

COURT (CHAMBER)

CASE OF COSTELLO-ROBERTS v. THE UNITED KINGDOM

(Application no. 13134/87)

JUDGMENT

STRASBOURG

25 March 1993

In the case of Costello-Roberts v. the United Kingdom *

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") ** and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,

Mr R. BERNHARDT,

Mr Thór VILHJÁLMSOON,

Mr F. GÖLCÜKLÜ,

Mr F. MATSCHER,

Mr R. MACDONALD,

Mr F. BIGI,

Sir John FREELAND,

Mr L. WILDHABER,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,
Having deliberated in private on 25 September 1992 and on 23 February 1993,
Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 7 December 1991, within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 13134/87) against the **United Kingdom** of Great Britain and Northern Ireland lodged with the Commission under Article 25 (art. 25) on 17 January 1986 by two British citizens, Mrs Wendy Costello-Roberts and her son Jeremy. The expression "the applicant" hereinafter designates Jeremy, his mother's complaints having been declared inadmissible by the Commission (see paragraphs 22-23 below).

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the **United Kingdom** recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 3, 8 and 13 (art. 3, art. 8, art. 13) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and designated the lawyers who would represent him (Rule 30).

3. On 24 January 1992 the President of the Court decided that, pursuant to Rule 21 para. 6 and in the interests of the proper administration of justice, this case and the case of Y v. the **United Kingdom** * should be heard by the same Chamber. Following a friendly settlement, the case of Y was struck out of the list by a judgment dated 29 October 1992 (Series A no. 247-A).

4. The Chamber to be constituted for this purpose included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 24 January 1992 the President drew by lot, in the presence of the Registrar, the names of the other seven members, namely Mr J. Cremona, Mr Thór Vilhjálmsson, Mr F. Gölcüklü, Mr R. Macdonald, Mr R. Bernhardt, Mr F. Bigi and Mr L. Wildhaber (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently Mr F. Matscher, substitute judge, replaced Mr Cremona, whose term of office had expired and whose successor had taken up his duties before the hearing (Rules 2 para. 3 and 22 para. 1).

5. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government of the **United Kingdom** ("the Government"), the Delegate of the Commission and the applicant's representative on the organisation of the procedure (Rules 37 para. 1 and 38). In accordance with the order made in consequence, the Registrar received, on 23 June 1992, the applicant's memorial and, on 22 July, the Government's. By letter of 17 August 1992, the Secretary to the Commission informed him that the Delegate would submit his observations at the hearing.

6. In accordance with the decision of the President, the hearing took place in public in the Human Rights Building, Strasbourg, on 23 September 1992. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mrs A. GLOVER, Legal Counsellor,
Foreign and Commonwealth Office, *Agent*,

Mr N. BRATZA, Q.C., *Counsel*,

Mr A. PRESTON, Department for Education,

Mr S. DANCE, Department for Education, *Advisers*;

- for the Commission

Sir Basil HALL, *Delegate*;

- for the applicant

Ms J. BEALE, Barrister-at-Law, *Counsel*,

Mr M. GARDNER, Solicitor,

Mr M. ROSENBAUM, *Adviser*.

The Court heard addresses by Mr Bratza for the Government, by Sir Basil Hall for the Commission, and by Ms Beale for the applicant.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

7. In September 1985 Mrs Costello-Roberts sent the applicant, who was then aged seven, to an independent boarding preparatory school in Barnstaple, Devon. The school had approximately 180 pupils, none of whose fees were paid out of public funds, and received no direct financial support from the Government.

8. In the school's prospectus it was stated that a high standard of discipline was maintained, but no mention was made of the use of corporal punishment. Mrs Costello-Roberts had made no enquiry about the school's disciplinary regime and did not at the outset make known her opposition to corporal punishment. The school in question operated a system whereby such punishment was administered upon acquisition of five demerit marks. On 3 October 1985 the applicant received his fifth demerit mark for talking in the corridor. The other demerit marks were for similar conduct and for being a little late for bed on one occasion. Having discussed the matter with his colleagues, the headmaster decided that the only answer to the applicant's lack of discipline, about which he had received three warnings from the headmaster, was to give him three "whacks" on the bottom through his shorts with a rubber-soled gym shoe. He so informed the applicant on 8 October.

9. The punishment was administered by the headmaster three days later, eight days after Jeremy had received his fifth demerit mark. No other persons were present. Before the Strasbourg institutions it was alleged by the applicant's counsel that he was told not to inform his parents about his punishment, but this was denied by the school. In any event, in a letter to his mother post-marked 21 October 1985, he wrote "come and picke me up I have had the wacke". He continued to write to her in some distress about the "slippering".

On 4 November 1985 the school confirmed to her that her son had been slippered; according to her - though this too was contested by the Government - the school had initially denied the fact.

On 5 November, Mrs Costello-Roberts wrote to the Governors of the school to express her "disquiet" and "grave concern" about the use of such a "barbaric practice". She acknowledged that the "growing problems" began after the first week of term and said that "we made it very clear to the staff ... that we considered his behaviour to be reflecting signs of an upset ...". The headmaster in his turn wrote to the Chairman of the Board of Governors on 7 November, stating that the applicant's problems were due to a lack of discipline; he refused to accept authority and his behaviour was disrupting the life of the school community. Mrs Costello-Roberts also wrote to the headmaster to inform him that she did not want her son to be corporally punished. On 16 November 1985 he replied as follows:

"in view of your obvious dissatisfaction with the education being offered ... to your son ... and your desire for him to be exempt from the framework of discipline and punishment that is acceptable to all other parents at the school, it seems best if [he] is removed from [the school] at the end of the present term."

10. The applicant's mother complained to the police some time between 4 and 16 November 1985, but was told that there was no action they could take without any visible bruising on the child's buttocks. A complaint by her to the National Society for the Prevention of Cruelty to Children received a similar response.

11. The staff were said to have noticed an almost immediate improvement in the boy's behaviour after the corporal punishment, but considered that the subsequent contact that he had had with his parents during the half-term holiday had caused him to revert. The headmaster was of the opinion that the applicant "strung his parents along", taking home stories about bullying and the like "which he has clearly made up but which equally clearly his parents believe".

It was argued in Strasbourg, on behalf of the applicant, that he had been extremely disturbed by the slipping, which turned him from a confident, outgoing seven-year-old into a nervous and unsociable child.

The Government contended that, according to their information, any change in the child's character during his time at the school was more likely to have been caused by his inability to adjust to the constraints of boarding-school life than the "slipping". In their view, the above-mentioned correspondence between the mother, the school Governors and the headmaster reflected the boy's adaptation difficulties.

12. The applicant left the Barnstaple school in November 1985 and entered a new school in January 1986. It reported in July 1986 that he had "calmed down considerably" since his arrival, when he had been unsociable, nervous and quite aggressive.

II. THE RELEVANT DOMESTIC LAW AND PRACTICE

A. The use of corporal punishment

13. In English law, at the relevant time, there were various criminal offences of assault, the penalties for which differed according to the gravity of the offence and the court in which it was tried. The law has since been amended by the Criminal Justice Act 1988.

Prosecution for common assault, the least serious form of assault, was normally brought by or on behalf of the aggrieved party in accordance with section 42 of the Offences against the Person Act 1861, as amended ("the 1861 Act"). Section 45 of the 1861 Act barred any further or other proceedings, civil or criminal, for the same cause. Consequently, the Crown did not normally undertake a prosecution for common assault, thus ensuring that the choice between criminal and civil proceedings remained with the victim of the alleged assault.

In the Magistrates' Court the maximum penalty for common assault was a fine of £400 or two months' imprisonment. In cases of "aggravated" common assault, namely where committed upon a male child no more than fourteen years old or any female, the maximum penalty was a higher fine or six months' imprisonment. In the Crown Court the maximum penalty on conviction increased to one year's imprisonment.

Assault occasioning actual bodily harm, a more serious form of assault, was and still is governed, in particular, by section 47 of the 1861 Act. Prosecutions are normally undertaken by the Crown and the penalty on conviction is a maximum term of five years' imprisonment.

In addition, it is an offence under section 1(1) of the Children and Young Persons Act 1933 to assault or ill-treat a child in a manner likely to cause him unnecessary suffering or injury to health. The maximum penalty on conviction is a fine or ten years' imprisonment.

14. Under the civil law, if no criminal prosecution has been brought for common assault, physical assault is actionable as a form of trespass to the person, giving the aggrieved party the right to recovery of damages. Civil proceedings arising out of the use of immoderate or unreasonable corporal punishment by a teacher will lie either against him or his employer - i.e. the school or school authorities. Such proceedings for assault may be heard by County Courts as well as by the High Court, from both of which an appeal lies to the Court of Appeal.

15. Subject to the exceptions brought about as a result of a change in domestic law (see paragraph 16 below), it is a defence to both criminal charges and civil claims that the person against whom the charge or claim is made was a teacher administering reasonable and moderate physical punishment with a proper instrument in a decent manner. The teacher is said to have this right by virtue of being in loco parentis, exercising by deemed delegation a parental right to inflict such treatment upon children.

The law governing the administration of corporal punishment by schoolteachers is, therefore, based upon the right of parents to use physical punishment on their children. Both parents and teachers are protected by the law only when the punishment in a particular case is "reasonable" in the circumstances. The concept of "reasonableness" permits the courts to apply standards prevailing in contemporary society with regard to the physical punishment of children.

16. With effect from 15 August 1987 when sections 47-48 of the Education (No. 2) Act 1986 came into force - i.e. after the events giving rise to the present case - the above-mentioned defence ceased to be available to a teacher in civil proceedings for trespass in respect of certain pupils, namely those at schools maintained by local education authorities and certain other schools for which the State provides financial assistance, and those at independent schools (see paragraph 21 below) whose fees are paid out of public funds.

B. The school system

17. Under the Education Act 1944 parents have a duty, on pain of criminal sanctions, to educate their children. They have the choice between providing suitable education at home or using independent or State schools. The Secretary of State has a duty under the same Act to ensure certain educational standards.

18. An independent school (often referred to as a "private school") is one at which full-time education is provided for five or more pupils of compulsory school age not being a special school defined under section 114(1) of the Education Act 1944 as one specially organised to provide education for pupils with learning difficulties, or a school maintained by a local education authority.

Independent schools must apply for registration to the Registrar of Independent Schools, an officer of the Department of Education and Science. Registration is subject to the provision of suitable safety, health and educational standards.

The Government contended before the Convention institutions that it was clear from the provisions of sections 70-75 of the Education Act 1944 that the Secretary of State has no power to refuse to register an independent school on the ground that corporal punishment is administered there and that any refusal to register a school on this ground would be open to legal challenge by the school concerned.

19. Once registered, independent schools remain subject to periodic inspections and visits by Her Majesty's Inspectors, but they are not subject to the same standards as State subsidised schools. Section 71(1) of the Education Act 1944 empowers the Secretary of State to initiate a complaints procedure which may result in an independent school being struck off the register.

Subject to the exceptions mentioned at paragraph 16 above, independent schools remain free to use corporal punishment as a disciplinary measure. According to the Government:

(a) whilst the use within the school of excessive corporal punishment (involving successful criminal prosecutions) might lead the Secretary of State to use his powers under section 71(1), the use of moderate and reasonable corporal punishment would not be a ground for serving a notice of complaint on the school or for withdrawing its registration;

(b) complaints of too frequent use of corporal punishment would be referred to Her Majesty's Inspectors who could be expected to discuss with the school its disciplinary policy, but ultimately this would be a matter for the school to decide on, within the legal constraints, leaving individual parents who objected to the policy to select a different school for their children;

(c) none of the eleven notices of complaint issued in the past five years concerned the use of corporal punishment.

The applicant contended, on the other hand, that the procedure leading to striking off the register was initiated in respect of a school making substantial use of corporal punishment. Her Majesty's Inspectors expressed concern, inter alia, with the corporal punishment system and recommended that the school review its practice.

20. Under the Children Act 1989 - not in force at the relevant time - independent schools which provide boarding accommodation for not more than fifty children (other than those approved under the Education Act 1981 as suitable for children with special educational needs) are required to register as children's homes. Under the Children's Homes Regulations 1991 the use of corporal punishment has been prohibited in such schools.

21. In England and Wales, the State funds directly three out of a total of 2,341 independent schools. Certain pupils in 295 independent schools receive financial support from public funds under the Assisted Places Scheme pursuant to section 17 of the Education Act 1980. In the year 1991-92, 28,303 pupils out of a total of some 550,000 took up assisted places. Local education authorities may pay for the education of pupils in their area at independent schools or assist with the fees of pupils in cases of hardship.

Independent schools have charitable status, which entitles them to the tax reliefs accorded to charities generally.

PROCEEDINGS BEFORE THE COMMISSION

22. In their application (no. 13134/87) lodged with the Commission on 17 January 1986, Mrs Costello-Roberts and her son Jeremy submitted that his corporal punishment constituted a breach of Article 3 (art. 3) of the Convention and also violated the right of each of them to respect for their private and family life guaranteed by Article 8 (art. 8). In addition, they alleged that, contrary to Article 13 (art. 13), they had no effective domestic remedies for these Convention complaints. An original complaint under Article 14 (art. 14) was subsequently withdrawn.

23. On 13 December 1990 the Commission declared the mother's complaints inadmissible and the son's admissible. In its report of 8 October 1991 (drawn up in accordance with Article 31) (art. 31), the Commission expressed the opinion, by nine votes to four, that there had been a violation of Article 8 (private life) (art. 8), but not of Article 3 (art. 3) and, by eleven votes to two, that there had been a violation of Article 13 (art. 13).

The full text of the Commission's opinion and the five separate opinions contained in the report is reproduced as an annex to this judgment^{*}.

FINAL SUBMISSIONS MADE TO THE COURT

24. At the hearing the Government confirmed the submissions they had made in their memorial. They asked the Court to hold that there had been no violation of Articles 3, 8 and 13 (art. 3, art. 8, art. 13) of the Convention.

AS TO THE LAW

I. RESPONSIBILITY OF THE RESPONDENT STATE

25. Mr Costello-Roberts alleged that the treatment to which he had been subjected had given rise to violations of Articles 3 and 8 (art. 3, art. 8) of the Convention.

Whilst conceding that the State exercised a limited degree of control and supervision over independent schools, such as the applicant's, the Government denied that they were directly responsible for every aspect of the way in which they were run; in particular, they assumed no function in matters of discipline.

Accordingly, it must first be considered whether the facts complained of by the applicant are such as may engage the responsibility of the **United Kingdom** under the Convention.

26. The Court has consistently held that the responsibility of a State is engaged if a violation of one of the rights and freedoms defined in the Convention is the result of non-observance by that State of its obligation under Article 1 (art. 1) to secure those rights and freedoms in its domestic law to everyone

within its jurisdiction (see, mutatis mutandis, the *Young, James and Webster v. the United Kingdom* judgment of 13 August 1981, Series A no. 44, p. 20, para. 49). Indeed, it was accepted by the Government for the purposes of the present proceedings that such an obligation existed as regards securing the rights guaranteed by Articles 3 and 8 (art. 3, art. 8) to pupils in independent schools. Notwithstanding this, they argued that the responsibility of the **United Kingdom** was not in fact engaged because the English legal system had adequately secured the rights guaranteed by Articles 3 and 8 (art. 3, art. 8) of the Convention by prohibiting the use of any corporal punishment which was not moderate or reasonable.

27. The Court notes first that, as was pointed out by the applicant, the State has an obligation to secure to children their right to education under Article 2 of Protocol No. 1 (P1-2). It recalls that the provisions of the Convention and its Protocols must be read as a whole (see the *Kjeldsen, Busk Madsen and Pedersen v. Denmark* judgment of 7 December 1976, Series A no. 23, pp. 26 and 27, paras. 52 and 54, and the *Soering v. the United Kingdom* judgment of 7 July 1989, Series A no. 161, p. 40, para. 103). Functions relating to the internal administration of a school, such as discipline, cannot be said to be merely ancillary to the educational process (see, mutatis mutandis, the *Campbell and Cosans v. the United Kingdom* judgment of 25 February 1982, Series A no. 48, p. 14, para. 33). That a school's disciplinary system falls within the ambit of the right to education has also been recognised, more recently, in Article 28 of the United Nations Convention on the Rights of the Child of 20 November 1989 which entered into force on 2 September 1990 and was ratified by the **United Kingdom** on 16 December 1991. This Article, in the context of the right of the child to education, provides as follows:

"2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention."

Secondly, in the **United Kingdom**, independent schools co-exist with a system of public education. The fundamental right of everyone to education is a right guaranteed equally to pupils in State and independent schools, no distinction being made between the two (see, mutatis mutandis, the above-mentioned *Kjeldsen, Busk Madsen and Pedersen* judgment, Series A no. 23, p. 24, para. 50).

Thirdly, the Court agrees with the applicant that the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals (see, mutatis mutandis, the *Van der Musselle v. Belgium* judgment of 23 November 1983, Series A no. 70, pp. 14-15, paras. 28-30).

28. Accordingly, in the present case, which relates to the particular domain of school discipline, the treatment complained of although it was the act of a headmaster of an independent school, is none the less such as may engage the responsibility of the **United Kingdom** under the Convention if it proves to be incompatible with Article 3 or Article 8 or both (art. 3, art. 8).

II. ALLEGED VIOLATION OF ARTICLE 3 (art. 3)

29. Jeremy Costello-Roberts claimed that the corporal punishment inflicted on him constituted "degrading punishment" contrary to Article 3 (art. 3), according to which:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

He maintained that although the actual physical force to which he had been subjected had been moderate, there had, nevertheless, been an assault on his dignity and physical integrity. He relied, in particular, on the dissenting opinions of three members of the Commission. The degrading character had, he claimed, been aggravated by his age at the time (seven years), the fact that he had been at the school for only about five weeks, the humiliating site of the punishment, the impersonal and automatic way in which it had been administered as a result of "totting up" demerit marks for minor offences, and the three-day wait between the "sentence" and its implementation.

The applicant's allegation was contested by the Government and was not accepted by a majority of the Commission.

30. In its *Tyrer v. the United Kingdom* judgment of 25 April 1978 (Series A no. 26), the Court has already held that corporal punishment may constitute an assault on a person's dignity and physical integrity as protected under Article 3 (art. 3). However, as was pointed out in paragraph 30 of that judgment, in order for punishment to be "degrading" and in breach of Article 3 (art. 3), the humiliation or debasement involved must attain a particular level of severity and must in any event be other than that usual element of humiliation inherent in any punishment. Indeed, Article 3 (art. 3), by expressly

prohibiting "inhuman" and "degrading" punishment, implies that there is a distinction between such punishment and punishment more generally.

The assessment of this minimum level of severity depends on all the circumstances of the case. Factors such as the nature and context of the punishment, the manner and method of its execution, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim must all be taken into account (see the Ireland v. the **United Kingdom** judgment of 18 January 1978, Series A no. 25, p. 65, para. 162, the above-mentioned Tyrer judgment, Series A no. 26, pp. 14-15, paras. 29-30, and the above-mentioned Soering judgment, Series A no. 161, p. 39, para. 100).

31. The circumstances of the applicant's punishment may be distinguished from those of Mr Tyrer's which was found to be degrading within the meaning of Article 3 (art. 3). Mr Costello-Roberts was a young boy punished in accordance with the disciplinary rules in force within the school in which he was a boarder. This amounted to being slipped three times on his buttocks through his shorts with a rubber-soled gym shoe by the headmaster in private (see paragraphs 8 and 9 above). Mr Tyrer, on the other hand, was a young man sentenced in the local juvenile court to three strokes of the birch on the bare posterior. His punishment was administered some three weeks later in a police station where he was held by two policemen whilst a third administered the punishment, pieces of the birch breaking at the first stroke.

32. Beyond the consequences to be expected from measures taken on a purely disciplinary plane, the applicant has adduced no evidence of any severe or long-lasting effects as a result of the treatment complained of. A punishment which does not occasion such effects may fall within the ambit of Article 3 (art. 3) (see the above-mentioned Tyrer judgment, Series A no. 26, pp. 16-17, para. 33), provided that in the particular circumstances of the case it may be said to have reached the minimum threshold of severity required. While the Court has certain misgivings about the automatic nature of the punishment and the three-day wait before its imposition, it considers that minimum level of severity not to have been attained in this case.

Accordingly, no violation of Article 3 (art. 3) has been established.

III. ALLEGED VIOLATION OF ARTICLE 8 (art. 8)

33. The applicant alleged that his corporal punishment had also given rise to a breach of Article 8 (art. 8) of the Convention, which reads:

"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."

This claim was contested by the Government, but upheld by a majority of the Commission.

34. That majority recalled the consistent case-law of the Convention institutions to the effect that the concept of "private life" covered a person's physical and moral integrity (see, in particular, the X and Y v. the Netherlands judgment of 26 March 1985, Series A no. 91, pp. 11-13, paras. 22-27). It was of the opinion that the protection afforded by Article 8 (art. 8) to an individual's physical integrity could be wider than that contemplated by Article 3 (art. 3) and that, accordingly, the applicant's complaint could be examined under the former as well as the latter provision.

35. In the applicant's submission, the aim of the punishment was to exercise coercion through force and fear and this constituted an interference with moral integrity as well as physical integrity. At school a child was in the public world where he had to learn to respect the privacy of others and was entitled to have his own private life respected, as was recognised by Article 16 of the United Nations Convention on the Rights of the Child of 20 November 1989, and to be treated with dignity.

This right was guaranteed under the Convention irrespective of whether he deserved to be punished or whether - which was denied - his parents had consented to such punishment in general or to the particular instance of "slipping" to which he had been subjected.

36. The Court agrees with the Government that the notion of "private life" is a broad one, which, as it held in its recent judgment in the case of Niemietz v. Germany (16 December 1992, Series A no. 251-B, p. 11, para. 29), is not susceptible to exhaustive definition. Measures taken in the field of education may, in

certain circumstances, affect the right to respect for private life (see, *mutatis mutandis*, the judgment of 23 July 1968 on the merits of the "Belgian Linguistics" case, Series A no. 6, p. 33, para. 7), but not every act or measure which may be said to affect adversely the physical or moral integrity of a person necessarily gives rise to such an interference.

The particular disciplinary measure taken against Jeremy Costello-Roberts for a series of minor breaches of school rules did not attain, in the opinion of the Court, a level of severity which was sufficient to bring it within the ambit of Article 3 (art. 3) (see paragraph 32 above), the Convention Article which expressly deals with punishment and therefore provides a first point of reference for examining a case concerning disciplinary measures in a school.

The Court does not exclude the possibility that there might be circumstances in which Article 8 (art. 8) could be regarded as affording in relation to disciplinary measures a protection which goes beyond that given by Article 3 (art. 3). Having regard, however, to the purpose and aim of the Convention taken as a whole, and bearing in mind that the sending of a child to school necessarily involves some degree of interference with his or her private life, the Court considers that the treatment complained of by the applicant did not entail adverse effects for his physical or moral integrity sufficient to bring it within the scope of the prohibition contained in Article 8 (art. 8). While not wishing to be taken to approve in any way the retention of corporal punishment as part of the disciplinary regime of a school, the Court therefore concludes that in the circumstances of this case there has also been no violation of that Article (art. 8).

IV. ALLEGED VIOLATION OF ARTICLE 13 (art. 13)

37. The applicant further alleged that he had no effective remedy in the **United Kingdom** in respect of his complaints under Articles 3 and 8 (art. 3, art. 8), as required by Article 13 (art. 13) of the Convention, which reads as follows:

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

In his submission, a civil action by him for assault would have been dismissed on the ground that his punishment fell within the bounds of reasonable and moderate chastisement. He relied on the case of *Y v. the United Kingdom* in which corporal punishment of a child that had involved the use of more severe physical force than in his case had been considered lawful by the County Court and in which the child had been advised that an appeal had no chance of success (see the Court's judgment of 29 October 1992 in that case, Series A no. 247-A, p. 3, para. 12). Moreover, the relevant domestic law was not concerned with whether it was permissible to inflict such punishment at all, nor did it address issues of degradation or invasion of privacy.

38. The Commission concluded that the English law of assault had not provided the applicant with an effective remedy under Article 13 (art. 13). It referred to the case of *Y* and also to its opinion in the case of *Maxine and Karen Warwick v. the United Kingdom* (application no. 9471/81, Commission's report of 18 July 1986, Decisions and Reports 60, pp. 18-19, paras. 94-102) in which, again, a more severe punishment than that inflicted on Jeremy Costello-Roberts had been considered lawful by a County Court.

39. Notwithstanding its findings that no right guaranteed by either Article 3 (art. 3) or Article 8 (art. 8) has been violated, the Court must, in accordance with its case-law, consider the applicant's claim under Article 13 (art. 13), provided that his grievances under Articles 3 and 8 (art. 3, art. 8) can be regarded as "arguable" in terms of the Convention (see, among other authorities, the *Boyle and Rice v. the United Kingdom* judgment of 27 April 1988, Series A no. 131, p. 23, para. 52). In view of the approach it has adopted in paragraphs 30-32 and 36 above, the Court considers that this condition is satisfied.

40. For the following reasons the Court agrees in substance with the Government's submission that an effective remedy was available to the applicant in respect of his Article 3 and 8 (art. 3, art. 8) complaints.

First, it was not disputed that it would have been open to the applicant to institute civil proceedings for assault and that, had they succeeded, the English courts would have been in a position to grant him appropriate relief in respect of the punishment which he had received.

Secondly, the effectiveness of a remedy for the purposes of Article 13 (art. 13) does not depend on the certainty of a favourable outcome (see, as the most recent authority, the *Pine Valley Developments Ltd and Others v. Ireland* judgment of 29 November 1991, Series A no. 222, p. 27, para. 66); in any event it is

not for the Court to speculate as to what decision the English courts would have reached, given particularly the latitude which those courts would have to apply relevant contemporary standards (see paragraph 15 in fine above).

In so far as the applicant's arguments relate to the more general question of the scope of the relevant domestic law, the Court recalls that Article 13 (art. 13) does not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention or to equivalent domestic legal norms (see, among other authorities, the *James and Others v. the United Kingdom* judgment of 21 February 1986, Series A no. 98, p. 47, para. 85).

There has accordingly been no breach of Article 13 (art. 13).

FOR THESE REASONS, THE COURT

1. Holds by five votes to four that there has been no violation of Article 3 (art. 3);
2. Holds unanimously that there has been no violation of Article 8 (art. 8) or Article 13 (art. 13).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 March 1993.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint partly dissenting opinion of Mr Ryssdal, Mr Thór Vilhjálmsson, Mr Matscher and Mr Wildhaber;

(b) concurring opinion of Sir John Freeland.

R.R.
M.-A.E.

JOINT PARTLY DISSENTING OPINION OF JUDGES RYSSDAL, THÓR VILHJÁLMSSON, MATSCHER AND WILDHABER

We agree with the majority that the **United Kingdom** may indeed incur responsibility under the Convention on account of the administration of corporal punishment in independent schools. Primary education is compulsory in the **United Kingdom** as elsewhere. In such fields, the State must exercise some measure of control over private schools so as to safeguard the essence of the Convention guarantees. A State can neither shift prison administration to the private sector and thereby make corporal punishment in prisons lawful, nor can it permit the setting up of a system of private schools which are run irrespective of Convention guarantees. On the other hand, it is granted that the Convention is not applicable as such in all respects to relations between private persons. It therefore becomes a matter of balancing whether and to what extent private schools must respect Convention guarantees, in particular Articles 3 and 8 (art. 3, art. 8).

We also accept that in the circumstances of this case Article 3 (art. 3) is the first point of reference for examining a case concerning disciplinary measures in a school. Accordingly, the protection afforded by Article 8 (art. 8) to the applicant's physical integrity is not wider than that contemplated by Article 3 (art. 3).

However, in the present case, the ritualised character of the corporal punishment is striking. After a three-day gap, the headmaster of the school "whacked" a lonely and insecure 7-year-old boy. A spanking on the spur of the moment might have been permissible, but in our view, the official and formalised nature of the punishment meted out, without adequate consent of the mother, was degrading to the applicant and violated Article 3 (art. 3).

At the relevant time the laws relating to corporal punishment applied to all pupils in both State and independent schools in the **United Kingdom**. However, reflecting developments throughout Europe, such punishment was made unlawful for pupils in State and certain independent schools. Given that such punishment was being progressively outlawed elsewhere, it must have appeared all the more degrading to those remaining pupils in independent schools whose disciplinary regimes persisted in punishing their pupils in this way.

We might add that the child's rights under Article 3 (art. 3) are not diminished by balancing them against the mother's rights. The parents of the boarders in Barnstaple were not adequately informed that corporal punishment was used in order to maintain discipline.

CONCURRING OPINION OF JUDGE SIR JOHN FREELAND

I have joined in voting for the findings of non-violation of the Convention. So far as Article 3 and Article 8 (art. 3, art. 8) are concerned, this is essentially because, whatever view may be taken on the general question of the acceptability in principle, by contemporary standards, of continued toleration of corporal punishment as a disciplinary sanction in part, but not all, of the English school system, that was not the question before the Court; and I have not been satisfied that, in its own particular circumstances, the nature, purpose and effects of the punishment administered to Jeremy Costello-Roberts were sufficient to bring it within what is in my view the true scope of the protection afforded by either Article (art. 3, art. 8). But it must be evident, if only from the division of opinion in the Court, that the case is at or near the borderline; and I, for my part, would emphasise the Court's expression of misgivings in the penultimate sentence of paragraph 32 of the judgment and its wish, as stated in the last sentence of paragraph 36, not "to be taken to approve in any way the retention of corporal punishment as part of the disciplinary regime of a school".

* The case is numbered 89/1991/341/414. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

* Case no. 91/1991/343/416

* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 247-C of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

CHAPPELL v. THE **UNITED KINGDOM** JUDGMENT

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COSTELLO-ROBERTS v. THE **UNITED KINGDOM** JUDGMENT

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