CHAPTER
10

Secretaries to the Commission

Polys Modinos (1899–1988)

Greek/Cypriot

- *Secretary (1954–9)*

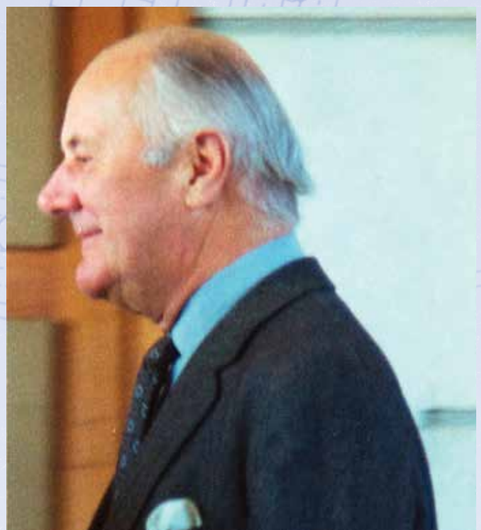
Anthony B. McNulty (1911–92)

British

- *Secretary (1959–76)*

When Anthony Bernard McNulty joined the Council of Europe he was 43 years old and had already enjoyed a distinguished career as a barrister at the London Bar and an officer in the British army. During the Second World War he had served with the Lancers in North Africa and then in Italy, holding the rank of lieutenant colonel by the end of the war. He then served as legal adviser to the military government in Vienna. I always had the impression that these were important years for him, and until the end he was known in various quarters as Colonel McNulty or simply as The Colonel. He himself was modest about his distinguished military career, as is evident from the story he told about Rommel's Order of the Day (*Tagesbefehl*) to his troops in North Africa: 'Don't shoot at McNulty. He wrecks more British tanks every day than we do.'

At the Council of Europe, and for the rest of his life, Tony McNulty devoted himself to the cause of human rights. In July 1954 he joined the Human Rights Directorate, which at that time also provided the Secretariat of the newly established European Commission of Human Rights. The



Right: Anthony B. McNulty.

Human Rights Directorate was headed by Polys Modinos, an eminent jurist from Greece, who later became Deputy Secretary General of the Council of Europe. McNulty was put in charge of the Secretariat of the Commission. In December 1959 the Commission's Secretariat was separated from the Directorate of Human Rights, and McNulty became the first Secretary to the Commission, holding this position until his retirement in June 1976. During those 22 years he set up the Commission's Secretariat and, together with the Commission and its successive Presidents, Sir Humphrey Waldock, Sture Petrén, Max Sørensen and James Fawcett, developed an important body of case-law. He did so with enormous strength and energy and with a great deal of imagination.

Among his ideas was that of creating traineeships within the Secretariat in order to cope with the increasing workload. It was as a trainee in 1963 that I met him for the first time. The Secretariat was then composed of a handful of lawyers and assistants, but what was already remarkable was the excellent harmony and *esprit de corps* that existed among the staff. Many of the people, trained by Tony, later took up important positions in the Council of Europe or elsewhere. Today those who worked in the Commission's Secretariat at the time still remember the 'McNulty spirit'.

The secret of McNulty's success with people is easy to describe. There was clearly a charisma about him that was the reflection of his own strong personality. This allowed him to get away with sometimes very direct and even rude remarks. I shall never forget eating out after a sauna in Offenburg, a small German town near Strasbourg, during the carnival season. It was 'Dirty Thursday', the day of the witches, and into the restaurant came a group of women wearing the ugliest witch masks one could imagine. One of the women, who wore a particularly hideous mask, seemed to have taken a fancy to Tony and would not let go of him. She finally moved on when Tony asked in a kind and interested voice, and in perfect German, 'Why don't you wear a mask like all the others?'

The framework in which the Commission would operate in the future had been set in these formative years, during which Tony McNulty played an important role in developing the confidence of the governments and the public in the system. He expressed his philosophy in the major publication of his term of office, 'Stock-taking on the European Convention on Human Rights. A Periodic Note on the Concrete Results Achieved under the Convention', in which he described the cases dealt with. He concluded:

> *It is particularly cooperation based on the confidence of governments in the working of the Commission, rather than a relationship of prosecutor and accused, which has made the Convention a living and, above all, an evolving instrument. This has been particularly clear by the marked increase in the variety and importance of cases in recent years.*

Another important contribution by Tony McNulty to the development of the system of human rights protection in Europe was his emphasis on the conciliatory function of the Commission. As Secretary he was normally asked by the Commission to try to secure a friendly settlement between the parties, and he accomplished this task with great skill and devotion. He described his role as being that of an honest broker, and he developed a method of going about this task that served as a template for many years to come.

He was equally talented in organizing the Commission's investigatory function. The investigations in the important inter-State case against Greece will be remembered by all those who participated in the case. The high degree of authority and determination he displayed in order to bring to light the human rights violations committed by the colonels' regime are unforgettable. Similarly, the interrogation of witnesses in the Northern Ireland inter-State case involving Ireland and the United Kingdom, which for security reasons Tony organized in a remote NATO air base in Norway under very difficult conditions, will be remembered by all those who were there.

In addition to his professionalism as a lawyer and administrator, Tony McNulty was a person who liked literature, the fine arts, the theatre and the cinema. When he was living in Strasbourg he would sponsor young artists and support them financially so that they could more easily continue their work. He was a man of wide reading. He mastered several languages, and there was always a novel or a work on history on his table. His favourite sports were golf and fishing, and he would devote his free time to these activities.

When he retired from the Commission in June 1976 Tony McNulty moved back to London. He was bothered by difficulties with his eyesight, but he remained as active as ever. First, there was the British Institute of Human Rights, of which he was one of the founders and first director. He was indefatigable in his efforts to obtain proper funding for the Institute and in setting up a proper human rights documentation and library. It was not easy for him to work

alone, with only one part-time secretary, and he was rather impatient. Once, in March 1981, I got the full impact of his frustrations when he sent a letter saying: 'I know I am less than dust as regards importance but I do think I might get copies … Everyone else gets individual Commission reports and Court judgments long before me, and mine arrive by pigeon post … years later … Susie just telephoned me to tell me that the crocuses are coming out. At least I get up-to-date news from her.' Needless to say, we took good care to send the documentation he required at once.

Later he started the Aldo Trust, named after a race horse that he part-owned and that made him some money. He created the trust to help provide small grants to needy prisoners for little luxuries, such as sport shoes, hobby materials or radios.

Tony McNulty died on 7 August 1992 at the age of 81. He never married and never founded a family of his own, but he had many godchildren, whom he regarded as being part of his family. Above all, he had many friends who loved him dearly. I should like to recall the story told by his close friend, Sir Anthony Kershaw, at the funeral in Wellesbourne, England, on 26 August 1992. The Kershaws' daughter had spoken to Tony the day before he died and in the course of the conversation had said how lucky he was to have so many friends. Tony replied in his inimitable manner: 'Yes, and I bloody well deserved every one of them.'

In the hearts of those who have known him there will always be a place for this intelligent, kind, generous, humorous and charming man.

Hans Christian Krüger
Secretary to the Commission, 1976–97

Hans Christian Krüger (b.1935)

German

- *Secretary (1976–97)*

Everyone is Chris's friend and genuinely feels so. He exudes enormous warmth and enthusiasm, which could motivate the dullest person into action. He was one of my important professional mentors, being a remarkable legal draftsman, an inspired leader of the Commission's Secretariat and an innovative manager at a time when no one had heard of the word except in private business, let alone the word 'computer'. With hard work and gritty determination, tempered by a great sense of humour, he transformed an old-fashioned, bureaucratic administration into a lean machine that was ready to face the ever-increasing volume of cases arriving in Strasbourg. The new Court, which replaced the old Court and the Commission in 1998, owes Chris a large debt of thanks for that.

Sally Dollé
Section Registrar, 1998–2010

Michele de Salvia (b.1940)

Italian

- *Secretary (1997–8)*

Marie-Thérèse Schoepfer (b.1935)

French

- *Secretary (1998–9)*

Below left: Hans Christian Krüger.
Below: Marie-Thérèse Schoepfer.

Steck-Risch and Others v. Liechtenstein, 19 May 2005 (63151/00)

The Problems of Judges Having Other Jobs

The Principality of Liechtenstein is a small country, both as regards size and population. This may lead to various practical problems, including the organization of the judiciary. Small as it is, Liechtenstein has a fully fledged hierarchy of courts, consisting of the Regional Court, the Court of Appeal, the Supreme Court, as well as the Administrative Court and the Constitutional Court.

The situation sometimes arises that lawyers only work on a part-time basis as judges and that many know each other. This was one of the main issues in the case of *Steck-Risch and Others*. The background to the case was the establishment in the community of Schellenberg of a provisional area zoning plan designating land belonging to the applicants as non-building land. The applicants objected, claiming de facto expropriation, and filed appeals before the Liechtenstein Administrative Court (presided by Judge X) and the Constitutional Court. When the latter informed the parties of the Constitutional Court judges sitting on the bench, including Judge Y, the applicants unsuccessfully challenged Y for bias on account of his partnership in a law firm with X. Eventually, the Constitutional Court upheld the Administrative Court's decision.

In Strasbourg the applicants' complaint as to a breach of the equality of arms vis-à-vis the community of Schellenberg in the proceedings was upheld, and the Court found a violation of Article 6 § 1 of the Convention.

A further complaint, to be discussed here, concerned the applicants' concern of bias in view of the fact that X and Y shared offices. The applicants submitted that as colleagues in the same law office, X and Y had a long-established personal relationship and appeared as a unit to the outside world. In these circumstances, the applicants claimed that they were objectively justified in fearing that Y might have discussed the case with X, or that the former might even have hesitated to overturn the decision, which the latter had presided.

The Court thoroughly examined this complaint and concluded that there had been no violation of Article 6 § 1 of the Convention. It noted at the outset that the complaint had to be seen against the background of a part-time judiciary operating in a small country where the same persons often performed dual functions both as part-time judges and as practising lawyers. The Court noticed in particular that neither X and Y had in the same case exercised both functions at the same time; rather, the complaints were directed against their partnership. The Court considered that X and Y did not obtain a common income and that their partnership did not involve any professional or financial dependence. Equally, there was no relationship of subordination between the two – both X and Y were equal and independent partners in the law office. Finally, there was nothing to indicate that X and Y were particularly close friends or that they had breached professional secrecy and shared substantial information as regards the case. As a result, the Court concluded that there were no indications objectively justifying the applicants' fears that Y lacked impartiality.

The judgment emphasizes the need for a high sense of professionalism in such situations. It is of relevance for the judiciaries of all small States where lawyers perform dual functions as part-time judges and practising lawyers.

Mark E. Villiger
Judge at the Court

First-day cover issued in celebration of the Council of Europe's 60th anniversary and the Court's 50th in 2009.

Bajrami v. Albania, 12 December 2006 (35853/04)

The Hague Convention: A General International Law Standard in Child Abduction Cases?

The applicant, Agim Bajrami, who was born and was resident in Kosovo,* married F.M., an Albanian national, in 1993. In January 1997 they had a child, I.B., but in 1998 the couple separated, and F.M. together with her daughter, moved to her parents' house in Vlora, Albania. F.M. remarried twice, using forged documents, following which she travelled frequently to Greece. Most of the time she left her daughter for long periods with her parents in Vlora. F.M. and her parents did not allow the applicant to have any contact with his daughter, and he was allowed to see her only twice.

In June 2003 the applicant brought divorce proceedings before the Vlora district court and two days later asked the Vlora police district to block his daughter's passport as there was a real possibility that F.M. would take her to Greece. In January 2004 F.M. nonetheless managed to take the child to Greece. On 4 February 2004 the district court decreed the divorce and granted custody of the child to the applicant. The many attempts made by the applicant to have the Albanian authorities find and return his daughter to him, in accordance with the final district court decision, were unsuccessful. The applicant complained before the Court of violation of Articles 6 § 1 and 8 of the Convention.

In its judgment the Court emphasizes the positive obligation incumbent upon the Contracting States under Article 8 of the Convention to take appropriate measures when family unification is at stake. Specific diligence is called for in proceedings relating to child abduction and child custody, as in this case. In this context the Court is inspired directly by Article 11 of the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980, even though it had not been ratified by Albania.

Turning to the specific circumstances of the case, the Court considers that the family relationship between the applicant and his daughter was harmed by the failure of the Albanian authorities to enforce the Vlora district court judgment assigning to the applicant the custody of his daughter. The Court finds that the Albanian authorities have not done what they should to enforce the court judgment, especially in view of the interests at stake and of the spirit of the Hague Convention.

The Court goes on to find that, in view of the non-ratification of the Hague Convention, the Albanian legal system as it stood did not offer the applicant any alternative practical and effective protection, as required by the State's positive obligation enshrined in Article 8 of the Convention. The Court concludes there has been a violation of Article 8 in this case.

This judgment, unfortunately, did not have any individual impact as the applicant had died one month before its delivery. But it had a significant impact for the Albanian legal system and at the same time reaffirmed an important position in relation to international standards concerning children's rights. This judgment constituted the direct incentive for the Albanian authorities to complete the procedures of Albanian accession to the Hague Convention of 25 October 1980. Although the Albanian Parliament had voted Law no. 9446 for the ratification of the Hague Convention on 24 November 2005, it was only five months after this judgment that the instrument of ratification was deposited and Albania only became a Party to the Convention on 1 August 2007.

The wider importance of this judgment lies in its general reliance on the Hague Convention on the Civil Aspects of International Child Abduction. Appropriately enough, the Court does not find Albania responsible just for not having acceded to the Hague Convention but also for the failure of the Albanian legal system to offer alternative practical and effective protection to the applicant, as required by Article 8 of the European Convention, which it interprets in the light of Article 11 of the Hague Convention. The Court, in this context, not only confirms its standing jurisprudence regarding child protection, but, as it has already done in relation to the right of visit, confirms the positive obligation of a State non-party to the Hague Convention to take measures in cases on international child abduction. The case not only shows that Article 8 of the European Convention in matters of child protection is interpreted in light of the Hague Convention. Indeed, the judgment offers clear support for considering the Hague Convention as a general international law standard to be respected in child abduction cases.

Ledi Bianku
Judge at the Court

Ramazanova and Others v. Azerbaijan, 1 February 2007 (44363/02)

Registration Delayed is Justice Denied

To date there have not been many judgments involving Azerbaijan, but I can confirm that each of them has already played an important part in the development and evolution of national legislation and judicial practice in the face of the complex problems, both objective and subjective, that the country has encountered in its transition to becoming a democratic State.

The vast majority of judgments concern Article 6 § 1 of the Convention. Article 3 was violated in three cases, signifying that there are also serious human rights violations in the country. Breaches of Article 11 of the Convention have been found in four cases. As an example of an Article 11 case, *Ramazanova and Others* stands out since it was the first judgment of the Court in respect of Azerbaijan in a line of applications concerning a similar problem. The applicants complained that the significant delays in the State registration of their public association amounted to a violation of their right to freedom of association. The Court noted that the domestic law effectively restricted the association's ability to function properly as a charity because not having the status of a legal entity prevented it from receiving any 'grants' or financial donations, one of the main sources of financing for non-governmental organizations in Azerbaijan.

When it came to whether the interference was justified, the Court found that there had been no basis in domestic law for such significant delays and did not accept as reasonable the government's excuse that delays were caused by the Ministry of Justice's alleged heavy workload. The Court considered that it was the duty of the Contracting State to organize its domestic State registration system and to take all necessary measures to allow the relevant authorities to comply with the time limits imposed by its own law.

Furthermore, seeing that domestic law did not provide for automatic registration in the event that the ministry failed to take any action in a timely manner and did not specify a limit on the number of times the ministry could return documents without issuing a final decision, the Court considered that domestic law did not afford the applicants sufficient legal protection against the arbitrary actions of the ministry.

Such significant delays in the registration of the association, in breach of statutory time limits, and against which domestic law did not afford protection, resulted in the association's prolonged inability to acquire the status of a legal entity and amounted to an interference by the authorities with the applicants' exercise of their right to freedom of association.

The impact of this judgment on the national legal system has resulted in changes in the practice of State registration of associations. Now there are fewer arbitrary delays in the registration process, and the number of repetitive cases lodged with the Court concerning this problem has significantly decreased.

Khanlar Hajiyev
Judge at the Court

Vilho Eskelinen and Others v. Finland, 19 April 2007 (63235/00)

Pellegrin's Progress: A Right to Fairness for Civil Servants

The case was brought by eight applicants who were either employees of the district police (five police officers and one office assistant) or their heirs. Under a collective agreement concluded in 1986, they were entitled to an allowance which was added to their salaries as a bonus for working in a remote part of the country. When the allowance was withdrawn by another collective agreement in 1988, they were granted monthly individual wage supplements to make up the difference. In November 1990, following the incorporation of their police district, the applicants' duty station was moved even further away from their homes, but they lost their individual wage supplements. The Ministry of Finance subsequently refused a request for authorization to pay a monthly individual supplement.

The applicants appealed to the county administrative court, arguing that they had been promised compensation. The appeal was rejected on the grounds that, at the relevant time, only the Ministry of Finance could authorize compensation and no compensation had been awarded in other similar cases. In April 2000 the Supreme Administrative Court upheld the lower court's decision. The applicants complained *inter alia* under Article 6 § 1 about the excessive length of the proceedings and the lack of oral hearing before the domestic instances.

As a starting point, the majority of the Court considered that the applicants could claim to have a 'right' on arguable grounds under domestic law. The Court then observed that those applicants who were employed by the Ministry of the Interior as police officers participated directly in the exercise of public powers, whereas the functions of the office assistant were purely administrative and therefore indistinguishable from any other office assistant in private employment. A strict application of the *Pellegrin v. France* (1999) precedent would mean that while the office assistant would enjoy the guarantees of Article 6 § 1, the police officers would not, irrespective of the fact that the dispute was identical for all applicants. The Court found that the functional criterion adopted in *Pellegrin* had not simplified the analysis of the applicability of Article 6 in proceedings to which a civil servant is a party and that the criterion must be further developed.

The key feature in the Court's new approach was a presumption in favour of the application of Article 6. Two conditions must be fulfilled in order for the respondent State to rely successfully on an applicant's status as civil servant to exclude the application of Article 6. First, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Second, the exclusion must be justified on objective grounds in the State's interest. There can in principle be no justification for the exclusion from the guarantees of Article 6 of ordinary labour disputes, such as those relating to salaries, allowances or similar entitlements, on the basis of the special nature of the relationship between particular civil servants and the State in question. It will be for the respondent government to demonstrate that the criteria are fulfilled. In the present case the applicants had access to the court under national law. Accordingly, Article 6 § 1 was applicable. The Court found a violation *inter alia* of Article 6 § 1 regarding the length of the proceedings.

The judgment is a landmark in the evolution of the Strasbourg Court's approach to the applicability of Article 6 of the Convention on Human Rights to the determination of disputes concerning civil servants. The Court stepped further away from the principle that Article 6 does not cover the civil service and re-evaluated the functional test adopted in *Pellegrin v. France.*

Päivi Hirvelä
Judge at the Court