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

SECOND SECTION

CASE OF E. AND OTHERS v. THE UNITED KINGDOM

(Application no. 33218/96)

JUDGMENT

STRASBOURG

26 November 2002

FINAL

15/01/2003

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of E. and others v. the United Kingdom,

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

Mr J.-P. COSTA, *President*,
Sir Nicolas BRATZA,
Mr L. LOUCAIDES,
Mr C. BÎRSAN,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs W. THOMASSEN, *judges*,
and Mr T.L. EARLY, *Deputy Section Registrar*,

Having deliberated in private on 5 November 2002,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 33218/96) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by four United Kingdom nationals, E., H., L. and T. ("the applicants"), on 2 July 1996. It was transmitted to the Court on 1 November 1999 in accordance with Article 5 § 3, second sentence, of Protocol No. 11 to the Convention, the Commission not having completed its examination of the case by that date.

2. The applicants, who had been granted legal aid, were represented by Messrs Henderson & Sons, solicitors practising in Dumfries. The United Kingdom Government ("the Government") were represented by their Agent, Mr C. Whomersley of the Foreign and Commonwealth Office, London. The President of the Chamber acceded to the applicants' request not to have their names disclosed (Rule 47 § 3 of the Rules of Court).

3. The applicants alleged that the local authority had failed to protect them from abuse by their stepfather and that they had no remedy in this respect. They invoke Articles 3, 8 and 13 of the Convention.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 23 October 2001, the Court declared the application admissible and deliberated on the merits.

6. The applicants and the Government each filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*), the parties replied in writing to each other's observations.

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicants, E., H., L. and T. were born in 1960, 1961, 1963 and 1965 respectively and live in Scotland. E., L. and T. are sisters and H. is their brother.

A. The circumstances of the case

9. The applicants' mother had six children by her husband. After the death of the applicants' father in 1965, their mother cohabited with W.H. Two further children were born in that relationship.

10. The family, living in a local authority flat in Dumfries, were known to the social services of Dumfries and Galloway Regional Council ("the local authority"). The records provided by the Government show that they were principally concerned from 1970 onwards in relation to the mother's severe financial difficulties. The mother suffered from bad health and it was noted in 1973 that when she had a broken arm she always kept one of the children off school (presumably to help in the home) and was likely to be summoned before the Education Sub-Committee. Problems with rent and electricity arrears were noted as recurring through 1975 and 1976, as well as continuing health difficulties suffered by the mother. An entry on August 1976 noted that the eight children were all happy though overcrowded and that there were no behavioural problems.

11. On 16 November 1976, it was recorded however that E., the first applicant, who had been causing concern as she had been staying out at night, was found semi-conscious at a nearby flat, having taken an overdose. It was noted that the mother was to take her to attend a psychiatric clinic. The medical notes recorded that E. complained that she disliked intensely her mother's cohabitee W.H. who hit her, shouted and upset her so much that she ran away with intent to kill herself.

12. A social work report dated 25 November 1976 noted that the family consisted of six daughters and two sons living with their mother. W.H., the father of the two youngest children, was recorded as not cohabiting and the mother had stated that she would not marry him as she would be worse off financially. The state of the home was said to fluctuate according to the mother's health but was considered to be adequately furnished with a warm, friendly atmosphere. The mother had always demonstrated a great deal of concern for her children and had perhaps overindulged them at times. In spite of the fact that there was much juvenile delinquency in the area, this was noted as being the first time that any of her children had given cause for concern. The mother's ambivalent attitude to school attendance was commented on.

13. In December 1976, E. left school and the social services gave assistance in finding employment.

14. On 7 January 1977, L., the third applicant, then aged 13, ran away from home, following an incident in which she claimed that W.H. had attempted to rape her. She was referred as an emergency by the police to the social services. The police interviewed all the family. It is not apparent that the family, in particular the children, were interviewed by social workers concerning the implications of L.'s disclosures. No steps were taken to refer them to the Reporter of the Children's Hearing.

15. On 7 January 1977, W.H. was arrested by the police and charged with indecently assaulting E. and L.

16. On 8 January 1977, W.H. entered a guilty plea concerning charges involving offences of indecent behaviour against E. and L. before Dumfries Sheriff Court. The pleas were accepted by the prosecution and the case proceeded on the basis that W.H. had committed one act of indecency against E. between 20 October 1972 and 31 August 1976, and two acts of indecency against L. between 1 January 1975 and 7 January 1977. The Sheriff requested the social services to prepare social enquiry and psychiatric reports. W.H. was not detained pending sentence. According to the applicants, he returned to live at the applicants' home.

17. On 11 January 1977, the applicants stated that the police submitted a report to the children's social worker, S., expressing concern that the children should be protected from further abuse. The Government have found no trace of any such report in existence.

18. On 28 January 1977, W.H. appeared before the Sheriff for sentencing. The social enquiry report dated 18 January 1977 stated *inter alia* that the family lived in a four room local authority flat in an area where there was a high incidence of social problems. The home was adequately furnished and maintained to a reasonable standard. The mother was described as a caring woman who did not enjoy good health but who put her childrens' interests first. The family was considered as appearing a happy well-adjusted group though they were well known to the social services as

they had been given assistance from time to time. The children attended school regularly and appeared happily settled. W.H. was recorded as admitting the offence and as being more than ashamed of his conduct, though he could offer no explanation for these actions. It was noted that he did not appear to realise fully the serious nature of these charges. Since the alleged offence he had obtained accommodation outside the applicants' home - it indicated an address in the same apartment block. It was further noted that the mother was not prepared to accept the charges relating to this man and stated that they had plans to marry in the Spring as they had had a close relationship for many years. It was concluded that, in view of the serious nature of the offences, it would be necessary for firm control to be exercised over the accused for a period of time.

19. The psychiatric report found that W.H. did not show any psychiatric abnormality. His criminal record showed one prior minor offence of dishonesty.

20. W.H. was sentenced by the Sheriff to two years' probation. The applicants state that this was with a condition that he cease to reside at the applicants' address. The Government have found no record of that condition attaching to the probation order and stated that the probation file cannot now be found. They accepted however that it was the social services' responsibility to supervise W.H.'s probation. According to the recollection of Mr M., who was the supervising officer for part of that period (after June 1977), he would have made it clear to W.H. that he was not permitted to live in the family home due to the nature of the offences. He recalled visiting W.H. at a separate address in Dumfries during this period and sending mail to that address. He believed that W.H. was living there and not at the applicants' home. In the precognition annexed to the Government's observations, Mr M., who was also probation officer for E. and acted as replacement for the family social worker, recalled however that he did have suspicions that W.H. might still be living at the family home and that on visiting the family home two or three times unexpectedly he found W.H. "just leaving". He did not consider that there was sufficient evidence of W.H. breaching the conditions attached to his probation order to justify taking the matter further.

21. The social worker, Mr R., visited the home on 22 occasions between 24 January and the end of June 1977 and did not see W.H. However, his notes recorded in March 1977 a suspicion that the mother was still cohabiting with W.H. When Mr M. took over the case, he noted that W.H. was not living there (social work case notes entry of 6 August 1977) and that W.H. was not contributing financially to his children. In his later affidavit, he stated that this entry was based on information from the mother. Entries indicated concerns about school attendance and that the mother had been repeatedly told that she should not keep the girls off school. In September 1977, it was noted that the school had expressed

concerns about the welfare of T., the fourth applicant, which was attended to by a senior social worker. A school meeting concerning the children's attendance was arranged but the mother and H., the second applicant, failed to attend. In November 1997, the social worker paid an unexpected visit to the home and found that W.H. was there. Both he and the mother denied that he was living there.

22. According to a social enquiry report of 1 June 1977 drawn up by Mr R. when E. was charged with criminal damage before the Sheriff Court, she had left home in about February 1977. No reference was made to the past history of sexual abuse in the home though it was stated that she had left home after a scene with the man who was at that time co-habiting with her mother. E. was found guilty of malicious mischief on 15 June 1997 and sentenced to two years' probation. Social work case notes also recorded that by March 1977 she had left home. According to her claims lodged in later proceedings, E. finally left home on her 17th birthday, in October 1977.

23. School attendance was still recorded as a problem in December 1977 for the remaining girls at home. H., the second applicant, had now left school officially. In her later statements, L. recalled that during 1977 she was on occasion taken into temporary local authority care in connection with problems of running away.

24. In January 1978, the mother was recorded as giving her various health problems as the reason for keeping L. and T. off school. It was noted that her speech was slurring, among other symptoms, but that she had shown reluctance in going to see her doctor or in allowing the social workers to approach her doctor. In February 1978, she was keeping one or both girls off school to help her at home or to run messages.

25. In March 1978, it was noted that the house was becoming even more disordered and the younger children and the mother were becoming more unkempt. The mother gave the impression of having given up. In June 1978, the mother was finally referred through her doctor for hospital tests, though she failed to attend the appointments set. In October 1978, it was noted that the house stank and that the carpet was matted. The mother informed the social worker that W.H., who lived in Derbyshire, had invited her to go and live with him there. She gave up that idea shortly afterwards.

26. In January 1978, L. was referred to a Children's Hearing for failure to attend school. In the background report drawn up by Mr M. for the hearing, explanation was given of the financial and health difficulties of the mother and it was stated that it was the mother who kept L. from school to help in the home. There was no reference to the history of sexual abuse in the home. In April 1978, L. was living temporarily in a social work establishment known as the Closeburn Assessment Centre. On 22 April 1978, she ran away from the home and was returned. At a date unspecified, she went back to live at home.

27. H., aged 17, left the family home in or about 1978.

28. On or about 15 January 1979, L. left home after an argument with her mother about going out at night and was brought back by the police who referred the matter to the social services. After discussion with the mother, L. was taken into care by the social services until 20 February 1979.

29. On 16 March 1979, the school attended by L. called a multi-disciplinary meeting to discuss the problems of non-attendance of a number of the children of the family. Though a social worker was invited to attend, none was present.

30. On 28 March 1979, L. was transferred to a residential centre but left the following day to return home. At about the same time, the applicants' mother changed address. L. lived with her there for about a week and then left to live with a friend. She took an overdose and was admitted to hospital. A letter dated 11 April 1979 from the psychiatric registrar to L.'s G.P. noted that "... she doesn't get on well with her mother's cohabitee. The relationship with Mum's cohabitee seems a bit peculiar".

31. After being discharged from hospital on 9 April 1979, L. went to live with a 50 year old man with whom she had a sexual relationship. On 17 April 1979, the police picked up L. who told them about the relationship. The mother agreed that L. was beyond her control and agreed that she be put in a place of safety. An order lasting one month was made to that effect. From 18 April 1979, she was made the subject of compulsory care measures by the local authority which brought her before the Children's Hearing. In the background report drawn up by the social worker Mr E. for the hearing, details were given of the mother's financial difficulties and ill-health and comment was made that, apart from truancy, the family had not been in any trouble. No reference was made to the past sexual abuse. The hearing extended the place of safety order. L. was sent to Closeburn Assessment Centre from 18 April to 18 June 1979. She appears to have remained there for most of the period until her 16th birthday on 28 July 1979, at which date she ceased to be subject to the legislation governing the compulsory education of children. Efforts were then made to find employment for her. Social work notes of 1 August 1979 concerning L. recorded that, when the social worker accompanied her to the mother's home for a visit, a man described as L.'s stepfather was present in the living room.

32. Entries in the social work notes for the family during 1979 continued to emphasise financial difficulties. An entry in February 1979 referred to problems of school attendance of ten years' standing and the mother's frequent summoning before the school council.

33. On 7 April 1979, it was noted that the family had moved to a larger home, a self-contained house provided by the local authority.

34. Through 1979-1981, financial difficulties were noted as continuing, and the mother's health and general state deteriorating to such an extent that she rarely got out of bed.

35. The applicants' mother died in 1981. It appeared that she had been suffering, *inter alia*, from undiagnosed multiple sclerosis. The applicants' elder sister (aged 22) took on the mothering role in the family home.

36. T. left home in November 1984, after she had become pregnant and had a child. By January 1988, she was living at an address with her 3 year old daughter and was in contact with the social services concerning her financial problems. In February 1988, she indicated to her social worker that she had been subject to sexual abuse in the past. In April 1988, she disclosed that this had involved her step-father W.H. as well as other men, one of whom had been convicted of rape. As at the time she was in regular contact with W.H., whom she considered had reformed, she was counselled concerning the risk to her own child.

37. Following counselling, E., L. and T. reported the history of abuse by W.H. to the police in or about November 1988. In her statement of 13 January 1989, L. stated that after W.H. had been arrested in 1977, various social workers used to come around and she and the others had had to tell them that W.H. was not living with them anymore. When they came to the house, W.H. used to hide and her mother used to keep the children out of their way if possible. She recalled wanting to tell a social worker what was happening but was so petrified of W.H. that she did not. W.H. continued to interfere with her and had sex with her a couple of times after the court case.

38. Charges were brought against W.H. of committing sexual offences against E., L. and T.

39. At his trial before the High Court on 20 July 1989, W.H. pleaded guilty to four charges and not guilty to two charges. The prosecution accepted his pleas. W.H. was duly convicted of serious acts of indecency against E. between 19 October 1967 and 18 October 1972 and of further such acts against her between 1 September 1976 and 18 October 1976; of serious acts of indecency against L. between 28 July 1968 and 31 December 1974; and of similar acts against T. between 28 August 1974 and 27 August 1978. Only part of the latter charge concerned the period after W.H.'s earlier conviction on 8 January 1977.

40. The trial was adjourned for sentencing reports to be obtained. On 20 July 1989, the High Court sentenced W.H. to a two year suspended sentence of imprisonment, having regard to the reports which indicated that he now lived in Yorkshire and that most of the offences predated his earlier conviction in 1977. However, it was only at this time that the applicants alleged that they became aware that W.H. had been subject to criminal proceedings in 1977 and that he had been placed on probation on the condition that he did not reside in their home.

41. On 18 June 1992, the four applicants brought proceedings against the local authority seeking damages on the basis that the local authority had failed to carry out its statutory duties, in particular, that W.H. had breached

his probation order by residing at the family home and that the social services had, or ought to have, known this and had failed to report the breach to the court or to take the children into care.

42. On 4 January 1996, following the decision of the House of Lords in *X. and Others v. Bedfordshire County Council* ([1995] 3AER 353) and in the light of counsel's advice that their case was indistinguishable, the applicants consented to an order that their action be dismissed.

43. In or about 1992 to 1993, the applicants applied for compensation to the Criminal Injuries Compensation Scheme in respect of the abuse suffered. In their applications, they alleged as follows:

(i) E. stated that from about 1967 she suffered 10 years of abuse from W.H. The first incident which she recalled was when she was 6 or 7 when he struck her, sending her flying into the wall. Soon after, he began coming into her room at night and doing things to her, requiring her to masturbate him. If she cried, he would punch her in the face. From the age of 12, he used to make the girls have a bath together and would touch them all over their bodies, inserting his finger into them. Often he would keep her off school and would abuse her sexually. He assaulted her often, coming up behind her to hit her on the back of the head. He also used to stand on her naked feet with his shoes on and twist, pinch her with his nails and punch her. This physical abuse happened on a daily basis. He would also get her and the others to strip to the waist and hit each other with dog chains. This conduct continued regularly until she left home on her 17th birthday (19 October 1977). She recalled going to the social services when she was aged 14 and telling them that W.H. was living with them when he was not supposed to. Nothing happened as a result. While the social services were coming to the house, she did not remember them talking to her. She recalled that this period was before she was 14 or 15, before 1974 or 1975. When she was 15, she started running away from home. On one occasion she took pills. When she was visited by the police in hospital, she told them that W.H. was interfering with her. She also told this to a psychiatrist whom she saw soon after. However, W.H. continued interfering with her. W.H. was only arrested after L. had run away from home in January 1977. E. had suffered serious problems since that time, having made several suicide attempts and having developed a severe drink problem. A psychiatric report of 24 April 1992 concluded that her symptoms accorded with a diagnosis of severe post traumatic stress disorder.

(ii) H. stated that he suffered from physical abuse, assaults and threats of violence from W.H. from about 1967. From about the age of 6 or 7, W.H. used to punch him in the stomach and bash him against the wall. He also made him and the others strip to the waist and punch and hit each other with chains. These relentless assaults went on regularly until he left home during 1978. A psychiatric report of 9 June 1992 concluded that he had long term

relationship problems, poor self confidence and long standing personality difficulties.

(iii) L. stated that she had suffered sexual and physical abuse from W.H. from 1969 until she left home in about 1979 and on occasion after that. W.H. had started interfering with her when she was about 5 or 6. The first thing she remembered was him bathing her with her sister E. and rubbing her private parts. Hardly a day went past when he did not do something of a sexual nature to her (e.g. touching her breasts or private parts) or batter her. When she was older, he made her touch him on his private parts and perform oral sex. He made her and the other children hit each other with chains and whips and would sometimes join in. She was often left with bad bruises and a bleeding nose. From the age of 11 or 12, he had sexual intercourse with her several times. When she ran away in January 1977, she told the police and he was arrested. However, he returned home and started interfering with her again, having intercourse with her and punching or kicking her if she refused. She ran away again in Spring 1977 and was put into a home, first in Dumfries, then Annan and finally Closeburn, which she eventually left in 1979 when she was 16. At that point, she did not return home but went to stay with her sister and then embarked in a series of relationships. When she visited her mother on 1 January 1980, W.H. put his hands up her skirt but let her go when she threatened to tell her boyfriend. On another occasion in 1981, W.H. tried to fondle her but she got up and left. She had never been able to tell anyone about these things as she was scared of him and thought that he would severely assault her. A psychiatric report of 24 April 1992 concluded that her symptoms, including nightmares and sleep disturbance, accorded with a diagnosis of severe post traumatic stress disorder.

(iv) T. stated that she had suffered sexual and physical abuse from W.H. from about 1971 to 1989. Though she did not remember anything specifically before the age of 9, she slept in the same bed as L. and remembered him coming naked into the bed with them. From an early age, he used to stand on her naked feet in his shoes and twirl round, nip her and punch her in the stomach. She had black eyes occasionally. When she was 9, she remembered him making her touch him and masturbate him. She had to do that to him two or three times a week when he came home from work. He then started keeping her off school and would lie down on the bed naked, making her take her clothes off and masturbate him. This occurred two or three times a week. When she was 10 or 11, he began to touch her breasts and rub his penis over her until he ejaculated. When she was 14, he forced her to have sexual intercourse with him. He did not repeat that but continued touching her and making her masturbate him or have oral sex. This continued until 1984 when she was able to leave home – she deliberately got pregnant by having sex with someone she knew, so that the local authority would provide her with accommodation away from home. In

1987, W.H. started coming to her house and would try to touch and grab her. She became very depressed and suicidal. She then told the Family Centre about the abuse. A psychiatric report of 24 April 1992 concluded that her symptoms, including low self-esteem, fear, mistrust and depression, accorded with a diagnosis of severe post traumatic stress disorder.

44. Though the applicable provisions did not permit claims for injuries from violence arising before 1 October 1979 where the victim and assailant were in the same household, the Criminal Injuries Compensation Board ("CICB"), in an apparent oversight, made an assessment awarding 25,000 pounds sterling (GBP) to E., L. and T. for general damages. They appealed against the failure to award damages for loss of earnings. As it was noted that in the proceedings for the fourth applicant T. that most of her injuries had arisen before 1979, the applicants E. and L. withdrew their appeals to prevent their awards being reconsidered altogether. In deciding T.'s appeal, the Board decided that as she had sustained some damage post-October 1979 it would not disturb the award but made no award for alleged loss of earnings or damage to employment prospects. H. did not receive any award. A letter dated 23 July 1992 from the CICB indicated that his application had been rejected in that his claim had not been made within three years of the incident giving rise to the claim and the Chairman had decided not to waive the requirement in his case.

45. On 30 January 1996, the applicants requested the Commissioner for Local Administration in Scotland to undertake an investigation into their allegations of negligence and maladministration by the local authority. By letter dated 8 February 1996, the Ombudsman stated that he had no jurisdiction pursuant to section 24(6)c of the Local Government (Scotland) Act 1975, which precluded investigations where the complainants had a remedy by way of proceedings in a court of law, and that, even if he had jurisdiction, he would not have undertaken an investigation due to the lapse in time since the events occurred. By letter of 22 February 1996, he declined to reconsider his decision.

B. Social work expert reports submitted by the parties

Reports by Ms Ann Black submitted by the Government

46. The Government submitted two reports by Ms Black, a social work consultant who has worked for more than 30 years in the field of child care, principally in Scotland.

47. In her first affidavit dated 26 March 2002, Ms Black stated that with the exception of cases of incest there was in the 1970s no real appreciation of the incidence of, and consequences for victims of, child sexual abuse within families. Circulars referred to non-accidental injury without specific reference to sexual abuse which was not recognised as a particular issue. It

was only in the 1980s that literature began to arrive in the United Kingdom from the United States on the subject of child sex abuse and initially this was regarded as controversial. The first real recognition of the problem in the United Kingdom was a CIBA publication "Child Sexual Abuse in the Family" published in 1984. A Working Group on the topic was set up by the Social Work Services Group of the Scottish Office in which she was involved and which reported in 1985.

48. According to her experience, during the 1970s and before, where a case of incest or sexual abuse had been identified, the focus would be on ensuring that the perpetrator was punished. Little or no attention was given to the needs of the victim and once the perpetrator was convicted that would be seen as the end of the matter. There was no real appreciation of the extent to which abusers might continue to abuse their victims over many years or of the skills of abusers in avoiding detection. Social workers were not given any specific training about child sex abuse. There was also the practice at the time of local authorities keeping their probation and child care functions separate, with social workers working separately rather than as part of a team and there was a tendency for there to be relatively little interaction between schools and social work departments.

49. In her view, after W.H. had been convicted and sentenced to probation in January 1977, it would have been generally assumed that any continuing problem would have been resolved, particularly if a condition in his probation was that he was not allowed to live in the family home. No work would have been envisaged with the victims unless they were showing obvious distress or problems. A mere suspicion that the W.H. was in breach of the probation order, and his presence found in the house during the day, would not have been sufficient proof of breach. He was the father of two of the mother's youngest children, contact with the family was not prohibited and his presence in the house would have even been seen as positive. Even if they had considered the possible breach of probation further, they would not have gone on to consider possible harm to the children. It would have been standard practice to make specific appointments to visit the home in order to avoid wasted time and she would not have expected the social worker to make spot checks or call at unexpected times to check on W.H.. As was the practice, social services provided support for the mother who had considerable problems in running the home, and would have had a tendency not to investigate the causes of any running away or of truancy, particularly where the child was close to school leaving age. Nor would it have been expected at the time for the social workers to make a point of talking individually to the children, unless for the purpose of a specific report.

50. In her additional comments of 20 May 2002, added in the light of the examination of further documents, Ms Black noted that at the meeting convened by the school in March 1979 concerning L. the social work

department had not sent a participant though invited to do so. The school problems drawn to the attention of the social services did not appear to have prompted the social worker to suggest a meeting to try to draw together the issues for the family and this meant that the full extent of the problems that L. and the others in the family faced were not discussed by the wider group of professionals who knew the family. By this time, the use of case conferences was well established in social work practice.

51. She also noted that following E.'s overdose of pills in November 1976, the social services did not appear to react to E.'s dislike of W.H. and her allegations of an earlier sexual assault and his shouting and hitting. Nor was there any social work follow-up when L. ran away in January 1977, beyond a visit of the emergency social worker, or any discussion with E. and L. after W.H. had been sentenced. Even if social workers at the time were not aware of the incidence of sexual abuse, the incidents with the two girls and the evident distress shown by them should have usefully led to an attempt to discuss with them individually how things were at home, in particular to establish the severity of past incidents and whether any other children in the house were at risk of sexual or physical abuse.

52. Further, in the light of Mr R's report to the court which commented on the need for firm control of W.H. and the mother's refusal to accept that he had committed the offences, this made the assurances given by W.H. and the mother that W.H. was not living in the home much less safe to rely on. Mr R. did not appear to have issued any warning to them about the consequences of breaching the probation order. When the report was made on E. in June 1977 there was no reference to the sexual abuse or home difficulties. Also the report to the Children's Hearing on L. in January 1978 failed to give a full picture of her difficulties. Throughout the case there was an emerging pattern of different people not using the information available to assess the safety of the girls and W.H.'s adherence to the probation conditions. After the report on E. in June, it could have been expected that the workers involved in the family would have increased their scrutiny of the living arrangements in the family. The lack of detail in the reports on L. deprived the Children's Hearing of vital information which could have led them to place L. on supervision and afforded more opportunity for her to speak about the home situation.

53. Though by January 1977 E. was too old to be referred to the reporter of the Children's Hearing, grounds existed for referring L. at that time. Given the abuse, her level of truancy, the poor financial and material circumstances in the family and the offence of W.H., coupled with allegations by E. as to shouting and hitting in the family home, she considered that a referral of L. ought to have been made. This would have given an opportunity for all the different agencies involved with the family to contribute to the discussion and for the Hearing to appreciate the full extent of the problems. Though L. might not have been removed in the first

instances, a supervision requirement would have allowed closer contact and more individual work. The Reporter would also have had the opportunity to consider whether any other children in the household were in need of compulsory measures of care.

54. She concluded that the failure to share significant issues with the Children's Hearing about L., the failure to work collaboratively with the school, the lack of attention to the assessed need for firm control of the situation after W.H. was placed on probation and the lack of attention to the significance that the mother did not believe her daughters' complaints against W.H., all contributed to a failure to help get the girls the support they were likely to need after the conviction of W.H. and disclosed a failure in the approach taken to the family by the social work department.

Reports by Mr Richard Jack submitted by the applicants

55. The applicants provided three reports dated 20 March, 13 May and 10 June 2002 by Mr Richard Jack, a consultant in social work with experience in social work practice over 28 years.

56. He stated that from 1975, when circular SW1/75 was issued, a mult-disciplinary approach by professionals was promoted in respect of neglect and child protection, though sexual abuse was not explicitly referred to. While public and professional acknowledgement of a significant child abuse problem did not emerge until the mid-1970's, in this case E. and L. had made disclosures which were believed and not in doubt. Literature as to the nature of the problem was available to practitioners, in particular with Kempe and Kempe's work published in 1978, *inter alia*, identifying clear indicators as to the behaviour exhibited by abused children.

57. Despite long-term problems with the family and notes of truanting dating back to 1973, there was minimal reference to dialogue between the social services and the education authority. There was no reference in the social work records to the disclosures made by E. to medical personnel or to a visit to her in hospital by an emergency social worker, disclosing a significant breakdown in communication. The family social worker Mr E. appears to have had no clear knowledge as to the situation, while Mr M., who later supervised probation of W.H., was not a qualified social worker and did not appear to have proper knowledge of the seriousness and persistence of the offences in issue.

58. Once disclosures had been made by E. and L. in 1977, it would have been reasonable, given the ages of the children, to discuss W.H. with them outwith the presence of the mother. A serious discussion ought to have taken place in the social services as to the potential risks to the children in the household and at the very minimum a report should have been prepared for the Reporter to the Children's Hearing. In fact there was nothing to suggest that the social services explored W.H.'s impact on the children in the family at all.

59. The social service records noted clear suspicions that W.H. continued to live in the household. Though it was stated in the context of the probation order that firm control was needed, no steps were taken such as further enquiries from neighbours or the local police as to W.H.'s actual place of residence. Breach of the probation order was a very serious matter and should have triggered a referral of his case back to the court and of the children to the Reporter.

60. When L.'s truancy was referred to the Children's Hearing in 1978, there was no reference to the background of her running away in January 1977 or to the history of neglect and turbulent dynamics in the family. It was negligent of the social services not to provide the panel with full information. Nor when there was a case study meeting at the school in March 1979 did any social worker attend. There was never any multi-disciplinary case conference which reviewed in a full, objective and accurate manner the history and circumstances of the family.

II. RELEVANT DOMESTIC LAW AND PRACTICE

Probation

61. Imprisonment is used in Scotland only where there is no alternative. One alternative is probation, which was at the relevant time imposed under section 384 of the Criminal Procedure (Scotland) Act 1975. When an offender is placed on probation he is allowed to retain his liberty during the period of probation but must comply with the requirements of the probation order. In all cases the order requires the offender to be of good behaviour, conform to the directions of the supervising officer and to inform the supervising officer if he changes residence or employment. Other requirements may be imposed, such as conditions as to the place of residence. If the offender fails to comply with requirements of the probation order, that failure may be reported to the sentencing court by the supervisory officer or other responsible officials of the Social Work Department. The supervising officer has a degree of discretion where there is an apparent breach of the order. He may warn the probationer about the conduct if he considers a warning is likely to alter the probationer's behaviour. If he reports the matter to the court, the court then investigates the matter. If the failure is proved to its satisfaction, the court can impose a variety of penalties including sentencing the probationer to imprisonment for the offence for which he was placed on probation.

Child care provisions

62. The care and protection of children in Scotland was governed for most of the relevant period by the Social Work (Scotland) Act 1968 (the "1968 Act").

63. There was a duty on local authorities under section 15(1) of the 1968 Act to receive a child under 17 into care when it appeared to an authority that his parent or guardian was unable, by reasons of illness, mental disorder or other circumstance, from providing proper accommodation, maintenance and upbringing. The test was whether the intervention was necessary in the interests of the welfare of the child. Compulsory measures of care were also required under section 32 for children in need, including those who were suffering unnecessarily or were the victims of cruelty. Under section 37(1), anyone with reasonable cause to believe a child fell into this category could inform the Reporter to the Children's Panel of the matter.

64. The Children's Panel was a tribunal specifically designed to cope with cases involving children. The Reporter had investigative powers to establish the condition of the welfare of the child and had three options: to take no further action, to refer the case to the Social Work Department for them to give guidance or support, or to convene a Children's Hearing. The Children's Panel had the power to order the child to submit to a supervision requirement in accordance with such conditions as it saw fit or to reside in a special establishment.

65. After the entry into force of the Children Act 1975, the local authority had a duty to cause inquiries to be made, unless it did not deem them necessary.

66. Under section 37(2) of the 1968 Act, a police constable or other person authorised by a court or justice of the peace could take a child to "a place of safety", e.g. if offences had been committed in relation to the child, including cruelty or the infliction of unnecessary suffering.

Remedies available to victims of abuse

Civil actions

67. Physical or sexual abuse of a child will generally constitute a civil wrong (such as assault), as well as a criminal offence, and give rise to an action for damages by the perpetrator.

68. Actions in civil damages may also lie against the social work department (local authority) either in respect of alleged wrongdoing (e.g. negligence, or wilful abuse of power) for its own actions or vicariously for the actions of its staff.

69. Under Scots law, a body carrying out statutory functions will be liable in damages to a person affected by its performance or non-performance of those functions (in the absence of a wilful disregard of its

duties) only if the statute expressly or impliedly provides for such a liability, or the relationship between the statutory body and the person in question is of such a nature as to create a common law duty of care, and the statutory body violated that duty (i.e. was negligent).

70. As set out in *Z. and Others v. the United Kingdom* [GC], (no. 29392/95, ECHR 2001-V), negligence arises in specific categories of situations. These categories are capable of being extended. There are three elements to the tort (delict) of negligence: a duty of care, breach of the duty of care and damage. The duty of care may be described as the concept which defines the categories of relationships in which the law may impose liability on a defendant in damages if he or she is shown to have acted carelessly. To show a duty of care, the claimant must indicate that the situation comes within an existing established category of cases where a duty of care has been held to exist. In novel situations, in order to show a duty of care, the claimant must satisfy a threefold test, establishing:

– that damage to the claimant was foreseeable;
– that the claimant was in an appropriate relationship of proximity to the defendant; and
– that it is fair, just and reasonable to impose liability on the defendant.

The leading case is *Caparo Industries v. Dickman* ([1990] 2 AC 605).

71. If the courts decide that as a matter of law there is no duty of care owed in a particular situation, that decision will (subject to the doctrine of precedent) apply in future cases where the parties are in the same relationship.

72. The decision in *X and Others v. Bedfordshire County Council* ([1995] 3 AER 353) is the leading authority in the United Kingdom in this area. The House of Lords there held that local authorities could not be sued for negligence or for breach of statutory duty in respect of the discharge of their functions concerning the welfare of children. The children in that case had suffered severe neglect and abuse from their parents and had alleged that the local authority had failed to protect them, *inter alia*, by not exercising their power to take them into care at an earlier stage. As regards the claims that the local authority owed a duty of care to the applicants pursuant to the tort of negligence, Lord Browne-Wilkinson in his leading judgment found that no duty of care arose as it was not fair, just or reasonable to impose one on the local authority in their exercise of this aspect of their duties.

73. More recently, in the case of *W. and Others v. Essex County Council* ([1998] 3 AER 111) in a case concerning the claims of a family, parents and children, that they had suffered abuse and damage due to the foster placement in their home by the local authority of a 15 year old boy who was a suspected sexual abuser, the Court of Appeal held that a duty of care lay towards the children of the family, while the House of Lords on 16 March 2000 ([2000] 2 WLR 601) held that the parents could also arguably claim

that they were owed a duty of care. The House of Lords had also given judgment on 17 June 1999 in *Barrett v. the London Borough of Enfield* ([1999] 3 WLR 79). That case concerned the claims of the plaintiff, who had been in care from the age of ten months to seventeen years, that the local authority had negligently failed to safeguard his welfare causing him deep-seated psychiatric problems. The local authority had applied to strike out the case as disclosing no cause of action. The House of Lords, upholding the plaintiff's appeal, unanimously held that the case of *X and Others v. Bedfordshire County Council* did not in the circumstances of this case prevent a claim of negligence being brought against a local authority by a child formerly in its care.

Criminal Injuries Compensation

74. The Criminal Injuries Compensation Authority (known at the relevant time as the Criminal Injuries Compensation Board – CICB) may make an award where it is satisfied on the balance of probabilities that an applicant is a victim of a criminal offence and suffered the harm alleged. Payments of some 210 million GBP are paid out each year. However, under the rules in force until 1 October 1979, there was a complete bar on claims where the victim and the assailant were living together at the same time as members of the family.

Judicial review

75. The acts, omissions and decisions of social work agencies carrying out statutory functions in connection with the welfare of children in Scotland are subject to judicial review by the Court of Session. Decisions by the local authority, for example, concerning the place of residence of children or recording the name of an abuser on a register have been quashed. Damages may be awarded in such proceedings.

Local Government Ombudsman

76. Persons aggrieved by the actions or omissions of social work agencies may complain to the Commissioner for Local Administration in Scotland whose functions include investigation of written complaints by persons who claim to have suffered from the maladministration of local authorities (Part II of the Local Government (Scotland) 1975 as amended). The Local Government Ombudsman may recommend an appropriate remedy, including the payment of compensation. Though the local authority is not legally obliged to pay the compensation recommended, it is the general practice to do so.

77. There are restrictions on the investigations which may be conducted. Section 24(4) of the 1975 Act above requires a person to bring a complaint within 12 months from the day on which the complainant had notice of the matters concerned, though there is a discretion to consider complaints

outside this time-limit if the Ombudsman considers it reasonable to do so. He may not investigate any matter in which the person aggrieved has or had a remedy by way of proceedings in any court of law (section 24(6)c).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

78. Article 3 of the Convention provides:

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

A. The parties' submissions

1. The applicants

79. The applicants submitted that taken as a whole the evidence established that they were abused by W.H., that the abuse continued after January 1977, that there were material faults in the handling of the situation by the social services and that they sustained loss and damage as a result. They submitted that the local authority was aware of proven sexual abuse in January 1977 in relation to E. and L. and that this had been ongoing for some time before January 1977. They therefore knew of the risk of future ill-treatment to the children and ought to have been aware of the continuation of actual abuse.

80. The local authority failed however to take the protective measures necessary and provided for in the statutory framework. Already in January 1977 there were grounds for referral of the children to the Reporter to the Children's Panel due to the serious concerns for their welfare (the mother was unable to cope, school attendance was atrocious, E. had attempted suicide, and E. and L. had been sexually abused). A hearing would then have been held and the situation properly investigated. The failure to refer the children precluded further steps being taken to protect their welfare.

81. There was also a failure properly to supervise W.H.'s probation. It was noted that he had been found in the home and yet no further investigation into the situation occurred. No consideration was given either to a referral to the Reporter on the basis that a convicted sexual offender had been in contact with the household. Nor did L.'s known behaviour (running away, truancy and offending) lead the social services to hold a multidisciplinary conference to investigate the cause of her behaviour while

information about the background of sexual abuse by W.H. was not passed on by the social services to relevant agencies including the Children's Panel when it dealt with L. concerning truancy in 1978 and care measures in 1979.

82. The applicants submitted that the local authority should have been aware of the risk of continued abuse, arguing that there was recognition at the time that sexual abuse occurred in families, that W.H. was found guilty of serious sexual offences of abuse which had been going on for some time and the recorded suspicion that he continued to cohabit in the home. It should also have been apparent to the local authority that there was a possible connection between the disturbed behaviour of E. and L. and ongoing sexual abuse. No steps were taken to talk individually to the children, social work concerns seeming to concentrate on matters of rent and finance. Visits by social workers were also made at regular and pre-arranged times which allowed W.H. to evade notice most of the time.

2. The Government

83. The Government did not consider that it would be appropriate for the Court in assessing to what extent the applicants has suffered ill-treatment to go beyond the conclusions of the domestic courts, which had found W.H. guilty of specific offences against E., L. and T. in 1977 and 1989, as this would involve finding W.H. guilty of serious criminal offences in proceedings to which he was not a party. As the second applicant H.'s allegations referred most vividly to ill-treatment at an early age, only mentioning in sweeping terms alleged continuation of abuse after the first conviction in 1977, his statements in their view did not provide an adequate basis for making specific findings about ill-treatment after 7 January 1977. The Government also pointed to the evidential difficulties arising from the allegations which concerned events occurring more than 20 years ago and the incomplete evidence which was available. However, they accepted that the conduct for which W.H. was convicted in respect of E., L. and T. amounted to inhuman or degrading treatment.

84. The Government understood that the applicants were alleging that from January 1977, and not before, the social services were or should have been aware that there was a risk of sexual abuse from W.H. continuing. They submitted that, following his conviction in January 1977, the Social Work Department had no evidence that W.H. was continuing to reside in the home. Although Mr R. had a suspicion that the mother was still cohabiting with W.H., he had visited the house very frequently without seeing W.H. and, in the view of the social work consultant Ms Anne Black, given the low level of awareness about child sexual abuse at the time, she would not have expected him to pursue his suspicions further. None of the applicants, when seen by the social workers or interviewed for various purposes, gave any hint that W.H. was still living in their home or continuing to abuse them. Though the social worker Mr M. recalled that he found W.H. leaving

the home on two to three occasions, the notes indicated that the mother and W.H. both denied that he was living there, and he took the view that W.H.'s visits during the day while the children were at school was not tantamount to living there and did not constitute sufficient evidence of a breach of his probation to justify further action.

85. There were no other features which would have led the social workers to suspect that the applicants were still suffering abuse. They were concerned in the problems of school attendance and the difficulties arising from the mother's illness and lack of money, and it was not unreasonable for the social workers to believe that the children's problems at the time were associated with general problems arising from their environment. They submitted therefore that the social services did not have knowledge of any continuing abuse and, having regard to practice and understanding at the time, they could not legitimately be criticised for failing to appreciate that W.H. was continuing to abuse the applicants.

86. The Government agreed with the applicants that the social services' actions were nonetheless inadequate in certain respects, particularly with regard to the support offered to the applicants after W.H.'s conviction in 1977. The most serious omission was the failure to make a reference to the Reporter of the Children's Hearing after that conviction. This would have been likely to have led to a supervision order in respect of L., leading to closer contact with her and the family. Further, there should have been greater vigilance in supervising W.H. with less reliance on the assurances of W.H. and the mother that he was not living in the home, and the background report on E. prepared for court in June 1977, and the social enquiry report on L. prepared in January 1978 and in April 1979 should have referred to the previous circumstances surrounding the disclosure of abuse and the conviction of W.H.; there should have been social work input at the case conference meeting held in relation to L. in March 1979; and the visit by the police to L. in April 1979 should have led to discussion about the situation at home.

87. However, notwithstanding these failings, it could not be said that any different conduct on the part of the authorities would have necessarily led to discovery of any further incidents of abuse by W.H. There had been ongoing contact between the applicants and the social services over this period without any disclosures being made. Similarly, even if the possibility of a breach of probation proceedings had been more seriously considered, the social services still had had no concrete evidence that he was living in the home. In the circumstances, it could not be said that there was a violation of Article 3 in respect of the applicants.

B. The Court's assessment

1. General principles

88. Article 3 enshrines one of the most fundamental values of a democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment. The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals (see A. v. the United Kingdom judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VI, p. 2699, § 22). These measures should provide effective protection, in particular, of children and other vulnerable persons, and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge (*mutatis mutandis*, Osman v. the United Kingdom, judgment of 28 October 1998, *Reports* 1998-VIII, § 116). Thus a failure, over four and a half years, to protect children from serious neglect and abuse of which the local authority were aware disclosed a breach of Article 3 of the Convention in the case of *Z. and Others v. the United Kingdom* ([GC] no. 29392/95, ECHR 2001-V, §§ 74-75).

2. Application in the present case

89. The Court recalls that the four applicants allege that they suffered sexual and physical abuse from W.H. over a long period of time. There is no doubt that the treatment described (see paragraph 43) falls within the scope of Article 3 of the Convention as inhuman and degrading treatment. Certain of the assaults on E., L. and T. were subject to criminal proceedings and W.H. was convicted in January 1977 and July 1989 in respect of seven offences.

90. The Government have argued that no findings of ill-treatment should be made beyond those of the criminal courts as this would be tantamount to finding W.H. guilty of further criminal offences in proceedings to which he is not a party. The Court notes that the Government do not contest the applicants' allegations or argue that they are false or erroneous or unsubstantiated. The Criminal Injuries Compensation Board indeed made substantial awards to E., L. and T., which would imply that the allegations of long standing abuse were upheld. It is true that no award was made to the second applicant, H., and that no charges concerning him were ever brought against W.H.. It does not appear that H. made any disclosure about physical abuse until relatively late, in the context of the civil proceedings brought in 1992. However, the statements of the other applicants, his sisters, support

his claims concerning the violence and physical battering that occurred in the home and the psychological reports submitted are consistent with a history of abuse.

91. The Court is satisfied that it may make a finding on the materials before it, which are uncontroverted, that the applicants suffered abuse as described. It does not consider that this may be construed as any determination of guilt of criminal offences on the part of W.H., any more than the accepted findings of ill-treatment of the child applicants in the case of *Z. and Others v. the United Kingdom* (cited above) disclosed any attribution of criminal responsibility on the part of the children's parents. Criminal law liability is distinct from international law responsibility under the Convention, this Court not being concerned with reaching any findings as to guilt or innocence under domestic law (see, for example, Avşar v. Turkey, no. 25657/94, ECHR 2001, § 284).

92. The question therefore arises whether the local authority (acting through its Social Work Department) was, or ought to have been, aware that the applicants were suffering or at risk of abuse and, if so, whether they took the steps reasonably available to them to protect them from that abuse.

93. The parties appear agreed that it is the period after January 1977 which is in issue, no disclosures or evidence of sexual or physical abuse arising before E.'s overdose and L'. running away from home in November 1976 and January 1977 respectively. Though in certain statements E. has a recollection of making a complaint about W.H. in or about 1974, her memory is uncertain on the details and the applicants do not rely on this as proving knowledge of the abuse before 1977. The parties do disagree whether the authorities should have been aware of the abuse that continued thereafter.

94. The Court recalls that until T. made disclosures of sexual abuse to her social worker in 1988 there is no indication that any of the children in the house made any complaint about W.H.'s ongoing assaults after January 1977. The Government take the view that there was nothing to alert the social workers that he continued to be a risk and that in the light of knowledge and practice at the time the fact that he had been found in the family home after the conviction in January 1977 would not have been regarded as any significant cause for alarm or have provided sufficient ground for action against him.

95. However, the Court notes that the Government accept that even if it was not a formal condition of his probation it would have been understood that W.H. was no longer permitted to reside in the applicant's home. An examination of the materials reveals the following factors:

– W.H. had been charged with a series of serious sexual offences against two children of the family indicating a background of repetitive offending;

– the disclosures made by E. in hospital indicated that there was also an element of physical abuse present in the home;

– E. and L. both showed serious levels of distress and disturbance arising out of the situation of known abuse in the home, which had contributed to E. taking an overdose of pills and L. running away;

– the social enquiry report dated 28 January 1977 produced by the social worker Mr R. noted that W.H. did not appear to accept the serious nature of the charges and that the mother also did not accept the charges against him and talked of marriage;

– that report concluded that it would be necessary for firm control to be exercised over the accused for a period of time;

– the notes of Mr R. gave the opinion in March 1977 that the mother was still cohabiting;

– the affidavits of the social worker Mr M. indicate that he regarded W.H. as dishonest and likely not to tell the truth when it suited him;

– Mr M. in the same affidavits recalled meeting W.H. leaving the home two or three times when he called unexpectedly;

– a social enquiry report dated 1 June 1977 drawn up in respect of E.'s appearance for criminal damage noted that she had left home after a scene with the man cohabiting with her mother, at a date unspecified but which would appear to be about March 1977 (see paragraph 22);

96. The Court is satisfied that from these elements that the social services should have been aware that the situation in the family disclosed a history of past sexual and physical abuse from W.H. and that, notwithstanding the probation order, he was continuing to have close contact with the family, including the children. Even if the social services were not aware he was inflicting abuse at this time, they should have been aware that the children remained at potential risk. The fact that at the relevant time there was not the knowledge of the prevalence of, and persistence of, sexual offenders victimising children within a family that there exists now, is not significant in this case where, as the applicants emphasise, the social services knew that there had been incidences of sexual abuse resulting in criminal offences and were under an obligation to monitor the offender's conduct in the aftermath of the conviction.

97. Yet the social services failed to take steps which would have enabled them to discover the exact extent of the problem and, potentially, to prevent further abuse taking place. The Government have accepted that after the initial disclosures the social services should have worked with both E. and L. who had shown significant distress at the situation at home which could have led to further understanding of family dynamics; and, most importantly, that the social services should have referred L. to the Reporter of the Children's Hearing, which could have led to a supervision requirement over one or more of the children who had been living with a known and convicted offender.

98. In addition, the Government have accepted that more should have been done to investigate the possible breach by W.H. of the probation order,

that there was a consistent failure to place the full and relevant details of the family situation before the Sheriff's Court or Children's Hearing when the applicant children were the subject of a specific examination in the context of offending and truancy (see paragraphs 22, 26 and 31), and that there was no effective co-operation or exchange of information between the school authorities which were attempting to deal with a persistent truancy problem and the social services who had access to the information about the wider family situation and history. It is also not apparent that E.'s disclosures at the hospital in December 1976 were passed to the social services or that, if they were, they led to any response.

99. The Court recalls that the Government argued that notwithstanding any acknowledged shortcomings it has not been shown that matters would have turned out any differently, in other words, that fuller co-operation and communication between the authorities under the duty to protect the applicants and closer monitoring and supervision of the family would not necessarily have either uncovered the abuse or prevented it. The test under Article 3 however does not require it to be shown that "but for" the failing or omission of the public authority ill-treatment would not have happened. A failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State.

100. The Court is satisfied that the pattern of lack of investigation, communication and co-operation by the relevant authorities disclosed in this case must be regarded as having had a significant influence on the course of events and that proper and effective management of their responsibilities might, judged reasonably, have been expected to avoid, or at least, minimise the risk or the damage suffered.

101. There has, accordingly, been a breach of Article 3 in respect of the applicants in this case.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

102. Article 8 of the Convention provides as relevant:

> "1. Everyone has the right to respect for his private and family life, ...
>
> 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."

103. The applicants referred to the ill-treatment and assaults to which they were victim and claimed that the authorities had failed in their positive obligation to protect them from damage to their private life.

104. The Government submitted that the deterrent sanctions against sexual and physical abuse and the statutory system of child protection fulfilled any positive obligation imposed by this provision to protect the applicants from abuse by W.H.

105. Referring to its finding of a violation of Article 3 above, the Court finds that no separate issue arises under this Convention provision.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

106. Article 13 of the Convention provides:

> "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. The parties' submissions

1. The applicants

107. The applicants submitted that Article 13 required that they have available to them a means for establishing the liability of State officials for acts or omissions involving a breach of their rights and the possibility of obtaining compensation for the wrong suffered. Advisory remedies such as complaints to the ombudsman were not effective, while the CICB could not attribute blame to the local authority or hold them to account. The compensation paid by the CICB to three applicants related to a separate wrong and not to the substance of their complaint before the Court. It also did not cover pecuniary damage for loss of earnings. The applicants were precluded from suing the local authority for damages in negligence due to the effect of the *X. and Others v. Bedfordshire County Council* case (cited above).

2. The Government

108. The Government submitted that the applicants did have at their disposal an effective remedy in respect of any alleged failure of the local authority to protect them from abuse. In their view, there was a margin of appreciation available to Contracting States as to how to satisfy the two main elements - a mechanism for establishing liability and the availability of compensation at least for the non-pecuniary damage suffered thereby. Where the damage was caused directly by a perpetrator of abuse and the liability of the local authority was subsidiary or derivative, the requirement for compensation could be met through remedies against the abuser himself or by the State providing awards under a compensation scheme such as the CICB. The applicants could also have obtained a determination of liability

through judicial review proceedings, civil proceedings against the local authority (which they chose to withdraw) and the local authority ombudsman. It was not apparent that the applicants' civil claims would have been rejected for lack of a cause of action as they arguably raised operational matters not affected by the ruling in the *X. and Others* case, though in the Government's view it would have failed on the merits. In any event, such proceedings would have provided a procedure by which the applicants' claims could have been tested in a judicial procedure. As the applicants E., L. and T. had in this case received GBP 25,000, they had already received an effective compensatory remedy.

B. The Court's assessment

109. As the Court has stated on many occasions, Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law. In particular its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see Aksoy v. Turkey, judgment of 18 December 1996, *Reports* 1996-VI, p. 2286, § 95; Aydın v. Turkey, judgment of 25 September 1997, *Reports* 1997-VI, pp. 1895-96, § 103; Kaya v. Turkey, judgment of 19 February 1998, *Reports* 1998-I, pp. 329-30, § 106).

110. Where alleged failure by the authorities to protect persons from the acts of others is concerned, Article 13 may not always require that the authorities undertake the responsibility for investigating the allegations. There should however be available to the victim or the victim's family a mechanism for establishing any liability of State officials or bodies for acts or omissions involving the breach of their rights under the Convention. Furthermore, in the case of a breach of Articles 2 and 3 of the Convention, which rank as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of redress (see *Z. and Others v. the United Kingdom* [GC], no. 29392/95, ECHR 2001-V, § 109; *Keenan v. the United Kingdom*, no. 27229/95, (Sect. 3), ECHR 2001-III, § 129).

111. In the present case, the Court has found that the Government failed in their obligations under Article 3 of the Convention to take reasonable steps to protect the applicants from inhuman and degrading treatment. The applicants' complaints in this regard are therefore "arguable" for the purposes of Article 13 (see Boyle and Rice v. the United Kingdom, judgment of 27 April 1988, Series A no. 131, p. 23, § 52; the Kaya judgment, cited above, § 107, and Yaşa v. Turkey, judgment of 2 September 1998, *Reports* 1998-VI, p. 2442, § 113).

112. Though awards were made to three applicants by the CICB and the applicants accept that this may be relevant to any subsequent question of just satisfaction, the Board cannot be regarded as providing a mechanism for determining the liability of the social services for any negligence towards the children. In any event, while it provided some compensation to E., L. and T., no award at all was made to H. and the awards that were made did not take into consideration any pecuniary loss flowing from the abuse suffered. Similarly, while a complaint to the local authority ombudsman, at the appropriate time, might have led to an investigation of certain aspects of social services management of the case, it would not have provided a binding determination, the ombudsman only having the power to make recommendations. Furthermore, it would appear that, time considerations aside, the ombudsman in response to the applicants' complaints gave his view that he did not have jurisdiction since it appeared that they had the possibility of taking action in the courts.

113. The Court recalls that, in general, actions in the domestic courts for damages may provide an effective remedy in cases of alleged unlawfulness or negligence by public authorities (see, for example, *Hugh Jordan v. the United Kingdom*, no. 24746/94, (Sect. 3), judgment of 4 May 2001, §§ 162-163, extracts published in an annex to *McKerr v. the United Kingdom*, ECHR 2001-III). In the present case, the applicants did lodge a civil action in negligence in the Scottish courts but withdrew their claims on 4 January 1996 pursuant to counsel's advice that they were doomed to failure in the light of the *X. and Others* case decided by the House of Lords on 29 June 1995. This decision, which was the subject of consideration by the Grand Chamber in the above-mentioned *Z. and Others v. the United Kingdom* case, had held that no duty of care existed in respect of the child applicants' claims that the local authority in that case had been negligent in failing to remove them from their home where they were victims of abuse and neglect.

114. The Government submitted that it was not correct to assert that this House of Lords decision prevented all claims in negligence against local authorities in the exercise of their child protection duties, and argued that it could not be regarded as beyond doubt that these applicants would have failed as, in the case of these applicants, the social services arguably were negligent in the way they approached operational, as well, as policy matters.

115. It is true that since the case of *X. and Others v. Bedfordshire County Council* there have been further cases in the English courts which indicate that a duty of care may arise where, for example, the social services have failed to prevent foreseeable damage to children either already in their care or affected in other ways by their exercise of their duties (see paragraph 73). However, these developments took place some years after the *X. and Others* case, which at the time gave the impression that the highest judicial authority had ruled out the possibility of suing local authorities in the exercise of their child protection functions on grounds of public policy. If taking action at the present time, the applicants might, at least on arguable grounds, have a claim to a duty of care under domestic law, reinforced by the ability under the Human Rights Act to rely directly on the provisions of the Convention. The Court is not satisfied that this was the case at the relevant time in 1996. While the Government have also made reference to the possibility of judicial review proceedings, these would only have been available to challenge the social services' actions at the time that they occurred. The applicant children were not in a position where they could make use of such redress.

116. The Court accordingly finds that the applicants did not have at their disposal the means of obtaining a determination of their allegations that the local authority failed to protect them from inhuman and degrading treatment. There has been in that respect a violation of Article 13 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

117. 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

1. The parties' submissions

118. The applicants submitted that they were entitled to awards for pecuniary and non-pecuniary damage. While they accepted that the CICB awards could be taken into account in assessing loss, these did not provide full compensation for the severe abuse which took place over many years. They claimed in respect of the failure to protect them from abuse and for anxiety and frustration an additional GBP 20,000 for E., GBP 37,000 for L. and GBP 5,000 for T., while H. who had not previously obtained any

compensation claimed GBP 20,000. The applicants claimed for pecuniary damage sums for loss of earnings because of the effect that the abuse had had on their wage earning potential due to their resulting educational and psychological difficulties – GBP 25,927.55 for E., who has only been able to obtain occasional poorly paid seasonal work, GBP 20,000 for H., who has only been able to obtain poorly paid and physically demanding work, GBP 78,548.15 for L. who has only been able to work on a part time basis and GBP 68,760.64 for T., who has been unable to work for long periods. The calculations submitted by the applicants were stated as taking into account, *inter alia*, the length of time over which the local authority were at fault and the earnings in fact obtained by the applicants.

119. The Government submitted that any finding of a violation would in itself constitute just satisfaction. They did not consider that any clear causal connection could be shown in respect of any alleged pecuniary damage and submitted that the applicants' calculations were artificial and hypothetical. As regards any non-pecuniary damage it would be necessary to identify precisely the damage suffered by the applicants which would not have occurred but for the alleged violation, which was in the circumstances of this case difficult bearing in mind the background of abuse and deprivation already suffered by the applicants prior to January 1977. Furthermore, the compensation paid by the CICB should be deducted from any award.

2. The Court's assessment

120. As regards the applicants' claims for pecuniary loss, the Court's case-law establishes that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention and that this may, in the appropriate case, include compensation in respect of loss of earnings (see, amongst other authorities, Barberà, Messegué and Jabardo v. Spain, judgment of 13 June 1994 (Article 50), Series A no. 285-C, pp. 57-58, §§ 16-20; Cakıcı v. Turkey, judgment of 8 July 1999, *Reports* 1999-IV, § 127).

121. A precise calculation of the sums necessary to make complete reparation *(restitutio in integrum*) in respect of the pecuniary losses suffered by applicants may be prevented by the inherently uncertain character of the damage flowing from the violation (Young, James and Webster v. the United Kingdom (former Article 50), judgment of 18 October 1982, Series A no. 55, p. 7, § 11). An award may still be made notwithstanding the large number of imponderables involved in the assessment of future losses, though the greater the lapse of time involved the more uncertain the link becomes between the breach and the damage. The question to be decided in such cases is the level of just satisfaction, in respect of both past and future pecuniary loss, which it is necessary to award to each applicant, the matter to be determined by the Court at its discretion, having regard to what is equitable (Sunday Times v. the United Kingdom (former Article 50)

judgment of 6 November 1989, Series A no. 38, p. 9, § 15; *Lustig-Prean and Beckett v. the United Kingdom* (Article 41), judgment of 25 July 2000, §§ 22-23).

122. In the present case, the applicants have submitted reports and assessments arguing that their wage-earning capacity, even for those of them who are currently in employment, has been seriously damaged by the past abuse which they suffered. The Court observes however that its finding of a violation relates to the period after January 1977, when the local authority should have been aware that they were at risk of abuse. The applicants had already suffered long periods of violence and assault - E. and H. from 1967, L. from about 1969 and T. from 1971. As E. left home in or about March 1977, H. in or about 1978, L. in 1979 and T. in 1984. The period of abuse suffered by the oldest three applicants therefore after January 1977 was relatively short compared with the prior period.

123. While the reports submitted by the applicants attempt to attribute pecuniary loss to the local authority by taking into account this time element, the Court considers that the psychological injury and the ongoing impact on their ability to lead normal lives would almost certainly have existed even if no abuse had occurred after 1977. It appears to this Court impossible to assess what additional damage was caused after that date. The Court also considers that it must have regard to the fact that, though the local authority did fail to take reasonable steps to avoid the risk, this is not a case where those failings can be regarded as being causally connected with the totality of any damage suffered during that period. If the local authority had acted with more care in monitoring and supervising the family, though this would have increased the likelihood of uncovering the ongoing abuse, it can only be speculative as to at what stage this would have occurred and how effective the measures taken would have been.

124. In the light of these uncertainties and the difficulties of attributing any specific degree of damage to the failings of the local authority, the Court has decided to award a global figure, for pecuniary and non-pecuniary damage together, taking into account as conceded by the applicants the awards made in respect of the non-pecuniary damage by the CICB.

On an equitable basis therefore, it awards the sum of 16,000 euros (EUR) each to E., H. and L. and the sum of EUR 32,000 to T.

B. Costs and expenses

125. The applicants claimed a total of GBP 52,146.65 (inclusive of VAT), including GBP 29,554.74 for solicitors' fees, covering their work on behalf of the applicants from 1994 (applications to the CICB, the Legal Aid Board, local authority ombudsman and the European Commission and Court of Human Rights), GBP 21,150 for counsels' fees, GBP 4,022.91 fees

to the social work consultant for his reports and GBP 1,350 for medical reports on the applicants.

126. The Government submitted that the sums claimed were excessive and that if an award was made it should not be more than GBP 20,000.

127. Having regard to the complexity of the case and the amounts awarded in other cases, and making an assessment on an equitable basis, the Court awards EUR 64,000, inclusive of VAT.

C. Default interest

128. 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. *Holds* that there has been a violation of Article 3 of the Convention;

2. *Holds* that no separate issue arises under Article 8 of the Convention;

3. *Holds* that there has been a violation of Article 13 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts to be converted into pounds sterling at the date of settlement:
      (i) EUR 16,000 (sixteen thousand euros) each to E., H. and L. and EUR 32,000 (thirty two thousand euros) to T. in respect of damage;
      (ii) EUR 64,000 (sixty four thousand euros) 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 amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 26 November 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Deputy Registrar

J.-P. COSTA
President