CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

CASE OF PECK v. THE UNITED KINGDOM

(Application no. 44647/98)

JUDGMENT

STRASBOURG

28 January 2003

FINAL

28/04/2003

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

In the case of Peck v. the United Kingdom,

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

Mr M. PELLONPÄÄ, *President*,
Sir Nicolas BRATZA,
Mr A. PASTOR RIDRUEJO,
Mr M. FISCHBACH,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 7 January 2003,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 44647/98) against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a national of the United Kingdom, Mr Geoffrey Dennis Peck ("the applicant"), on 22 April 1996.

2. The applicant, who had been granted legal aid, was represented by Mr P. Leach, a solicitor lecturing in London. The United Kingdom Government ("the Government") were represented by their Agent, Ms R. Mandal, of the Foreign and Commonwealth Office.

3. The applicant complained about the disclosure to the media of closed circuit television footage, which resulted in images of himself being published and broadcast widely, and about a lack of an effective domestic remedy in that respect. He invoked Articles 8 and 13 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11). It was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By decision of 15 May 2001 the Court declared the application admissible.

6. The Government, but not the applicant, filed observations on the merits (Rule 59 § 1). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*).

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1955 and he lives in Essex.

A. Closed Circuit Television ("CCTV") and the relevant footage

9. In February 1994 Brentwood Borough Council ("the Council") approved guidelines for the operation and management of CCTV. The CCTV tape recordings would be retained initially for 90 days, this period to be reviewed from time to time and reduced to a minimum, and the tapes would be erased on completion of the storage period. In the section headed "privacy to neighbouring properties", it was noted that the CCTV system should ensure adequate provision for the avoidance of unwarranted intrusion in areas surrounding those under surveillance. In the event of it becoming apparent that privacy was being violated, it was foreseen that the Council would take such steps as to ensure that "either an electronic (digital) screening or physical screening is taking place". In April 1994 the Council installed a CCTV surveillance system in Brentwood. It was fully operational by July 1994. The Council's monitoring operator had a direct visual and audio link to the police so that if it was considered that an incident warranting police involvement was taking place, the images being captured could be switched through to the police.

10. In August 1995 the applicant was suffering from depression as a result of personal and family circumstances. On 20 August 1995 at 11.30 p.m. he walked alone down the High Street towards a central junction in the centre of Brentwood with a kitchen knife in his hand and he attempted suicide by cutting his wrists. He stopped at the junction and leaned over a railing facing the traffic with the knife in his hand. He was unaware that a CCTV camera, mounted on the traffic island in front of the junction, filmed his movements. The CCTV footage later disclosed did not show the applicant cutting his wrists, the operator was solely alerted to an individual in possession of a knife at the junction.

11. The police were notified by the CCTV operator and arrived. They took the knife from the applicant, gave him medical assistance and brought him to the police station. He was detained under the Mental Health Act

1983. His custody record refers to his self-inflicted injury to his wrists on arrival and notes that he was examined and treated by a doctor, after which he was released without charge and taken home by police officers.

B. Release and publication of the footage

12. On 14 September 1995 the CCTV working party of the Council agreed to authorise the release of regular press features on the CCTV system. The Council also decided to cooperate with third parties in the preparation of factual programmes concerning their CCTV system.

13. The Council's first press feature ("CCTV News") was released on 9 October 1995 and included two still photographs taken from the CCTV footage of the applicant to accompany an article entitled "Defused – the partnership between CCTV and the police prevents a potentially dangerous situation". The applicant's face was not specifically masked. The article noted that an individual had been spotted with a knife in his hand, that he was clearly unhappy but not looking for trouble, that the police had been alerted, that the individual had been disarmed and brought to the police station where he was questioned and given assistance for his problems. The article included the name of a Council employee in the event that readers wished to obtain copies of the pictures.

14. On 12 October 1995 the "Brentwood Weekly News" newspaper used a still photograph of the incident involving the applicant on its front page to accompany an article on the use and benefits of the CCTV system. The applicant's face was not specifically masked.

15. On 13 October 1995 an article entitled "Gotcha" appeared in the "Yellow Advertiser", a local newspaper with a circulation of approximately 24,000. The article was accompanied by a photograph of the applicant taken from the CCTV footage. The newspaper article referred to the applicant having been intercepted with a knife and a potentially dangerous situation being defused as a result of the CCTV system. It was noted that the applicant had been released without charge.

16. As a result Anglia Television sought, and the Council provided, footage of the incident involving the applicant. On 17 October 1995 extracts from that footage were included in its news programme about the CCTV system, a local broadcast to an average audience of 350,000. The applicant's face had been masked at the Council's oral request. However, that masking was later considered inadequate by the Independent Television Commission (see below), the applicant's distinctive hairstyle and moustache meaning that he was easily recognisable to anyone who knew him.

17. On 18 October 1995 the Chairman of the Council informed the Council Technical Services Committee that cooperation had been, and would continue to be, given in the preparation of factual documentary

programmes concerning the CCTV system. He referred to the feature on CCTV which had been broadcast by Anglia Television on the previous day.

18. In late October or November 1995 the applicant became aware that he had been filmed on CCTV and that footage had been released because a neighbour told his partner that the former had seen him on television. He did not take any action then as he was still suffering from severe depression.

19. On 16 February 1996 a second article entitled “Eyes in the sky triumph” was published in the “Yellow Advertiser” outlining the benefits of CCTV in the fight against crime and was accompanied by the same photograph as had been previously used by that newspaper. It appears that a number of people recognised the applicant. A letter of 25 April 1996 from the “Yellow Advertiser” opined that the applicant was not identifiable. The Press Complaints Commission did not decide whether or not the applicant was identifiable from the photograph (see below).

20. At or about that time the Council agreed to furnish CCTV footage of, *inter alia*, the applicant to the producers of “Crime Beat”, a series on BBC national television with an average of 9.2 million viewers. The Council imposed orally a number of conditions on the producers including that no one should be identifiable in the footage and that all faces should be masked. The BBC were also to consult with the police to ensure that they had “no objection to recordings being shown because of *subjudice* issues”.

21. In or around 9-11 March 1996 the applicant was told by friends that they had seen him on 9 March 1996 in trailers for an episode of “Crime Beat” which was to be broadcast soon. On 11 March 1996 he complained to the Council about the forthcoming programme at which stage the Council became aware of his identity. The Council contacted the producers who confirmed that his image had been masked. That evening the CCTV footage was shown on “Crime Beat”. The applicant's image was masked in the main programme itself but the Broadcasting Standards Commission (see below) later found that masking inadequate. Many of the applicant's friends and family who saw the programme recognised the applicant.

22. In response to the applicant's request for a copy of the Council's licence agreement with the producers of “Crime Beat”, by letter dated 21 February 1997 the Council provided an unsigned and undated agreement which did not appear to relate to the applicant but which contained a requirement to mask all faces in any copies of the relevant video. By letter dated 31 October 1997 the Council confirmed that it could not locate a signed copy of the agreement with the producers but it included an earlier draft of that agreement which had been signed by the producers, which related to the footage of the applicant but which did not include any masking requirement.

23. The applicant made a number of media appearances thereafter to speak out against the publication of the footage and photographs. On 28 March 1996 he participated in a national radio programme (BBC

Radio 4). On 31 March 1996 he spoke to a journalist who published an article in a national newspaper and this was the first time the applicant's name appeared in the media. Other newspaper articles included photographs of the applicant or quotes given by him. He also appeared on national television: on 13 April 1996 in Channel 4's "Right to Reply", on 25 July 1996 on Channel's 5's "Espresso" and on 5 August 1997 on BBC 1's "You Decide". He also had his photograph published in the "Yellow Advertiser" on 25 October 1996.

C. The Broadcasting Standards Commission ("BSC")

24. On 25 April 1996 the applicant lodged a complaint with the BSC in relation to, *inter alia*, the "Crime Beat" programme alleging an unwarranted infringement of his privacy and that he had received unjust and unfair treatment. On 13 June 1997 the BSC upheld both of his complaints.

25. The BSC noted that the BBC had already accepted that it had meant to mask the applicant's image and that this had not been done in the trailer due to an oversight. The BSC also considered the masking during the programme inadequate as the applicant had been recognised by viewers who had not seen the trailer. It was accepted that the BBC had not intended that the applicant would be identifiable. However, the BSC found that the effect was to reveal to the applicant's family, friends and neighbours an episode which he did not wish to reveal, and that the outcome had been distressing and amounted to an unwarranted infringement of his privacy. The BSC added that the fact that the applicant later chose to speak publicly about this incident did not alter the infringement established. The BBC was directed to broadcast a summary of the adjudication of the BSC with the episode of "Crime Beat" on 12 June 1997 and a summary of the adjudication was also published in the "Daily Telegraph" newspaper on 12 June 1997.

D. The Independent Television Commission ("ITC")

26. On 1 May 1996 the applicant complained to the ITC in respect of the broadcast by Anglia Television. Anglia Television had already apologised to the applicant and conceded that it had breached the privacy requirements of section 2(2) and (5) of the ITC code (sections concerning coverage of events in public and scenes of suffering and distress). The ITC noted that the implication was that a man carrying a knife was likely to be intent on a criminal act. It found that the applicant's identity was not adequately obscured and that he was readily identifiable and easily recognisable by those who knew him. It found that section 2(2) and (5) of the code had been breached and the decision of the ITC was published in its Programme Complaints and Interventions Report of June 1996. Given the admission and apology by Anglia Television, no further action was taken by the ITC.

E. The Press Complaints Commission ("PCC")

27. On 17 May 1996 the applicant complained to the PCC in respect of the articles published in the "Yellow Advertiser". The PCC rejected the applicant's complaint without a hearing and the decision was communicated to the applicant by letter dated 2 August 1996. The PCC considered that, whether or not the applicant was identifiable from the photographs, the events in question took place in a town high street, open to public view. It did not consider that the juxtaposition of the photographs and the articles implied that the applicant had committed a crime and it had been made clear that he was released without charge, the second article indicating that the applicant was ill at the relevant time.

F. The judicial review proceedings

28. On 23 May 1996 he applied to the High Court for leave to apply for judicial review of the Council's disclosure of the CCTV material arguing, *inter alia*, that that disclosure had no basis in law. On 26 June 1996 a single judge of the High Court refused leave. On 18 October 1996 the High Court granted leave on a renewed request and leave to amend the application to include a complaint that the disclosure was, if lawful, irrational.

29. By judgment dated 25 November 1997 the High Court rejected the application for judicial review. It found that the purpose of section 163 of the Criminal Justice and Public Order Act 1994 ("the 1994 Act") was to empower a local authority to provide CCTV equipment in order to promote the prevention of crime or the welfare of victims of crime:

> "By publicising information about the successful operation of the CCTV, the Council was providing information about its effectiveness and thereby reinforcing the deterrent effect of its operation. The making available to the media of footage from the CCTV film to show the effectiveness of the system can properly be said ... to be incidental to and to facilitate the discharge of the Council's function under Section 163 [of the 1994 Act] because it thereby increased, or tended to increase, the preventative effect of the equipment which [the Council was] providing for the purposes of the prevention of crime."

30. It concluded that the Council had the power to distribute the CCTV footage to the media by virtue of section 111 of the Local Government Act 1972 in the discharge of their functions under Section 163 of the 1994 Act.

31. As to the "rationality" of the Council's decision to disclose, the applicant submitted that the Council acted irrationally in disclosing the footage with the aim of crime prevention when he had not been, in fact, involved in any criminal activity. He argued that by failing to consult the police to see if he had been charged with a criminal offence and to impose sufficient restrictions as regards disclosure of his identity, the Council had

facilitated an unwarranted invasion of his privacy which was contrary to the spirit, if not the letter, of the Council's guidelines.

32. The High Court judge had some sympathy with that submission but did not consider it correct in law. He went on:

> "I have some sympathy with the applicant who has suffered an invasion of his privacy, as is borne out by the findings of the Independent Television Commission and the Broadcasting Standards Commission. However, if I am right in deciding that the Council does have power to distribute the film footage from its CCTV system, there may on occasion be undesirable invasions of privacy. Unless and until there is a general right of privacy recognised by English law (and the indications are that there may soon be so by incorporation of the European Convention on Human Rights into our law), reliance must be placed on effective guidance being issued by Codes of practice or otherwise, in order to try and avoid such undesirable invasions of a person's privacy.
>
> The evidence is that the CCTV cameras in public places play an important role in both crime prevention and crime detection. In this case, the film footage showed a man walking in the High Street carrying a large knife in his hand. It did not show him attempting to commit suicide. It was plainly a potentially dangerous situation which the Council's monitoring employee quite properly put to the police, as a result of which the man was arrested. ... It was not unreasonable for the Council to conclude that the footage was a useful example of how a potentially dangerous situation can be avoided. ... In those circumstances, it seems to me that the decision of the Council to distribute the film footage to the media could not be said to be irrational or unreasonable, bearing in mind that the film did not show an attempted suicide and that, at the time, they did not know the applicant's identity. They therefore had no reason to consult the police as to whether an offence had been committed. They did not sell the take-outs from the CCTV footage for commercial gain and, more importantly, they had imposed on the television companies a requirement that an individual's face should be masked. It is true that that was a verbal rather than a written requirement, but I am not persuaded that what happened was likely to have been different if it had been a written requirement. In the event, the fault lay with the television companies. Anglia TV failed to mask the applicant's identity adequately. The BBC failed to mask the applicant's identity at all in the trailers. As soon as the council were notified about that by the applicant, two days before the programme went out, which was the first time they were aware of the applicant's identity, they immediately contacted the BBC and received assurances that his image had been masked in the programme. In the event, unknown to the Council, it had not been adequately masked in the programme.
>
> I am sure that lessons can be learnt from this unfortunate incident, and it may be that, with the benefit of hindsight, the Council will want to see if they can tighten up their guidelines to seek to avoid a similar incident in the future. I am, however, equally sure that, in the circumstances that I have described, the Council cannot be said to have acted irrationally in the sense that they had taken leave of their senses or had acted in a manner in which no reasonable local authority could sensibly have acted."

33. An application to the High Court for leave to appeal to the Court of Appeal was rejected. The subsequent leave application to a single judge of the Court of Appeal was rejected on 21 January 1998 because:

> "... the [High Court] Judge was plainly correct in his interpretation of the relevant statutory provisions and the Council was neither acting outside its statutory authority nor irrationally in making the film and photographs available to the media. The injury, of which complaint is made, arises from a failure on the part of the media to sufficiently disguise the applicant when making the film and photographs visible to the public. That is and has been the subject of complaint against the media involved but is not capable of supporting a claim for a declaration against Brentwood Borough Council."

34. Following an oral hearing before the full Court of Appeal, the applicant's leave application was dismissed on 19 February 1998.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The relevant powers of the Council

35. The Criminal Justice and Public Order Act 1994 ("the 1994 Act") came into force on 3 February 1995. Section 163, in so far as relevant, provides as follows:

> "1. Without prejudice to any power which they may appear to exercise for those purposes under any other enactment, a local authority may take such of the following steps as they consider will, in relation to their area, promote the prevention of crime or the welfare of the victims of crime –
>
> (a) providing apparatus for recording visual images of events occurring on any land in their area;
>
> (b) providing within their area a telecommunications system which, under Part II of the Telecommunications Act 1984, may be run without a licence;
>
> (c) arranging for the provision of any other description of telecommunications system within their area or between any land in their area and any building occupied by a public authority.
>
> 2. Any power to provide, or to arrange for the provision of, any apparatus includes power to maintain, or operate, or, as the case may be, to arrange for the maintenance or operation of, that apparatus."

36. Section 111(1) of the Local Government Act 1972 provides, in so far as relevant, 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 the power to do anything ... which is calculated to facilitate, or is conducive or incidental to the discharge of any of their functions."

37. Essex Police Policy Guidelines dated June 1995 concern the involvement of the police in the installation and operation of CCTV systems in their remit. In the section concerning the release to the media of video

footage, it was pointed out that care should be taken not to jeopardise any existing or future legal proceedings, that licence agreements covering all appropriate terms and conditions of release should be drawn up and that care should always be taken to ensure that victims or other innocent parties featured were aware of its potential use and, where possible, their consent obtained. Where possible, the identity of victims, police employees and suspects (where identification might jeopardise criminal proceedings) should be masked.

38. As an extension of its Crime Reduction Programme announced in July 1998, Government funding for CCTV systems was introduced in March 1999 and the sum of 153 million pounds sterling (GBP) has been made available over a period of three years, of which over GBP 40 million has already been allocated to more than 200 CCTV schemes. One of the requirements of such funding is that the scheme should be regulated by a suitable code of practice to ensure that it operates fairly and with proper respect for personal privacy. In the first year of operation of the CCTV system in Brentwood, there was a 34% reduction in crime.

B. Judicial review

39. Where a public authority has exceeded its powers or has acted irrationally or has reached a decision in breach of the rules of procedural fairness, then a person aggrieved may challenge the decision by means of judicial review. If a decision is so disproportionate to its intended objective as to be irrational, the Court will strike it down. The English courts do not recognise proportionality as a separate head of judicial review. However, in the case of *Reg. (Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport & the Regions* [2001] 2 WLR 1389), Lord Slynn of the House of Lords stated *obiter dictum* that:

> "I consider that even without reference to the Human Rights Act 1998 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."

C. Private law remedies

40. The remedy of breach of confidence is made up of three essential elements: the information itself must have "the necessary quality of confidence about it", the information "must have been imparted in circumstances importing an obligation of confidence" and there must have been an "unauthorised use of that information to the detriment of the party communicating it" (*Coco v. A.N. Clark Engineers Ltd [1969] RPC 41*, at *47*). A fuller description of this cause of action together with more recent

domestic case-law are detailed in the case of the *Earl and Countess Spencer v. the United Kingdom* (applications nos. 28851/95 and 28852/95, decision of 16 January 1998, *Decisions and Reports* (DR) 25, p. 56).

41. Where a public official abuses his position by performing an administrative act maliciously, or which he knows he has no power to do, and causes foreseeable harm, then the injured person may recover damages on the basis of misfeasance in public office.

42. The remedy of defamation is well established in English law. Every person is entitled to his good name and to the esteem in which he is held by others and has a right to claim that his reputation shall not be disparaged by defamatory statements made about him to a third person or persons without lawful justification or excuse.

43. The essential elements of malicious falsehood are that a defendant has published words about the claimant that are false, that they were published maliciously and that special damage has followed as a direct and natural result of their publication (*Kaye v. Robertson* [1991] FSR 62).

44. The tort of nuisance consists of an unwarranted interference with the use or enjoyment of land (see, for example, *Thomas v. National Union of Mineworkers [1986] Ch 20*). Trespass consists of an unjustifiable intrusion by one person upon the land in the possession of another. The domestic courts have been developing the concept of a tort of harassment causing personal injury (see, for example, *Burnett v. George [1992] 1 FLR 525* and *Khorasandjin v. Bush [1993] 3 All ER 669*).

45. Depending on the circumstances in which any film has been taken or published, the unauthorised taking or publication of pictures might be prevented (or damages recovered) on the grounds of copyright, breach of contract or inducing breach of contract.

D. Statutory protection for privacy

46. Statute law provides certain protection in the form of the Protection from Harassment Act 1997. Statutory regulation of surveillance is provided by the Interception of Communications Act 1985, by the Intelligence Services Act 1994 and by the Police Act 1997. The purpose of the Regulation of Investigatory Powers Act 2000 is to ensure that the relevant investigatory powers of the authorities are used in accordance with human rights. Many users of CCTV will have to comply with the provisions of the Data Protection Act 1998. Specific statutory protection of privacy is accorded in certain other contexts such as the anonymity of rape victims (Sexual Offences (Amendment) Act 1976) and the prohibition of the publication of the names or photographs of children involved in legal proceedings (Children and Young Persons Act 1933).

47. The Human Rights Act 1998 came into force in October 2000. It requires that, so far as it is possible to do so, primary and subordinate

legislation be read and given effect in a manner compatible with the Convention and further provides that it is unlawful for a public authority to act in a way incompatible with a Convention right.

In the case of *Douglas v. Hello! Ltd* [2001 1WLR 992), Sedley L.J. indicated that he was prepared to find that there was now a qualified right to privacy under English domestic law, although other members of the Court of Appeal (Brooke L.J. and Keene L.J.) did not find it necessary to rule on the point.

E. The media commissions

48. The Broadcasting Standards Commission ("BSC") was established by section 106 of the Broadcasting Act 1996 with effect from April 1997. It is the duty of the BSC to draw up and publish a code giving guidance as to the principles to be observed, and practices to be followed, in connection with the avoidance of unjust or unfair treatment in programmes or the unwarranted infringement of privacy in programmes (section 107 of the 1996 Act). In this respect, paragraph 16 of the code points out that broadcasters should take care with material recorded by CCTV cameras to ensure identifiable individuals are treated fairly and that "any exceptions to the requirement of individual consent would have to be justified by an overriding public interest". The BSC is also required to consider and adjudicate on complaints relating to unjust or unfair treatment in programmes, or to unwarranted infringement of privacy in programmes (sections 110 and 111 of the 1996 Act).

49. The BSC has powers, *inter alia*, to direct broadcasting bodies to publish the findings of the BSC or a summary of them (section 119), but it has no powers to direct a broadcasting body not to broadcast any programme.

50. The Independent Television Commission ("ITC") is a public body set up by the Broadcasting Act 1990 to licence and regulate commercially funded television (excluding television services provided by, *inter alia*, the BBC). The Act requires the ITC to draw up and enforce a code governing programming standards and practice, which code covers issues of privacy. The ITC adjudicates upon complaints made under the code and, where a breach is confirmed, the ITC may impose sanctions such as requiring on-screen apologies, ordering fines and revoking licences.

51. The Press Complaints Commission ("PCC") is a non-statutory body set up by the newspaper industry for the purposes of self-regulation. The PCC operates a voluntary code of practice, which code includes provisions relating to privacy. If a newspaper is found to be in breach of the code, the newspaper is to publish the adjudication of the PCC. The PCC has no legal powers to prevent publication of material, to enforce its rulings or to grant any legal remedies to a complainant.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

52. The applicant complained that the disclosure by the Council of the relevant CCTV footage, which resulted in the publication and broadcasting of identifiable images of him, constituted a disproportionate interference with his right to respect for his private life guaranteed by Article 8 of the Convention. That Article, in so far as relevant, reads as follows:

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

A. The existence of an interference with private life

1. The parties' submissions

53. The Government contended that the applicant's right to private life had not been engaged. They mainly argued that the incident in question did not form part of his private life given the substance of what was filmed and the location and circumstances of filming. The applicant's actions were already in the public domain. Disclosure of those actions simply distributed a public event to a wider public and could not change the public quality of the applicant's original conduct and render it more private. The Government also maintained that the applicant waived his rights by choosing to do what he did, where he did, and submitted that the fact that the applicant did not complain about being filmed, as such, amounted to an acknowledgement that the filming did not engage his right to the protection of his private life. They further considered that the question of whether there was an interference with his private life was not clear-cut and submitted that certain factors should be borne in mind in this respect, including the nature of the impugned act and the parties' conduct.

54. The applicant maintained that the disclosure of the footage constituted a serious interference with his private life. The relevant footage related to an attempted suicide, he was unaware that he was being filmed and the footage showed the immediate aftermath of this episode while he still held the knife. The footage was disclosed to the written and audio-visual media with large audiences, without his consent or knowledge and without masking at all or adequately his identity. His image, even in those circumstances, was broadcast to millions and he was recognised by a large

number of persons who knew him including family members, friends and colleagues. While he was not complaining about being filmed by CCTV (as this saved his life), he took issue with the disclosure by the Council of the CCTV material which resulted in the relevant publications and broadcasts.

55. While the CCTV material disclosed did not show him actually cutting his wrists, the applicant argued that it concerned a period immediately following his suicide attempt and thus related to that personal and private matter. He may have been in the street, but it was late at night, he was not taking part in a public demonstration (the main reason for demonstrating is to be seen) and, given his psychological state, it could not be said that he was there voluntarily at all. He was unaware that he was being filmed and the disclosure took place without his knowledge or consent and the footage was later broadcast, and the stills published, without his permission and in a manner which did not exclude his identification by family, friends, neighbours and colleagues. The BSC, the ITC and the High Court found that his privacy had been invaded and, given those findings, the PCC's contrary view is not tenable.

56. In addition, the applicant maintained that the jurisprudence of the Convention organs accepts that the occurrence of an event in a public place was only one element in the overall assessment of whether there was an interference with private life, other relevant factors including the use made of the material obtained and the extent to which it was made available to the public. In contrast to that jurisprudence, not only was disclosure of the CCTV material specifically foreseen by the Council, but that disclosure was made to the media. Moreover, the applicant contended that it could not be said that he "unequivocally" waived his rights under the Convention on 20 August 1995.

2. The Court's assessment

57. Private life is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name, sexual orientation and sexual life are important elements of the personal sphere protected by Article 8. The Article also protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world and it may include activities of a professional or business nature. There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life" (*P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 56, ECHR 2001-IX, with further references).

58. In the above-cited *P.G. and J.H.* case the Court further noted as follows (paragraph 57):

> "There are a number of elements relevant to a consideration of whether a person's private life is concerned in measures effected outside a person's home or private premises. Since there are occasions when people knowingly or intentionally involve

> themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, though not necessarily conclusive factor. A person who walks down the street will, inevitably, be visible to any member of the public who is also present. Monitoring by technological means of the same public scene (e.g. a security guard viewing through close circuit television) is of a similar character. Private life considerations may arise however once any systematic or permanent record comes into existence of such material from the public domain."

59. The monitoring of the actions of an individual in a public place by the use of photographic equipment which does not record the visual data does not, as such, give rise to an interference with the individual's private life (see, for example, *Herbecq and Another v. Belgium*, applications nos. 32200/96 and 32201/96, Commission decision of 14 January 1998, DR 92-A, p. 92). On the other hand, the recording of the data and the systematic or permanent nature of the record may give rise to such considerations. Accordingly, in both the *Rotaru* and *Amann* judgments (to which the *P.G. and J.H.* judgment referred) the compilation of data by security services on particular individuals even without the use of covert surveillance methods constituted an interference with the applicants' private lives (*Rotaru v. Romania* [GC], no. 28341/95, §§ 43-44, ECHR 2000-V, and *Amann v. Switzerland* [GC], no. 27798/95, §§ 65-67, ECHR 2000-II). While the permanent recording of the voices of *P.G.* and *J.H.* was made while they answered questions in police cell as police officers listened to them, the recording of their voices for further analysis was regarded as the processing of personal data about them amounting to an interference with their right to respect for their private lives (the above-cited *P.G. and J.H.* judgment, at §§ 59-60).

60. However, the Court notes that the present applicant did not complain that the collection of data through the CCTV camera monitoring of his movements and the creation of a permanent record of itself amounted to an interference with his private life. Indeed, he admitted that that function of the CCTV system together with the consequent involvement of the police may have saved his life. Rather he argued that it was the disclosure of that record of his movements to the public in a manner in which he could never have foreseen which gave rise to such an interference.

61. In this respect, the Court recalls the Lupker and Friedl cases decided by the Commission which concerned the unforeseen use by the authorities of photographs which had been previously voluntarily submitted to them (*Lupker and Others v. the Netherlands*, no. 18395/91, Commission decision of 7 December 1992, unreported) and the use of photographs taken by the authorities during a public demonstration (*Friedl v. Austria*, judgment of 31 January 1995, Series A no. 305-B, Friendly Settlement, Commission report of 19 May 1994, §§ 49-52). In those cases, the Commission attached importance to whether the photographs amounted to an intrusion into the applicant's privacy (as, for instance, by entering and taking photographs in a

person's home), whether the photograph related to private or public matters and whether the material thus obtained was envisaged for a limited use or was likely to be made available to the general public. In the *Friedl* case, the Commission noted that there was no such intrusion into the "inner circle" of the applicant's private life, that the photographs taken of a public demonstration related to a public event and that they had been used solely as an aid to policing the demonstration on the relevant day. In this context, the Commission attached weight to the fact that the photographs taken remained anonymous in that no names were noted down, the personal data recorded and photographs taken were not entered into a data processing system and no action had been taken to identify the persons photographed on that occasion by means of data processing (see *Friedl v. Austria*, the above cited Commission report, §§ 50-51). Similarly, in the *Lupker* case, the Commission specifically noted that the police used the photographs to identify offenders in criminal proceedings only and that there was no suggestion that the photographs had been made available to the general public or would be used for any other purpose.

62. The present applicant was in a public street but he was not there for the purposes of participating in any public event and he was not a public figure. It was late at night, he was deeply perturbed and in a state of some distress. While he was walking in public wielding a knife, he was not later charged with any offence. The actual suicide attempt was neither recorded nor therefore disclosed. However, footage of the immediate aftermath was recorded and disclosed by the Council directly to the public in its "CCTV News". In addition, the footage was disclosed to the media for further broadcast and publication purposes. Those media included the audio-visual media: Anglia Television broadcast locally to approximately 350,000 people and the BBC broadcast nationally and it is "commonly acknowledged that the audio-visual media have often a much more immediate and powerful effect than the print media" (*Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, § 31). The "Yellow Advertiser" circulated in the applicant's locality to approximately 24,000 persons. The applicant's identity was not adequately, or in some cases not at all, masked in the photographs and footage so published and broadcast. He was recognised by certain members of his family and by his friends, neighbours and colleagues.

As a result, the relevant moment was viewed to an extent which far exceeded any exposure to a passer-by or to security observation (as in the above-cited *Herbecq* case) and to a degree surpassing that which the applicant could possibly have foreseen when he walked in Brentwood on 20 August 1995.

63. Accordingly, the Court considers that the disclosure by the Council of the relevant footage constituted a serious interference with the applicant's right to respect for his private life.

B. Whether the interference was in accordance with the law and pursued a legitimate aim

64. The Government submitted that any interference was "in accordance with the law" in that it fell within section 163 of the Criminal Justice and Public Order Act 1994 ("the 1994 Act") and section 111 of the Local Government Act 1972 ("the 1972 Act"), both of which provisions complied with the Convention's "quality of law" requirements. They added that any interference pursued a legitimate aim: as accepted during the judicial review proceedings, the Council's intention in installing and operating the CCTV system and in disclosing footage to the media was the detection and prevention of crime thereby securing public safety and private property.

65. The applicant considered that the interference in question was not "in accordance with the law" because it was not foreseeable. He argued that the scope and conditions of the exercise of the discretionary power to disclosure in the 1972 and 1994 Acts were not indicated with sufficient clarity and thereby failed to protect him against arbitrary interferences with his rights. He also considered that the disclosure of the CCTV material had no legitimate aim because any connection between the aim of detecting and deterring crime and his conduct was too remote.

66. The Court has noted the terms of section 163 of the 1994 Act and section 111(1) of the 1972 Act and the judgment of, in particular, the High Court. That court noted that the purpose of section 163 of the 1994 Act was to empower a local authority to provide CCTV equipment in order to promote the prevention of crime and the welfare of victims of crime. It further noted that the publicising of information about the successful operation of the CCTV system reinforced the deterrent effect of its operation. The Council had the power to distribute the CCTV footage to the media for transmission by virtue of section 111 (1) of the 1972 Act in the discharge of their functions under section 163 of the 1994 Act.

67. Accordingly, the Court considers that the disclosure did have a basis in law and was, with appropriate legal advice, foreseeable (The Sunday Times *v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, § 49).

It also regards the disclosure as having pursued the legitimate aim of public safety, the prevention of disorder and crime and the protection of the rights of others.

C. Whether the interference was justified

1. The parties' submissions

68. The Government considered that any interference was proportionate. They pointed out that the domestic courts had already assessed the

reasonableness of the disclosure, and that this Court should not substitute its own assessment for that of the domestic institutions.

69. As to the reasons why any such interference was proportionate, the Government emphasised their obligation to protect the life and property of its citizens. Given the margin of appreciation open to Governments to implement the most suitable measures to combat crime, the Government's view of CCTV as a powerful weapon in that combat must be accepted. Disclosure of CCTV footage complemented this aim: the policy was to give CCTV as prominent a role as possible in order to avoid covert surveillance, to inspire public confidence and support for the system and to deter criminals. This aim of deterrence was expressly accepted by the High Court as one of the bases of the Council's conduct, and crime had decreased since the installation of the CCTV system. An important element of the publicity given to CCTV had been the release to the media of footage and the CCTV footage of the applicant was an entirely suitable illustration of the type of situation constituting good publicity for CCTV. It was not a private tragedy sensationalised by the disclosure of the footage since it did not show the applicant's attempted suicide and it was not apparent from the footage disclosed that he had made such an attempted or tried to injure himself in any way. It was not obvious to the Council operator, who did not know on the relevant evening that the applicant had tried to commit suicide. Rather the footage evidenced the police defusing a potentially dangerous situation.

70. In addition, they argued that cooperation with the media to publicise the CCTV system would be undermined if they had to obtain the consent of everyone who appeared on the image, the Government referring to scenes on crowded streets and to footage which might include missing persons whose consent cannot be obtained.

71. Moreover, the Government submitted that the nature of the impugned act and the parties' conduct are relevant considerations in this context also. As to the impugned act, they point out that the disclosed footage was obtained neither covertly, intrusively or selectively obtained and the degree of intrusion was limited. The applicant, the Government suggested, courted attention by going to a busy junction at the centre of Brentwood clearly brandishing a knife, and he compounded the publicity thereafter by his voluntary appearances in the media. Indeed it was during those appearances that he was first identified to the public and that the first public reference was made to his attempted suicide. The Council, the Government contended, acted in good faith in the public interest with no commercial motive. Since it had no facilities to mask faces on CCTV footage, it released the footage to the media on the basis that the relevant television companies would mask the applicant's image. The fact that those companies did not do so, or did so inadequately, was not the responsibility of the Council.

72. The applicant maintained that the interference was not proportionate given the serious nature of the interference. The Council should have, and could have, taken reasonable steps to identify the applicant and inform themselves of his situation. It should have, since the purpose of disclosing the film was to advertise widely the benefits of CCTV and not to identify a criminal. It could have, because there was only one person in the image whose identification would have been possible through the police who had been called by the CCTV operator to the scene.

73. Moreover, he considers that the Council's attempt at ensuring the masking of the relevant image was inadequate. If the Council did not have the facilities themselves, they should have ensured that the media properly carried out the masking. Written agreements would be a step in the right direction, but none were completed prior to the disclosures in his case.

74. Furthermore, the applicant submitted that there was no sufficiently important countervailing public interest. He was not a public figure and he had no public role. The disclosure was made not to catch a criminal or find a missing person but to respond to the general aim of publicising the effectiveness of the CCTV system, to which aim properly masked images or other less intrusive footage would have responded.

75. The applicant contested the Government's assertion that the High Court had assessed the proportionality of the interference. He also rejected their contention that he courted attention on 20 August 1995. He further disputed their questioning of his motivation by their reference to his voluntary media appearances in 1996: his image had already been published and broadcast without his consent and he was identified by those who knew him. He then correctly pursued any remedies available, which procedures were public, and he could not be criticised for speaking about his predicament to responsible media. He faced the classic dilemma of one whose privacy has been interfered with: seeking a remedy and defending one's position by speaking out inevitably leads to further publicity.

2. The Court's assessment

76. In determining whether the disclosure was “necessary in a democratic society”, the Court will consider whether, in the light of the case as a whole, the reasons adduced to justify the disclosure were “relevant and sufficient” and whether the measures were proportionate to the legitimate aims pursued.

77. In cases concerning the disclosure of personal data, the Court has also recognised that a margin of appreciation should be left to the competent national authorities in striking a fair balance between the relevant conflicting public and private interests. However, this margin goes hand in hand with European supervision (*Funke v. France*, judgment of 23 February 1993, Series A no. 256-A, § 55) and the scope of this margin depends on such factors as the nature and seriousness of the interests at stake and the

gravity of the interference (*Z. v. Finland*, judgment of 25 February 1997, *Reports of judgments and Decisions* 1997-I, § 99).

78. The above-cited *Z. v. Finland* judgment related to the disclosure in court proceedings without the applicant's consent of his health records including his HIV status. The Court noted that the protection of personal data was of fundamental importance to a person's enjoyment of his or her right to respect for private life and that the domestic law must therefore afford appropriate safeguards to prevent any such disclosure as may be inconsistent with the guarantees in Article 8 of the Convention. In so finding, the Court referred, *mutatis mutandis*, to Articles 3 § 2 (c), 5, 6 and 9 of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (European Treaty Series no. 108, Strasbourg, 1981). It went on to find that the above considerations were "especially valid" as regards the protection of the confidentiality of information about a person's HIV status, noting that the interests in protecting the confidentiality of such information weighed heavily in the balance in determining whether the interference was proportionate to the legitimate aim pursued. Such interference could not be compatible with Article 8 of the Convention unless it was justified by an overriding requirement in the public interest. Any State measures compelling disclosure of such information without the consent of the patient and any safeguards designed to secure an effective protection called for the most careful scrutiny on the part of the Court.

79. As to the present case, the Court would note at the outset that the applicant was not charged with, much less convicted of, an offence. The present case does not therefore concern disclosure of footage of the commission of a crime.

The Court has also noted, on the one hand, the nature and seriousness of the interference with the applicant's private life (paragraph 63 above). On the other hand, the Court appreciates the strong interest of the State in detecting and preventing crime. It is not disputed that the CCTV system plays an important role in these respects and that that role is rendered more effective and successful through advertising the CCTV system and its benefits.

80. However, the Court notes that the Council had other options available to it to allow it to achieve the same objectives. In the first place, it could have identified the applicant through enquiries with the police and thereby obtained his consent prior to disclosure. Alternatively, the Council could have masked the relevant images itself. A further alternative would have been to take the utmost care in ensuring that the media, to which the disclosure was made, masked those images. The Court notes that the Council did not explore the first and second options and considers that the steps taken by the Council in respect of the third were inadequate.

81. As to the first option, it is true that individuals may not give their consent or that such an exercise may not be feasible where the footage includes images of numerous persons. In such circumstances, it is arguable that a consent-based system of disclosure could in practice undermine the promotion of the effectiveness of the CCTV system. However, in the present case, such limitations were not particularly relevant. The relevant footage clearly focussed on and related to one individual only. It is not disputed that the Council, whose CCTV operator had alerted the police and observed their intervention, could have made enquiries with the police to establish the identity of the applicant and thereby request his consent to disclosure. Indeed, it appears from the Council's own publication ("CCTV News") of 9 October 1995 that certain enquiries had been made with the police to establish that the relevant individual had been questioned and assisted, but not to establish his identity.

82. Alternatively, the Council could have masked such images itself. While the Government confirmed that the Council did not have a masking facility, the Court notes that the Council's own guidelines indicate that it was intended to have such a facility. Indeed, the Court notes that the Council itself directly disclosed in its own publication, the "CCTV News", stills taken from the relevant footage and that no attempt was made to mask those images.

83. As to the third option of ensuring appropriate and sufficient masking by the media to whom footage is disclosed, the Court notes that the High Court found that Anglia Television and the producers of the BBC programme had been orally requested to mask the applicant's image. The Court considers, contrary to the view of the High Court, that it would have been reasonable for the Council to demand written undertakings of the media to mask images, which requirement would have emphasised the need to maintain confidentiality. Indeed the High Court suggested that lessons could be learnt from this "unfortunate incident" and that, with the benefit of hindsight, the Council might see if it could tighten up its guidelines to avoid similar incidents in the future. The Council itself clearly intended to have a written licence agreement with the producers of Crime Beat but this does not appear to have been concluded as no final and signed agreement was disclosed to the applicant or submitted by the Government to this Court. The Essex police guidelines recommend written agreements with masking clauses. Moreover, there is no evidence that the "Yellow Advertiser" was required to mask the applicant's image at all.

84. Furthermore, the relevant CCTV material was released with the aim of promoting the effectiveness of the CCTV system in the prevention and detection of crime and it was not therefore unlikely that the footage would be used in such contexts. This proved to be the case, most notably in the BBC "Crime Beat" programme. In such circumstances and even though the applicant does not directly complain about damage to his reputation, the

Court considers that particular care was required of the Council, which would reasonably have included verifying with the police whether the individual had, in fact, been charged or not. It is difficult to accept the Government's explanation that the Council was unaware of his identity. As noted above, the Council's own "CCTV News" article of 9 October 1995 would imply that the Council had established that the relevant individual had been questioned and given assistance for his problems and could therefore have verified whether the applicant had, in fact, been charged. Indeed, the "Yellow Advertiser" had established by 13 October 1995 that the applicant had not been charged by the police.

85. In sum, the Court does not find that, in the circumstances of this case, there were relevant or sufficient reasons which would justify the direct disclosure by the Council to the public of stills from the footage in own publication "CCTV News" without the Council obtaining the applicant's consent or masking his identity, or which would justify its disclosures to the media without the Council taking steps to ensure so far as possible that such masking would be effected by the media. The crime prevention objective and context of the disclosures demanded particular scrutiny and care in these respects in the present case.

86. Finally, the Court does not find that the applicant's later voluntary media appearances diminish the serious nature of the interference or reduce the correlative requirement of care concerning disclosures. The applicant was the victim of a serious interference with his right to privacy involving national and local media coverage: it cannot therefore be held that against him that he sought thereafter to avail himself of the media to expose and complain about that wrongdoing.

87. Accordingly, the Court considers that the disclosures by the Council of the CCTV material in the "CCTV News" and to the "Yellow Advertiser", Anglia Television and to the BBC were not accompanied by sufficient safeguards to prevent disclosure inconsistent with the guarantees of respect for the applicant' private life contained in Article 8 of the Convention. As such, the disclosure constituted a disproportionate and therefore unjustified interference with his private life and a violation of Article 8 of the Convention.

D. Other complaints under Article 8 of the Convention

88. The applicant also appeared to suggest that the BBC, acting under Royal Charter, was a public authority as was Anglia Television which acted under the authority of the ITC constituted under the Broadcasting Act 1990. Even assuming those media could rely on their rights under Article 10 of the Convention, their broadcasts, he argued, also constituted unjustified interferences with his private life. The Government did not consider that the applicant had, in fact, made that submission and, in any event, denied that

either the BBC or Anglia Television could be regarded as organs of the State or public authorities within the meaning of Article 8 § 2 of the Convention. They relied, *inter alia*, on relevant domestic provisions and the conclusions to be drawn from the inclusion in Article 10 of the Convention of the phrase concerning the licensing of broadcasting, television or cinema enterprises.

The applicant also maintained that, given the significant impact on family members, the disclosure of the footage constituted a serious interference with his right to respect for his family life.

89. The Court notes that the question of whether the BBC was an "emanation of the State" was left open by the Commission in *Huggett v. the United Kingdom* (no. 24744/94, decision of 28 June 1995, DR 82-A, p. 98). However, in the light of the Court's finding of a violation in relation to the disclosure by the Council (at paragraph 87 above), it does not consider it necessary separately to consider these complaints.

90. The applicant further argued that the State failed to fulfil its positive obligation to protect his rights under Article 8 because he had no effective domestic remedy in respect of the disclosures. The Government maintained that there was no breach of any positive obligation and, more particularly, they argued that the applicant had available to him such remedies. The Court considers that the issue of the availability of a domestic remedy for the impugned disclosure by the Council is more appropriately considered under Article 13 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 IN CONJUNCTION WITH ARTICLE 8 OF THE CONVENTION

91. The applicant complained under Article 13, in conjunction with Article 8 of the Convention, that he had no effective domestic remedy in relation to the relevant disclosures by the Council.

92. Article 13, in so far as relevant, reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority ... ."

A. The parties' submissions

93. The Government explained that the need for a law of privacy had been the subject of much debate for many years, many private member's bills and a number of official reports. The debate continued. However, the absence of a general right to privacy in domestic law did not, of itself, show a lack of respect for the applicant's private life. The question was rather whether the regime of legal protection which existed adequately protected the applicant's rights and the Government considered that it did. They

pointed out that the common law and statutory remedies collectively provided a comprehensive regime of legal protection for privacy and therefore performed substantially the same function as a law of privacy.

94. In particular, the Government pointed out that the applicant had been able to assert and vindicate his claims before the BSC, the ITC and the PCC. They accepted that it was not intended that the media commissions should provide a "legal remedy, in the sense of making pecuniary compensation available, to an aggrieved individual who may have been injured by an infringement of the relevant codes". However, they contended that Article 13 did not require in every case a "court" or that a pecuniary award be available. In addition, the Government argued that the remedy of judicial review was also capable, in principle, of providing an adequate remedy and the rejection of the applicant's case did not undermine the effectiveness of that remedy.

95. The Government also maintained that a number of other remedies were available to the applicant. They considered the breach of confidence remedy to be the most relevant, suggesting that the applicant would have been entitled to bring such an action if he had been filmed "in circumstances giving rise to an expectation of privacy on his part". The Government underlined that this was an area of the law which was heavily dependent on policy considerations and, consequently, it was an area that had been, and would continue to be, developed by the courts. The Convention jurisprudence had had an important impact on such developments and would have an even stronger impact with the coming into force of the Human Rights Act 1998. They also submitted that the applicant could have brought an action for defamation or malicious falsehood if any item had been misreported so as to suggest that he had been involved in a criminal act of violence against some other person.

96. The applicant maintained that he had no effective domestic remedy. He pursued the most relevant remedies (the media commissions and judicial review) but those remedies were ineffective: the "irrationality" criteria in judicial review could not be equated with the proportionality test under Article 8 and the media commissions could not award damages.

97. In addition, he argued that a breach of confidence action would have had no realistic prospect of success. He noted that the Government had not quoted a single case where an individual in a relatively similar situation had obtained even partial satisfaction through this remedy. He considered their assertion that an expectation of privacy would be sufficient to give rise to such a remedy to be inaccurate in domestic law, and he found it noteworthy that the Government did not contend that he had failed to exhaust domestic remedies by not taking such an action. Moreover, he considered that the other remedies to which the Government referred were not relevant to his case. Certain of the statutes came into force after the relevant time, other statutes (relating, for example, to secret surveillance) could have no

conceivable impact in the present case, and the common law remedies to which the Government referred (in defamation, malicious falsehood, harassment and breach of confidence) were simply not relevant to the applicant in the particular circumstances of his case.

B. The Court's assessment

98. The Court notes that the applicant complained under Article 8 alone and in conjunction with Article 13 of the Convention, *inter alia*, that he did not have effective domestic remedies. The Government did not argue that the applicant had failed to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention. In the admissibility decision in this case, the Court considered that there was a close connection between any issue under Article 35 § 1 and the merits of the applicant's complaints concerning a lack of an effective domestic remedy and it joined any issue of exhaustion of domestic remedies to the merits of the application.

1. The applicable legal principles

99. The Court recalls that Article 13 guarantees the availability of a remedy at national level to enforce the substance of Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. Thus, its effect is to require the provision of a domestic remedy allowing the "competent national authority" both to deal with the substance of the relevant Convention complaint and to grant appropriate relief (*Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 135, ECHR 1999-VI, and *Murray v. the United Kingdom*, judgment of 28 October 1994, Series A no. 300-A, at § 100). That provision does not, however, require the certainty of a favourable outcome (the above-cited *Amann* judgment, at § 88 with further references) or require the incorporation of the Convention or a particular form of remedy, Contracting States being afforded a margin of appreciation in conforming with their obligations under this provision (*Vilvarajah and Others v. the United Kingdom*, judgment of 30 October 1991, Series A no. 215, § 122).

100. The Court further recalls that in the above-cited *Smith and Grady* judgment, it described the test of "irrationality" applied in judicial review proceedings as follows: a court was not entitled to interfere with the exercise of an administrative discretion on substantive grounds save where the court was satisfied that the decision was unreasonable in the sense that it was beyond the range of responses open to a reasonable decision-maker. In judging whether the decision-maker had exceeded this margin of appreciation, the human rights' context was important, so that the more substantial the interference with human rights, the more the court would require by way of justification before it was satisfied that the decision was reasonable.

It was, however, further emphasised by the Court in that case that, notwithstanding any human rights context, the threshold of irrationality which an applicant was required to surmount was a high one, as confirmed by the domestic judgments in that case. While those courts had commented favourably on those applicants' submissions challenging the justification of the relevant policy (against homosexuals in the armed forces), the domestic courts had, nevertheless, concluded that the policy could not be said to be beyond the range of responses open to a reasonable decision-maker and, accordingly, could not be considered to be "irrational". In such circumstances, the Court considered it clear that, even assuming that the essential complaints of *Smith and Grady* before this Court were before and considered by the domestic courts, the threshold at which those domestic courts could find the impugned policy to be irrational had been placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lay at the heart of the Court's analysis of complaints under Article 8 of the Convention. It therefore concluded that Messrs Smith and Grady had no effective remedy in relation to the violation of their right to respect for their private lives in violation of Article 13 of the Convention.

2. Application of those principles to the present case

101. The Court observes, in the first place, that the present case is distinguishable from *James and Others v. the United Kingdom* (judgment of 21 February 1986, Series A no. 98, §§ 85-86), *Leander v. Sweden* (judgment of 26 March 1987, Series A no. 116, § 77) and The Sunday Times *v. the United Kingdom (no. 2)* (judgment of 26 November 1991, Series A no. 217, § 61), which cases establish that Article 13 cannot be seen as guaranteeing a remedy against primary legislation or equivalent domestic norms. The legislation relevant to the present case did not require disclosure of the CCTV material and the complaint is about the Council's exercise of its powers to disclose.

(a) the regime of legal protection for privacy

102. As in the Winer case (*Winer v. the United Kingdom*, no. 10871/84, Commission decision of 10 July 1986, DR 48, p. 154), the Government argued that the Court should analyse the protection of privacy by the **"**regime of legal protection for privacy" as a whole, this regime effectively carrying out the role of a law of privacy.

However, the Court's task is not to review the relevant law or practice in the abstract but rather to confine itself, without overlooking the general context, to examining the issues raised by the case before it (the above-cited *Amann* judgment, at § 88) and, in particular, to considering only those

remedies which could have some relevance for the applicant (*N. v. Sweden*, no. 11366/85, Commission decision of 16 October 1986, DR 50, p. 173; the above-cited *Winer* decision; and *Stewart-Brady v. the United Kingdom*, nos. 27436/95 and 28406/95, Commission decision of 2 July 1997, DR 90, p. 45). The Court considers that it is not relevant therefore to examine remedies which were not in force at the relevant time or those which had no relevance to the facts of the applicant's case.

103. The Court notes in this regard that the applicant did not complain about malicious acts on the part of the Council, about untrue reports or, at least directly, about an attack on his reputation. It is not disputed that issues of trespass, harassment, nuisance, copyright, breach of contract or secret surveillance by security services have no relevance to the applicant's complaints. Similarly, the Government did not suggest that the Data Protection Act, the Sexual Offences (Amendment) Act 1976, the Children and Young Persons Act 1933 had any relevance to the facts of the present case. The Human Rights Act 1998 did not come into force until October 2000 after the relevant facts of the applicants' case.

104. The Court has therefore confined its assessment to the remedies which could be considered to have had some relevance to the applicant's complaint.

(b) Judicial review

105. The Court has found that the applicant's right to respect for his private life (see paragraph 87 above) was violated by the disclosure by the Council of the relevant footage. It notes that at the material time 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 questions to which answers could be offered.

As in the above-described *Smith and Grady* judgment, the sole relevant issue before the domestic courts was whether the policy could be said to be "irrational". As in the *Smith and Grady* case, the present High Court noted that the applicant had suffered an invasion of privacy but that unless and until there was a general right of privacy in domestic law, reliance had to be placed on the guidance provided by codes of practice or otherwise to avoid such undesirable invasions of privacy. The High Court went on to examine a number of factors including the important role of CCTV cameras in public places, the images captured by those cameras, the fact that the footage was not sold for commercial gain, the attempt (albeit unsuccessful) by the Council to ensure that the applicant's identity was masked and the fact that the footage was not sold for commercial gain. The High Court concluded that, while lessons could be learned from the unfortunate incident including the necessity to tighten up the Council's guidelines to seek to avoid a similar

incident in the future, it was satisfied that the Council could not be said to have acted "irrationally in the sense that they had taken leave of their senses or had acted in a manner in which no reasonable authority could sensibly have acted."

106. In such circumstances, the Court considers that the threshold at which the High Court could find the impugned disclosure irrational was placed so high that it effectively excluded any consideration by it 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 as noted above lie at the heart of the Court's analysis of complaints under Article 8 of the Convention.

As to the Government's reference to the above-cited case of *Alconbury Developments Ltd*, 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 accepted by the Government to be *obiter dictum*. In any event, the Government do not suggest that this comment is demonstrative of the full application by domestic courts of the proportionality principle in considering, in the judicial review context, cases such as the present.

107. The Court finds therefore that judicial review did not provide the applicant with an effective remedy in relation to the violation of his right to respect for his private life.

(c) The media commissions

108. The Court notes that the Government submitted that the proceedings before these commissions provided the applicant with an opportunity to assert and vindicate his rights. However, they accept that those bodies were not "intended to provide a legal remedy, in the sense of making pecuniary compensation available to an aggrieved individual who may have been injured by an infringement of the relevant codes".

109. The Court finds that the lack of legal power of the commissions to award damages to the applicant means that those bodies could not provide an effective remedy to him. It notes that the ITC's power to impose a fine on the relevant television company does not amount to an award of damages to the applicant. While the applicant was aware of the Council's disclosures prior to "Yellow Advertiser" article of February 1996 and the BBC broadcasts, neither the BSC not the PCC had the power to prevent such publications or broadcasts.

(d) An action in breach of confidence

110. The Court considers the fact that the Government did not claim that the applicant had failed to exhaust this remedy to be particularly noteworthy, given the Commission's finding that Earl and Countess Spencer's application (cited above) was inadmissible on this ground.

111. The Court considers that the facts of this case are, in any event, sufficiently different from those in the Spencer case as to allow the Court to conclude that the present applicant did not have an actionable remedy in breach of confidence at the relevant time, even accepting the Government's description of that remedy.

In the first place, the Earl and Countess Spencer had a strong case on the facts that former friends had disclosed in secret indisputably private information previously given to them on a confidential basis by the applicants. The present applicant would have had much greater difficulty in establishing that the footage disclosed had the "necessary quality of confidence" about it or that the information had been "imparted in circumstances importing an obligation of confidence". The Government argued before the Court under Article 8 that the applicant's right to respect for his private life had not even been engaged. They have cited no domestic case which could be considered similar or analogous to the present case and which would suggest that these two elements of the breach of confidence claim were satisfied. The above-cited case of *Douglas v. Hello!* post-dated the relevant facts of the present case and, as importantly, the entry into force of the Human Rights Act 1998. In any event, only one of three judges in that case indicated that he was prepared to find that there was now a qualified right to privacy in domestic law. Moreover, the Court is not persuaded by the Government's argument that a finding by this Court that the applicant had an "expectation of privacy" would mean that the elements of the breach of confidence action were established. The Court finds it to be unlikely that the domestic courts would have accepted at the relevant time that the images had the "necessary quality of confidence" about them or that the information was "imparted in circumstances importing an obligation of confidence".

Secondly, once the material in question was in the public domain, its re-publication was not actionable as a breach of confidence. Such an action could not have been contemplated before the applicant became aware of the disclosures by the Council of the CCTV material namely, prior to October or November 1995. Accordingly, a claim of breach of confidence would not have been actionable in respect of the "Brentwood Weekly News" or the "Yellow Advertiser" articles or in respect of the BBC broadcast.

112. Given these deficiencies, it not necessary to consider whether an award of damages would have been available in a breach of confidence action. The Court would confine itself to noting that, despite this being the second area of dispute between the parties in the above-cited case of the Earl and Countess Spencer, no attempt has been made by the Government in the present case to clarify how damages could have been awarded in the absence of a prior injunction. The applicant could only have applied for such an injunction after he became aware of the disclosures in late October/early November 1995 and therefore only against the "Yellow

Advertiser" and the BBC. Although an award of an account of profits is not dependent on the grant of a prior injunction, the Government have referred to no case where this has been ordered in respect of a broadcast. While an account of profits in respect of the national press was a possibility open to the Earl and Countess Spencer, the "Yellow Advertiser" had a local as opposed to a national circulation.

3. The Court's conclusion

113. In such circumstances, the Court finds that the applicant had no effective remedy in relation to the violation of his right to respect for his private life guaranteed by Article 8 of the Convention. The Court does not accept as relevant the Government's argument that any acknowledgement of the need to have a remedy will undermine the important conflicting rights of the press guaranteed by Article 10 of the Convention. As noted above, the Council, and therefore the media, could have achieved their objectives by properly masking, or taking appropriate steps to ensure such masking of, the applicant's identity.

114. Accordingly, there has been a violation of Article 13 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

115. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

116. The applicant claimed compensation for the non-pecuniary damage suffered by him and reimbursement of his pecuniary losses and his legal costs and expenses. The Government contested these claims.

A. Non-pecuniary damage

117. The applicant claimed 7,500 pounds sterling (GBP) in respect of non-pecuniary loss. He underlined the distress, anxiety, embarrassment and frustration suffered by him as a consequence of the impugned disclosures: he had been the subject of taunts, jokes and abuse from neighbours, the assumption was made that he was part of a crime problem and he had to explain his personal problems to his family after the relevant coverage in the media. He emphasised that the footage related to a distressing time for him, that the dissemination was without his knowledge or consent, that the consequent publications and broadcasts were at local and national level and that he had no remedy in national law.

The Government argued that the finding of a violation would constitute sufficient just satisfaction in itself or, alternatively, that a sum of approximately GBP 4,000 would be appropriate compensation.

118. The Court observes that some forms of non-pecuniary damage, including emotional distress, by their very nature cannot always be the object of concrete proof. However, this does not prevent the Court from making an award if it considers that it is reasonable to assume that an applicant has suffered injury requiring financial compensation (*Davies v. the United Kingdom*, no. 42007/98, § 38, 16 July 2002, unreported).

119. The Court has noted above the reasons why it considered the interference with the applicant's private life to be a serious one and the personal consequences for the applicant of the wide dissemination of the footage, together with the absence of any effective remedy in these respects (in this latter respect, see *D.P. and J.C. v. the United Kingdom*, no. 38719/97, § 142, 10 October 2002, unreported). It considers that the applicant must thereby have suffered significant distress, embarrassment and frustration which is not sufficiently compensated by a finding of violation.

120. The Court therefore awards the applicant on an equitable basis 11,800.00 euros (EUR) in respect of non-pecuniary damage.

B. Pecuniary loss

121. The applicant also claimed reimbursement of pecuniary loss incurred by him as a direct result of the matters constituting a violation in this case. In particular, he claimed compensation in the sum of GBP 2,500 for expenses he incurred in pursuing his applications before the BSC, the ITC, the PCC, the High Court and this Court. These losses included his travel expenses (to attend meetings with his representatives and to attend hearings), loss of salary (due to the nature of his work the applicant claimed to have lost wages for the periods he was obliged to attend meetings and hearings), together with postage and telephone costs. The Government pointed out that the applicant claimed those expenses without providing any evidence. They added that, in so far as they were incurred in domestic proceedings, they were not necessarily and reasonably incurred in the course of the Convention proceedings and were not therefore recoverable.

122. The Court observes that these claims of the applicant have not been sufficiently detailed by him, the applicant claiming a global figure for all such expenses, and that, importantly, he has not submitted any documents vouching such pecuniary losses. In such circumstances, the Court does not award the applicant compensation for pecuniary damage.

C. Legal costs and expenses

123. The applicant further claimed reimbursement of his legal costs of both the domestic and Convention proceedings.

124. As to the domestic proceedings, the applicant claimed GBP 5,047.40 (inclusive of VAT) in respect of proceedings before the PCC, the ITC and the BSC. This was based on a charge-out rate of GBP 140 per hour for a senior solicitor and GBP 100 per hour for a legal officer. In addition to telephone calls and letters, 3 hours and 45 minutes were accorded to the PCC proceedings and 1 hour and 55 minutes were accorded to the ITC proceedings, the applicant not specifying whether this represented the time of the solicitor or the legal officer. Additionally, the applicant claims for 13 hours and 25 minutes of solicitor's time and 5 hours of a legal officer's time for the BSC proceedings. It appears that legal aid was available for the judicial review proceedings, and no claim was made in that respect.

The Government rejected this claim, arguing that the costs were not necessarily or reasonably incurred in the course of Convention proceedings.

125. The applicant also claimed GBP 11,563.54 in respect of the costs to date of the Convention proceedings up to and including research on the submissions to be made under Article 41 of the Convention. This represented work done by a solicitor and a legal officer (at the hourly rates set out above) and by a Queen's Counsel. A detailed bill of costs was submitted which noted time spent at each stage and disbursements, including Counsel's fees. Counsel's fee note has also been submitted (in the amount of GBP 1,727.25). The Government submitted that the costs claimed should be reduced if the Court was to find only partially in favour of the applicant and by any legal aid paid to the applicant.

126. Finally, the applicant claimed GBP 19,000 approximately (inclusive of VAT) in respect of the "anticipated costs" of Convention proceedings after the admissibility stage and prior to this judgment. The Government commented that this aspect of his claim was too speculative and that any future costs should be addressed if and when they were incurred.

127. The Court recalls that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (*Lustig-Prean and Beckett v. the United Kingdom* (just satisfaction), nos. 31417/96 and 32377/96, § 32, 25 July 2000, unreported). The Court further recalls that the costs of the domestic proceedings can be awarded if they are incurred by applicants in order to try to prevent the violation found by the Court or to obtain redress therefor (see, among other authorities, *Le Compte, Van Leuven and De Meyere v. Belgium*, judgment of 18 October 1982, Series A no. 54, § 17). Costs in respect of the domestic proceedings were in fact

awarded at paragraphs 30-33 of the above-cited case of *Lustig-Prean and Beckett* (just satisfaction).

128. Accordingly, the Court considers that it was reasonable, given the absence of other remedies, for the applicant to have sought some public recognition of the breach of his privacy and some vindication of his position before the media commissions. Indeed, the Government argued, in the context of Article 13, that these commissions formed part of the legal regime of privacy protection in the United Kingdom and allowed the applicant to "assert and vindicate" his rights. The applicant was in fact successful before the BSC and ITC, both bodies recognising that there had been a breach of privacy and their decisions being later published. He may have been unsuccessful before the PCC, but this does not imply that the costs incurred in this connection can be considered to have been unnecessarily incurred (see, for example, *Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports* 1997-I, § 91). Nevertheless, the Court does not consider that all of the fees were reasonable as to quantum given the nature of the proceedings before those bodies and, in particular, it considers excessive the hours billed in respect of the BSC complaint and the level of involvement of both a legal officer and a senior solicitor.

129. Accordingly, the Court awards, on an equitable basis, EUR 3,000 in relation to the costs of the domestic proceedings.

130. As to the Convention proceedings, the Court has noted the detailed bill of costs of the applicant's representatives and that both of his complaints (under Article 8 alone and in conjunction with Article 13) have been found to disclose violations of the Convention. As to the Government's objections to his claim for anticipated costs, the Court would not make an award as regards costs in respect of post-admissibility observations since none were required to be, or were, submitted on the applicant's behalf. On the other hand, it considers that the costs of researching, drafting and filing the Article 41 submissions were necessarily incurred and reasonable as to quantum.

131. The Court, accordingly, awards the applicant a total sum of EUR 15,800 in respect of the costs of the Convention proceedings less EUR 725 paid by the Council of Europe to the applicant in legal aid, the net award in respect of the Convention proceedings amounting to EUR 15,075.

132. The total award in respect of the legal costs and expenses of the domestic and Convention proceedings amounts therefore to EUR 18,075.

D. Default interest

133. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank to which should be added three percentage points (see *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 124, ECHR 2002-).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention;

2. *Holds* that there has been a violation of Article 13 taken in conjunction with Article 8 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention the following amounts to be converted to pounds sterling on the date of settlement:
      (i) EUR 11,800 (eleven thousand eight hundred euros) in respect of non-pecuniary damage;
      (ii) EUR 18,075 (eighteen thousand and seventy five euros) in respect of costs and expenses, inclusive of any value-added tax that may be chargeable;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 28 January 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Matti PELLONPÄÄ
President