EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 21830/93

X., Y. and Z.

against

the United Kingdom

REPORT OF THE COMMISSION

(adopted on 27 June 1995)

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I. INTRODUCTION

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

A. The application

2. The applicants are British citizens, born in 1955, 1959 and 1992 respectively, and resident in Manchester. They are represented before the Commission by Mr. David Burgess, a solicitor practising in London.

3. The application is directed against the United Kingdom. The respondent Government are represented by Ms. Susan Dickson as Agent, from the Foreign and Commonwealth Office.

4. The case concerns the complaints of the applicants that they are denied respect for their family and private life as a result of the lack of recognition of the first applicant's role as father to the third applicant and that the resulting situation in which they are placed discloses discrimination. The application as declared admissible raises issues under Articles 8 and 14 of the Convention.

B. The proceedings

5. The application was introduced on 6 May 1993 and registered on 12 May 1993.

6. On 30 August 1993, the Commission decided to communicate the application to the respondent Government for their written observations on the admissibility and merits of the application.

7. The Government submitted their written observations on 20 January 1994. The applicants submitted their written observations in reply on 18 April 1994.

8. On 27 June 1994, the Commission decided to invite the parties to an oral hearing on the admissibility and merits.

9. At the hearing which was held on 1 December 1994, the Government were represented by Ms. Susan Dickson as Agent, Mr. D. Pannick QC, Counsel, Mr. R. Singh, Counsel, and Ms. H. Jenn and Mr. W. Jenkins as Advisers. The applicants were represented by Mr. N. Blake, Counsel, and Mr. D. Burgess, Solicitor.

10. On 1 December 1994, the Commission declared admissible the applicants' complaints concerning lack of respect for their family and

private life and discrimination. The remainder of the complaints were declared inadmissible.

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

12. On 3 February 1995, the applicants submitted supplementary material and on 21 March 1995, the Government submitted further observations.

13. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, placed itself at the disposal of the parties with a view to securing a friendly settlement of the case. In the light of the parties' reactions, the Commission now finds that there is no basis on which a friendly settlement can be effected.

C. The present Report

14. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM. C.A. N🔲RGAARD, President
H. DANELIUS
C.L. ROZAKIS
E. BUSUTTIL
S. TRECHSEL
A.S. G🔲Z🔲B🔲Y🔲K
A. WEITZEL
H.G. SCHERMERS
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
B. MARXER
G. B. REFFI
N. BRATZA
J. MUCHA
E. KONSTANTINOV
D. SV🔲BY

15. The text of the Report was adopted by the Commission on 27 June 1995 and is now transmitted to the Committee of Ministers in accordance with Article 31 para. 2 of the Convention.

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

1) to establish the facts, and

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

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

18. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the

Commission.

II. ESTABLISHMENT OF THE FACTS

A. Particular circumstances of the case

19. The first applicant, X., is a female to male transsexual who has been living in a permanent and stable union with the second applicant, a woman. The third applicant is the child, born to the second applicant as a result of artificial insemination by a donor.

20. The first applicant had at birth the appearance of a biological female. From the age of four, he felt himself to be a sexual misfit and was drawn to male roles of behaviour. During adolescence, he suffered suicidal depressions at the discrepancies in sexual identity. At the age of 17, the first applicant read about the experiences of transsexuals.

21. In 1975, the first applicant started to take hormone treatment and to live and work as a man. In 1979, he began co-habiting with the second applicant, Y., who is a woman by birth.

22. Later in 1979, the first applicant underwent gender re-assignment surgery, having been accepted for treatment after counselling and psychological testing.

23. In 1990, the first and second applicants' doctor applied for treatment of the couple with a view to artificial insemination by donor (AID).

24. The first and second applicants were interviewed by the specialist in January 1991 in respect of obtaining private treatment and their case referred to the hospital ethics committee, supported by two referees and a letter from their doctor. Their application was refused.

25. The applicants appealed, making representations which included reference to a research study in which it was reported that of 37 children raised by transsexual or homosexual parents there was no evidence of abnormal sexual orientation or any other adverse effect.

26. The hospital ethics committee agreed on appeal to provide treatment to the applicants in November 1991. The first applicant was asked to acknowledge himself to be the father of the child within the meaning of the Human Fertility and Embryology Act 1990.

27. On 30 January 1992, the second applicant became pregnant through AID treatment with donated sperm. The first applicant was present throughout the process. The third applicant, Z., was born on 13 October 1992.

28. In February 1992, the first applicant had enquired of the Registrar General whether there was an objection to his being registered as the father of Z.. In a reply dated 4 June 1992 to his Member of Parliament, the Minister of Health replied that the Registrar General had taken legal advice and took the view that only a biological man would be regarded as the father for the purposes of registration. It was pointed out that the third applicant could lawfully bear the first applicant's surname and, subject to the relevant conditions, the first applicant would be entitled to an additional personal tax allowance if he could show that he maintained the third applicant.

29. Following Z.'s birth, the first and second applicants attempted to register the child in their joint names as mother and father. The first applicant however was not permitted to be registered as the child's father and that part of the register was left blank. Z. was given the first applicant's surname.

B. Relevant domestic law and practice

Definition of gender in domestic law

30. Under the law of England and Wales, wherever sex is defined as a matter of law, biological criteria are employed (see eg Corbett v. Corbett [1971] Probate Reports 83).

Registration of births

31. By section 2 of the Births and Deaths Registration Act 1953, it shall be the duty of the father and mother of a child to give to the registrar of the subdistrict in which it was born prescribed particulars within 42 days of the birth.

32. Where the mother and father are not married, there is no obligation on the father to give such particulars and the registrar shall not enter the name of a father save in defined circumstances, including where there is a joint request by the mother and the person stating himself to be the father (section 10 of the 1953 Act, as amended by the Family Law Reform Act 1987).

33. It is a criminal offence to give false information to a registrar relating to particulars required to be registered concerning any birth (section 4(1)(a) Perjury Act 1911).

Provisions governing human fertility and embryology

34. The Human Fertility and Embryology Act 1990 (the 1990 Act) makes provision in connection with human embryos, regulates certain practices and establishes a Human Fertilisation and Embryology Authority.

Section 25 provides inter alia:

> "1. The Authority shall maintain a code of practice giving guidance about the proper conduct of activities carried on in pursuance of a licence under this Act and the proper discharge of the functions of the person responsible and other persons to whom the licence applies.
>
> 2. The guidance given by the code shall include guidance for those providing treatment services about the account to be taken of the welfare of the children who may be born as a result of treatment services (including a child's need for a father), and of other children who may be affected by such births."

35. By section 28(3) of the 1990 Act, where a man, who is not married to the mother, is party to the treatment which results in the sperm of another being placed in the woman, he shall be deemed to be the father of the child.

The Children Act 1989

36. Under the terms of the Children Act 1989 (the 1989 Act), parental responsibility for a child vests in the mother and, where she is married, in her husband. An unmarried biological father may obtain parental responsibility by agreement with the mother or by order of the court (section 4).

37. Pursuant to the provisions of the 1989 Act, application may be made (with leave or as of right) for a residence order in respect of a child (section 10). A residence order means an order settling the arrangements to be made as to the person with whom a child is to live (section 8). Where the court makes a residence order in favour of a person not the parent or guardian of the child that person has parental responsibility for the child while the order remains in force (section 12 (2)). Section 3 provides that for the purposes of the Act "parental responsibility" means all the rights, duties, powers, responsibility and authority which by law a parent of a child has in relation to the child and his property.

38. On 24 June 1994, the High Court made a joint residence order in respect of two women, who lived together with the child born to one of them as the result of an arrangement whereby she had become pregnant by a man who wanted no involvement in the child's life.

Miscellaneous

39. Since a female-to-male transsexual continues to be regarded at law as female, he is unable under domestic law to marry a woman, cannot be granted a parental responsibility order or obtain a parental responsibility agreement in respect of the child of a female partner, and cannot obtain a joint adoption order in respect of such a child.

40. The child living with a transsexual who acts as parent will not have any inheritance rights in the event of the transsexual's intestacy, will have no right to financial support from him and cannot benefit through him from the transmission of tenancies pursuant to certain statutory provisions, from nationality and immigration measures or from rights accruing from his citizenship in the European Union.

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

41. The Commission has declared admissible the applicants' complaints that they are denied respect for their family and private life as a result of the lack of recognition of the first applicant's role as father to the third applicant and that the resulting situation in which they are placed discloses discrimination.

B. Points at issue

42. The issues to be determined are:

- whether there has been a violation of Article 8 (Art. 8) in that there has been a lack of respect for the family and/or private life of the applicants;

- whether the applicants have been subject to discrimination in violation of Article 14 of the Convention in conjunction with Article 8 (Art. 14+8) of the Convention.

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

43. Article 8 (Art. 8) of the Convention provides as relevant:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

44. The applicants submit that the failure of English law to give legal recognition to the de facto father-child relationship discloses a violation of their right to respect for family and private life. They complain that English law refuses to recognise that a person with the biological characteristics of one sex can be irrevocably assigned to the opposite one. They submit that the first applicant cannot be vested with parental rights, even with the second applicant's agreement, and cannot make a joint adoption application, such matters being restricted to married couples. The third applicant will be prejudiced in that she cannot inherit from the first applicant on intestacy, will have no right to financial support from him and cannot benefit through him from the transmission of tenancies or from nationality and immigration measures. The applicants accept that illegitimacy has lost most of its disabilities but point to the lack of a named father on the birth certificate.

45. The applicants refer to two written opinions, "Social and legal acceptance and the family" by Dr. David King, University of Liverpool and "Report on X." by Dr. Russell W. Reid, consultant psychiatrist. It is submitted, inter alia, that law has a powerful symbolic as well as legal function in affirming an individual's status and value in society. The failure to give a transsexual legal recognition of his change in gender and role in the family has the effect of stigmatising him or her and those related to them are obliged to share the stigma and discredit. This places a strain on individuals in the family group: for example, exerting pressure on members to distance themselves from the stigmatised person, distorting family behaviour to cope with the "spoiled identity" and concealing the information from others. In the case of a child which has grown up close to a transsexual parent, it will come into conflict with society's view of the parent figure and find the validity of its family unit challenged by society. Children, it is postulated, require a secure family situation and this cannot be separated from the acceptance of the family unit in society and law. The impact of social acceptance may be illustrated, in Dr. King's view, by the way in which now there is increased social acceptance of single mothers, they are allowed to keep their babies and the social problem of unwanted babies has miraculously disappeared. In particular, where there is a blank space on a birth certificate which conflicts with the factual family circumstances, a child's sense of its own worth is likely to be impaired; it will find itself inadvertently in possession of a guilty secret which may at any time be revealed and the stress and embarrassment caused by the birth certificate will persist throughout the child's life.

46. Further, the applicants assert that there are no strong factors of social policy weighing against the acknowledgment of the applicants' family relationships given, inter alia, that recognition of the first

applicant's role as father would not require falsification of the system of birth registration and that under the legislation relating to births by artificial insemination by donor fatherhood is no longer equated purely with biological links.

47. The respondent Government submit that no family relationships exist between the first applicant and the other applicants, since the first applicant is still legally a female. As regards the third applicant, the Government submit that Article 8 (Art. 8) does not extend beyond recognising relationships of blood, marriage and adoption.

48. Even assuming the applicants could be regarded as a family unit, the Government submit that they are not prohibited from living as such and there are no significant practical detriments suffered by the applicants in this case. The child, the third applicant, suffers no prejudice as regards nationality since she is a British citizen through her mother and the first applicant can arrange by will for her succession rights. Furthermore, the first and second applicants are able to apply to the courts for a joint residence order giving rise to rights in relation to parental responsibility in respect of the third applicant. They refer to the wide margin of appreciation to be accorded to the Contracting State in an area posing difficult questions of social policy and contend that in the absence of real and practical disadvantages to the applicants, they have no duty to recognise for legal purposes that a person's sex is changed by gender reassignment surgery.

49. As regards the absence of the name of a father on the third applicant's birth certificate, the Government consider that is no more likely to pose problems than in any other case where the child is born illegitimate and the parents not married. It is, in their submission, highly unlikely that the contents of her birth certificate will cause the applicant any serious detriment since limited use is made of such a document in the United Kingdom. The Government iterate that the United Kingdom has not limited or confined the substance of the relationship which the first and second applicants have established with the third applicant and that even if third parties treat the third applicant less favourably because the first applicant was born female, the United Kingdom is not responsible for such conduct.

1. Existence of family life

50. Since it is disputed by the Government that family life exists as regards the relationships between the first applicant and the other applicants, the Commission has considered whether the facts of the case disclose "family life" in the sense protected under the first paragraph of Article 8 (Art. 8) of the Convention. In particular, it has examined whether, as the Government claim, since the applicants are not related by blood, marriage or adoption, they fall outside the concept of "family life".

51. The Commission recalls that "family life" is not restricted only to marriage-based relationships but may extend to other de facto "family" ties. Whether other ties are sufficient to fall within the scope of Article 8 (Art. 8) will depend on the particular circumstances of the case and relevant factors in the Commission's determination will include the existence of blood ties, co-habitation, the nature of the relationships between the persons concerned, including the demonstrable interest, commitment and dependency existing between them (see eg. Eur. Court H.R., Keegan v. Ireland judgment of 26 May 1994, Series A no. 290

pp. 17-18, paras. 44-45 and Comm. Rep. 17.2.93, loc. cit. para. 48; No. 9492/81, Dec. 14.7.82, D.R. 30 p. 232).

52. The cases examined hitherto by the Court have dealt with relationships where blood ties existed, natural fathers with their children for example, and it appears that there is a strong presumption that family life will exist in such cases (see Keegan case loc. cit.). Other blood relationships in the Commission's view (eg. grandparents and grandchildren; uncles and nephews; adult children and parents) require closer examination of elements of dependency and may disclose a sufficiently close relationship for the purposes of Article 8 (Art. 8). The Commission has however yet to find in any case that "family life" exists where there is no blood link or legal nexus of marriage or adoption (see eg. Nos. 9993/82, Dec. 5.10.82, D.R. 31 p. 241, 10375/83 Dec. 10.12.84 D.R. 40 p. 196 and 12402/86, Dec. 9.3.88, D.R. 55 p. 224: see also Boyle v. the United Kingdom, Comm. Rep. 9.2.93). The existence of family life between a foster parent and a foster child is an issue which has been raised but not pursued by the Commission (see No. 8257/78, Dec.10.7.78, D.R. 13 p. 248)

53. The Commission recalls that in a previous case it held that the relationship of a woman with the child of her long term lesbian partner did not fall within the scope of family life, despite her sharing of a parental role (see No. 15666/89 Kerkhoven and others v. the Netherlands, Dec. 19.5.92). The Commission found that despite the evolution of attitudes towards homosexuality a lesbian relationship did not fall within the scope of the term "family life". Accordingly, Article 8 (Art. 8) did not import a positive obligation on a State to grant parental rights to a woman who was living with the mother of a child. While homosexual relationships could raise issues under the concept of "private life", the Commission found that the restriction complained of did not reveal any curtailment of the enjoyment of their private life.

54. In the present case, the Commission recalls that the first and second applicants co-habit and have done so in a stable relationship of many years ie. since 1979. The third applicant was born to the second applicant as result of medical intervention, a procedure in which the first applicant supported the second applicant and to which he was party as the prospective male parent, having been asked pursuant to the relevant legislation to acknowledge himself to be the father. Since her birth, it appears that the third applicant has lived with the first and second applicants, who act as her parents in the commonly accepted sense of the word, providing her care and financial and emotional support. To all appearances, the Commission notes that the first applicant is the third applicant's father.

55. The Commission considers that the position of the applicants in this case cannot be equated to that of the two women in the Kerkhoven case. Notwithstanding that under United Kingdom law the first applicant remains for legal purposes a female by birth, the Commission considers that the situation of a transsexual discloses significant differences. A transsexual as appears from the material submitted to the Commission is a person diagnosed with a condition sometimes referred to as gender dysphoria. This condition, widely recognised by the medical profession in Contracting States, may receive medical treatment, which in the United Kingdom may lawfully include re-assignment of gender by surgical means, with the purpose of permitting the transsexual to assume the gender to which he or she has the conviction of belonging.

56. The Commission notes that the first applicant is living in

society as a man pursuant to such medical treatment, has done so for many years, bears a male name and fulfils the overt role in society of male partner and parent.

57. The Commission finds that the relationships enjoyed by the applicants fulfil both the appearance and substance of "family life". The only element which detracts from this is the fact that the first applicant was registered at birth as being of the female sex with the consequence, inter alia, that he is under a legal incapacity to marry the child's mother or register on the child's birth certificate as father.

58. The Commission is of the opinion that this element, whether seen as biological or historical, cannot outweigh the reality of the applicants' situation, which is otherwise indistinguishable from the traditional notion of "family life". It would note that the United Kingdom, in the context of children born by artificial insemination by donor, has itself for the purposes of the 1990 Human Fertilisation and Embryology Act accepted that there are circumstances where a "father" need not be linked to a child either by blood or by marriage to its mother (see para. 35 above) and that it was by virtue of United Kingdom law in force that the relationships between the three applicants were created.

59. Consequently, the Commission finds that the applicants enjoy "family life" within the meaning of Article 8 paragraph 1 (Art. 8-1) of the Convention.

2. Compliance with Article 8 (Art. 8) of the Convention

60. The applicants claim that their right to respect for their family life is violated in that they are unable to obtain recognition of the first applicant's role of father of the third applicant. He is unable, for example, to have his name placed on the birth certificate as father, to adopt the third applicant legally or obtain a parental responsibility order as a natural father might be able to do.

61. The Commission has examined whether an effective respect for the applicants' family life imposes a positive obligation on the United Kingdom to modify its existing legal system as it applies to transsexuals.

62. The Commission recalls that in determining whether or not such a positive obligation exists, regard must be had to the fair balance which has to be struck between the general interest of the community and the interests of the individual (see eg. Eur. Court H.R., B. v. France judgment of 25 March 1992, Series A no. 232-C p. 47, para. 44). In striking this balance, the aims mentioned in the second paragraph of Article 8 (Art. 8) may be of relevance. The Court has also commented that as concerns transsexuals, where there is little common ground in Contracting States and the law appears to be in a transitional stage, the Contracting Parties enjoy a wide margin of appreciation (see eg. Eur. Court H.R., Rees judgment of 17 October 1986, Series A, no.106 p. 15, para. 37).

63. As regards the interests of the applicants, the Commission notes that a number of legal consequences flow from the lack of legal recognition of the first applicant's role as father (see paras. 39-40 and 60). While, as the Government state, it is possible for the first applicant to make provision by will for the third applicant, it remains the case that on intestacy the third applicant would have no rights of

inheritance. The Commission and Court found in the Johnston case (Eur. Court H.R. Johnston v. Ireland judgment of 18 December 1986, Series A. no. 112) that a similar situation existing in respect of a child born out of wedlock contributed to a failure to respect her family life.

64. In relation to the absence of the first applicant's name on the third applicant's birth certificate, the Commission accepts the Government's submission that in the United Kingdom a birth certificate is not in common use for administrative or identification purposes. Nonetheless, the Commission considers that a birth certificate must be regarded as a document of some significance and notes, moreover, that the birth register is accessible to the public. The possibility of its being required for an official or educational purpose and the risk that it might come to the attention of third parties or even the child herself before the first and second applicants have explained the family's particular situation is, in the Commission's view, not a negligible factor.

65. The Commission recalls that the Government have further stated that the first applicant may in any event obtain a residence order in respect of the third applicant, which will provide him with legal rights of care and custody (see para. 37 above). The Commission does not consider however that this possibility, which may be granted by a court in respect of anyone with whom a child is living and which is linked to the duration of that residence, can be regarded as providing the first applicant with legal recognition of his role as father and parent which is at the heart of the complaints in this application.

66. The Government have argued that, where there is no immediate and concrete detriment suffered by the applicants and no practical impediment placed in the way of their life as a de facto family, Article 8 (Art. 8) should not be interpreted as placing a positive obligation on them to take any further steps in an area which remains sensitive. The Commission is of the opinion however that while there may be no direct or visible disadvantage suffered by the applicants, the lack of legal recognition may in itself constitute a serious disadvantage. It has noted the opinion of the experts submitted by the applicants to the effect that the legal value given to family relations can affect its social validity and family members' own sense of worth and security. The Commission considers that this could, in the case of the third applicant, play a role in her personal development and sense of identity. Whether or not any third party is aware of the legal status of the applicants, the applicants' may claim to be subject to a stigma that impinges on the quality and enjoyment of their family life.

67. While it is true that in the Rees and Cossey cases (loc. cit.), the Court found no violation of the right to respect for private life by reason of the failure of the United Kingdom to establish a type of documentation showing, and constituting proof of current legal status, the present case concerns also the right to family life. The Commission is further of the opinion that there is a clear trend in Contracting States towards the legal acknowledgement of gender re-assignment (see eg. the domestic law of Germany, Italy, the Netherlands, Sweden and Turkey, and also the Recommendation 1117(1989) of the Parliamentary Assembly of the Council of Europe on the condition of transsexuals, which recommends the introduction of legislation by member States, inter alia, to allow the rectification of birth registers). It finds that in the case of a transsexual who has undergone irreversible gender re-assignment in a Contracting State and lives there with a partner of his former sex and child in a family relationship, there must be a

presumption in favour of legal recognition of that relationship, the denial of which requires specific justification.

68. The Commission finds that the Government have not put forward any countervailing public concern which outweighs the interests of the applicants. It cannot agree therefore that the margin of appreciation extends in the circumstances of this case to denying effective/appropriate legal recognition where the Commission has found the existence of "family life" which attracts the protection of Article 8 (Art. 8) of the Convention.

69. Having regard therefore in particular to the welfare of the third applicant and her security within her family unit, the Commission finds that the absence of an appropriate legal regime reflecting the applicants' family ties discloses a failure to respect their family life.

70. In light of the above finding, the Commission finds it unnecessary to examine whether the applicants' complaints reveal a lack of respect for their private life.

CONCLUSION

71. The Commission concludes, by 13 votes to 5, that there has been a violation of Article 8 (Art. 8) of the Convention.

D. Article 14 (Art. 14) of the Convention

72. Article 14 (Art. 14) of the Convention provides:

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

73. The applicants submit that the failure to recognise their family relationship discloses discriminatory treatment in violation of Article 14 of the Convention in conjunction with Article 8 (Art. 14+8).

74. In the context of Article 14 (Art. 14), the Government submit that the first applicant is in an analogous position to any female-to-male transsexual or to any other woman. Therefore the Government submit that there is no discrimination within the meaning of Article 14 (Art. 14) of the Convention.

75. In view of its conclusion in para. 71, the Commission does not find it necessary to examine the complaint that the applicants suffered discrimination contrary to Article 14 (Art. 14) of the Convention (cf. mutatis mutandis eg. Eur. Court H.R., Beldjoudi judgment of 26 March 1992, Series A no. 234-A p. 29, para. 81).

CONCLUSION

76. The Commission concludes, by 17 votes to 1, that it is not necessary to examine whether there has been a violation of Article 14 in conjunction with Article 8 (Art. 14+8) of the Convention.

E. Recapitulation

77. The Commission concludes, by 13 votes to 5, that there has been a violation of Article 8 (Art. 8) of the Convention (para. 71).

78. The Commission concludes, by 17 votes to 1, that it is not necessary to examine whether there has been a violation of Article 14 in conjunction with Article 8 (Art. 14+8) of the Convention (para. 76).

Secretary to the Commission — President of the Commission

(H.C. KR�GER) — (C.A. N�RGAARD)

(Or. English)

CONCURRING OPINION OF MR. H.G. SCHERMERS

Without any hesitation I support the Commission's conclusion that the United Kingdom violated Article 8 of the Convention by failing to respect the applicants' family life. I am unable, however, to accept the reasoning in paragraph 55 of the Commission's Report, drawing a distinction between the case of Kerkhoven and others against the Netherlands, where the majority of the Commission found that their lesbian relationship and ipso facto the relationship between the child and the lesbian partner of the child's mother fell outside the notion of "family life' within the meaning of Article 8 of the Convention.

The basic principle underlying the various specific rights contained in the Convention is respect for human dignity and human freedom. These two elements imply that a person must be allowed to shape his or her private and family life in the way he or she considers best fitting his or her personality. This approach is generally followed in the Convention organs' case-law, the case-law of the Human Rights Committee on the International Covenant on Civil and Political Rights and is equally reflected in the European Parliament Resolution of 8 February 1994 on equal rights for homosexuals and lesbians in the EC.

In my opinion, therefore, the position of the applicants in the present case can be - and must be - equated to that of the two women in the Kerkhoven case. Although the existence of "family life" by its nature will always depend on the factual situation in each individual case, this equation should operate so that all forms of durable relationships between adults and their children or their partner's children should, in principle, be respected under Article 8 of the Convention under the notion of "family life".

Principal elements of family life are mutual affection, which may exist between persons - irrespective of their sex - and between children of one or both of these persons, and the wish of such persons to found and/or maintain a "family unit" by establishing a joint household, either through marriage or cohabitation; in short, the wish to establish a union, which is legally and/or socially recognised, creating or entailing mutual responsibilities. In this respect it should be noted that it is accepted that marriage, as such, creates family life between the spouses and will generally create family life between one spouse and the children of the other spouse of which the former is not the biological parent. However, this possibility does not exist for homosexuals and lesbians in the Contracting States and not for transsexuals in the United Kingdom. The only way for these persons to create a "family unit" is through cohabitation. This does not mean. however, that such cohabitation does not create family life under

Article 8 of the Convention.

For those reasons I cannot accept the distinction made in paragraph 55 between different forms of family life deviating from the traditional pattern.

(Or. English)

DISSENTING OPINION OF MR. H. DANELIUS

In the present case, the Commission is faced with a combination of two difficult and sensitive issues, one concerning child-birth as a result of artificial insemination by a donor and the other concerning the legal effects of gender re-assignment surgery.

1. A Contracting State may well apply legal rules, according to which a person shall in some circumstances be regarded as a father, although this does not correspond to the biological reality. In some cases, the law may lay down presumptions of paternity, which in the individual case may be, or may not be, well-founded. In other cases, the law may recognise someone as a father, although it is clear that he is not in reality the father.

In these matters, the Contracting States must have a rather wide margin of appreciation insofar as the requirements of Article 8 of the Convention are concerned. On the other hand, I do not consider that Article 8, taken separately, requires that a State shall recognise someone as a father in a case where it is clear that he is not the father. Such is the situation in the present case where the first applicant A is not in reality the father of the third applicant Z.

Consequently, I find no violation of Article 8 of the Convention, taken alone.

2. In my opinion, a separate question arises in the present case in regard to Article 14 of the Convention in conjunction with Article 8.

According to the applicable law - section 28(3) of the Human Fertility and Embryology Act 1990 - a man, who is party to treatment which involves the placing of sperm of another man in a woman, shall be deemed to be the father of the child born as a result of that treatment. However, in this respect a female to male transsexual, who has undergone gender re-assignment, such as the first applicant X, is not recognised as a man and cannot therefore under this provision be considered to be the father of a child born as a result of artificial insemination.

The question arises whether this constitutes discrimination contrary to Article 14 in conjunction with Article 8 of the Convention.

While I take the view that the Court's case-law in the Rees and Cossey cases should probably not in the long run be upheld, I consider that, as long as this case-law has not been changed, it is not possible to take the further step it would involve if the United Kingdom was considered in this case to be under an obligation to recognise X as Z's father on the same basis as a man referred to in the above-mentioned 1990 Act.

I conclude therefore that there has not been in the present case any violation of Article 14 in conjunction with Article 8 of the Convention.

(Or. English)

DISSENTING OPINION OF MRS. J. LIDDY,
JOINED BY MR. G.B. REFFI

1. While I agree that there exists family life within the meaning of the Convention, I do not consider that there has been a failure to respect that family life.

2. The question to be addressed is, as indicated at para. 62 of the Report, whether a fair balance has been struck between the general interest of the community and the interest of the individual.

3. In seeking to consider that question, I have regard to the following principles:

(i) There may be positive obligations inherent in respect for private life or family life. The area of positive obligations under Article 8 is one in which the Contracting States enjoy a wide margin of appreciation in determining the steps to be taken with due regard to the needs and resources of the community and of the individual (Rees v. United Kingdom, Series A, Vol. 106 para. 37; Johnston v. Ireland. Series A, Vol. 112 para. 55).

(ii) The law concerning transsexuals appears to be in a transitional stage. Having regard to its margin of appreciation, the United Kingdom is not under a positive obligation to establish a type of documentation showing, and constituting proof of, current civil status. It must for the time being be left to the United Kingdom to determine to what extent it can meet the remaining demands of transsexuals (Rees, loc. cit., paras. 42 and 47; Cossey, Series A, vol. 184, para. 45.)

(iii) It is not possible to derive from Article 8 an obligation to establish for unmarried couples a status analogous to that of married couples or to establish a special regime for couples who wish to marry but are legally incapable of marrying (Johnston, loc. cit., para. 68).

(iv) Respect for family life requires that the child of such a couple should be placed, legally and socially, in a position akin to that of a legitimate child. Notwithstanding the wide margin of appreciation in this area, there may be a violation of Article 8 if the child's legal situation differs "considerably" from that of a legitimate child and if there are no means available to her or her parents to "eliminate or reduce" the differences (Johnston, loc.cit., paras. 74 and 75).

4. The case-law leads me inexorably to the conclusion that the failure of United Kingdom law to allow for special legal recognition, as such, of the relationship between the applicants does not disclose a lack of respect for either private or family life. Article 8 does not require that a historical record of fact be altered to conceal the fact that a female-to-male transsexual was born a male or to record that he has fathered a child, notwithstanding the truth of the matter.

5. However, the situation of Z, the child, might constitute a lack of respect for the family life of the applicants if her situation differs considerably from that of a legitimate child and if there are no means available to eliminate or reduce the differences.

6. At first sight, the case seems very similar to the Johnston case, where there was a finding of a violation because the child's legal situation differed from that of a child born within marriage. It is true that the first and second applicants may reduce the differences, particularly by applying for a residence order or a joint residence order settling the arrangements to be made as to the persons with whom the third applicant is to live, and that the first applicant may make further court applications as necessary and thereby enjoy full parental responsibility. However there was a not dissimilar possibility open to a natural father under the Irish Guardianship of Infants Act. It is also the case that Z. will not inherit from the first applicant in the event that he fails to make a will in her favour.

7. Notwithstanding the similarities, it is my opinion that the present case falls to be distinguished from the Johnston case.

First, Z. is not, as a matter of fact, the natural child of the first applicant. The present case does not involve questions of inheritance on intestacy to the estates of blood relatives. Second, as acknowledged by the applicants' representatives at the hearing before the Commission, and as indicated at page 5 of the Report by Dr. Dave King of the Department of Sociology, University of Liverpool submitted by the applicants, the status of illegitimacy has now lost most of its disabilities and there is increased social acceptance of single mothers. I infer that there is also increased social acceptance of single mothers who set up home with a partner who is not the father of the child. It would appear to be common ground between the applicants and the Government that the differences between the situation of Z. and the situation of a child born within marriage are not considerable. Third, the present case raises an aspect which did not call for consideration in the Johnston case; whether there is a countervailing general interest of the community, which must be balanced.

8. I consider that the interest of the first and second applicants in not being put to the trouble of so regulating their affairs as to make Z.'s situation as close as possible to that of a child being reared by any couple in a stable relationship must be balanced against the general interest of the community that the legislature proceed with prudence and after due research and considered debate in the sensitive areas concerning, on the one hand, children born by artificial insemination by donor and, on the other hand, the concerns of transsexuals - especially where the two areas overlap and the development of children might be affected.

9. The applicants have submitted a paper entitled "Biological factors in the development of human sexual identity" by Warren Gadpaille, published, apparently, in the United States of America in 1990. Professor Gadpaille states as follows:-

> "Green29 has reported on 37 children who were raised by homosexual or transsexual parents, in whom there is no evidence to date of any unusual degree of cross-sex identity or sexual orientation (only a few, however, have reached mid to late adolescence, and most were not part of the atypical household since birth). Studies by other researchers, as yet unpublished, are expected to be in general concurrence, though some differences from control populations are found33. Too many unknowns, such as the nature of influences in early infancy, specific parents' overt and covert attitudes towards their own and their child's sexual

> identity, and so forth, make it imprudent to do more than note that these data, so far, do not indicate an inevitable influence on the child's developing sexual identity, by that of the parent. They suggest, at least, a certain inherent resistance against developmental deviation, perhaps attributable in fact to assumed biological normality or the children." Footnote 29 states "Green, R. Sexual identity of 37 children raised by homosexual or transsexual parents Amer. J. Psychiatry 135, 692-697, 1978." Footnote 33 states "Harrington, S.B. Children and lesbians developmentally typical. Psychiatric News, Oct. 19, 1979 pp. 20-22."

10. No more recent, or less cautiously qualified, psychiatric studies concerning children being reared by transsexuals, and no study at all concerning children born by artificial insemination by donor was made available to the Commission. However, the foregoing quotation, from a study provided by the applicant, is indicative of concern at least in academic circles in the United States of America that children in such atypical households might possibly develop atypically or to their detriment. The initial refusal by the hospital ethics committee to provide treatment to the second applicant is indicative of similar concern on the part of professionals in the United Kingdom. The welfare of children at large would appear to require that at this time, when there are "too many unknowns", the legislature proceed with prudence and after due research and considered debate in determining the extent to which and consequences of enabling transsexuals to be deemed parents of children born to another by artificial insemination by donor.

11. If, as in the Rees and Cossey cases, the law concerning transsexuals appears to be in a transitional stage, and this is an area in which Contracting States enjoy a wide margin of appreciation, the same can be said with even more force in regard to the law concerning children born by artificial insemination by donor and being reared by transsexuals.

12. Having regard to that margin of appreciation, it appears to me that a fair balance has been struck between the general interest of the community and the interest of the applicants. The United Kingdom has not, in my opinion, failed to show effective respect for their family life.

13. This conclusion is not affected by the fact that United Kingdom law made possible the artificial insemination by donor of the second applicant and that the Hospital Ethics Committee allowed the first applicant to be considered as "father" on that occasion. As stated by the Court in the Rees case (para. 45): "In the instant case, the fact that the medical services did not delay the giving of medical treatment until all legal aspects of persons in the applicant's situation had been fully investigated and resolved obviously benefitted him and contributed to his freedom of choice."

14. Accordingly, I have voted against a finding of violation of Article 8 in the circumstances of this case.

15. I agree that in the circumstances of this case no separate issue arises under Article 14. In any event, there is, for the foregoing reasons, objective and reasonable justification for treating in the present state of knowledge the de facto but artificially created father-child relationship in question differently from a de facto relationship between biological father and child, and the means chosen

are not disproportionate to the aim of proceeding with prudence in an area of concern to the well-being of the newborn generally.

(Or. English)

DISSENTING OPINION OF MR. L. LOUCAIDES

I have voted against a finding of a violation of Article 8 in the present case substantially for the reasons set out in para. 1 of the dissenting opinion of Mr. Danelius and in paras. 8-13 of the dissenting opinion of Mrs. Liddy.

I must add that I was also particularly influenced by the fact that on the basis of the material placed before the Commission, adverse effects on the personality and development of children due to their bringing up in atypical families such as that of the applicants cannot be excluded.

(Or. English)

DISSENTING OPINION OF MR. N. BRATZA

I have with considerable reservations voted against a finding of a violation of Article 8 in the present case, substantially for the reasons given in the dissenting opinion of Mrs. Liddy.

As the Commission has noted the issue in the present case is whether the effective respect for the applicants' family life imposes a positive obligation on the United Kingdom to modify its existing legal system as it applies to transsexuals, so as to afford legal recognition to the first applicant's role as father to the third applicant.

In the Rees and Cossey cases the Court concluded that Article 8 imposed no such positive obligation on the United Kingdom to alter the birth register to record the new sexual identity of a transsexual who had undergone a gender re-assignment operation. In so concluding the Court placed particular emphasis on the fact that the requirement of striking a fair balance in Article 8 could not give rise to any direct obligation on a respondent State to alter the very basis of its system for the registration of births, which was designed as a record of historical fact, by substituting therefore a system of documentation for recording current civil status.

As the applicants correctly point out, this factor is of considerably less significance in the context of the present case. To allow the first applicant's name to be entered in the birth register as father of the third applicant would not involve an alteration in the very basis of the registration of births. Nor could it be said to involve a substantial falsification of the system of birth registration in the case of a child conceived as a result of artificial insemination by a donor. In such a case, the person registered as "father" of the child is never in fact the biological father but is only deemed to be so by virtue of the 1990 Act.

It is doubtless true that the birth register has traditionally only recorded as "father" of a child a person who is biologically male. It is also true that to enable a post-operative transsexual to be registered as "father" would in all probability require an amendment to the 1990 Act, which in section 28(3) refers to a "man", a word which is likely to be interpreted by the courts as meaning a person who is

biologically a male. However, the modification required would not appear to be as fundamental as that with which the Court was concerned in the cases of Rees and Cossey; nor would it involve a comparable falsification of an historical fact.

The question, nevertheless, remains whether the obligation of respect for the private or family life of the applicants in Article 8 of the Convention requires such a change.

I have concluded, with hesitation, that it does not. On the one hand, I accept that, while there would appear to be no direct or visible disadvantages suffered by the applicants in consequence of the refusal to register the first applicant as the father of the third applicant, the lack of legal recognition may in itself constitute a serious disadvantage for the applicants, even to the extent of possibly affecting the personal development and sense of identity of the third applicant. On the other hand, as the Court observed in its Rees and Cossey judgments, the issue of transsexuality, including the legal recognition if any afforded within the domestic legal system to gender reassignment operations, remains an area in which the Contracting States enjoy a wide margin of appreciation. This is, in my view, the more true when the issue arises in the context of parenthood if children conceived by means of artificial insemination by a donor, itself a sensitive and controversial area.

The Court concluded in both cases that, despite the disadvantages which the applicant had suffered and continued to suffer, the United Kingdom has not exceeded its margin of appreciation in refusing to grant legal recognition to the applicant's change of sex in the birth register. In both cases the Court further concluded that the State was entitled, consistently with its obligations under Article 12, to lay down biological criteria for the purpose of marriage. So long as these judgments stand, I am unable to find that the margin of appreciation was exceeded, or a fair balance upset, in consequence of the refusal in the present case to grant legal recognition to the fatherhood of the first applicant.