CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 63608/00
by Janette MARTIN
against the United Kingdom

The European Court of Human Rights (Third Section), sitting on 27 March 2003 as a Chamber composed of

Mr G. RESS, *President*,
Mr I. CABRAL BARRETO,
Sir Nicolas BRATZA,
Mr L. CAFLISCH,
Mr P. KŪRIS,
Mr R. TÜRMEN,
Mrs H.S. GREVE, *judges*,
and Mr M. VILLIGER, *Section Registrar*,

Having regard to the above application lodged on 11 September 2000,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Ms Janette Martin, is a United Kingdom national, who was born in 1959 and lives in Nottingham, England. She was represented before the Court by Mr T. Oldham, a lawyer practising in Nottinghamshire, England.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

Since 1995 the applicant has been a secure tenant of Nottingham County Council ("the Council"). A secure tenant is defined, under sections 79-81 of the Housing Act 1985 as, *inter alia*, a person who rents a property as his only or principal home from a landlord who is a local authority. She lives in a rented Council house with her four children.

The tenancy agreement that the applicant signed with the Council in 1995 included an express term that neither she, nor any person living with her nor any visitor to her home would harass or cause a nuisance to anyone on or in the vicinity or neighbourhood of her property. Harassment was defined to include violence, abusive or insulting words or behaviour, damage to property, including damage to any part of a person's home, or any act or omission calculated to interfere with the peace or comfort of any other person.

In 1998 the Council received complaints about the behaviour of the applicant and her children from Mr and Mrs Davies, the freeholders and occupiers of the neighbouring property. The applicant was not aware of anyone other than the Davies' having complained to the Council about her behaviour or that of her family.

In July 1999 the Council served a Notice Seeking Possession (of the applicant's home) and applied for an injunction against her as a result of an alleged assault by her upon Mrs Davies on 26 May 1999. The applicant was alleged to have grabbed hold of the hair of Mrs Davies and to have repeatedly banged her head on the top rail of the fence, causing severe bruising to her nose and eyes. Mrs Davies went to the Accident and Emergency Department of her local hospital following the alleged assault.

The applicant gave an undertaking on 19 July 1999 that she would not harass or cause a nuisance to anyone in her road, in particular Mrs Davies and her family. She agreed to be bound by her undertaking until 17 April 2000. The Council's application for an injunction was adjourned generally as a result.

On 9 November 1999 the Council's solicitor wrote to the applicant's solicitor stating that the applicant's children had been playing football in a manner that caused the Davies' a nuisance, and had been throwing stones

and firing pellets at their property. The applicant was put on notice that, should that behaviour continue, it would be interpreted as a breach of the undertaking given on 19 July 1999 and that an application would be made for the applicant's committal.

The Davies' further alleged that between 9 November 1999 and 18 April 2000, *inter alia*, eggs were thrown at their property, excrement was placed on the door handle of their front door and bleach was poured into their letterbox.

On 18 April 2000, the Council attached a hidden video camera, disguised as a junction box, to the wall to the right of Mr and Mrs Davies' front door. The applicant was not notified about the installation of the camera.

The applicant stated that the camera was directed at her front door and that its effect was to monitor both the side and rear doors of her premises. She accepted that a small area of the neighbouring house and the space between the houses were caught on the camera. However, she pointed out that the filming did not take place from the position of a passer-by in the street, from which only a little of her front door could be observed, as it was at the side of the property.

The Government stated that the camera was not directed specifically at the applicant's front door, but was rather angled so that the space between the property of the Davies' and that of the applicant could be seen. They noted that this space was visible from the street. They observed that when the applicant's front door was open, part of the inside of her hall could be seen on film, but that the view was limited and the quality of the film was poor.

On 12 May 2000, the applicant first became aware of the presence of the video camera. At that time a representative of the Council's legal section confirmed to the applicant's solicitor that video evidence had been obtained by the Council.

On 23 May 2000, the applicant first became aware of the location of the camera, following the viewing of a video recording supplied by the Council.

During May 2000 the Council issued a further Notice Seeking Possession and possession proceedings against the applicant under Schedule 2 of the Housing Act 1985 (as amended), on the grounds, *inter alia*, that she had broken an obligation of her tenancy and/or was causing a nuisance.

The Council's case, as set out in the Particulars of Claim, was that there had been various incidents of abusive, anti-social, insulting, threatening and occasionally violent behaviour exhibited by the applicant, her children and visitors to her home towards the Davies' over a period between June 1998 and May 2000. Reliance was therefore placed upon events that had occurred since the commencement of the surveillance. The incidents included the allegations set out above and, *inter alia*, ones that alleged that the applicant's children and/or visitors to her home had thrown a brick or a similar object at the Davies' property, pulled the end of the side-gate of the

property off its hinges and had been verbally abusive to Mrs Davies. The Council sought, *inter alia*, possession of the applicant's property and an injunction against her.

By her Defence, the applicant generally denied the allegations against her and averred that the Davies' had exhibited similar behaviour on various occasions towards her and her children. She specifically averred that it was Mrs Davies who had assaulted her on 26 May 1999. The incidents alleged since the surveillance had commenced were not admitted.

On 31 May 2000 the applicant gave an undertaking to the court promising not to assault or cause a nuisance to the Davies', and neither to trespass upon their land, nor to permit her children and/or visitors to her home to do so. As a result of the applicant complying with that undertaking, the possession proceedings were adjourned generally in or after September 2000. No possession of the applicant's home ever, in fact, took place.

By letter of 4 September 2000 the Council confirmed to the applicant that no further covert surveillance would be undertaken on her property and that the tapes of the surveillance undertaken on her property had already been destroyed and disposed of. No surveillance took place thereafter.

No video surveillance was ever directed at the Davies' home.

The applicant stated that she suffered distress and inconvenience due to the continued surveillance of her and her family. She averred that she did not suffer mere feelings of injustice. Once she became aware of the camera she and her family suffered from a curtailment of their way of life. She and her family avoided being near the front of her house, she was embarrassed to entertain visitors and she could not let her children out to play. She decided to spend time away from her home to avoid being observed when entering or leaving the premises. She ceased to use that access to the house for herself, her family or her visitors. She alleged that she became distressed by the surveillance to such an extent that she became depressed and sought medical advice and assistance as a result. She was tearful and found it difficult to cope with her normal daily activities.

B. Relevant domestic law and practice

1. Judicial review

Where a public authority has acted unlawfully in the sense that it has exceeded its powers or has acted irrationally or has reached a decision in breach of the rules of procedural fairness, an aggrieved person may challenge the decision by means of judicial review.

The concept of "irrationality" was defined as follows by Lord Diplock in *Council of Civil Service Unions and Others v. Minister for the Civil Service* [1985] 1 A.C. 374 (HL):

> "It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

The domestic courts have not recognised proportionality as a separate head of judicial review in its own right. However, in the case of *R (Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389, § 51, Lord Slynn in the House of Lords stated, *obiter dictum*, that:

> "I consider that even without reference to the Human Rights Act the time has come to recognise that this principle <of proportionality> is part of English administrative law, not only when judges are dealing with Community acts but also when they are dealing with acts subject to domestic law."

Damages are available on judicial review only where there is a right to damages in private law (see the old Rules of the Supreme Court, Order 53, rule 7(1)(b) and Part 54 of the Civil Procedure Rules 1998).

2. Misfeasance in public office

Where a public official abuses his position by performing an administrative act maliciously, or which he knows he has no lawful power to do, and causes foreseeable loss, then the injured party may recover damages as a result on the basis of misfeasance in public office (see *Bourgoin SA v. Ministry of Agriculture* [1986] QB 716 and *Three Rivers District Council and Others v. Governor and Company of the Bank of England* [2000] 3 All ER 1).

3. Privacy

There is no specific legal right to privacy under domestic English law. The debate as to whether there should be any such specific right is a continuing one.

In the case of *Douglas v. Hello! Ltd* [2001] 1 WLR 992, Lord Justice Sedley was prepared to find that there was now a qualified right to privacy under English domestic law. However, the other members of the Court of Appeal (Brooke and Keene LJJ.) did not find it necessary to decide the point.

In the later case of *Home Office v. Wainwright* [2001] EWCA Civ 2081, 20 December 2001, Lord Justice Mummery said (at §§ 57-59):

> "...there is no tort of invasion of privacy. Instead there are torts protecting a person's interests in the privacy of his body, his home, and his personal property. There is also available the equitable doctrine of breach of confidence for the protection of personal information, private communications and correspondence.
>
> The common law position remains as stated in the Justice Report on Privacy and the Law (1970) paragraph 30

'...it is generally recognised that at the present time there is no existing common law remedy for invasion of privacy as such.'

According to a more recent statement of the legal position in *The Law of Human Rights* (Clayton & Tomlinson) (2000) at paragraph 12.06

'It is well established that English law does not recognise a right of privacy as such'."

In the same case, Lord Justice Buxton stated (at §§ 87, 106-7, 112 and 114):

"The present case is important, not only because it appears to be the first case in which recovery has been achieved simply for a breach of the right to privacy; but also because, as Brooke LJ pointed out in paragraph 71 of his judgment in the important case of *Douglas and others v. Hello! and others* [2001] QB 967, previous investigations of this area have all been in cases where, in one way or another, confidence can be said to have been broken. That was of course the case in *Douglas* itself. The difficulty arises, as Brooke LJ foresaw, in a case where privacy alone is in issue; and that is this case ...

...

I have not been able to find any commentator who thought, at least before the coming into effect of the Human Rights Act, that there was a tort of invasion of privacy in English law, as opposed to thinking that there should be such a tort. Paragraph 1-34 of *Clerk & Lindsell*, the leading authority, says of the law in 2001, and thus *a fortiori* of the law before 1998:

'Privacy remains an interest unprotected by the English law of torts. However gross the invasion of the claimant's privacy, that violation of privacy is not itself a tort.'

That English law provides no direct action for invasion of privacy is also the view of the learned editor of the fifteenth edition of *Winfield and Jolowicz on Tort* (1998), at pp 464-465; and of Sir Brian Neill in his essay in the important collection *Protecting Privacy* (ed. Markesinis, 1999), at p.17.

I am therefore plainly of the opinion that it is not open to us to grant relief to the claimants on the basis of an invasion of their privacy. Since, however, the protection of privacy has been seen by some as nonetheless a proper field for the exercise of judicial activism, I venture to go further and draw attention to some difficulties that stand in our way.

...

I have no doubt that in being invited to recognise the existence of a tort of breach of privacy we are indeed being invited to make the law, and not merely to apply it. Diffidence in the face of such an invitation is not, in my view, an abdication of our responsibility, but rather a recognition that, in areas involving extremely contested and strongly conflicting social interests, the judges are extremely ill-equipped to undertake the detailed investigations necessary before the proper shape of the law can be decided. It is only by enquiry outside the narrow boundaries of a particular case that the proper ambit of such a tort can be determined. The interests of democracy demand

> that such enquiry should be conducted in order to inform, and the appropriate conclusions should be drawn from the enquiry by, Parliament and not the courts. It is thus for Parliament to remove, if it thinks fit, the barrier to the recognition of a tort of breach of privacy ...
>
> ...
>
> ... it is still the law of England that there is no tort of invasion of privacy."

4. Breach of confidence

(a) Elements of the tort

The elements of the tort of breach of confidence are that:

(i) there is in existence information that has the necessary quality of confidentiality and that has not previously been published;

(ii) the information was obtained in circumstances giving rise to a duty of confidence on the part of the recipient; and

(iii) there must be some unauthorised use (or threatened use) of that information to the detriment of the applicant.

(see *Coco v. A.N. Clark (Engineers) Ltd* [1969] RPC 41 at 47; and *Attorney-General v. Guardian Newspapers (No. 2)* [1990] 1 AC 109).

(b) Extinguishing the duty

The duty of confidence can be overridden if there is a superior public interest that requires disclosure of the information. The duty of confidence can also be lost if the information ceases to be confidential.

(c) Breach of confidence and filming

In relation to photographs taken without consent, the following was said, *obiter dictum*, by Mr Justice Laws (as he then was) in *Hellewell v. The Chief Constable of Derbyshire* [1995] 1 WLR 804 at 807:

> "If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would, in my judgment, as surely amount to a breach of confidence as if he had found or stolen a letter or diary in which the act was recounted and proceeded to publish it. In such a case, the law would protect what might reasonably be called a right of privacy, although the name accorded to the cause of action would be breach of confidence."

(d) Remedies

The two forms of remedy for breach of confidence are:

(i) injunctive relief, which is only likely to be useful where the applicant is aware of a threatened breach of confidence and is able to obtain a Court order before the breach takes place; and

(ii) financial compensation, which will be available after a breach of confidence has occurred:

(a) it is available where a claimant has suffered pecuniary loss;

(b) where a defendant has made a profit from the breach, the claimant is entitled to seek an account of such profits;

(c) it may be available where the claimant has suffered distress or hurt feelings. There is no reported case which holds that compensation will not be available in those circumstances.

5. The Data Protection Act 1998

Schedules 1 and 2 of this Act set out "the data protection principles" relating to how personal data should be processed and maintained.

Section 13 of the Act defines the circumstances in which a person can obtain compensation for a breach by a data controller of any of the requirements of the Act. It provides in its material part:

> "(1) An individual who suffers damage by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that damage.
>
> (2) An individual who suffers distress by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that distress if -
>
> (a) the individual also suffers damage by reason of the contravention, or
>
> (b) the contravention relates to the processing of personal data for the special purposes.
>
> (3) In proceedings brought against a person by virtue of this section it is a defence to prove that he had taken such care as in all the circumstances was reasonably required to comply with the requirement concerned."

Paragraph 4.5 of the legal guidance issued by the Data Protection Commissioner in relation to the Data Protection Act reads, *inter alia*, as follows:

> "**Right to compensation (section 13)**
>
> 'Damage' includes financial loss or physical injury. Unless processing is for the "special purposes", (as to which see below), compensation is not payable for distress alone. If the individual can prove that damage has been suffered, the Court may award compensation for any distress which has also been suffered by reason of the breach of the Act.
>
> Damages for distress alone can be claimed where the contravention relates to the processing of personal data for the "special purposes", which are referred to in Chapter 5 and which comprise journalistic, artistic or literary purposes."

6. The Regulation of Investigatory Powers Act 2000

Part II of the Regulation of Investigatory Powers Act 2000, which came into force on 25 September 2000, is legislation enacted to regulate, *inter alia*, intrusive and non-intrusive covert surveillance. It was enacted, at least in part, so as to comply with the European Convention on Human Rights and the Human Rights Act 1998 in relation to the regulation of covert surveillance. It contains specific provisions as to the circumstances in which such surveillance will be lawful, who may authorise it and how it may be authorised.

7. Anti-social behaviour

A consultation paper addressing anti-social behaviour on council estates was published by the Department of the Environment in April 1995. It recorded that anti-social behaviour caused a major drain on local authority resources and that local authorities were concerned about responding to it through the courts, in particular as a result of:

> " ... inconsistency over what is regarded as acceptable evidence, witness intimidation exacerbated by delays in court hearings, and what authorities see as their difficulty in convincing the courts of the serious nature of the nuisance caused by the tenant."

From 1995 onwards a number of measures were adopted by the Government in an attempt to strengthen the powers of local authorities in dealing with anti-social behaviour. These included the passing of the Housing Act 1996, which made provision for "introductory (trial) tenancies", extended the powers of local authorities to apply for repossession on grounds of nuisance and annoyance and granted them the power to apply for injunctions to restrain anti-social behaviour.

8. Schedule 2 of the Housing Act 1985

Schedule 2 of the Housing Act 1985 (as amended by the Housing Act 1996) reads, in relevant part:

> "GROUNDS FOR POSSESSION OF DWELLING-HOUSES LET UNDER SECURE TENANCIES
>
> *Ground 1*
>
> Rent lawfully due from the tenant has not been paid or an obligation of the tenancy has been broken or not performed.
>
> *Ground 2*
>
> The tenant or a person residing in or visiting the dwelling-house-
>
> (a) has been guilty of conduct causing or likely to cause a nuisance or annoyance to a person residing, visiting or otherwise engaging in a lawful activity in the locality"

9. Subsidiary powers of local authorities

Section 111(1) of the Local Government Act 1972 reads as follows:

> "Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions."

COMPLAINTS

The applicant complained under Articles 8 and 14 of the Convention about the decision to institute covert surveillance on her home and to maintain surveillance there between about 18 April and 4 September 2000.

THE LAW

The applicant complained that the decision to institute covert surveillance on her home and to maintain surveillance there between about 18 April and 4 September 2000 constituted a violation of her rights under Articles 8 and 14 of the Convention. Those Articles read, in relevant part, as follows:

Article 8

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... 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."

Article 14

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

A. Exhaustion of domestic remedies

1. The parties' submissions

(a) Breach of data protection principles

The Government submitted that the applicant should have attempted to recover compensation for the breaches of the data protection principles which she herself alleged in her application. They relied upon the applicant's own description of her feelings at being under surveillance, set out in the last paragraph of the above facts, to argue that she should have argued in the domestic courts that she had suffered from "damage" within the meaning of section 13 of the Data Protection Act 1998 ("the Act" - set out above under the heading "relevant domestic law and practice"). They submitted that the applicant had not cited any statutory provision or reported authority to suggest that she would not have been entitled to compensation under section 13 of the Act had her allegations concerning breaches of the data protection principles been correct.

The applicant argued that she had suffered only from distress within the meaning of section 13 of the Act and that, as such, any claim for compensation for breach of the data protection principles would have been futile. She argued that the matters set out at the final paragraph of the above facts were particulars of her distress. She did not suggest that she had suffered any other damage. As the data processing was not for "special purposes" within the meaning of the Data Protection Act 1998, she did not have any right to claim damages for distress. She referred, in this context, to the guidance issued by the Data Protection Commissioner (set out under the heading "relevant domestic law and practice" above).

(b) Breach of privacy or confidence

The Government submitted that the applicant should have pursued an action based upon breach of privacy or breach of confidence. They submitted that in so far as there was a doubt about the availability of those remedies, which have been developing in recent years, the applicant should have given the domestic courts the opportunity to resolve that doubt, particularly within the context of a common law system in which the law is developed by the courts.

The applicant pointed out that the Government's own observations stated that there was no specific right to privacy under English law. She referred to the case of *Wainwright v. the Home Office* [2001] EWCA Civ 2081, 20 December 2001 (set out within the section headed "relevant domestic law and practice" above) and maintained that she did not, at the time, have any right to privacy under domestic law. While the applicant accepted that a right to privacy can now be considered by the English courts under the

Human Rights Act 1998, she pointed out that she was unable to rely upon that Act in her case, as it was not yet in force at the material time and did not have retrospective effect.

The applicant submitted further that she did not have any cause of action for breach of confidence as, unlike in the domestic cases of *Douglas v. Hello!* and *Hellewell v. the Chief Constable of Derbyshire* (referred to under the heading "relevant domestic law and practice" above), there was no disclosure or threatened disclosure of the confidential material in her case. She also submitted that it was settled law that damages were not available for breach of confidence unless damage had been suffered as a result of unauthorised use of confidential material. She emphasised that she was unaware of any unauthorised use of the material and that she was complaining not about the disclosure of the material, but about the distress caused by the invasion which the surveillance caused to her privacy.

(c) Public law remedies

The Government submitted that the applicant could have sought judicial review of the Council's decision to conduct surveillance, at least from the moment when she became aware of it. The Government argued that in circumstances in which she alleged that the video surveillance was unnecessary, disproportionate and not in accordance with the law in that it was in breach of the data protection principles, she would have had at least an arguable claim that the Council was acting unlawfully or irrationally in conducting the surveillance that it did.

The applicant argued that she did not have any private law right in the present case and, as such, she was not entitled to damages on judicial review.

The applicant also pointed out that she could not commence an action for misfeasance in public office as there was no evidence of either malice or knowledge of excess of power in the present case.

The applicant concluded that the Government had failed to point to any authority which suggested that she had a cause of action available to her under domestic law at the relevant time. As such, she concluded her response to the submissions of the Government under this head by stating that she did not have any domestic remedy available to her, in violation of Article 13 of the Convention.

2. The Court's assessment

(a) General principles

The Court recalls that the rule of exhaustion of domestic remedies referred to in Article 35 of the Convention obliges those seeking to bring their case against the State before an international judicial or arbitral organ

to use first the remedies provided by the national legal system. Consequently, States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system.

Under Article 35 normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. Article 35 also requires that the complaints intended to be made subsequently at Strasbourg should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used.

In the area of the exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports* 1996-IV, §§ 65-66 and 68).

Where there is doubt as to the prospects of success in a particular case it should be submitted to the domestic courts for resolution. This is particularly so in a common law system since, where the courts extend and develop principles through case-law, it is generally incumbent on an aggrieved individual to allow the domestic courts the opportunity to develop existing rights by way of interpretation (*Earl Spencer and Countess Spencer v. the United Kingdom*, nos. 28851/95 and 28852/95, Commission decision of 16 January 1998, *Decisions and Reports* 25, p. 56).

(b) Breach of data protection principles

The Court notes that the applicant could not have recovered compensation for breach of the data protection principles under section 13 of the Data Protection Act 1998 as a result of having suffered distress alone. To do so, she would have had to have established that she had also suffered from "damage", defined in the legal guidance on the Act as including financial loss or physical injury.

The Court has had full regard to those matters which the applicant characterised as "distress and inconvenience", set out at the final paragraph of the above facts. The Court notes that it cannot, without more, determine that any of those matters, on their face, constituted "damage" as opposed to distress, within the meaning of section 13 of the Act. The Court observes further that the Government have not provided any evidence, whether by reference to domestic legislation, case-law or otherwise, to demonstrate that it was reasonably arguable that the matters that the applicant has described, including her allegation that she was distressed to such an extent that she became "depressed", were sufficient to constitute "damage", as opposed to distress, under domestic law.

In the above circumstances the Government, upon whom the burden of proof lies, have not satisfied the Court that the remedy under section 13 of the Act was one which was practical and effective for the applicant in the sense of being available to her and offering her reasonable prospects of success.

(c) Privacy

The Court regards as significant the agreement between the parties that there was no specific right to privacy under domestic English law. The Court has had regard to the view expressed by Lord Justice Sedley in the above-cited case of *Douglas v. Hello!* that he was prepared to find that there was now a qualified right of privacy under domestic law. However, the Court notes that Lord Justice Sedley was the only one of the three Lord Justices who was prepared so to find, that his remarks were *obiter dicta* and that they were made after the Human Rights Act 1998 (which incorporated Article 8 of the Convention into English law after 2 October 2000) had already come into force. That Act was not in force at the time of the events complained of by the applicant and could not, therefore, be relied upon by her in the present case.

Moreover, the Court has had regard to the later case of *Home Office v. Wainwright*, cited above, in which the Court of Appeal clearly stated that no tort of privacy was recognised by English law. It appears from the passages of that case cited under the heading "relevant domestic law and practice" above that that was also the unananimous view of the leading commentators in the field, certainly in relation to the period before the Human Rights Act 1998 came into force. The Court has also noted the view expressed by Lord Justice Buxton, in that case, that if any such tort were to be introduced into English law, that would be a matter for Parliament and not for the courts.

In the above circumstances, the Government have not discharged their burden of proving to the Court that the applicant had available to her an accessible domestic cause of action for breach of privacy, at the material time, which was capable of providing redress in respect of her complaints

and offered reasonable prospects of success. Furthermore, the Court does not find that there was a sufficient doubt as to whether a tort of invasion of privacy existed under English law that obliged the applicant to submit the issue to the domestic courts for resolution (see the above-cited Commission decision in *Earl Spencer v. the United Kingdom*).

(d) Breach of confidence

The Court recalls that one of the three elements that is required for the tort of breach of confidence to be established is that there must be some unauthorised use (or threatened use) of confidential information to the detriment of the applicant. The Court further recalls that financial compensation is only available once a breach of confidence has occurred as a result of the unauthorised use of confidential material. In the present case, there was no unauthorised disclosure or use of confidential information. In those circumstances, the Government have not satisfied the Court that the tort of breach of confidence was one which was available to the applicant.

(e) Public law remedies

The Court notes that, until 12 May 2000, the applicant was unaware that surveillance was being carried out. As such, she could not have sought judicial review about the decision to install the surveillance prior to that date in any event.

Thereafter, even assuming that the applicant could have applied for judicial review of the Council's decision to use the camera on the basis that it was unlawful as being an act in excess of its powers as a result of being in breach of the data protection principles, as the Government asserted, the Court is not persuaded that the substance of her Convention complaints under Article 8 could have been addressed. In addition to her argument that the use of the surveillance was not regulated by legislation or publicly available guidelines, the essence of the applicant's Article 8 complaint is that her right to private life was interfered with in a manner that was unnecessary and disproportionate.

The Court notes that, at the time at which the surveillance was undertaken, the Convention did not form part of domestic law and questions as to whether the disclosure violated the applicant's rights under Article 8 and, in particular, as to whether the disclosure had been shown by the authorities to respond to a pressing social need or to be proportionate to any legitimate aim served, were not issues upon which the applicant could have based any claim for judicial review.

The Court recalls that it has previously considered the test of irrationality used by the domestic courts on applications for judicial review. It has concluded that the threshold at which the domestic courts could have found a particular act to be irrational has been placed so high that it effectively excludes any consideration by them of the question of whether the

interference with the applicant's right answered a pressing social need or was proportionate to the aims pursued, principles which lie at the heart of the Court's analysis of complaints under Article 8 of the Convention (see *Peck v. the United Kingdom*, no. 44647/98, § 106, 28 January 2003, unreported, and the references at § 100 therein to *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, ECHR 1999-VI).

The Court has taken account of the comments of Lord Slynn in the *Alconbury Developments Ltd* case, set out under the heading "relevant domestic law and practice" above, and referred to by the Government in their submissions. The Court notes that that case post-dated the entry into force of the Human Rights Act 1998. Moreover, the relevant comment concerning the place of the principle of proportionality in domestic law was *obiter dictum*. In any event, the Government did not suggest that this comment was demonstrative of the full application by domestic courts of the proportionality principle in considering, in the judicial review context, cases such as the present one.

Furthermore, the Court observes that the applicant was not entitled under domestic law to claim damages on an application for judicial review unless she had a right to damages in private law. For the reasons set out above, the Court does not find it established that the applicant had any such private law right. As such, the Court is not persuaded that the applicant would have been entitled to an award of damages on any application for judicial review.

In the above circumstances, the Court is not satisfied that the remedy of judicial review was one which was available and/or sufficient to afford redress in respect of the applicant's complaint under Article 8 of the Convention, either alone or in combination with Article 14.

For the sake of completeness, the Court notes that misfeasance, which was mentioned by the Government, but not specifically argued by them to be a ground on which the Court should find that the applicant had failed to exhaust her domestic remedies, could only be established if there were evidence of either malice or knowledge of acting in excess of power which caused foreseeable loss. The Court is not aware of any such evidence in the present case. Therefore, the Court is not persuaded that it was open to the applicant to commence an action for misfeasance.

(f) Conclusion

Accordingly, the Court does not consider that the applicant has failed to exhaust her domestic remedies in respect of her Convention complaints.

B. Article 8 of the Convention

1. The parties' submissions

(a) Were the applicant's rights under Article 8 engaged?

(i) The Government

The Government submitted that the applicant's right to private life was not engaged. They argued that the allegations made against her and her family related to anti-social behaviour which was causing a nuisance to their neighbours. As such the Government contended that their conduct, by its very nature, involved public acts and did not form part of their private life. They further submitted that the camera was located outside and that it was angled so that it could see what was taking place between neighbouring houses. They averred that it could only record events that occurred in public. They acknowledged that in certain circumstances a limited view inside the applicant's front door was possible when that door was open. However, they argued that there was no question of any intrusive surveillance being conducted in the applicant's home or in any private or secluded area.

The Government pointed out that the video camera could not record anything more than a neighbour might have seen from their own house or than a stranger might have seen from the street. They averred that the fact that a neighbour or stranger might see what a person was doing on their own doorstep, or later give evidence of what they had seen, could not possibly have engaged the applicant's rights under Article 8. As such, they argued that the material recorded by the video camera, which merely contained the same evidence, albeit in video format, as could have been given orally by a neighbour, could not logically form part of the applicant's private life either. They further contended that neither the fact that the camera recorded what it saw on film, nor that it was making a continuous record, could be relevant to the degree of privacy involved in the actual subject-matter of what was being filmed.

The Government referred to the case-law of the Convention organs to argue that an act which was public when it was performed could not subsequently be transformed into a private act simply because it had been recorded and the recording had been disseminated (the Government cited *Friedl v. Austria*, no. 15225/89, Series A no. 305-B, Friendly Settlement, Report of the Commission of 19 May 1994; *X v. the United Kingdom*, no. 5877/72, Commission Decision of 12 October 1973, unreported; *X v. the United Kingdom*, no. 3868/68, Commission decision of 25 May 1970, unreported; and *Herbecq and Another v. Belgium*, nos. 32200/96 and 32201/96, Commission decision of 14 January 1998, DR 92-A, p. 92).

(ii) The applicant

The applicant submitted that the decision to undertake and to maintain both covert and overt surveillance of her and her children engaged her right to private and family life and to her home under Article 8 of the Convention.

She argued that the nature of the conduct concerned was not relevant when considering whether her right to private life was engaged. She averred that the position of the camera, directed at her front door from another private dwelling, constituted an intrusion into her privacy. She pointed out that she was on her home territory, in the area inside and surrounding her house. As such, she argued that her ordinary comings and goings in that area, and those of her visitors, had the necessary quality of privacy. She emphasised that while she had a reasonable expectation that her conduct would be observed from time to time by her immediate neighbour, she did not expect to be continuously monitored by an organ of the State. She further pointed out that a stranger on the street could not have seen what was recorded by the camera, such as a view inside her front door. She also contended that it would have been intrusive had a stranger peered into her home from the street for any length of time.

The applicant submitted that the Government had failed to take into account her separate right to respect for her home under Article 8 of the Convention. She argued that none of the case-law relied upon by the Government concerned observation of the home and that it was distinguishable from the facts of her case in any event. The applicant also referred to the Court's case-law to emphasise that private life considerations may arise once any permanent record comes into existence from the public domain (*P.G. and J.H. v. the United Kingdom*, no. 44787/98, §§ 57-60, ECHR 2001-IX).

(b) Was there any interference with the applicant's Article 8 rights?

(i) The Government

The Government submitted that there was no interference with the applicant's Article 8 rights. They argued that there was no real intrusion into the applicant's privacy. The camera was left passively to record whatever might occur in the space between the neighbours' houses. There was no specific or intentional filming of the applicant. The Government emphasised the following factors: subject to the partial view into the applicant's front door when it was open, there was no intrusive surveillance into any private or secluded area; the camera was in a fixed position; recordings were only made of incidents in respect of which there could have been no expectation of privacy; the surveillance was of limited duration and was known to the applicant from 12 May 2000 onwards; and it was non-discriminatory in that

it would have recorded any misconduct by the Davies family as much as by the applicant.

The Government also submitted that it was important to consider the reasons for the Council's actions. The surveillance was initiated as a result of complaints received by the Council from the applicants' neighbours, which were of sufficient gravity to warrant serious and prompt investigation; the Council had a legitimate interest in conducting the surveillance, being landlords who were responsible to the community to apply for anti-social behaviour or possession orders in appropriate cases; it furthered the ends of justice to obtain and rely upon the best available evidence (as opposed to the conflicting oral testimony of two neighbouring families who had plainly fallen out with each other) before the courts of what the true situation was between the neighbours at the time of any application for a court order; indeed, had the applicant's complaints against her neighbours been well-founded, the recording would have vindicated her position; the Council were therefore treating the applicant herself fairly; as it was, it was the incontrovertible evidence obtained on video that forced the applicant to give an undertaking to abide by the terms of her tenancy agreement with the Council; the recording therefore served to minimise any unnecessary expenditure of public funds in a contested trial.

The Government emphasised that their concession in *Khan v. the United Kingdom*, no. 35394/97, ECHR 2000-V, that the surveillance in that case amounted to an interference with that applicant's rights under Article 8 arose in a situation where there had been intrusive surveillance by means of a covert listening device installed in a private residence to record confidential conversations and therefore could not assist the applicant in the present case.

(ii) The applicant

The applicant submitted that the use of continuous covert and overt video surveillance over a period of five months constituted an interference with her right to respect for her private life and for her home. She argued that there was no relevant difference between a fixed or a moving camera and emphasised that it was directed at her home. She averred that the Davies family was aware of the citing and location of the camera and the fact that it could have caught their activities was irrelevant.

The applicant further submitted that the reasons for using surveillance were irrelevant to the issue of whether there was an interference with the right to respect for her home and private life. The reasons were only relevant to whether the interference could be justified under Article 8 § 2 of the Convention. As such, the applicant asserted that she had already given her undertaking before the surveillance commenced; that there were no serious breaches of the undertaking thereafter; that CCTV should not be used in an indiscriminate way and without procedural safeguards; covert

surveillance should not have been used unless less intrusive means had been tried and had failed; the Council could have informed the applicant of its intention to use surveillance; and the use of the camera was unfair to her in that she was not aware of its presence and it was directed at her home: neither of those latter factors applied to the Davies'.

(c) Was any interference "in accordance with the law"?

(i) The Government

The Government submitted that the surveillance was in accordance with the law. They pointed out that the Council had a public law function in determining whether or not to apply for an anti-social behaviour order or for a possession order against the applicant. They referred to section 111(1) of the Local Government Act 1972 (set out under the heading "domestic law and practice" above) to contend that the Council had an ancillary power to obtain the necessary evidence to bring such proceedings effectively and fairly, which it exercised by setting up the video camera. The Government argued that a local authority did not need express enabling powers specifically to cater for every conceivable means of obtaining and adducing evidence for use in legal proceedings which it was expressly empowered to bring. The Government submitted that, accordingly, the fact that there was no express statutory regime governing the use of a video camera in a public place was no more surprising or objectionable than the fact that there was no express statutory regime governing the use by a local authority of written or oral testimony from witnesses.

The Government further averred that it was foreseeable that the Council would attempt to obtain reliable evidence in relation to the applicant's conduct, given the earlier proceedings in 1999. They further denied the applicant's assertion that the Council had acted in breach of the data protection principles, contending that the surveillance undertaken was fair and necessary for the performance of the Council's functions.

(ii) The applicant

The applicant submitted that the interference was not in accordance with the law. She pointed out that the Government had failed to refer to any legislation or publicly available guidelines which were in force at the time which legislated for the use of closed circuit television or surveillance in general; or which were readily accessible and precise to enable her to be aware of the circumstances under which surveillance might be undertaken or which could have provided her with adequate safeguards to protect her from the abuse of such surveillance. As such, she argued that the use of covert surveillance was not foreseeable and that she did not know how to regulate her conduct to avoid it.

Moreover, the applicant averred that the Regulation of Investigatory Powers Act 2000, which now achieved statutory control of the use of surveillance, was not yet in force at the time of the alleged interference and alleged that, in using the surveillance, the Council had failed to comply with the data protection principles set out in the Data Protection Act 1998.

(d) Legitimate aim

The Government submitted that undertaking the surveillance pursued the legitimate aim of preventing disorder or crime by the applicant and her family and/or of protecting the rights and freedoms of the Davies family. The Government argued also that the Council's intention in exercising its functions as landlord was to preserve the rights of the Davies family to enjoy their own private and property rights in accordance with Article 8 of the Convention and Article 1 of the First Protocol.

The applicant denied that the surveillance pursued any legitimate aim under Article 8 § 2 of the Convention.

(e) Was any interference "necessary in a democratic society"?

(i) The Government

The Government submitted that local authorities must be allowed a wide margin of appreciation to determine how best to deal with the significant problem of anti-social behaviour by council tenants, which can blight the lives of their neighbours. They argued that one of the principle functions of those authorities is to provide accommodation within their area and that they have been faced with considerable practical difficulties in dealing with the problem of anti-social behaviour. The Government pointed out their response to this problem, referring to the consultation papers and legislation set out under the heading "relevant domestic law and practice" above.

The Government submitted that the Council's decision to use surveillance was proportionate. Its intention was to discover the extent to which the allegations were true and to respond proportionately to the actual level of nuisance arising from the behaviour of the applicant and her family. In this regard, they repeated the submissions that they made in respect of the reasons for the undertaking of the surveillance that are set out under the heading "Was there any interference with the applicant's Article 8 rights?" above.

(ii) The applicant

The applicant averred that the surveillance undertaken was not necessary in a democratic society. She alleged, *inter alia*, that it was part of a "fishing expedition"; that there was no need to undertake covert surveillance at any time; and that there was no need for the Council to continue the surveillance

once it had recorded relatively minor incidents in respect of her children by the end of April 2000. She further alleged that the proceedings were not criminal; that she had already given undertakings to the court in July 1999 in relation to the more serious allegation of assault and that there was no reason to suppose that she would breach those undertakings; that the Council unfairly sought to corroborate the evidence of the Davies' with video evidence rather than allowing the court to decide on the basis of the oral evidence of the parties; and that there were other courses of action open to the Council, such as setting up mediation between the parties, accepting undertakings from the applicant or advising the Davies' to seek their own civil remedy against the applicant.

The applicant argued that the surveillance was not proportionate. She averred that this was not a case of serious crime, but of relatively minor allegations about the conduct of children. She averred that the more serious allegations had been dealt with by way of her undertaking to the court on 19 July 1999. Thereafter she alleged that there were no comparatively serious allegations and that the use of covert surveillance was disproportionate to the severity of those further allegations. She submitted that the benefit to the Council of the additional video evidence to supplement the testimonial which it had from the Davies' was disproportionate to the intrusion on her privacy. She averred that there was no evidence that her right to privacy was considered before the decision to undertake surveillance was taken.

(f) The Court's conclusion on admissibility under Article 8

The Court considers that the complaints of the applicant raise serious issues under Article 8 of the Convention which require determination on the merits. It follows that they cannot be dismissed as manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring the complaints under Article 8 inadmissible has been established.

C. Article 13 of the Convention

The Court notes that, at the very end of her submissions in reply to the observations of the Government about her alleged failure to exhaust domestic remedies, the applicant concluded that she did not have any such remedies available to her, which she then stated was in violation of Article 13 of the Convention. That Article reads:

> "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."

Those submissions were dated 21 February 2002. That was the first time that the applicant had made any specific complaint about a violation of Article 13 of the Convention.

The applicant has at all times been legally represented. Her initial letter to the Court, dated 11 September 2000, set out her complaints as being under Articles 6, 8 and 14 of the Convention. In her subsequent application to the Court, dated 11 November 2000, the applicant alleged violations of Articles 8 and 14 of the Convention. In subsequent correspondence the applicant was asked to clarify whether she wished to pursue her complaint under Article 6 of the Convention. By letter of 20 August 2001, the applicant's solicitors replied as follows:

> "On reviewing the file we confirm that the Articles relied upon by the applicant are those as set out in the application rather than as referred to in the letter of the 11th of September 2000. That is, Articles 8 and 14 rather than 6."

The Court recalls the requirement under Article 35 § 1 of the Convention for the matter to be brought before it within a period of six months from the date on which the final domestic decision was taken in the process of the exhaustion of domestic remedies, or, in the absence of any such decision, from the act complained of (see e.g. *Hilton v. the United Kingdom*, no. 12015/86, Commission decision of 6 July 1988, DR 57, p. 108). The Court notes that the applicant's complaint under Article 13 of the Convention was made more than six months after the termination of the surveillance, and the introduction of the applicant's case to this Court, in September 2000. As such, the applicant's complaint under Article 13 of the Convention is inadmissible for having failed to comply with the six months requirement under Article 35 § 1 of the Convention.

D. Article 14 of the Convention

1. The parties' submissions

The Government submitted that, even if the Court considered that Article 8 was engaged, there could have been no discrimination under Article 14, which involved the different treatment of people in relevantly similar positions. They submitted that the Council was exercising its functions as the applicant's landlord, in determining, with reference *inter alia* to Schedule 2 of the Housing Act 1985, whether to apply for a possession order, or an anti-social behaviour order, against her. They argued that the Council was not exercising any functions in respect of the Davies family and that, as such, it could not be regarded as having "treated" the applicant and the Davies family differently as it did not, and could not, "treat" the Davies family at all. The Government further submitted that there was, in any event, no significant difference in the impact of the recording on the

two households: the position of the camera was such that if either had been guilty of misconduct, that misconduct would have been recorded.

The applicant submitted that the use of surveillance against her alone was discriminatory. She pointed out that the dispute was a personal one between two families. However no surveillance was carried out on the Davies' and they were aware of the presence of the camera whereas she was not. She emphasised that the surveillance was undertaken upon her alone because of her status as a secure tenant, whereas the Davies' were freeholders. She submitted that Convention case-law (*James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98 and *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, ECHR 1999-III) had considered Article 14 to be relevant in cases of differential treatment of persons with different interests in property.

2. The Court's assessment

The Court recalls that Article 14 of the Convention affords protection against discrimination in the enjoyment of the rights and freedoms safeguarded by the other substantive provisions of the Convention. However, not every difference in treatment will amount to a violation of this Article. It must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment, and that there is no reasonable or objective justification for this distinction (see *Stubbings and Others v. the United Kingdom*, judgment of 22 October 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1507, § 72).

The Court recalls that the applicant in the present case was a "secure tenant" of the Council. As such, she had entered into a tenancy agreement with the Council in order to rent her home from them. That agreement included an express term that neither she, nor any person living with her, nor any visitor to her home would harass or cause a nuisance to anyone on or in the vicinity or neighbourhood of her property. It was governed, *inter alia*, by Schedule 2 of the Housing Act 1985 (as amended), which enabled the Council to seek possession of the home of a secure tenant in circumstances where an obligation of the tenancy had been broken. The installation of surveillance occurred as part of the Council's consideration as to whether, as the applicant's landlord, it should apply for a possession order against her.

The Davies' were the freeholders of their property. As such, they did not have any relationship with the Council at all in relation to their property. They neither had any agreement with the Council about the terms of their occupation of their property; nor could the Council have sought possession of their home under Schedule 2 of the Housing Act 1985.

In the above circumstances, the applicant cannot establish that there was differential treatment between "persons in an analogous or relevantly similar situation". She was a secure tenant; the Davies' were freeholders.

Their positions were therefore not analogous for the reasons set out above. Moreover, the above-cited cases upon which she relied, unlike the present case, involved different treatment between persons in analogous situations in the sense of being based upon either a distinction between categories of property owner (*James and Others v. the United Kingdom*) or between landowners based solely upon the size of their land (*Chassagnou and Others v. France*).

Accordingly, the applicant's complaint under Article 14 of the Convention is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be declared inadmissible in accordance with Article 35 § 4.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the applicant's complaints under Article 8 of the Convention;

Declares the remainder of the application inadmissible.

Mark VILLIGER
Registrar

Georg RESS
President