Article 6 were complied with, it has in my view some relevance to the question whether the lack of these safeguards may be said also to have had repercussions on the family life of the applicants so as to justify the examination of the case additionally under Article 8.

In the end, however, I have concluded that the lack of legal representation of the applicants can be said to have had such repercussions. In this regard, I attach importance to the fact that, even if a care order was inevitable in the case of S. and even if the legal representation of P. could have made no difference to the result of those proceedings, the same is not necessarily true in the case of the freeing for adoption proceedings, in which effective legal representation could well have had a material influence both on the decision to free S. for adoption and on the decision relating to continuing contacts between S. and her parents prior to and after her adoption.

While, therefore, a finding of a breach of Article 6 in family proceedings should not in my view inevitably lead to a separate finding of a breach of the procedural requirements of Article 8, I consider that in the circumstances of the present case such a separate finding is justified.

PARTLY DISSENTING OPINION OF JUDGE BAKA

I share the opinion of the majority that there has been a breach as far as the fairness of the procedure is concerned under Article 6 § 1 and also that there has been a violation of Article 8 in respect of the applicants P. and C. as regards the removal of S. at birth. My reasoning under Article 6 § 1 is different, however, from that of the majority of the Court and I am not convinced that there has been a violation of Article 8 of the Convention concerning all the applicants as far as the subsequent procedures are concerned.

The majority was of the opinion that the procedural shortcomings in the case – on which basis the Court has found a violation of Article 6 § 1 of the Convention – "deprived the applicants of a fair and effective hearing in court" and that this "placed [them] at a serious disadvantage" in protecting their interests (see paragraph 137 of the judgment)

My approach is different. I, too, think that there has been a procedural violation of Article 6 in not granting the applicants time enough to find adequate legal representation. This in my view gave the *appearance of unfairness*, which should be avoided in a serious case like the present one. On this basis and on this basis only, I found a breach of the relevant Article. I am not, however, convinced that the applicants, even without legal representation, were completely helpless or that they were prevented in any way from putting forward their arguments effectively. The applicants, from the beginning of the procedure until the hearing, had had the benefit of legal advice and legal assistance in a case which was primarily based on expert opinions. Moreover, all the other participants in the proceedings (including counsel for the guardian *ad litem*) were in agreement that there had been a fair hearing without any identifiable irregularities or shortcomings.

I do think that, as Article 8 requires, the subsequent care and freeing for adoption proceedings served the best interests of the child and were intended to strike a balance between the interests of S. and her parents. Consequently, the interference of the national authorities served a legitimate aim and was based on the applicable domestic provisions and practice. In these respects, there is no serious disagreement between my view and that of the majority. On the other hand, the question whether the interference was necessary in a democratic society raises more complex issues.

According to the majority of the Court, the procedural violation was so serious that they took it into account again when they examined the necessity requirements under Article 8.

I admit that the above approach has its basis in the case-law of the Court (see *McMichael v. the United Kingdom*, judgment of 24 February 1995, Series A no. 307-B). In *W. v. United Kingdom* (judgment of 8 July 1987, Series A no. 121 – cited in paragraph 119 of the present judgment) the Court extended the interpretation of Article 8 by deciding that the lengthy duration of the proceedings resulted in a decision which could not be regarded as necessary in a democratic society within the meaning of Article 8.

In the present case, however, I am rather against this extensive interpretation of Article 8. I believe that the lack of legal representation disclosed a procedural violation of Article 6 § 1. The appearance of unfairness gave rise to a violation of Article 6 § 1 but – not being decisive for the outcome of the relevant procedures – it did not amount to a violation of Article 8.