AS TO THE ADMISSIBILITY OF

Application No. 20357/92
by Marina WHITESIDE
against the United Kingdom

The European Commission of Human Rights sitting in private on 7 March 1994, the following members being present:

MM. C.A. NØRGAARD, President
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
M.P. PELLONPÄÄ
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
D. SVÁBY

Mr. M. de SALVIA, Deputy 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 10 July 1992 by Marina Whiteside against the United Kingdom and registered on 24 July 1992 under file No. 20357/92;

Having regard to :

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

- the observations submitted by the respondent Government on 18 March 1993 and the observations in reply submitted by the applicant on 26 July 1993;

- the further observations submitted by the applicant on 18 February 1994;

- the parties' oral submissions at the hearing on 7 March 1994;

Having deliberated;

Decides as follows:

THE FACTS

a. The particular circumstances of the case

The applicant is a British citizen born in 1959 and resident in Blackpool. She is represented by Ms. Jillian Baxter, a solicitor practising in Preston, and Mr. Edmund Farrell, a barrister practising in Manchester. The facts as submitted by the parties may be summarised as follows.

The applicant is a divorced and single woman living with her five

children, who range in age from 12 to 3. Her three younger children suffer from Ehlers-donlos syndrome and the very youngest suffers in addition from spina bifida.

In 1984, the applicant formed a relationship with Mr. B. and they cohabited until 1989. Mr. B. is the father of the two youngest children. The applicant alleges that Mr. B. became violent and abusive towards her and she left him. She and the children obtained accommodation from the local authority which was however only a few hundred yards from Mr. B.'s house.

Mr. B. enjoyed access visits to the oldest of his children until late 1990 when the child alleged that he had indecently assaulted her.

The applicant claims that since then she and her children have been seriously harassed by Mr. B.. She refers to the following incidents:

- on 9 March 1991, he forcibly entered the applicant's house;

- on 10 March 1991, he again tried to enter her house shouting abuse;

- from 11 to 13 March 1991, he waited in an alley on the applicant's route back from school and on one occasion took hold of her and shook her;

- on 16 March 1991, he tried to gain entry to the house;

- in October 1991, the applicant discovered that sugar had been placed in the petrol tank of her car;

- since October 1991, the tyres of the applicant's car have been slashed 8 times;

- since October 1991, Mr. B. has taken to following the applicant in his car when, for example, she takes the children to school, nursery or dancing classes. He allegedly drives in an erratic and dangerous manner approaching very close to her car, on one occasion blinding her with his headlights and on another forcing her to swerve in order to avoid a collision. He frequently sounds his horn in a loud and menacing manner;

- on 24 January 1992, Mr. B. followed the applicant in his car to her solicitors' office and remained waiting outside;
- on 30 January 1992, he followed the applicant to a St. John's Ambulance Centre and when she drove off, he drove in front of her car and then braked suddenly. He then pulled in front of her again at traffic lights forcing her to swerve to avoid a collision.

On 21 February 1992, the applicant instituted proceedings against Mr. B. at the County Court, seeking damages and an injunction restraining Mr. B. from using violence against her and an injunction restraining him from threatening, harassing, pestering or otherwise interfering with her. In her affidavit of 21 February 1992, the applicant submitted: "the police say that they are unable to help me as, as yet, the Defendant has not committed an illegal act. I am myself at the end of my tether. I am now experiencing dizzy and fainting sensations when I am trying to drive. I am tense and I have panic attacks whilst I am driving.....He is making my life a misery and he is also putting my life, and that of my children, in danger..."

Mr. B. swore an affidavit in reply on 25 February 1992 in which he denied the allegations.

At the hearing on 26 February 1992, the district judge refused an interlocutory injunction but gave the applicant leave to amend her particulars of claim and to make a new application. The applicant's

solicitor's manuscript note of the judgement noted that there was no tort of harassment and referred to the case of Patel v. Patel (1988 2 FLR 179) in which it had been held by the Court of Appeal that an injunction could only be granted where an actual tortious act had or was likely to be committed. Costs were reserved to be dealt with at the subsequent hearing.

The applicant renewed her application requesting an injunction to prohibit Mr. B. from assaulting her and from entering her property.

On 13 March 1992, the County Court judge refused to grant any interlocutory injunctive relief. The applicant's solicitor's note of the proceedings also recalled that the case of Patel v. Patel was mentioned. The judge's notes recorded that at the earlier hearing it had been agreed that there was no cause of action as no particulars of assault or trespass had been pleaded. Since it was his view that even if the applicant substantiated her claims no injunction was possible, he did not hear any oral evidence or make any specific findings on the written evidence before him. The judge reserved the issue of costs to a specific hearing of the matter in view of the possibility of making an order that the applicant's lawyers pay her costs personally, disallowing the applicant's lawyers' costs on the basis that they had wasted court time in bringing the application.

Following a hearing on 23 April 1992, the county court judge disallowed part of the applicant's lawyers' costs.

On 14 June 1993, Mr. B. applied to the court to strike out the applicant's claim for final relief as disclosing no cause of action. The applicant's counsel attended court without being covered by legal aid and resisted the application successfully.

An extension in legal aid for the applicant to pursue her claim for damages and/or an injunction was refused by the legal aid authority. The applicant's appeal to the Area Committee of the legal aid authority was dismissed by letter of 10 August 1993 on the ground that any award of damages obtained would be likely to be modest and would not justify proceedings at public expense.

The applicant has succeeded in obtaining alternative local authority housing, but her new home is still relatively close to the area where Mr. B. lives.

Following the court proceedings Mr. B. continued to follow the applicant in his car and to keep watch on her outside her house. On 4 May 1992, she reported to the police that some kind of poisonous substance had been poured over her garden, which killed the vegetation. On 19 June 1992, the applicant returned to her car to find Mr. B. lying under the car by the tyres, which action he explained by stating that he was tying his shoelaces.

In a statement dated 23 February 1994, the applicant stated that the harassment, molestation and pestering by Mr. B. continues. He persists in following the applicant when she drives in her car and trying to reach her destination before her. The pressure and stress that this has caused her has resulted in a curtailment in the activities of her children and the abandonment of an academic course which she was following.

b. Relevant domestic law and practice

Injunctive relief

The power of the County Courts to grant injunctions, whether interlocutory or final, in the cases where the County Court has jurisdiction, is the same as the power in the High Court (section 38 of the the County Courts Act 1984 as amended). The statutory authority contained in section 37(1) of the Supreme Court Act 1981 provides that

the High Court may by order, whether interlocutory or final, grant an injunction "in all cases in which it appears to the Court to be just and convenient to do so".

The courts interpret this power in practice as presupposing the existence of an action, actual or potential, claiming substantive relief which the court has jurisdiction to grant (eg the Siskina 1979 AC 210).

The grant of an injunction is discretionary. It will only be granted if it is shown, inter alia, that it is necessary ie. because it is likely that the defendant will repeat the actions complained of. In this context, the courts take into account how long ago the last action complained of took place.

Remedies available under domestic law

The law of tort provides, inter alia, for actions claiming damages in respect of trespass to the person (false imprisonment, battery or assault), trespass to land or to goods. There are also dicta suggesting an action may lie in tortious interference with the highway (Thomas v. National Union of Mineworkers 1986 1 Ch).

The tort of nuisance provides remedies where there is undue interference with the use and enjoyment of land.

In the case of Khorasandjian v. Bush (1993 QB 727), the Court of Appeal held, by a majority, that where the defendant (an ex-boyfriend) was pestering the plaintiff, inter alia, by repeated telephone calls, such conduct amounted to private actionable nuisance in that it interfered with the ordinary and reasonable use of property, and that the County Court had power to grant an injunction in this context.

An action may also be brought in tort in respect of conduct which is calculated to impair the plaintiff's health whether physical or mental and having that effect (Wilkinson v. Downton 1897 2 QB 57, Janvier v. Sweeney 1919 2 KB 316 and Burnett v. George 1992 1 FLR 525). In this last case, in which the plaintiff complained of being the victim of a campaign of harassment from a former male friend, the Court of Appeal granted an interlocutory injunction prohibiting the defendant from "assaulting, molesting or otherwise interfering with the plaintiff by doing acts calculated to cause her harm". In the case of Khorasandjian v. Bush (see above), the Court of Appeal also appear to have considered that the grant of an interlocutory injunction was justified under this line of authority. While it did not appear in that case that the plaintiff was as yet suffering from any physical or psychiatric illness there was an obvious risk that the cumulative effect of the campaign of harassment would cause such illness. Consequently, the courts were entitled to look at the defendant's conduct as a whole and to restrain his acts of harassment on a quia timet basis. The majority of the court thus approved an injunction by the county court judge restraining the defendant from harassing or molesting the plaintiff. The dissenting judge considered that the injunction should have been restricted to "acts calculated to do the <plaintiff> harm".

The existence of a tort of harassment has yet to receive express recognition under English law. In Patel v. Patel (1988 2 FLR 179), Mr Justice Waterhouse in the Court of Appeal stated that "in the present state of the law there is no tort of harassment". Lord Justice Dillon in the Khorasandjian case commented that he found it "difficult to give much weight to that general dictum ...when the reformulated injunctions which Waterhouse J. approved included an injunction restraining the defendant from molesting the plaintiff". In the consultation paper of the Lord Chancellor's Department "Infringement of Privacy" dated July 1993, it was stated:

> "4.16 The question whether there exists a general tort of harassment in England and Wales has been considered twice by the Court of

Appeal in recent years, in cases involving family or personal relationships. The Court took different approaches in the two cases. In Patel v. Patel Waterhouse J; stated that "in the present state of the law there is no tort of harassment" and May LJ that "in common-law actions based upon an alleged tort injunctions can only be an appropriate remedy where an actual tortious act has been or is likely to be committed". On the other hand, in Khorasandjian v. Bush, Dillon LJ and Rose LJ came close to saying that there was such a tort, although they did not do so expressly...

4.20 The present state of the law is uncertain, with conflicting decisions both in the High Court and the Court of Appeal. It is too early to say categorically that there is now a tort of harassment...".

COMPLAINTS

The applicant complains of the continued harassment inflicted on her by Mr. B. in respect of which she is afforded no practical or effective remedy in the domestic courts. This, she submits, discloses a lack of respect for her private life and home and an interference with her enjoyment of her possessions, namely, her home. She invokes Articles 8 and 13 of the Convention and Article 1 of Protocol No. 1 to the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 10 July 1992 and registered on 24 July 1992.

On 12 October 1992, the Commission decided to communicate the application to the Government and to ask for written observations on the admissibility and merits of the application.

The Government's observations were submitted on 18 March 1993 after one extension of the time-limit, and the applicant's observations in reply were submitted on 26 July 1993 after one extension of the time-limit.

On 14 May 1993, the Commission decided to grant legal aid to the applicant.

On 18 October 1993, the Commission decided to invite the parties to make submissions at an oral hearing.

On 18 February 1994, the applicant presented further written submissions.

At the hearing held on 7 March 1994, the parties were represented as follows:

For the Government

Mr. Huw Llewellyn	Agent
Mr. James Holman, Q.C.	Counsel
Ms Andrea Jenkins	Legal Adviser, Lord Chancellor's Department
Ms Susan Dickson	Legal Adviser, Foreign and Commonwealth Office
Ms Gloria Wilkinson	Administrator, Lord Chancellor's Department

For the applicant

Mr. Edmund Farrell	Counsel
Mr. John Roberts	Solicitor

The applicant also attended.

THE LAW

1. The applicant complains that the failure to provide her with a remedy in the domestic courts in respect of the harassment by Mr. B. constitutes an infringement of her right to respect for her private life and home and with the peaceful enjoyment of her possessions, namely, her home. She invokes Article 8 (Art. 8) of the Convention and Article 1 of Protocol No. 1 (P1-1) to the Convention.

Article 8 (Art. 8) of the Convention provides:

"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 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."

Article 1 of Protocol No. 1 (P1-1) to the Convention provides in its first sentence:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions...".

The applicant submits that the United Kingdom is under a positive obligation to ensure the effective implementation of its Convention obligations. She submits that the Government have failed to provide in their law for practical and effective protection from harassment and that this is in violation of her rights as guaranteed by Article 8 (Art. 8) of the Convention and Article 1 of Protocol No. 1 (P1-1) above.

As to whether the responsibility of the Government is engaged, the Government have made no specific submission but leave the question to be decided by the Commission in the light of its jurisprudence.

The Commission recalls that the obligation to secure the effective exercise of Convention rights imposed by Article 1 (Art. 1) of the Convention may involve positive obligations on a State and that these obligations may involve the adoption of measures even in the sphere of relations between individuals (see eg Eur. Court H.R., X. and Y. v. the Netherlands judgment of 26 March 1985, Series A no. 91, p. 11, paras. 22 and 33).

On the facts of this case, the alleged harassment of the applicant by Mr. B. is of a level which could arguably constitute an interference with the applicant's right to respect for her private life and the enjoyment of her home. The Commission notes the persistent and distressing nature of the alleged conduct of Mr. B. and the consequent effect which it has had on the applicant and the way in which she leads her life. In these circumstances, the Commmission finds that the responsibility of the State is engaged and that it is under a positive obligation to secure the applicant's rights by providing adequate protection against this type of deliberate persecution.

The respondent Government submit however that the applicant has failed to exhaust domestic remedies since her case against Mr. B. was not sufficiently or adequately pursued in the domestic courts. They point out that so far as damage to her home, garden or car was concerned, or direct assault upon herself, she had clear and undoubted remedies based on trespass to her property or goods, and assault. They refer in respect of her other complaints to a range of remedies, including a claim for damages and an injunction, based on tortious interference with the right to use the highway, conduct calculated to impair health and having that

effect, or nuisance. They also submit that the Court of Appeal in the case of Khorasandjian v. Bush (1993 QB 727) found that harassment could constitute tortious conduct and could permit the grant of an injunction. Further, they point out that the applicant failed to appeal to the Court of Appeal from the decision of the County Court refusing an interlocutory injunction and that it does not appear that she exhaustively pleaded and argued her case before the County Court at first instance.

The applicant alleges that she has no available effective domestic remedy for her complaints. She was refused an injunction by the County Court, in respect of which an appeal would have been without any prospect of success given the state of the case-law at the time. The remedies afforded in respect of torts such as nuisance do not extend to cases such as her own where the conduct complained of falls short of an actionable tort and where there is no actual physical or psychiatric damage suffered, as opposed to emotional stress and trauma. Further, the case-law of the courts in this area is unclear and self-contradictory and, she submits, does not reveal any recognition of the existence of a tort of harassment. She contends that she should be provided with a single coherent remedy in respect of the harassment which she suffers and that at best domestic law offers piecemeal and highly doubtful solutions.

The Commission recalls that Article 26 (Art. 26) of the Convention only requires the exhaustion of such remedies which relate to the breaches of the Convention alleged and at the same time can provide effective and sufficient redress. An applicant does not need to exercise remedies which, although theoretically of a nature to constitute remedies, do not in reality offer any chance of redressing the alleged breach (cf. No. 9248/81, Dec. 10.10.83, D.R. 34 p. 78).

It is furthermore established that the burden of proving the existence of available and sufficient domestic remedies lies upon the State invoking the rule (cf. Eur. Court. H.R., Deweer judgment of 27 February 1980, Series A no. 35, p. 15, para. 26, and No. 9013/80, Dec. 11.12.82, D.R. 30 p. 96, at p. 102).

It appears to the Commission that there are well-established remedies under domestic law which would have provided the possibility of obtaining damages and/or injunctive relief in respect of the applicant's specific complaints which allege that Mr. B. has entered her home or attempted to interfere with her property or assaulted her. While the Commission notes that the proceedings in the County Court included claims in respect of assault and trespass, it is apparent that these claims were introduced in respect of incidents which were too remote in time for the Court to exercise its discretion in issuing an injunction. Insofar as incidents relating to her property have taken place following the court proceedings, the Commission notes that the applicant has not sought relief in the courts alleging trespass to property or nuisance.

Insofar as the applicant complains in more general terms of the campaign of harassment, ie. actions falling short of assault, trespass or nuisance, the Commission notes that English law at the present time does not appear expressly to acknowledge the existence of a tort of harassment as such. It is evident however that an action lies in respect of conduct calculated to impair health and having that effect. The Court of Appeal has granted or upheld interlocutory injunctions restraining such conduct where a plaintiff alleged that she was being subjected to a campaign of harassment by a former male friend. Moreover, in Khorasandjian v. Bush, the majority of the Court of Appeal adopted the approach of regarding a defendant's conduct as a whole and restraining conduct which risked leading to the impairment of health.

The applicant contends that the County Court refused to grant her an interlocutory injunction in the light of the Court of Appeal decision in Patel v. Patel, which is authority for the proposition that an injunction cannot be granted in the absence of actual tortious acts being committed, or the likelihood that such acts would be committed. It does

not appear however that the County Court was referred to the line of authority establishing the existence of a remedy for conduct calculated to impair health. Further, the applicant took no step with a view to appealing against the refusal of the County Court to grant injunctive relief, neither applying for legal aid nor proceeding with an appeal. The Commission notes that, given the applicant's allegations of continuing harassment, it also remains open for her to issue fresh proceedings.

While, as the applicant points out, there is no certainty that an appeal, given the conflicting decisions of the Court of Appeal, would have succeeded, the Commission's case-law establishes that where there is doubt as to the prospects of success in a particular case it should be submitted to the domestic courts for resolution (see eg. No. 6271/73, Dec. 13.5.76, D.R. 6 p. 62). Further, in a common law system, 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 (see eg. No. 18760/91, Dec. 1.12.93, to be published in D.R.).

Consequently, the Commission concludes that the present applicant had, in relation to her complaints under Article 1 of Protocol No. 1 (P1-1), available to her remedies which could have provided her with effective relief and, in relation to her complaints under Article 8 (Art. 8), the possibility of appealing against the adverse first instance decision in the County Court, which she did not avail herself of. Moreover, the Commission does not find on the facts of this case that the lack of one single remedy for her complaints rendered these avenues of redress impractical or ineffective for the purposes of Article 26 (Art. 26) of the Convention.

It follows that the applicant has not complied with the requirements of Article 26 (Art. 26) of the Convention and that this part of the application must be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

2. The applicant further submits that she has no remedy for her complaints as required by Article 13 (Art. 13) of the Convention.

Article 13 (Art. 13) of the Convention provides:

> "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 it has rejected the applicant's substantive complaints under Article 8 (Art. 8) of the Convention and under Article 1 of Protocol No. 1 (P1-1) to the Convention as failing to comply with the requirement of exhaustion of domestic remedies under Article 26 (Art. 26) of the Convention. The Commmission found that the applicant had failed to avail herself of remedies or the possibility of appealing which could have furnished her with effective redress for her complaints. In these circumstances, the Commission finds that her complaints under Article 13 (Art. 13) of the Convention must be rejected 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.

Deputy Secretary to the Commission (M. de SALVIA)

President of the Commission (C.A. NØRGAARD)