

**APPLICATION/REQUÊTE N° 8542/79**

**Fay GODFREY v/the UNITED KINGDOM**

**Fay GODFREY c/ROYAUME-UNI**

**DECISION of 4 February 1982 on the admissibility of the application**

**DÉCISION du 4 février 1982 sur la recevabilité de la requête**

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**Article 8 of the Convention :** *This provision does not merely compel States to abstain from interfering with the right to private and family life, but can in addition entail positiv obligations for them. Nevertheless a vaccination scheme falls outside the scope of this provision.*

**Article 14 of the Convention :** *This provision cannot be applied independently. When a State however take measures which go beyond its strict Convention obligations an issue under Article 14 may arise when the measure in question falls within the general area covered by a Convention right.*

**Article 8 de la Convention :** *Cette disposition ne se borne pas à obliger les Etats à s'abstenir de porter atteinte à la vie privée et familiale mais peut entraîner des obligations positives de leur part. Toutefois, la matière des campagnes de vaccinations se trouve en-dehors de son champ d'application.*

**Article 14 de la Convention :** *Cette disposition est inapplicable isolément. En revanche, lorsqu'un Etat prend des mesures qui excèdent les engagements pris aux termes de la Convention, l'article 14 peut trouver à s'appliquer à ces mesures si celles-ci se situent dans un domaine où s'exerce un droit garanti par la Convention.*

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**THE FACTS**

*(français : voir p. 100)*

The applicant, Mrs Fay Godfrey, brings the present application on behalf of her vaccine-damaged son, Mr Rodney Stuart Godfrey. Both the

applicant and her son are United Kingdom nationals at present living in Lancashire, England. The applicant is represented by Mr Brian Apfel, a solicitor based in Liverpool and Mr Philip Kremen, of counsel.

The applicant's son Rodney was born on 20 September 1945. She states that at his birth he was a normal healthy baby. When her son was eight months old she had him vaccinated against whooping cough and diphtheria in a Government clinic at Sale in April 1946. She states that at the time she was influenced by a Government campaign recommending that mothers have their children vaccinated. Rodney suffered an immediate and serious adverse reaction which the applicant claims was attributed by the paediatrician treating him to the vaccination that he had received. Her son was left seriously disabled, mute and unable to fend for himself in any way. He also suffers from epilepsy (grand mal) and is in constant need of care and attention. The applicant and her family have looked after him ever since.

In 1977 the Report of the Royal Commission on Civil Liability and Compensation for Personal Injury (Pearson Report) recommended that in future there should be strict liability in tort for severe damage suffered by anyone as a result of vaccination and that there should be a new weekly benefit for all seriously disabled children, whatever the source of their handicap.

In 1978 the Government announced that because a final decision on the above proposals would take some time, it had been decided to introduce an interim Non-statutory Vaccine Damage Payments Scheme to be put into immediate effect. Under this Scheme, the Secretary of State made payments of £10,000 to certain vaccine-damaged victims until the coming into force of the Vaccine Damage Payments Act 1979. The terms of both the Statutory and Non-Statutory Scheme were the same. According to the Scheme a lump sum of £10,000 was to be paid in respect of those, whether children or adults, who have, since 5 July 1948, been severely damaged as a result of vaccination for certain specified diseases in the United Kingdom. It was made clear by the Secretary of State for Social Services in a statement announcing details of the Scheme to the House of Commons (9 May 1978) that the Scheme did not in any way pre-empt the Government's decision on the recommendations of the Royal Commission and that it would not prejudice the rights of those who have suffered damage to take action in the future.

The applicant was informed in a letter dated 22 September 1978 that the case of her son Rodney was outside the scope of the payments scheme. It was explained to her that the Government felt that it was proper for the scheme to apply from the beginning of the National Health Service in 1948 and that it would be reasonable to expect it to go back any further. It was considered more likely that records would be in existence in respect of those who had been vaccinated after this date.

From information submitted by the Government it appears that only one in five applications for a lump sum payment under the Scheme have been successful. A substantial number of applications have been disallowed for medical reasons, either because the disablement did not amount to 80% as required by the 1979 Act or because of a failure to establish a causal link between the vaccine and the disability. In a small number of cases payments have been made without any records having been produced where the applicant succeeded in proving by other means that, on the balance of probabilities, the disability was attributable to vaccination.

In addition to the above Scheme, the National Health Service provides a range of benefits to assist handicapped people. These include Supplementary Benefits, Attendance Allowances and, for those incapable of work, a non-contributory invalidity pension. A mobility allowance is also available for several disabled people.

The applicant's son is in receipt of a non-contributory invalidity pension and Supplementary Benefits.

The applicant states, on the basis of newspaper reports, that the decision to limit payment under the Scheme to those vaccinated after 5 July 1948 affects only twelve other families. This claim is disputed by the respondent Government who, while unable to give any precise indication of the number of families affected, consider that the number of potential claimants may be about one hundred although it is pointed out that the Government have no means knowing how many of such claims would be successful.

## COMPLAINTS

The applicant seeks her son's case to be included in the compensation scheme introduced by the Government. She complains that the Vaccine Damage Payments Scheme 1979 discriminated unfairly against her son. She invokes Articles 8 and 14 of the Convention.

## THE LAW

### *As to Article 8*

1. The applicant complains, under Article 8 of the Convention, that her son has been arbitrarily excluded from the Vaccine Damage Payments Scheme subsequently incorporated in the Vaccine Damage Payments Act 1979. She submits that the non-inclusion of her son in the Scheme because he was vaccinated prior to 5 July 1948 constitutes a failure of the State to respect their private and family life as required by this provision. She maintains, with reference to various passages in the Pearson report that Schemes to provide compensation for vaccine-damaged children are closely connected to the concept of family life in Article 8 of the Convention.

2. The Government, on the other hand, submit that neither the vaccination programme nor the Scheme to benefit vaccine-damaged children are matters that fall within the purview of Article 8 and that the applicant's son cannot derive a right to receive such a benefit from the Convention. In their view Article 8 is primarily concerned with protecting the individual from arbitrary interference by the public authorities in his private life and not the provision of social benefit such as that provided for in the 1979 Act.

3. The Commission recalls its observations in Application No. 7154/75 [Association X. v/United Kingdom, D & R 14, p. 31] that the Convention does not, apart from Article 5 (5) and Article 50 contain any provisions conferring a right to compensation for injury or damage although such a right might possibly be derived from Article 13 where such injury was the product of a violation of one of the provisions of the Convention. However, it is clear that this question cannot arise in the present case since the Commission has no competence *ratione temporis* to examine events which took place in 1946 at the time the vaccination was carried out.

4. Article 8 (1) provides as follows :

"Everyone has the right to respect for his private and family life, his home and his correspondence".

5. The Commission observes that this provision goes further than merely requiring that the State refrain from interfering with the right to respect for private and family life. As the European Court of Human Rights stated in the Airey Case

"... although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life" (Judgment of 9 October 1979, p. 17, para. 32).

Similar remarks had also been made in the Marckx Case (Judgment of 13 June 1979, p. 15, para. 31).

6. In the present case the applicant complains that her son is not eligible, because of the date of his vaccination, for consideration under the payments Scheme. At the very least she claims that her son should be able to submit his case to the Tribunal which has been instituted under the 1979 Act to assess claims.

7. The Commission is conscious that the facts of the present application bear testimony to a family tragedy rendered more poignant by the exclusion of the applicant's son from the payments Scheme. It has been made aware in the course of the proceedings of the total dependency of Roney on his family since the vaccination took place in 1946 and the immense social, financial and

emotional difficulties that the family have faced and continue to face in caring for him.

8. However the Commission must recall that its task under the Convention is limited to ensuring the observance of the rights and freedoms therein. It has constantly held in its case law that economic and social rights are not, as such, guaranteed under the Convention (e.g. Application No. 6907/75, D & R 3, p. 153).

In its view, in a system where vaccination is not compulsory, the establishment of a payments Scheme for vaccine-damaged children is essentially a social security measure which falls outside the scope of the Convention. Accordingly the applicant's complaint under this provision must be rejected as incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 27 (2).

*As to Article 14 in conjunction with Article 8*

9. The applicant also alleges a breach of Article 14 of the Convention claiming that the Vaccine Damage Payments Scheme discriminates unfairly against her son. She does not accept that the difference in treatment between those vaccinated before 5 July 1948 and those vaccinated after that date can have a reasonable and objective justification. The Government submit on the other hand, firstly that such a complaint is incompatible *ratione materiae* since the provision of benefit is a matter which falls outside the ambit of the Convention. In the alternative, it is submitted such a differentiation finds its justification in the fact that 5 July 1948 marks the beginning of the National Health Service after which there is more chance that records would be available in respect of vaccinations.

10. Article 14 provides that

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

11. It is clearly established in the case law of both the Commission and Court that this provision has no independent existence in the sense that under the terms of Article 14 it relates solely to the rights and freedoms set forth in the Convention. (See e.g. Eur. Court H.R., Belgian Linguistic Case Judgment of 23 July 1968, p. 33, para. 9).

12. In the present case the Commission recalls its conclusion in paragraph 8 above that the applicant's complaint under Article 8 concerns a matter which is outside the scope of the Convention and thus falls to be rejected as in-

compatible *ratione materiae*. However, in the Commission's view the question arises whether this conclusion would necessarily prevent it from examining a complaint of discrimination under Article 14.

13. In this regard the Commission notes the following statement of the Court in the Belgian Linguistic Case

"Thus, persons subject to the jurisdiction of a Contracting State cannot draw from Article 2 of the Protocol the rights to obtain the public authorities the creation of a particular kind of educational establishment ; nevertheless, a State which had set up such an establishment could not, in laying down entrance requirements, take discriminatory measures within the meaning of Article 14.

To recall a further example, cited in the course of the proceedings, Article 6 of the Convention does not compel States to institute a system of appeal courts. A State which does set up such courts consequently goes beyond its obligations under Article 6. However it would violate that Article, read in conjunction with Article 14, were it to debar certain persons from these remedies without a legitimate reason while making them available to others in respect of the same type of actions."

14. Following this approach the Commission considers that, where the State takes positive measures going beyond its strict Convention obligations an issue could arise under Article 14 where the matter concerned falls within the general area covered by a Convention right. However, in the present case this question does not arise for consideration because the Commission is of the opinion that the Vaccine Damage Payments Scheme, for the reasons already described in paragraph 8 above, falls outside the Convention system and thus beyond the area covered by a Convention right.

It follows therefore that his complaint must also be rejected as incompatible *ratione materiae* within the meaning of Article 27 (2) of the Convention.

For these reasons, the Commission

**DECLARES THE APPLICATION INADMISSIBLE**