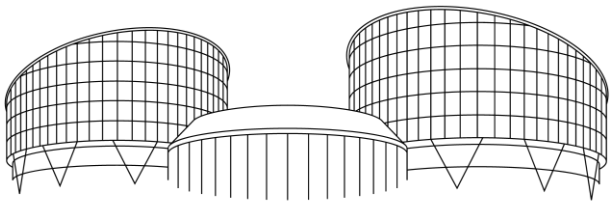

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF M.A.K. AND R.K. v. THE UNITED KINGDOM

(Applications nos. 45901/05 and 40146/06)

JUDGMENT

STRASBOURG

23 March 2010

FINAL

23/06/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of M.A.K. and R.K. v. the United Kingdom,

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

Lech Garlicki, *President,*
Nicolas Bratza,
Giovanni Bonello,
Ljiljana Mijović,
Ján Šikuta,
Mihai Poalelungi,
Nebojša Vučinić, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 2 March 2010,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in two applications (nos. 45901/05 and 40146/06) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two British nationals, Mr M.A.K. and Ms R.K. ("the applicants"), on 18 October 2005 and on 28 September 2006 respectively. The President of the Chamber acceded to the applicants' request not to have their names disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicants, who had been granted legal aid, were represented by J. Sykes of Levi Solicitors LLP and Ms N. Mole of the AIRE Centre. The United Kingdom Government ("the Government") were represented by their Agent, Mr J. Grainger of the Foreign and Commonwealth Office.

3. The applicants and the Government each filed observations on the admissibility and merits of the case (Rule 59 § 1).

4. The Chamber decided to join the proceedings in the applications (Rule 42 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first applicant's daughter, who is the second applicant, was born on 6 March 1989.

6. On 9 September 1997 the first applicant took the second applicant to see their general practitioner because he and his wife were concerned about what appeared to be bruising on her legs. A clotting test was carried out but it showed no abnormality.

7. On 25 February 1998 the first applicant took the second applicant back to the general practitioner because her swimming teacher had expressed concern about the marks on her legs. The first applicant asked for a referral to hospital and an appointment was made for 17 March 1998 with Dr W., a consultant paediatrician.

8. On 15 March 1998 the second applicant hurt herself in the genital area while riding her bike. She complained to her mother of hurting between her legs. Her mother did not examine her and she did not tell the first applicant of the incident.

9. On 17 March 1998 the first applicant took the second applicant to the appointment with Dr W. Dr W. said that the bruising did not appear to be a skin disease and admitted the second applicant to hospital for further examination. The first applicant had to go to work but before leaving the hospital he told Dr W. that his wife would arrive soon and there should be no further examination or tests until she came and gave any necessary consent.

10. When the first applicant's wife arrived one hour later, she found that a sample of the second applicant's blood had been taken for testing, photographs had been taken of her legs and the local authority had been notified. A social worker informed her that Dr W. thought the second applicant had been abused. The first applicant's wife then gave consent for a further examination. Dr W. and a police surgeon examined the second applicant's legs and genitalia. The second applicant was given no explanation for the examinations and she was not questioned about the allegations of abuse. Following the examination, Dr W. informed the first applicant's wife that the second applicant had been sexually abused and that it had probably been going on for eight months on account of the bruising. The social worker interviewed the second applicant generally, but asked no direct questions about sexual abuse. No record was made of the interview. During the interview the social workers told the first applicant's wife to ask the first applicant and their eldest son to move out of the family home until further investigations had taken place. At this point she recalled that the second applicant had “hurt between her legs” while on her bicycle. She informed the social worker, who said that she would pass the information on to the doctor.

11. At 17.30 that evening, when the first applicant and his wife attempted to visit the second applicant on the ward, a nurse told them that there were orders that the first applicant should not be allowed to see her. This exchange was witnessed by other people on the ward. News was passed through the community and reached acquaintances in India. The following day, hospital staff were correctly informed that there could be no restrictions on visitors. The first applicant was thereafter permitted to visit the second applicant in

hospital, although all visits were supervised on account of the suspicion that she had been sexually abused.

12. On 18 March 1998 the first applicant's wife informed Dr W. that the second applicant had "hurt between her legs" on her bicycle. Dr W. told her that there was no doubt the second applicant had been sexually abused and advised her that if she did not accept it, there was a risk that her other children would be taken into care.

13. On the same day two social workers visited the applicants' home. The applicant's wife asked for a second opinion on the cause of the bruising but the social workers told her that they saw no point in obtaining a second opinion. They did not, however, insist that the first applicant should leave the family home; instead it was arranged that the first applicant's wife should sleep in the room with her daughters.

14. On 21 March 1998 the first applicant's wife noticed that the second applicant had marks on her hands. An appointment was made for the second applicant to see a dermatologist.

15. On 24 March 1998 the dermatologist reported that the marks on the second applicant's legs were caused by vasculitis.

16. On 27 March 1998 the second applicant was diagnosed with Schamberg's disease, a rare condition of the capillaries which is manifested by the eruption of purple patches on the skin. She was discharged from hospital. Dr W. wrote a letter to the first applicant and his wife which stated that there was insufficient evidence to say that the second applicant had been sexually abused and that the first applicant should no longer be considered to be implicated in the sexual or physical abuse of his daughter.

17. The first applicant and his wife were unhappy with what had happened and made a formal complaint to the NHS Trust. The Trust set up an Independent Review Panel with two Assessors who were consultant paediatricians experienced in child abuse cases. The Panel report concluded that Dr W. had been right to admit the second applicant to hospital but found that she had acted too quickly in carrying out examinations. The report further noted that examinations and photographs should not have been taken while no parent was present; that while Dr W. was not to blame for misdiagnosing the bruises, she should have monitored them and obtained a dermatologist's opinion as a matter of urgency; that the first applicant should have been properly consulted and interviewed; and that Dr W. had attached far too much importance to the bruising, neglecting other relevant information available from the first applicant, his wife and the family doctor. Finally, the report noted that Dr W. had, without convincing explanation, failed to write to the first applicant with an explanation and an apology.

18. On 9 March 2001 the applicants brought proceedings in negligence against the local authority and hospital trust claiming compensation for personal injury and financial loss. Both were legally aided.

19. On 22 November 2002 the County Court judge struck out the claims, finding that no duty of care arose between the local authority and the first applicant and that the hospital but not the local authority had owed a duty of care to the second applicant. The applicants appealed. Their appeals were joined to those of a number of other appellants.

20. On 31 July 2003 the Court of Appeal granted the second applicant's appeal and allowed her claim to proceed against the local authority as well as the hospital. The Legal Services Commission, however, withdrew the second applicant's legal aid certificate on the basis that it was no longer reasonable for her to receive legal aid because the likely costs were disproportionate to the value of the claim. On 4 April 2006 the second applicant's appeal against the withdrawal was dismissed by an independent Funding Review Committee, which agreed that the costs of pursuing the claim considerably outweighed any likely award of damages.

21. On 31 July 2003 the Court of Appeal dismissed the first applicant's appeal together with the appeals of the other appellants. The first applicant and the other appellants were granted leave to appeal to the House of Lords.

22. The House of Lords gave judgment in 2005 (see *JD v East Berkshire Community Health NHS Trust and Ors* [2005] 2 AC 373). The question before the House of Lords in *JD* was whether the parent of a minor child falsely and negligently said to have abused or harmed the child could recover common law damages for negligence against a doctor or social worker who, discharging professional functions, made the false and negligent statement, if the suffering of psychiatric injury by the parent was a foreseeable result of making it and such injury had in fact been suffered by the parent. The House of Lords concluded (Lord Bingham of Cornhill dissenting) that there were cogent reasons of public policy for holding that no common law duty of care should be owed to the parents and it would not be just or reasonable to impose such a duty.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Section 8 of the Family Reform Act 1969

23. Section 8 of the Family Reform Act 1969 provides as follows:

"**Consent by persons over 16 to surgical, medical and dental treatment**

(1) The consent of a minor who has attained the age of sixteen years to any surgical, medical or dental treatment which, in the absence of consent, would constitute a trespass to his person, shall be as effective as it would be if he were of full age; and where a minor has by virtue of this section given an effective consent to any treatment it shall not be necessary to obtain any consent for it from his parent or guardian.

(2) In this section "surgical, medical or dental treatment" includes any procedure undertaken for the purposes of diagnosis, and this section applies to any procedure

(including, in particular, the administration of an anaesthetic) which is ancillary to any treatment as it applies to that treatment.

(3) Nothing in this section shall be construed as making ineffective any consent which would have been effective if this section had not been enacted."

24. In relation to children under the age of sixteen, the House of Lords has held that such minors have the right to consent on their own behalf to a variety of medical procedures, as long as they fully understand what is involved. Until the child achieves the capacity to consent, however, the parental right to make the decision continues save only in exceptional circumstances (see *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112).

25. The General Medical Council ("GMC") guidelines for doctors in relation to obtaining consent for the treatment of children provide as follows:

"23. You must assess a child's capacity to decide whether to consent to or refuse proposed investigation or treatment before you provide it. In general, a competent child will be able to understand the nature, purpose and possible consequences of the proposed investigation or treatment, as well as the consequences of non-treatment. Your assessment must take account of the relevant laws or legal precedents in this area. You should bear in mind that:

At age 16 a young person can be treated as an adult and can be presumed to have capacity to decide;

Under age 16 children may have capacity to decide, depending on their ability to understand what is involved;

Where a competent child refuses treatment, a person with parental responsibility may authorise investigation or treatment which is in the child's best interests. The position is different in Scotland, where those with parental responsibility cannot authorise procedures a competent child has refused. Legal advice maybe helpful on how to deal with such cases.

Where a child under 16 years old is not competent to give or withhold their informed consent, a person with parental responsibility may authorise investigations or treatment which are in the child's best interests. This person may also refuse any intervention, where they consider that refusal to be in the child's best interests, but you are not bound by such a refusal and may seek a ruling from the court. In an emergency where you consider that it is in the child's best interests to proceed, you may treat the child, provided it is limited to that treatment which is reasonably required in that emergency.

B. Legal Aid Act 1988

26. The statutory framework for civil legal aid is contained within Parts IV and I of the 1988 Act.

27. A civil Legal Aid Certificate can only be issued where the case has sufficient merit to justify public funding. With limited exceptions, every application for civil legal aid is subject to two statutory tests: first, section 15(2) of the 1988 Act requires that the applicant have reasonable grounds for

taking, defending or being a party to the proceedings ("the legal merits test"); secondly, section 15(3)(a) of the 1988 Act provides that civil legal aid might be refused if is unreasonable that the applicant should be granted legal aid ("the reasonableness test").

28. Factors relevant to determining the reasonableness of a grant of legal aid include, *inter alia*, a cost benefit analysis, the importance of the case to the applicant, and whether the case is in the public interest.

29. Once an applicant is granted legal aid, the merits are kept under review throughout the case. Under the Civil Legal Aid (General) Regulations 1989, the Legal Aid Board has the power to discharge or revoke a Legal Aid Certificate.

30. If a certificate is discharged or revoked, the assisted person may appeal to the Area Committee. If they remain dissatisfied with the decision, they may seek to have the Area Committee's decision quashed by the High Court by way of judicial review. It is possible to appeal against a decision of the High Court on judicial review to the Court of Appeal and (with leave) to the House of Lords.

III. RELEVANT INTERNATIONAL MATERIAL

31. The Council of Europe's Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (opened to signature at Oviedo on 4 April 1997) contains the following principles regarding consent:

> **"Chapter II – Consent**
>
> **Article 5 – General rule**
>
> An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it.
>
> This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks.
>
> The person concerned may freely withdraw consent at any time.
>
> **Article 6 – Protection of persons not able to consent**
>
> 1. Subject to Articles 17 and 20 below, an intervention may only be carried out on a person who does not have the capacity to consent, for his or her direct benefit.
>
> 2. Where, according to law, a minor does not have the capacity to consent to an intervention, the intervention may only be carried out with the authorisation of his or her representative or an authority or a person or body provided for by law.
>
> The opinion of the minor shall be taken into consideration as an increasingly determining factor in proportion to his or her age and degree of maturity.
>
> 3. Where, according to law, an adult does not have the capacity to consent to an intervention because of a mental disability, a disease or for similar reasons, the

intervention may only be carried out with the authorisation of his or her representative or an authority or a person or body provided for by law.

The individual concerned shall as far as possible take part in the authorisation procedure.

4. The representative, the authority, the person or the body mentioned in paragraphs 2 and 3 above shall be given, under the same conditions, the information referred to in Article 5.

5. The authorisation referred to in paragraphs 2 and 3 above may be withdrawn at any time in the best interests of the person concerned.

Article 8 – Emergency situation

When because of an emergency situation the appropriate consent cannot be obtained, any medically necessary intervention may be carried out immediately for the benefit of the health of the individual concerned."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

32. The first applicant complained that he was subjected to grossly humiliating and distressing treatment contrary to Article 3 of the Convention, which provides as follows:

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

33. The Government submitted that as the first applicant did not seek to rely on Article 3 before the domestic courts, he had failed to exhaust domestic remedies. In the alternative, while the Government did not doubt that the first applicant had suffered distress due to the circumstances in which he found himself, they submitted that the circumstances in issue did not come close to constituting ill-treatment of the severity necessary to engage Article 3 of the Convention. The Government therefore submitted that the Court should reject as manifestly ill-founded the contention that any of the matters at issue disclosed a violation of Article 3.

34. The first applicant contended that the Convention only required that he raise the substance of his complaint in the domestic proceedings (*Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, 23 February 1995, Series A no. 306-B). He therefore submitted that as he had expressly set out in the domestic proceedings the distress that he had felt and the degradation that he had suffered in his community, he had exhausted domestic remedies. The first applicant further submitted that in the present case, "special elements" existed which brought his distress and humiliation within the definition of degrading treatment for the purposes of Article 3. In particular, he submitted that he was a member of a close-knit Muslim community and

his humiliation resounded both through his community in the United Kingdom and overseas.

35. The Court's case-law establishes that Article 3, which prohibits torture and inhuman or degrading treatment or punishment, cannot be relied on where distress and anguish, however deep, flows, inevitably, from measures which are otherwise compatible with the Convention, unless there is a special element which causes the suffering to go beyond that inherent in their implementation (see, *mutatis mutandis*, *Tyrer v. the United Kingdom* judgment of 25 April 1978, Series A no. 26, p. 15, § 30; *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, p. 39, § 100; *V. v. the United Kingdom* [GC], no. 24888/94, § 71, ECHR 1999-IX). Child protection measures will, generally, cause parents distress and on occasion humiliation, if they are suspected of failing, in some way, in their parental responsibilities. However, given the responsibility of the authorities under Article 3 to protect children from serious abuse, whether mental or physical, it would be somewhat contradictory to the effective protection of children's rights to hold that authorities were automatically liable to parents under this provision whenever they erred, reasonably or otherwise, in their execution of their duties. As mentioned above, there must be a factor apart from the normal implementation of those duties which brings the matter within the scope of Article 3 (see *R.K. and A.K. v. the United Kingdom*, no. 38000/05, 30 September 2008).

36. In the present case, while the Court does not doubt the first applicant's distress at events, and in particular the fact that he was mistakenly suspected of abuse, this cannot be regarded as constituting a special element in the sense identified above. The second applicant had clearly suffered an injury which could not be accounted for and it is not disputed that the measures pursued, in good faith, the aim of safeguarding her health and physical security.

37. It follows that this complaint must be rejected as manifestly ill-founded and rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

38. The second applicant complained that the withdrawal of legal aid deprived her of effective access to court and thus violated her rights under Article 6 § 1 of the Convention, which provides, as relevant:

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

39. The Government submitted that the second applicant had failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention because she did not seek to challenge the decision to discharge her Legal Aid

Certificate by way of judicial review. It was well established that a final decision to revoke a legal aid certificate could be challenged by judicial review (see *R (Martin) v Legal Services Commission* [2007] EWHC 1786 (Admin), in which the claimant challenged the discharge of a legal aid certificate in educational negligence proceedings). In principle, therefore, judicial review offered an effective route of challenge in meritorious cases. Without commenting on the merits of such an application, the Government submitted that the second applicant could have challenged the decision of the Legal Services Commission on the ground that it failed to take into account the novelty of her claim. If a judicial review application had been unsuccessful, it would have been possible for the second applicant to appeal to the Court of Appeal and (with leave) to the House of Lords.

40. The second applicant submitted that she had exhausted domestic remedies because, according to the Court's case law, she was only required to exhaust those domestic remedies which had a reasonable prospect of success. Her representatives had advised her that a judicial review application would be bound to fail because judicial review only permitted her to challenge the procedural propriety of an impugned decision and the withdrawal decision had been taken following the proper application of the standard cost-benefit analysis.

41. The second applicant further submitted that as her legal aid certificate had been withdrawn, the legal aid which she would have needed to fund an application for leave to move for judicial review would not have been forthcoming either. The Government did not accept that submission. They contended that there was no evidence that legal aid would not have been forthcoming and, as far as they were aware, no application for legal aid was ever made.

42. The Court reiterates the importance of the right of access to a court, having regard to the prominent place held in a democratic society by the right to a fair trial (*Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, p. 12-13, § 24). The right is not, however, absolute and it may be subject to limitations (*Edificaciones March Gallego S.A. v. Spain*, judgment of 19 February 1998, 1998-I, § 34 and *Garcia Manibardo v. Spain*, no. 38695/97, § 36), but these limitations must not restrict or reduce access in such a way or to such an extent that the very essence of the right is impaired. In this regard the Court recalls that the rights guaranteed under the Convention must be practical and effective and not theoretical and illusory (*Airey v. Ireland*, cited above, at § 24; *McVicar v. the United Kingdom*, no. 46311/99, § 47, ECHR 2002-III). Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (*Ashingdane v the United Kingdom*, judgment of 28 May 1985, Series A no. 93, p. 24, § 57; *Prince*

Hans-Adam II of Liechtenstein v. Germany [GC], no. 42527/98, § 44, ECHR 2001 – VIII, *mutatis mutandis*).

43. Although there is no obligation under Article 6 § 1 of the Convention to make legal aid available for all disputes in civil proceedings, where those proceedings involve complicated points of law, and the applicant cannot afford legal representation, the denial of legal aid could amount to a restriction on his or her access to court (*Airey v. Ireland*, cited above, at § 24). Where it results in a restriction on the right of access to court, the refusal or withdrawal of legal aid will only be compatible with Article 6 § 1 if it is both pursuant to a legitimate aim and proportionate to that aim.

44. The principle question for the Court is whether the restriction was legitimate and proportionate. The Court recognises that a legal aid system can only operate if machinery is in place to enable a selection to be made of those cases qualifying for it (see, among other authorities, the Commission's decisions of 10 July 1980 in *X v. the United Kingdom*, no. 8158/78, Decisions and Reports 21, p. 95, and *Garcia v. France*, no. 14119/88). In the present case the Court notes that the reason relied on by the Legal Aid Board and the Independent Funding Review Committee for refusing the second applicant's application for legal aid – namely that the cost of funding the case would outweigh any likely award for damages – is expressly contemplated in the Legal Aid Act 1988 and was undoubtedly intended to meet the legitimate concern that, in the absence of any point of public interest, public money should only be made available to applicants whose claims were likely to result in an award of damages that was greater than the cost of funding the case.

45. The Court further observes that the legal aid system in the United Kingdom offers individuals substantial guarantees to protect them from arbitrariness (*Del Sol v. France*, no. 46800/99, § 26, ECHR 2002-II). In particular, the Court has regard to the fact that applicants who are refused legal aid or whose certificates are discharged or withdrawn can appeal to an Independent Funding Review Committee. If they are not satisfied with the Committee's decision, they can apply to have it quashed by way of judicial review.

46. In the light of the foregoing, the Court finds that even if the withdrawal of legal aid constituted a restriction on the second applicant's right of access to court, it was both legitimate and proportionate.

47. The Court therefore finds that the second applicant's complaint under Article 6 § 1 of the Convention is manifestly ill-founded. It follows that this complaint must be rejected pursuant to Articles 35 § 3 and 4 of the Convention.

48. Consequently, it is not necessary for the Court to consider whether the second applicant had exhausted domestic remedies.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

49. The applicants complained that their separation during the ten days that the second applicant was in hospital violated their right to respect for their private and family life under Article 8 of the Convention. The second applicant further complained that the decision to take a blood sample and photographs without consent constituted an unjustified and disproportionate interference with her physical and moral integrity.

50. Article 8 provides that:

> "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."

A. Admissibility

51. The Government have accepted that the applicants' complaints under Article 8 of the Convention are admissible. The Court agrees that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further agrees that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

a. The Government

52. While the Government accepted that there was no legal basis on 17 March 1998 for the hospital staff to prevent the first applicant from visiting the second applicant, they submitted that the following day, on 18 March 1998, hospital staff were correctly informed that there could be no restriction on visitors. Thereafter, the first applicant was permitted to visit the second applicant in hospital. During her stay in hospital the second applicant was visited by both her parents and by other relatives.

53. The Government further submitted that only nine days elapsed before the erroneous diagnosis was corrected, and during this short period the second applicant remained in hospital, at least in part at her mother's request.

54. Following the correct diagnosis, extensive investigations were carried out by the NHS Trust and by social services into the events that had occurred.

55. With regard to the alleged interference with the second applicant's physical and moral integrity, the Government submitted that the medical tests

and treatment pursued the legitimate aim of seeking to establish with appropriate urgency what had caused her alarming symptoms. Furthermore, they corresponded to the pressing social need of seeking to treat a child with alarming symptoms, and were pressing to that end.

56. The Government did not accept that the medical procedures and treatment were contrary to section 8 (1) of the Family Law Reform Act, which only applied to children who had reached the age of sixteen. Rather, the correct question to be asked by medical practitioners, under the general law and under the guidance of bodies such as the GMC, was whether there was informed consent and, in the absence of informed consent, whether treatment was justified by the urgency of the situation.

57. The Government submitted that any suggestion that the medical procedures would not have had to be carried out had the second applicant been interviewed fully was pure speculation. Moreover, they submitted that some guidelines, such as those of the Standing Medical Advisory Committee for the Secretaries of State for Social Services and Wales, indicated that in situations of suspected abuse at initial contact it was preferable to keep contact to a minimum.

58. Finally, the Government relied on the Court's recent judgment in *R.K. and A.K. v. the United Kingdom*, no. 38000/05, § 36, 30 September 2008, in which the Court held that

> "mistaken judgments or assessments by professionals do not per se render child-care measures incompatible with the requirements of Article 8. The authorities, medical and social, have duties to protect children and cannot be held liable every time genuine and reasonably-held concerns about the safety of children vis-à-vis members of their families are proved, retrospectively, to have been misguided."

b. The applicants

59. The applicants submitted that a great deal of damage was done during the nine day period when the second applicant was in hospital. First, the first applicant was accused of sexually abusing the second applicant; secondly, the first applicant was initially asked to leave the family home, although this did not prove necessary in the end; thirdly, on the day the second applicant was admitted to hospital, the first applicant was publicly barred from visiting her; finally, the accusations of sexual abuse led to derogatory assumptions about the first applicant which damaged his reputation.

60. In particular, while the applicants accepted that the first applicant was eventually permitted to visit the second applicant in hospital, they submitted that all subsequent visits were monitored and the monitoring compounded his humiliation.

61. Moreover, the applicants complained that the recommendations of the Independent Review Panel were not all followed. In particular, they complained that Dr W. did not issue them with a written apology.

62. The second applicant further complained that photographs and a blood test were taken against her parents' express wishes during the one hour period in which neither parent was present at the hospital, which constituted an unjustified interference with her moral and physical integrity, protected under the private life rubric of Article 8 of the Convention. The photographs included intimate photographs of her upper thighs. The second applicant submitted that this was completely contrary to section 8(1) of the Family Law Reform Act 1969 and the guidelines of the General Medical Council. Moreover, the hospital did not seek to justify the procedures on the grounds of urgency and in any case the Independent Review Panel clearly stated that the case did not meet the criteria for urgent examination as set out by the Local Area Child Protection Committee.

63. The second applicant also complained that if the correct procedures had been followed, she would have been interviewed and this would have avoided the need for any forensic investigation. She also pointed to the fact that relevant information concerning her injuries had been ignored. If the doctors had accepted the account of the bicycle incident, there would have been nothing to indicate sexual abuse.

2. The Court's assessment

a. Hospital visiting restrictions

64. It is not disputed that the initial decision to prevent the first applicant from visiting the second applicant in hospital constituted an interference with both applicants' right to respect for their family life. It therefore remains to be determined whether the interference was justified under the second paragraph of Article 8 of the Convention: namely, whether it was in accordance with the law, whether it had a legitimate aim and whether it could be regarded as necessary in a democratic society.

65. Without question, the challenged measure pursued the legitimate aim of protecting the rights of others, namely those of the second applicant. The Government have, however, accepted that there was no legal basis for the measure and the Court therefore finds that the decision to prevent the first applicant from visiting the second applicant on the night of her admission to hospital violated both applicants' rights under Article 8 of the Convention.

66. The Court observes, however, that the following day the first applicant was permitted to visit the second applicant, albeit under supervision. This arrangement continued for the duration of her stay in hospital.

67. The Court therefore accepts that the interference with the applicants' right to respect for their family life continued until 27 March 1998, when the second applicant was released from hospital and the doctors and social workers concluded that there was insufficient evidence of abuse. It notes that it was common ground between the parties that the continued interference

was in accordance with the law and pursuant to a legitimate aim, namely the protection of the rights of the second applicant. The only remaining question is therefore whether the interference was necessary in a democratic society.

68. The Court reiterates that the question of whether an interference is "necessary in a democratic society" requires consideration of whether, in the light of the case as a whole, the reasons adduced to justify the measures are "relevant and sufficient". In considering the reasons adduced to justify the measures, the Court will give due account to the fact that the national authorities had the benefit of direct contact with all of the persons concerned.

69. The Court further reiterates that mistaken judgments or assessments by professionals do not *per se* render childcare measures incompatible with the requirements of Article 8 of the Convention. The authorities, both medical and social, have duties to protect children and cannot be held liable every time genuine and reasonably held concerns about the safety of children *vis-à-vis* members of their family are proved, retrospectively, to have been misguided (*R.K. and A.K. v. the United Kingdom*, no. 38000/05, § 36, 30 September 2008).

70. In the present case, the second applicant had presented at hospital with an unexplained injury which could have been the result of physical abuse. On further examination, there also appeared to be evidence of sexual abuse. The Court therefore finds that in view of the available evidence, it was reasonable for Dr W. to suspect abuse and consequently to contact social services. This view would appear to have been supported by the Independent Review Panel, which found that Dr W. could not be blamed for initially misdiagnosing the bruising. Moreover, while it must have been frustrating for the first applicant and his wife when the information about the bicycle accident was apparently ignored, the Court finds that the continued suspicions of the local authority were justified in the circumstances. First, as the parents were themselves under suspicion, any explanation that they provided understandably had to be treated with caution. Secondly, the bicycle accident only accounted for one of the second applicant's apparent injuries. Even if Dr W. had accepted the mother's account, the bruising remained unexplained and abuse could therefore not be ruled out.

71. The Court is, however, concerned about two of the Independent Review Panel's other findings. First, it notes that the Panel were critical of the decision not to consult the second applicant about the allegations of abuse. The Government, on the other hand, have submitted that some guidelines indicate that contact with suspected victims of child abuse should be kept to a minimum. It is not for the Court to state which approach doctors and social workers should employ when dealing with such cases and, in the circumstances of this case, it is not necessary for it to do so. In the absence of a medical diagnosis for the bruising, it is unlikely that any denial by the second applicant would have been, or indeed could have been, taken at face value. It is therefore unlikely that interviewing the second applicant would

have allowed the doctors and social workers to rule out abuse as a possible cause of her injuries at an earlier stage.

72. Of greater concern is the Panel's finding that Dr W. should have obtained a dermatologist's opinion as a matter of urgency. A dermatologist was only consulted on 21 March 1998, four days after admission, when the second applicant's mother noticed that she also had marks on her hands. On 24 March 1998 the dermatologist noted that the marks were caused by vasculitis, and on 27 March 1998 Schamberg's disease was diagnosed. It would therefore appear that if the dermatologist had been consulted immediately as recommended by the Panel, the second applicant's condition could have been diagnosed some days earlier.

73. The Government have not submitted any evidence which would indicate either that there was no reason for Dr W. to consult a dermatologist earlier than she did, or that even if she had, Schamberg's disease could not have been diagnosed any earlier. The Court is therefore satisfied that while there were relevant and sufficient reasons for the authorities to suspect abuse at the time the second applicant was admitted to hospital, the delay in consulting a dermatologist extended the interference with the applicants' right to respect for their family life and was not proportionate to the legitimate aim of protecting the second applicant from harm.

74. Consequently, the Court finds that there has been a violation of the applicants' right to respect for their family life under Article 8 of the Convention.

b. Tests conducted on the second applicant without parental consent

75. The Court considers that the decision to take a blood test and photograph the second applicant against her parents' express instructions gave rise to an interference with her right to respect for her private life and, in particular, her right to physical integrity (see *X and Y v. the Netherlands*, 26 March 1985, § 22, Series A no. 91; *Pretty v. the United Kingdom*, no. 2346/02, §§ 61 and 63, ECHR 2002-III; *Y.F. v. Turkey*, no. 24209/94, § 33, ECHR 2003-IX; and *Glass v. the United Kingdom*, no. 61827/00, § 70, ECHR 2004-II).

76. The Court would add that it has not been contested that the hospital was a public institution and that the acts and omissions of its medical staff were capable of engaging the responsibility of the respondent State under the Convention.

77. Domestic law and practice clearly requires the consent of either the patient or, if they are incapable of giving consent, a person with appropriate authorisation before any medical intervention can take place. Where the patient is a minor, the person with appropriate authorisation is the person with parental responsibility. This fully accords with the Council of Europe's Convention on Human Rights and Biomedicine (see *Glass v United Kingdom*, cited above, § 75).

78. In the present case the patient was nine years' old. It has not been suggested that she had the capacity to consent to any medical intervention. The consent of either the first applicant or his wife was therefore required before any medical intervention could take place. On leaving the hospital on 17 March 1998, the first applicant informed the medical staff that no further tests should be carried out until his wife arrived in approximately one hour's time. These instructions were confirmed by his wife in a telephone call to the hospital.

79. In view of her parent's express instructions, the only possible justification for the decision to proceed with the blood test and photographs was that they were required as a matter of urgency. In this regard, the Court does not accept the Government's submission that there was a pressing social need to treat the second applicant's symptoms. There is no evidence to suggest that the second applicant's condition was critical, or that her situation was either deteriorating or was likely to deteriorate before her mother arrived. Moreover, it has not been suggested that she was in any pain or discomfort. Finally, there was no reason to believe that her mother would withhold consent, and even if she had, the hospital could have applied to the court for an order requiring the tests to be conducted. In the circumstances, the Court can find no justification for the decision to take a blood test and intimate photographs of a nine-year old girl, against the express wishes of both her parents, while she was alone in the hospital.

80. The Court therefore finds that the interference with the second applicant's right to respect for her private life was not in accordance with the domestic law and therefore violated her rights under Article 8 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

81. The first applicant complained under Article 13 that the domestic court's finding that the local authority did not owe him a duty of care deprived him of an effective remedy for his complaints under Articles 3 and 8 of the Convention. The second applicant complained under Article 13 that the withdrawal of legal aid deprived her of an effective remedy within the national legal system for her complaint under Article 8 of the Convention.

82. Article 13 provides 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."

A. Admissibility

83. The Government have accepted that the first applicant's complaint under Article 13 of the Convention, insofar as it relates to the complaint

under Article 8 of the Convention, is admissible. The Court agrees that it is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further agrees that it is not inadmissible on any other grounds. It must therefore be declared admissible. The Court finds, however, that the first applicant's complaint under Article 13 read together with Article 3 of the Convention is manifestly ill-founded, as it has already held that the first applicant's rights under Article 3 are not engaged.

84. The Court also finds that the second applicant's complaint under Article 13 read together with Article 8 of the Convention is manifestly ill-founded. Unlike the first applicant, the second applicant was able to bring an action for damages against the local authority, but she did not pursue this action following the withdrawal of legal aid. The Court has already held that her complaint under Article 6 § 1 of the Convention was manifestly ill-founded as the withdrawal of legal aid pursued a legitimate aim and was proportionate to that aim. For the same reasons, the Court finds that the second applicant's complaint under Article 13 is also manifestly ill-founded.

B. Merits

1. The parties' submissions

a. The Government

85. In the particular circumstances of this case, the Government accepted that it was arguably obliged to ensure that an enforceable right to compensation was made available for such damage as could have been proved to have been suffered as a result of any violation of Article 8 of the Convention. Although they submitted that such a remedy has since been provided by sections 7 and 8 of the Human Rights Act 1998, the Government accepted that the Human Rights Act only applied in respect of acts occurring after 2 October 2000.

b. The first applicant

86. The first applicant re-iterated that he could not avail himself of the Human Rights Act 1998 because the events in question took place before 2 October 2000. He therefore had no enforceable right to compensation, which constituted a violation of his rights under Article 13 of the Convention read together with Article 8.

2. The Court's assessment

87. The Court reiterates that the purpose of Article 13 is to require the provision of a remedy at national level allowing the competent domestic authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are

afforded some discretion as to the manner in which they conform to their obligations under this provision. Such a remedy, however, is only required in respect of grievances which can be regarded as arguable in terms of the Convention (see *Halford v. the United Kingdom*, 25 June 1997, § 64, *Reports of Judgments and Decisions* 1997-III; *Camenzind v. Switzerland*, 16 December 1997, § 53, *Reports of Judgments and Decisions* 1997-VIII).

88. There is no doubt that the first applicant's complaint about the interference with his right to respect for his family life was arguable. Moreover, in the case of *R.K. and A.K.*, the Court held that the applicants should have had available to them a means of claiming that the local authority's handling of the procedures was responsible for any damage which they suffered and obtaining compensation for that damage. As such redress was not available at the relevant time, the Court held that there had been a violation of Article 13 of the Convention (see § 45).

89. As the first applicant is in an analogous position to the applicants in *R.K. and A.K.*, the Court considers that there has also been a violation of his rights under Article 13 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

90. Article 41 of the Convention provides:

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

A. Damage

91. In relation to the complaints under Articles 8 and 13, the first applicant claimed GBP 10,000 (EUR 11,101) in respect of non-pecuniary damage. He claimed a further GBP 32,182.95 (EUR 35,722.43) in respect of pecuniary loss, including loss of earnings, a visit to his mother in Canada, a visit to his father in India, twenty-five counselling sessions and Legal Aid Contributions.

92. The Government submitted that these sums were excessive. With regard to the claim for non-pecuniary damage, they relied on the case of *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, ECHR 2001-V (extracts), in which the applicants were each awarded GBP 10,000 in respect of a separation which lasted a year. In the present case the allegations concerned a period of only nine days, and for the majority of this period the first applicant was permitted to visit his daughter under supervision. With regard to the claim for pecuniary damage, the Government submitted that no payment should be made to the first applicant as he has failed to demonstrate a causal link between the violation and the alleged loss. In any case they

submitted that counselling would have been available without cost through the National Health Service.

93. The Court recalls the judgment in *T.P. and K.M. v. the United Kingdom*, in which the Grand Chamber found a violation of Articles 8 and 13 and awarded each applicant GBP 10,000 in respect of a separation which lasted a year. The Court further recalls its recent judgment in *R.K. and A.K. v. the United Kingdom*, in which it found a violation of Article 13 read together with Article 8 and the applicants were jointly awarded EUR 10,000 in respect of a separation which lasted for seven months. In the present case the Court has found that the violation of the first applicant's rights under Article 8 lasted only a matter of days, and for most of this period he continued to have contact with his daughter, albeit under supervision. The Court therefore awards the first applicant EUR 2,000 in respect of non-pecuniary damage as a result of the violation of Article 8. In doing so, it takes into account the humiliation experienced by the first applicant after he was publicly barred from the second applicant's ward without any legal basis.

94. The Court makes no award in respect of pecuniary damage as the first applicant has failed to establish the existence of a causal link between the violation of his rights under Articles 8 and 13 of the Convention and the sums claimed.

95. The second applicant claimed GBP 5,000 in respect of non-pecuniary damage arising from the violation of Article 8 of the Convention. As this was the sum she believed she would have received in damages before the domestic courts, she claimed a further GBP 2,153.20 to include interest (at 2% per annum) from the date of injury to the date of judgment and interest (at 8% per annum) from the date of the unpaid judgment to the date of the just satisfaction claim. In awarding damages, she submitted that the Court should take into consideration the humiliation that the allegations of child abuse had caused her and her family. She further submitted that she had suffered mental distress as a result of the events of 1998, and in particular had experienced anxiety and depression. The experience had also impacted on her relationship with her father, as she blamed herself for his clinical depression. Finally, she submitted that her marriage prospects may have been greatly reduced on account of the allegations of abuse.

96. The second applicant claimed a further GBP 1,300 in respect of pecuniary damage. This figure was to cover the cost of ten future rehabilitative counselling sessions.

97. The Government again submitted that in view of the Grand Chamber's judgment in *T.P. and K.M. v. the United Kingdom*, the sum claimed for non-pecuniary damage was excessive. They further submitted that the sum claimed for counselling was speculative and should not be allowed.

98. With regard to the violation of the second applicant's physical integrity, the Court recalls its judgment in *Y.F. v. Turkey*, no. 24209/94, ECHR 2003-IX, in which the applicant was awarded EUR 4,000 after she

was forced to undergo a gynaecological examination. The Court further recalls its judgment in *Glass v. United Kingdom*, in which the applicant was awarded EUR 5,000 after he was administered diamorphine contrary to his mother's express wishes. It is noted, however, that the applicant in *Glass* was gravely ill and there were other aggravating factors. Without underestimating the distress that the nine-year old second applicant undoubtedly experienced, the Court observes that the intervention in the present case was not as invasive as the interventions in *Y.F.* and *Glass*. Taking full account of her age, and the intimate nature of the photographs which were taken while she was alone in hospital, together with the associated interference with her right to respect for her family life, the Court awards the second applicant EUR 4,500 in respect of non-pecuniary damage.

99. The Court makes no further award to the second applicant in respect of pecuniary damage as the claim for counselling is speculative.

B. Costs and expenses

100. With regard to the first applicant's complaint, Levi Solicitors claimed GBP 12,460.42 in respect of costs and expenses, while the AIRE Centre claimed GBP 10, 520.

101. In relation to the second applicant's complaint, Levi Solicitors claimed GBP 4,400 in respect of costs and expenses, while the AIRE Centre claimed GBP 10, 816.

102. The Government submitted that the number of hours claimed (215 for the first applicant and 155 for the second applicant) were clearly excessive. In particular, they submitted that it was unreasonable for both applicants' claims to have been dealt with separately as this had led to very considerable increased expense.

103. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, the Court finds that the involvement of two lawyers and the decision to deal with the two applications separately has led to considerable duplication. Consequently, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the applicants jointly the sum of EUR 15,000 for the proceedings before the Court.

C. Default interest

104. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Joins* the applications;

2. *Declares* the first applicant's complaint under Article 3 of the Convention and the second applicant's complaint under Article 6 § 1 of the Convention inadmissible and the remainder of the application admissible;

3. *Holds* that there has been a violation of the first and second applicant's rights under Article 8 of the Convention;

4. *Holds* that there has been a violation of the first applicant's rights under Article 13 of the Convention;

5. *Holds*
(a) that the respondent State is to pay, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into pounds sterling at the rate applicable on the date of settlement:
(i) EUR 2,000 (two thousand euros), plus any tax that may be chargeable, to the first applicant in respect of non-pecuniary damage;
(ii) EUR 4,500 (four thousand five hundred euros), plus any tax that may be chargeable, to the second applicant in respect of non-pecuniary damage;
(iii) EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable, to the applicants jointly in respect of costs and expenses;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 23 March 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Lech Garlicki
Deputy Registrar	President