No. 172/56

" . . .

Having regard to the application lodged on 18th April, 1956, by X . . . against the Kingdom of Sweden and registered on 20th April, 1956, under file no. 172/56 [1];

Having regard to the report provided for in Rule 45, paragraph 1, of the Rules of Procedure of the Commission;

Having regard to the decision whereby the Commission, on 18th July, 1957, ordered the aforementioned application to be communicated to the Government of Sweden, which was invited to present to the Commission within eight weeks, its written observations on the admissibility of the application;

Having regard to the memorial by the Government of Sweden, deposited with the Secretariat of the Commission on 23rd September 1957;

After having deliberated,

Whereas the facts of the case, as submitted by the Applicant, may be summarised as follows: The Applicant, a former Polish officer, began to live in Germany in 1939 and in recent years has resided in the Federal Republic of Germany. In March, 1946, he married a Latvian woman of Norwegian descent and there is one child of this marriage, a son, born in January, 1947. In the course of 1947 the family decided to emigrate to Sweden and, failing to obtain an immigration permit, they arranged to make a clandestine entry. In October, 1947, the Applicant's wife and child succeeded in entering Sweden and subsequently in obtaining a residence permit. The Applicant himself was unable to leave with his family because he had to undergo a surgical operation as the result of a motor accident in 1946. After his recovery, the Applicant, in May, 1948, requested the permission of the Swedish authorities to immigrate into Sweden to rejoin his family. The request was refused and the Applicant subsequently made several further requests for a Swedish entry permit, first with the object of settling in Sweden and later, in view of the repeated failure of these requests, with the more limited object of seeing his wife and child again. All his requests met with refusals from the Aliens Commission (*Utlänningskommissionen*) in Stockholm.

In 1949 the Applicant's wife broke off all relations with her husband, since when he has had no direct contact either with her or with his child. With the intention of suing for a divorce later, his wife commenced a suit in the Swedish courts for a judicial separation. Prior to the institution of this suit the Applicant had received a letter from the Swedish Protestant Minister acting in the procee-

[1] This application was communicated to the Government of Sweden in pursuance of Rule 45, para. 3(6), of the Rules of Procedure. The Commission declared it inadmissible after an exchange of written pleadings between the parties.

dings in accordance with Swedish law. The Minister asked him to appear in April, 1949, for the purpose of seeking a reconciliation between the couple. However, the Applicant was unable to present himself in Sweden because of the negative attitude adopted towards him by the Swedish immigration authorities, who refused him an entry visa, although he had clearly stated the reason why he required to enter Sweden. The proceedings for a reconciliation could not therefore take place and the wife afterwards brought the above-mentioned suit for judicial separation before the Stockholm Court of First Instance (*Rådhusrätt*). This court, in its judgment of ... 1951, found that the *de facto* separation of the couple since 1947 constituted a cause of "real and profound disagreement" sufficient under Swedish law to justify a decree of judicial separation. It also decided to grant the mother custody of the child on the ground that this was in the child's own interest.

The Applicant appealed to the Court of Appeal (*Svea Hovrätt*) but by an Order dated ... 1951, the Court of Appeal ruled that there was no ground for reversing the aforesaid judgement of ... 1951.

The Applicant then in turn brought an action for divorce in the Polish Court of S ... (Poland), the court competent under Polish law to deal with his case. In its judgment of ... 1951, the Polish Court awarded the Applicant a divorce, naming his wife as the guilty party and giving him custody of the child. Nevertheless, it held that Mme. X ... should have the right to supervise the child's education and training and to maintain personal relations with him.

In 1953 the Applicant's wife petitioned the Swedish courts for divorce and asked for custody of the child. On ... April, 1953, the Court of First Instance (*Rådhusrätt*), finding that the couple had not lived together for a year, converted the judicial separation into a divorce and gave the mother custody of the child. The Court held that the divorce decree pronounced by the Polish court in 1951 was not enforceable in Sweden; the Applicant's wife was to be considered stateless and not Polish, since she never had resided in Poland and now had a firm intention of living in Sweden, where she had obtained a residence permit.

The Applicant forthwith appealed to the Court of Appeal (*Svea Hovrätt*) in S .... He claimed that his wife was Polish from every point of view, the Polish authorities never having deprived her of citizenship. He therefore asked for annulment of the divorce decree of the Court of First Instance and for custody of the child in accordance with the decree of the Polish court. In a judgment dated ... 1954, the Court of Appeal upheld the Applicant's claim as to the validity of the divorce pronounced by the Polish Court and annulled the judgment of the Court of First Instance (*Rådhusrätt*). The Court decided, however, that it was not bound by the Polish decision

concerning custody of the child, but that in the special circumstances of the case it was entitled to apply Swedish law on the question of custody of the child. It held that the child should remain in his mother's care in view of his tender age.

The Applicant then appealed from this decision to the Supreme Court (*Högsta Domstol*) in Stockholm. In the interval between the decision by the Court of Appeal and that by the Supreme Court, the Applicant's ex-wife was married, on ... 1954, to a Swedish national. On ... 1956, she obtained Swedish nationality.

On ... 1956, the Applicant presented a final request for a visa so that he could appear before the Stockholm Supreme Court. At the Commission's direction he submitted a detailed account of the facts relating to this request for a visa: first he received a communication from the Counsel appointed by the Court concerning the date for the hearing before the Supreme Court in a letter of ... 1956. Counsel informed the Applicant that the hearing would probably be held towards the end of May, 1956, and asked him whether he intended to be present in court in person. On 20th April, 1956, the Applicant replied by asking his Counsel's opinion on the advisability of his attendance. At the same time, however, he stated that he was ready to go to Stockholm at any moment, and he requested his lawyer to send him, if necessary, a formal summons by the Supreme Court, so that he could take steps to obtain a Swedish entry permit.

His Counsel replied on 27th April, 1956, that, after hearing the opinion of the judge appointed as Rapporteur for his case before the Supreme Court and having regard to the fact that the Applicant had not expressed any very firm intention to be present at Stockholm in person, he had notified the Court that the hearing could take place in the absence of his client. He also informed the Applicant that the hearing had been fixed for 8th or 9th May, 1956.

Immediately after receipt of the above-mentioned letter, on 2nd May, 1956, the Applicant telephoned his Counsel and instructed him to withdraw the authorisation, given to the Court without his knowledge, to proceed in his absence, and requested him to approach the Aliens Commission (*Utlänningskommissionen*) immediately, in order to obtain a Swedish entry visa for him. These instructions he confirmed that same day by telegram and by letter. On 2nd May the Applicant himself wrote to the Swedish Embassy at Cologne requesting a visa to enable him to appear at the hearing before the Supreme Court, which meanwhile had been fixed definitively for 9th May.

On 4th May, the Applicant's Counsel informed him that the Aliens Commission had refused his request for a visa apparently on the ground that his ex-wife was alleging that he (the Applicant) had threatened to kill her. Counsel also reproached the Applicant for not having immediately expressed his desire to attend the Supreme

Court hearing; had he done so, the Court would probably have taken steps to ensure that the appropriate authorities granted the necessary visa.

In a letter to his Counsel, dated 6th May, 1956, the Applicant protested against the refusal by the Aliens Commission, which was, according to him, based on groundless allegations. The Applicant instructed his Counsel at the same time to request a stay of proceedings, in order that he could appear before the court in person; he considered such stay of proceedings to be essential to his defence, in view of the unfair methods used by the opposing party.

By telegram dated 7th May, 1956, the Applicant was informed by his Counsel that no stay of proceedings was possible.

On ... 1956, the Supreme Court rejected the Applicant's appeal from the Order pronounced by the Court of Appeal on ... 1954. Following the latter's example, the Supreme Court pronounced on the custody of the child by applying the relevant Swedish law instead of the Polish law. It held that the Applicant's ex-wife had acquired Polish nationality only upon her first marriage, which had been celebrated in Germany; that neither she nor the child had ever lived in Poland; that she had been living in Sweden with her son since 1947; that she had married a Swedish national and had the firm intention of remaining in Sweden. The court considered that all these circumstances justified an exception to the general rule that the personal status of the parties to a dispute is governed by their nationality.

Whereas the Applicant alleges that the refusal of the Aliens Commission in Stockholm to grant him an entry permit prevented him from appearing in person before the Swedish Courts and that this refusal constitutes a breach of Article 6 of the Convention;

Whereas, first, with the exception of one application for an entry permit in May, 1956, the facts complained of refer to a period prior to 3rd September, 1953, date of the entry into force of the European Convention of Human Rights and Fundamental Freedoms with regard to Sweden;

and *whereas*, in accordance with the generally recognised rules of international law, the said Convention only governs, for each Contracting Party, the facts subsequent to its entry into force in respect of that Party;

and *whereas*, therefore, the application, so far as it relates to facts complained of in the period prior to 3rd September, 1953, must be rejected *ratione temporis*;

Whereas, secondly, as regards the refusal of the Aliens Commission to grant an entry permit in May, 1956, the Applicant alleges on the one hand that the fact that he was not permitted to enter Sweden resulted in the final breaking up of his marriage and ultimately in his infant son being estranged from his father, and, on the other

hand, that such refusal constituted a breach of Article 6 of the Convention, in that the said request for an entry permit expressly referred to his wish to appear personally before the Supreme Court and he was, in consequence, deprived of the right to a fair hearing guaranteed under Article 6 of the Convention;

and *whereas* in respect of the Applicant's complaint that he was cut off from his wife and child by being denied entry into Sweden, the right to enter a country is not, as such, included among the rights and freedoms set forth in the Convention;

and *whereas* under the terms of Article 1, the Convention guarantees only those rights and freedoms set forth in Section 1 and, in accordance with Article 25, paragraph 1, only the alleged violation of one of these rights or freedoms by a Contracting Party can be the subject of an application admissible by the Commission;

and *whereas* it therefore appears that the application in this regard is incompatible with the provisions of Article 27, paragraph 2, of the Convention;

and *whereas*, in respect of the Applicant's complaint that the refusal of the Aliens Commission to grant him an entry permit deprived him of his right to a fair hearing under Article 6 of the Convention, it is not necessary to examine this complaint since it is clear from the facts of the case that a formal request for a personal appearance never reached the Supreme Court and that the application to the Aliens Commission was only refused after the Commission had learned from the Supreme Court that the Applicant's personal appearance was not required;

and *whereas* an examination of the file, including an examination made by the Commission *ex officio*, shows that the fact that a formal request for a personal appearance never reached the Supreme Court, is in reality attributed by the Applicant himself to his own lawyer because the latter did not transmit this request to the Supreme Court;

and *whereas* it follows that the application, in this respect, in fact concerns the action of a private individual and in no way involves the responsibility of the Swedish Government;

and *whereas* it results from Article 19 of the Convention that the sole task of the Commission is to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention; that it is, moreover, apparent from Article 25, paragraph 1, of the Convention that the Commission can properly receive an application from a person, non-governmental organisation or group of individuals, only if that person, non-governmental organisation or group of individuals claims to be the victim of a violation by one of the High Contracting Parties which have recognised the right of individual recourse to the Commission, of the rights set forth in the Convention; that it is clear that private persons cannot be

considered as High Contracting Parties within the meaning of Article 66 of the Convention;

and *whereas* it therefore appears that the application, in this respect, does not conform with the provisions of Articles 19, 25 and 66 of the Convention, and should therefore in pursuance of Article 27, paragraph 2, of the Convention be rejected accordingly:

Whereas in so far as the application infers that the Supreme Court of Stockholm in not paying full recognition to the judgment pronounced in the Polish Court of S ..., from which the Applicant had obtained a decree of divorce and an order awarding him the custody of his infant son, thereby wrongly applied the principles of private international law as understood in Sweden and thus committed an error of law;

and *whereas* it should be noted that the European Commission of Human Rights was not set up as a higher court to hear cases of alleged errors of law or fact committed by the domestic courts of the Contracting Parties but, in accordance with Article 19 of the Convention, to ensure the observance of the engagements undertaken by the Parties in the Convention;

and *whereas* such errors of law or fact concern the Commission, during its examination of the admissibility of an application, only in so far as they appear to have resulted in the violation of the rights and freedoms listed in the Convention;

and *whereas*, more generally, the Commission is only competent to pronounce on judgements of domestic courts if it appears that such judgments were given in disregard of the rights and freedoms guaranteed by the Convention;

and *whereas* an examination of the file in its present state does not disclose any appearance of such disregard;

and *whereas* it therefore appears that the application, in this respect, is manifestly ill-founded and should, in pursuance of Article 27, paragraph 2, of the Convention be rejected accordingly;

Whereas the Applicant alleges that the order of the Court of Appeal awarding the custody of his infant son to his ex-wife and which was confirmed by the Supreme Court, involves the breach of Articles 8 and 9 of the Convention;

and *whereas* it is plain that the right of one particular parent to the custody of an infant as against the other parent is not, as such, included among the rights and freedoms set forth in the Convention, and that the appreciation of the question which parent should be given the custody of an infant is, in principle, governed by the law of the domestic courts and whereas it does not appear in the present case that the Swedish law in the matter in itself violates the Convention;

and *whereas* under the terms of Article 1, the Convention guarantees only those rights and freedoms set forth in Section 1 and, in

accordance with Article 25, paragraph 1, only the alleged violation of one of these rights or freedoms by a Contracting Party can be the subject of an application admissible by the Commission;

and *whereas* it therefore appears that the application, in this respect, is incompatible with the provisions of the Convention and should, in pursuance of Article 27, paragraph 2, of the Convention be rejected accordingly;

Whereas, on the other hand, it should be considered whether the fact that one parent is deprived of the custody of an infant entails not in itself but in its effects, a *prima facie* violation, with regard to that parent and the infant in question, of the rights and freedoms guranteed by the Convention and Protocol;

and *whereas*, in this respect, the Applicant claims that the aforementioned order of the Court of Appeal, as confirmed by the Supreme Court, violates Articles 8 and 9 of the Convention in that it resulted in his infant son being brought up in ignorance of his Polish nationality, in his being educated in a way contrary to the teachings of the Roman Catholic Church in which he was baptised, and in his being ignorant of his father's existence;

and *whereas*, having regard to the allegations put forward by the Applicant and after having examined *ex officio* the file in its present state, the Commission is of opinion that two major questions arise regarding a possible *prima facie* violation of the rights and freedoms guaranteed by the Convention and Protocol as a consequence of the awarding of the custody of the Applicant's infant son to his ex-wife;

and *whereas* the first question that falls to be decided concerns the possible *prima facie* violation of Article 8 of the Convention in so far as the Applicant alleges that, as a result of his not having the custody of his infant son, he did not have an opportunity to have access to his son;

and *whereas*, in the view of the Commission, the parent who is deprived of the custody of an infant may not be prevented, under Article 8, paragraph 1, from access to that infant unless special circumstances, as defined in paragraph 2 of the same Article, so demand;

and *whereas*, in this respect, a remedy in the local courts was available to the Applicant since Article 10, Chapter 6, of the Swedish Parents' Law (*Föräldrabalken*) stipulates as follows:

"The father or mother who is deprived of the custody of a child may not be prevented from access to the child unless special circumstances exist against such access; when the parent is not satisfied with what has been decided in this matter by the parent who has the custody, the court shall make a ruling";

and *whereas*, under Article 26 of the Convention, the Commission may only deal with a matter after all domestic remedies have been

already stated above in regard to the complaint under Article 6 of the Convention;

Now therefore the Commission
Declares this application inadmissible".

[Decision taken on 20th December, 1957]