AS TO THE ADMISSIBILITY OF

Application No. 18601/91
by David ESBESTER
against the United Kingdom

The European Commission of Human Rights sitting in private on 2 April 1993, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
F. ERMACORA
G. SPERDUTI
E. BUSUTTIL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G.H. THUNE
Sir Basil HALL
Mr. C.L. ROZAKIS
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
M. NOWICKI

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 26 March 1991 by David Esbester against the United Kingdom and registered on 25 July 1991 under file No. 18601/91;

Having regard to:

- the report provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 13 and 28 May 1992 and the observations in reply submitted by the applicant on 13 August 1992;

- the hearing held on 2 April 1993;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen born in 1940 and resident in London. He is a clerical officer by profession. He is represented before the Commission by John Wadham of Liberty. The facts as submitted by the parties may be summarised as follows.

On 11 June 1990, he was offered a post as Administrative Officer at the Central Office of Information (hereinafter "the COI") "subject to the satisfactory completion of our enquiries into your age, health and other matters".

By letter dated 19 July 1990, the COI informed the applicant that "having completed our inquiries ... we are unable to offer you an appointment." No further explanation was given.

At the time of his application, the second applicant had been a member of the Communist Party of Great Britain for many years. He had also been active in the Campaign for Nuclear Disarmament (CND), anti-apartheid and various anti-deportation campaigns. In 1977, he had been arrested and fined £15 for obstruction of the police at the Grunwick industrial dispute and in 1984 arrested and cautioned after a CND demonstration.

The applicant unsuccessfully attempted to discover the reasons for the refusal of the post at COI through his Member of Parliament.

On 1 November 1990, the applicant submitted an application to the Security Services Tribunal alleging that the Security Services had provided "vetting information" on him to the COI with the result that their offer of employment was withdrawn.

On 14 January 1991, the Tribunal Secretary replied that his complaint had been investigated and that no determination in his favour had been made.

Relevant domestic law and practice

The Security Service

The Security Service Act 1989 places the Security Service on a statutory basis.

It provides inter alia:

> "1. (1) There shall continue to be a Security Service (in this Act referred to as "the Service") under the authority of the Secretary of State.
>
> (2) The function of the Service shall be the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.
>
> (3) It shall also be the function of the Service to safeguard the economic well-being of the United Kingdom against threats posed by the actions or intentions of persons outside the British Islands.
>
> 2. (1) The operations of the Service shall continue to be under the control of a Director-General appointed by the Secretary of State.
>
> (2) The Director-General shall be responsible for the efficiency of the Service and it shall be his duty to ensure
>
> > (a) that there are arrangements for securing that no information is obtained by the Service except so far as necessary for the proper discharge of its functions or disclosed by it except so far as necessary for that purpose or for the purpose of preventing or detecting serious

crime; and

(b) that the Service does not take any action to further the interests of any political party.

(3) The arrangements mentioned in subsection (2)(a) above shall be such as to ensure that information in the possession of the Service is not disclosed for use in determining whether a person should be employed, or continue to be employed, by any person, or in any office or capacity, except in accordance with provisions in that behalf approved by the Secretary of State.

(4) The Director-General shall make an annual report on the work of the Service to the prime minister and the Secretary of State and may at any time report to either of them on any matter relating to its work.

3. (1) No entry on or interference with property shall be unlawful if it is authorized by a warrant issued by the Secretary of State under this section.

(2) The Secretary of State may on an application made by the Service issue a warrant under this section authorizing the taking of such action as is specified in the warrant in respect of any property so specified if the Secretary of State

(a) thinks it necessary for the action to be taken in order to obtain information which

(i) is likely to be of substantial value in assisting the Service to discharge any of its functions; and

(ii) cannot reasonably be obtained by other means; and

(b) is satisfied that satisfactory arrangements are in force under section 2(2)(a) above with respect to the disclosure of information obtained by virtue of this section and that the information obtained under the warrant will be subject to those arrangements."

The Security Service Tribunal

The Act also provides for a tribunal, known as the Security Service Tribunal, to deal with complaints:

"5. (1) There shall be a Tribunal for the purpose of investigating complaints about the Service in the manner specified in Schedule 1 to this Act...
(4) The decisions of the Tribunal and the Commissioner under that Schedule (including decisions as to their jurisdictions) shall not be subject to appeal or liable to be questioned in any court."

Schedule 1 to the Act provides, inter alia:

"1. Any person may complain to the Tribunal if he is aggrieved by anything which he believes the Service has done in relation to him or to any property of his; and, unless the Tribunal consider that the complaint is frivolous or vexatious, they shall investigate it in accordance with this Schedule.

2. (1) The Tribunal shall investigate whether the complainant has been the subject of inquiries by the Service.

(2) If the Tribunal find that the Service has made inquiries about the complainant but that those inquiries had ceased at the

time when the complaint was made, they shall determine whether, at the time when the inquiries were instituted, the Service had reasonable grounds for deciding to institute inquiries about the complainant in the discharge of its functions.

(3) If the Tribunal find that inquiries by the Service about the complainant were continuing at the time when the complaint was made, they shall determine whether, at that time, the Service had reasonable grounds for deciding to continue inquiries about the complainant in the discharge of its functions...

4. (1) If and so far as the complainant alleges that anything has been done by the Service in relation to any property of his, the Tribunal shall refer the complaint to the Commissioner who shall investigate whether a warrant has been issued under section 3 of this Act in respect of that property and if he finds that such a warrant has been issued he shall, applying the principles applied by a court on an application for judicial review, determine whether the Secretary of State was acting properly in issuing or renewing the warrant.

(2) The Commissioner shall inform the Tribunal of his conclusion on any complaint so far as referred to him under this paragraph.

5. (1) Where the Tribunal determine under paragraph 2 or 3 above that the Service did not have reasonable grounds for the decision or belief in question, they shall

> (a) give notice to the complainant that they have made a determination in his favour under that paragraph; and
>
> (b) make a report of their findings to the Secretary of State and to the Commissioner.

(2) The Tribunal shall also give notice to the complainant of any determination in his favour by the Commissioner under paragraph 4 above.

(3) Where in the case of any complaint no such determination as is mentioned in sub-paragraph (1) or (2) above is made by the Tribunal or the Commissioner the Tribunal shall give notice to the complainant that no determination in his favour has been made on his complaint.

6. (1) Where the Tribunal give a complainant notice of such a determination as is mentioned in paragraph 5(1) above the Tribunal may

> (a) if the determination is under paragraph 2 above, order inquiries by the Service about the complainant to be ended and any records relating to such inquiries to be destroyed;
>
> (b) if the determination is under that paragraph or paragraph 3 above, direct the Secretary of State to pay to the complainant such sum by way of compensation as may be specified by the Tribunal.

(2) Where the Tribunal give a complainant notice of such a determination as is mentioned in paragraph 5(2) above the Tribunal may

> (a) quash any warrant in respect of any property of the complainant which the Commissioner has found to have been improperly issued or renewed and which he considers should be quashed;
>
> (b) if the Commissioner considers that a sum should be paid

to the complainant by way of compensation, direct the Secretary of State to pay to the complainant such sum as the Commissioner may specify."

Pursuant to Schedule 2, the Tribunal consists of 3-5 members each of whom must be a barrister, solicitor or advocate of not less than ten years' standing. Members are appointed for a period of five years by Her Majesty by royal warrant and may be removed from office by Her Majesty on an address presented to her by both Houses of Parliament.

Pursuant to para. 9(1) of Schedule 1, the Tribunal is limited as follows:

"9. (1) No complaint shall be entertained under this Schedule if and so far as it relates to anything done before the date on which this Schedule comes into force."

The Security Service Commissioner

Pursuant to Section 4 of the Act, the Prime Minister appoints as a Commissioner a person who holds or has held high judicial office. He has the role, inter alia, of keeping under review the exercise by the Secretary of State of his powers under Section 3 to issue warrants.

Pursuant to paragraph 7 of Schedule 1, matters may be referred to the Commissioner by the Tribunal:

"7. (1) If in a case investigated by the Tribunal under paragraph 2 above they consider that the Service may not be justified in regarding all members of a particular category as requiring investigation they shall refer that matter to the Commissioner.

(2) If in any case investigated by the Tribunal -

(a) the Tribunal's conclusions on the matters which they are required to investigate are such that no determination is made by them in favour of the complainant; but

(b) it appears to the Tribunal from the allegations made by the complainant that it is appropriate for there to be an investigation into whether the Service has in any other respect acted unreasonably in relation to the complainant or his property,

they shall refer that matter to the Commissioner.

(3) The Commissioner may report any matter referred to him under this paragraph to the Secretary of State who may take such action in the light of the report as he thinks fit, including any action which the Tribunal have power to take or direct under paragraph 6 above."

The Commissioner makes an annual report to the Prime Minister on the discharge of his functions and the report is then laid before Parliament.

Police Special Branches

Each of the police forces in England and Wales has its own Special Branch. Except for the Metropolitan Police Special Branch, which has responsibilities in relation to Irish Republican extremism and terrorism throughout Great Britain, the responsibility of each Special Branch relates only to the area of the force of which it is a part. The Special Branch is not a separate police force. Members of the Special Branch of any police force in England and Wales are police officers with the same powers and under the same duties at law as all

other police officers in the force.

The status and functions of police Special Branches are set out in Home Office Guidelines on the Work of a Special Branch.

The special functions which most commonly fall to be undertaken by the Special Branch of a police force include the provision of assistance to the Security Service in carrying out its task of the protection of national security. As is further noted, a large part of this effort is devoted to the study and investigation of terrorism, including the activities of international terrorists and terrorist organisations and, in this regard, the police Special Branches provide information to the Security Service about extremists and terrorist groups.

The Guidelines contain express provisions concerning the maintenance and use of records by police Special Branches. It is emphasised that, because of the particular sensitivity of the information concerned, it is important that only information relevant to the special functions of the Special Branch should be recorded. The Guidelines similarly contain instructions concerning access to information held by Special Branches, requiring that it should be limited to those who have a particulars need to know and that under no circumstances should information be passed to commercial firms or to employees' organisations.

As appears from Schedule 1 to the Police (Discipline) Regulations 1985 specific provision is made for the unauthorised disclosure of information: by paragraph 6(a), taken with Regulation 4(1) of the Police (Discipline)(Senior Officers) Regulations 1985, it is a disciplinary offence for any member of a police force, including members of police Special Branches, to communicate without proper authority to any person any information which he has in his possession as a member of a police force.

COMPLAINTS

The applicant complains that information as to his private life was kept on secret files by MI5 and/or police special branches and/or the Police National Computer and/or the Government Communications Headquarters (GCHQ). He submits that it is at very least reasonably likely that the intelligence services have compiled and retained information about his private life and this, taken with the existence of practices permitting secret surveillance, constitutes an infringement of Article 8 para. 1 of the Convention. The use of this information in the course of negative vetting procedures is an additional interference, especially since he did not have the opportunity to refute the information in question.

The applicant further submits that the interference was not in accordance with law since there is no law governing the compilation and use of information by police Special Branches, the Police National Computer or GCHQ. While the Security Service Act 1989 was passed in response to applications before the Commission, he submits that it only covers the activities of MI5 and in any case fails to offer an adequate definition of the function of the Security Service. Further, the Security Service Tribunal set up by the Act does not provide adequate protection from abuse.

The applicant submits that the interference fails to satisfy the other criteria of Article 8 para. 2 of the Convention. In particular, the Tribunal does not offer adequate and effective protection against abuse since it only has jurisdiction over the Security Service and cannot consider the correctness of the Security Service decisions on whether the Service was justified in retaining the records of its enquiries. Moreover, its jurisdiction is further limited where

inquiries are made by the Service on the ground that a person is a member of a category of persons regarded by the Service as requiring investigation. The Tribunal is also prevented from giving reasons for its decisions.

The applicant also complains that he had no effective remedy in respect of his complaints, contrary to Article 13 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 24 May 1990 and registered on 25 July 1991.

On 12 December 1991 the Commission decided to communicate the application to the respondent Government and to ask for written observations on the admissibility and merits of the application.

The Government's observations were submitted on 13 and 28 May 1992 after one extension in the time-limit and the applicant's observations in reply were submitted on 13 August 1992 also after one extension in the time-limit.

On 12 October 1992, the Commission decided to invite the parties to make submissions at an oral hearing.

At the oral hearing which was held on 2 April 1993, the parties were represented as follows:

For the Government:

Mrs. Audrey GLOVER	Agent
Mr. Nicolas BRATZA, QC	Counsel
Mr. James EADIE	Counsel

The Government were assisted by five advisers.

For the applicant:

Mr. Andrew NICOL	Counsel
Mr. John WADHAM	Solicitor, Liberty

THE LAW

Article 8 (Art. 8) of the Convention

The applicant complains that information concerning his private life has been compiled, retained and disclosed by the Security Service, police Special Branches, the Police National Computer or GCHQ. He invokes Articles 8 (Art. 8) of the Convention which provides as relevant:

> "1. Everyone has the right to respect for his private ... 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."

The Government, in line with their policy of not disclosing information about the operations of the intelligence services, have neither confirmed nor denied the applicant's allegations.

The Commission recalls that a security check does not per se constitute an interference with the right to respect for private life guaranteed by Article 8 (Art. 8) of the Convention. An interference with this right occurs when security checks are based on information about a person's private life (see e.g. Eur. Court H.R., Leander judgment of 26 March 1987, Series A no. 116, p. 22 para. 45).

The Commission notes that the applicant has no concrete proof to support his allegation that the any of the intelligence services, including the Security Service, compiled and continue to retain a file of personal information about him. The Commission recalls however that "an individual may, under certain conditions, claim to be a victim of a violation occasioned by the mere existence of secret measures ... without having to allege that such measures were in fact applied to him" (Eur. Court H.R., Klass judgment of 6 September 1978, Series A no. 28, p. 18 para. 34).

Similarly, in the Malone case, the Court agreed with the Commission that the existence of laws and practices permitting and establishing a system for effecting secret surveillance amounted in itself to an interference with the applicant's rights under Article 8 (Art. 8) of the Convention, apart from any measures actually taken against him (Eur. Court H.R., Malone judgment of 2 August 1984, Series A no. 82, p. 31 para. 64).

The Commission has held that this case-law cannot be interpreted so broadly as to encompass every person in the United Kingdom who fears that the Security Service may have compiled information about him. An applicant however cannot be reasonably expected to prove that information concerning his private life has been compiled and retained. It is sufficient, in the area of secret measures, that the existence of practices permitting secret surveillance be established and that there is a reasonable likelihood that the Security Service has compiled and retained information concerning his private life (see e.g. Application No. 12015/86, Dec. 6.7.88, D.R. 57 p.108).

In the present case, the Commission notes that the applicant was refused a post in the Central Office of Information after initial approval had been given subject to satisfactory completion of "enquiries". He was informed by the COI that "having completed our inquiries... we are unable to offer you the appointment". In these circumstances the Commission finds that the applicant's assertion that a security check was carried out and involved reference to information concerning matters falling within the sphere of "private life" is a reasonable inference from the facts. Such a check would appear to fall within the ambit of the Security Service and/or police Special Branches. There is nothing to indicate any possible involvement by GCHQ or the Police National Computer.

Against the above background, the Commission finds that the existence of practices permitting secret surveillance has been established and that the applicant has established a reasonable likelihood that the Security Service and /or police Special Branches have compiled and retained a file concerning his private life, which was referred to in the course of the security check. It follows that there has been an interference with the applicant's rights to respect for his private life guaranteed under Article 8 para. 1 (Art. 8-1) of the Convention.

The Commission must next determine whether this interference is justified under the second paragraph of Article 8 (Art. 8) of the

Convention, namely whether it was "in accordance with the law" and if so, whether it was necessary in a democratic society or one or more of the reasons specified.

"in accordance with the law"

This expression has been interpreted by the Court as importing three requirements - the interference must have some basis in domestic law, the law in question must be accessible to the individual concerned and its consequences for him must also be foreseeable. The Court has further held that the requirement of foreseeability in the special context of employment "vetting" in sectors affecting national security cannot be the same as in many other fields. In the LEANDER case (Eur. Court H.R., Leander judgment, loc. cit.) it stated:

> "Thus, it cannot mean that an individual should be enabled to foresee precisely what checks will be made in his regard by the Swedish special police service in its efforts to protect national security. Nevertheless, in a system applicable to citizens generally, as under the Personnel Control Ordinance, the law has to be sufficiently clear in its terms to give them an adequate indication as to the circumstances in which and the conditions on which the public authorities are empowered to resort to this kind of secret and potentially dangerous interference with private life (ibid., p. 32, para. 67)...
>
> In addition, where the implementation of the law consists of secret measures, not open to scrutiny by the individuals concerned or by the public at large, the law itself, as opposed to the accompanying administrative practice, must indicate the scope of any discretion conferred on the competent authority with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference (see the above-mentioned Malone judgment, Series A no. 82, pp. 32-33, para. 68)."

The Commission finds that the interference in the present case had a valid basis in domestic law, namely, the Security Service Act 1989 which placed the Security Service on a statutory footing for the first time.

The applicant has submitted however that the domestic law nonetheless lacks the requisite accessibility and foreseeability. In this context he refers to the only partially defined term of "the interests of national security" and the fact that the guidelines produced by the Secretary of State pursuant to section 2 (3) of the 1989 Act governing the Director-General's supervision of the use of information obtained by the Security Service are unpublished.

The Commission considers however that the principles referred to above do not necessarily require a comprehensive definition of the notion of "the interests of national security". Many laws, which by their subject-matter require to be flexible, are inevitably couched in terms which are to a greater or lesser extent vague and whose interpretation and application are questions of practice. The Commission notes that the exercise of the Security Service's functions are subject to express limitations and to the supervision of a tribunal and commissioner appointed pursuant to the 1989 Act. The guidelines referred to in section 2 (3) of the Act relate only to the administrative implementation of preceding provisions, which expressly limit the use of information by the Service to that necessary to fulfil its functions.

In light of the above, the Commission considers that in the present case the law is formulated with sufficient precision to enable the applicant to anticipate the application of vetting procedures and to the likely nature of the involvement of the Security Service and

police Special Branches with regard to the collection, recording and release of information relating to himself.

"necessary in a democratic society ..."

The Commission recalls that the notion of necessity implies that the interference corresponds to a pressing social need and, tin particular that it is proportionate to the legitimate aim pursued. Regard must also be had on this context to the margin of appreciation of the respondent state which in the area of assessing the requirements of and means of pursuing interests of national security has been held by the Court to be wide (Eur. Court H.R., Leander judgment loc. cit. p. 25 paras. 58-59).

The aim pursued by the interference in the present case was the "interests of national security". The Court has acknowledged the necessity for states to collect and store information on persons and to use this information when assessing the eligibility of persons for posts of importance for national security. It is however crucial given the potential seriousness of resulting invasions of a person's private sphere that there exist adequate and effective guarantees against abuse (Eur. Court H.R., Klaas judgment, loc. cit., p. 23 para. 50).

The Government have pointed to the framework of supervision set up under the 1989 Act.

The applicant contends that the protection offered is inadequate and ineffective. He alleges, inter alia, the following defects:

- the wide scope of the term "interests of national security";

- the fact that the Tribunal does not give reasons for its failure to make a determination in favour of an applicant;

- the fact that the Tribunal is prohibited from examining inquiries which ceased before the 1989 Act came into force (see para. 9(1) of Schedule No. 1);

- the limited scope of the Tribunal's inquiries, in particular, since it cannot examine whether the information if true renders the person concerned a security risk;

- the inability of the Commissioner to make binding decisions.

The applicant has also submitted that in comparison with the other systems whose security legislation has come under the scrutiny of the Convention organs there is significantly no element of Parliamentary or judicial control. He also has drawn attention to the framework of legislative controls provided for in the Canadian and Australian systems which are alleged to provide much greater respect for the rights of the individual.

The Commission however finds reference to other systems of limited relevance. One particular system may be more ideal or more sophisticated than another. The task of the Commission is however to determine whether the system under examination in the concrete case before it passes the threshold imposed by the Convention guarantees.

The Commission has already stated above that the term "national security" is not amenable to exhaustive definition and since sufficient indication is given of the scope and manner of exercise of the functions of the Security Service, considers that no problem arises in this respect. As regards the lack of reasons for the decisions of the tribunal, the Court considered a similar problem in the KLAAS case (Eur. Court H.R. Klaas judgment, loc. cit. p. 27 paras. 57-58) but found that the State could legitimately fear that the efficacy of surveillance systems might be jeopardised if information is divulged

to the person concerned.

As regard the applicant's assertion that the Tribunal is barred from investigating matters arising before the Act came into force, the Commission notes that the provision refers specifically to the Tribunal's examination of enquiries which have ceased. The Commission notes that it does not purport to extend to the Security Service's use of information already collected and accepts the Government's assertion that the Tribunal could have examined the vetting procedure if applied to the applicant since it would have taken place after the Act came into force.

The Commission has examined the applicant's remaining complaints against the background of the 1989 Act as a whole. It notes that the Tribunal consists of lawyers of ten years' experience and who act in an independent capacity. While they do not have jurisdiction to substitute their opinion for that of the Security Service, it has a supervisory role which includes examination of whether the Service had reasonable grounds for a particular belief or decision. It must also refer to the Commissioner cases where it finds that the Service is not justified in treating a person as a legitimate object of enquiry merely on the ground that he is member of a particular group and where it considers that the Service has acted unreasonably with respect to a complainant. The Commissioner is a person who holds or who has held high judicial office and he may make recommendations concerning complaints to the Secretary of State in addition to making an annual report to the Houses of Parliament.

As regards any possible involvement of the police special branches, the Commission recalls that their role is to support the Security Service and that they pass on to the Service any relevant information. The use of such information would then appear to fall within the ambit of supervision of the Tribunal and Commissioner.

In the absence of any evidence or indication that the system is not functioning as required by domestic law, the Commission finds that the framework of safeguards achieves a compromise between the requirements of defending democratic society and the rights of the individual which is compatible with the provisions of the Convention. Consequently it concludes that the interference in the present case was necessary in a democratic society in the interests of national security.

It follows that this complaint is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

Article 13 (Art. 13) of the Convention

The applicant complains that he has no effective remedy for his complaints and invokes Article 13 (Art. 13) of the Convention, which provides that:

> "Everyone whose rights and freedoms as set forth in this 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."

The Commission recalls however that Article 13 (Art. 13) does not require a remedy under domestic law in respect of any alleged violation of the Convention. It only applies if the individual can be said to have an "arguable claim" of a violation of the Convention (Eur. Court H.R., Boyle and Rice judgment of 27 April 1988, Series A no. 131, p.23, para. 52).

The Commission finds that the applicant cannot be said, in light of its findings above to have an "arguable claim" of a violation of his Convention rights.

It follows that this complaint must be dismissed as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission by a majority

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C. A. NØRGAARD)