

HILTON v. THE UNITED KINGDOM[1]

AS TO THE ADMISSIBILITY OF

Application No. 12015/86  
by Isabel HILTON  
against the United Kingdom

The European Commission of Human Rights sitting in private on 6 July 1988, the following members being present:

MM. C. A. NØRGAARD, President  
J. A. FROWEIN  
S. TRECHSEL  
E. BUSUTTIL  
A. S. GÖZÜBÜYÜK  
A. WEITZEL  
J. -C. SOYER  
H. G. SCHERMERS  
H. DANELIUS  
G. BATLINER  
H. VANDENBERGHE  
Mrs. G. H. THUNE  
Sir Basil HALL  
MM. F. MARTINEZ  
C. L. ROZAKIS  
Mrs. J. LIDDY  
  
Mr. H. C. KRÜGER Secretary to the Commission

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

Having regard to the application introduced on 7 February 1986 by Isabel HILTON against the United Kingdom and registered on 26 February 1986 under file No. 12015/86;

Having regard to the Commission's decision of 18 July 1986 to communicate the application to the respondent Government under Rule 42 para. 2 (b);

Having regard to the submissions of the parties;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen born in 1947 and resident in London. She is represented before the Commission by Ms. Madeline Colvin, Legal Officer of the National Council for Civil Liberties (N.C.C.L.), London. The facts, which are not in dispute between the parties unless indicated otherwise, may be summarised as follows:

The applicant gained an M.A. Degree in Chinese at Edinburgh University in 1970 and after conducting research and lecturing, she was awarded a scholarship to study in China. From 1973 to 1975 she studied Chinese literature in Peking and Shanghai.

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The applicant returned to Scotland in July 1975 to resume her academic studies. In autumn of that year, the Head of the Chinese Department at Edinburgh University asked the applicant to act as Secretary to the Scotland-China Association which was a group under the patronage of the Department and to which most of the Department's students belonged.

In autumn 1976, the applicant was employed as an on-screen reporter for Scottish Television (an independent company). She applied at the same time to the BBC for the job of reporter/presenter on BBC Scotland's current affairs programme called "Current Account". The applicant received an interview but was not offered the job. After many weeks, believing she would not receive the job, she accepted in January 1977 the offer of a job as a journalist for the Daily Express in London. The applicant was subsequently informed by letter from the BBC dated 7 March 1977 that she had not been selected for the job.

Before she left Scotland, Mr. Alastair Hetherington, former Controller of BBC Scotland, asked the applicant why she had not taken the job with the BBC. On being told the job had not been offered to her, Mr. Hetherington disclosed that her appointment had been recommended by the interviewing Board in Scotland. Afterwards, the Head of BBC Personnel in Scotland telephoned the applicant to offer her the job and apologised for the delay. However, the applicant by that time had accepted a job in London with the Daily Express and had to decline. She duly took the job in London but it proved unsatisfactory and she left after six months and joined the Sunday Times.

In the summer of 1985, the applicant was questioned by journalists from the Observer concerning her application for the BBC job in 1976. On reading an article in the Observer of 18 August 1985 entitled "How MI5 vets BBC staff", she discovered the details of what had occurred in 1976. The content of the article has been confirmed as accurate by Mr. Alastair Hetherington, now a Research Professor at the University of Stirling. He had not informed her previously because of the Official Secrets Act 1911.

The applicant alleges that the events surrounding her job application were as follows. In late 1976 the interview board had unanimously decided that the applicant was the best candidate and should be offered the job. The decision was referred to London, where the News and Current Affairs Division had a right of veto and where applications had to go through a security check. Mr. Hetherington, who has submitted an affidavit which supports in some particulars the applicant's version of events, but provides no dates of the relevant events under dispute, states that "although I cannot recall the exact timing of events in respect of Ms Hilton's application, I have no reason to believe that there was any unusual delay in referring her particulars to the Personnel Department in London." He states that he was subsequently informed by a senior official of the Personnel Directorate "approximately a week after the referral had been made to London" that the appointment of the applicant could not go ahead. This was confirmed several days later by a security liaison officer - a BBC employee. He insisted, however, that the security liaison officer should explain the reason for this and was finally told three to four weeks later that the applicant was refused because she had been the Secretary of a suspect organisation associated with China.

After enquiries, Mr. Hetherington was of the opinion that the security personnel had confused the university organisation with which the applicant was associated with another association considered

suspect. He informed the security officer of this serious mistake and after further delay, he was informed it was permissible to offer the applicant the job. However, by that time (January 1977), the applicant had accepted a job with a London newspaper. She resigned as Secretary of the Scotland-China Association in February 1977.

The applicant states that at no time did any person in authority inform her that information relevant to security was obtained, retained and used in relation to her job application and at no time was she given an opportunity to know the contents of that information so that its accuracy could be checked. She believes that the security procedures applied by the BBC are carried out by, or at the insistence of, the Security Services of the United Kingdom and she may in the future wish to apply for a job with the BBC.

She stresses that while she is uncertain as to the precise dates of the relevant events, she is certain that she accepted the offer of the job as a journalist in London in January 1977 because she knew that she would not be appointed to the BBC Scotland job.

The respondent Government accept that the applicant was subject to a security check but state that it was only on 14 February 1977 that the BBC made enquiries of the Security Service in respect of her candidature by which date the applicant had accepted alternative employment. The Security Service, according to the Government, responded to the BBC's enquiry on 16 March 1977 after the applicant had accepted alternative employment. The Government also point out that the Security Service assessment of the applicant provided to the BBC was not based upon a confusion between the Scotland-China Association and any other organisation. The assessment concluded by advising against offering the applicant the job unless the BBC were to decide that there were good reasons for doing otherwise. They state that it was at all times exclusively for the BBC to decide what attitude to take in the light of the Security assessment. On 21 April 1977 the Security Service advised that since the applicant was no longer the Secretary of the Scotland-China Association, she should not be debarred from working for the BBC.

The Government state that the applicant has been informed by the BBC in a letter dated 2 December 1985 that no files exist concerning the events she complains of. Furthermore, as a result of discussions with trade union representatives, the BBC agreed to destroy files and other materials concerning security matters after a period of two years which might have existed in respect of current and previous members of staff. The only file now held by the BBC referring to the applicant is a programme contracts file which contains only copies of contributors' contracts.

The applicant, however, notes that the BBC's letter only relates to files kept about her by the BBC. She believes that files are kept about her by the Security Service and points out that the BBC's letter did not concern the existence of such files. She states that this is a matter of continuing concern to her since as a freelance journalist who works occasionally for the BBC she may be subject to prejudice as a result of files relating to her kept by the Security Service.

#### COMPLAINTS

The applicant complains that the obtaining, retention and application of personal information by the BBC and the Security Service so as adversely to affect her prospects of being appointed to

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a particular post, without any opportunity for her to know or to comment on the accuracy of the information, constitutes a breach of her right under Article 8 (Art. 8) of the Convention to respect for her private life. She claims that as a result of not being offered the job with the BBC she suffered personal financial loss and disruption to her personal and professional life in Scotland.

She further complains, in the following terms, of the continuing retention and potential use of such information:

"Ms. Hilton believes that the BBC continues to operate security 'procedures' of the sort applied to her in 1976. She has, without success, asked the BBC to give her access to any and all files held concerning her so that she can check the accuracy of the information.

...

Ms. Hilton believes that the 'security procedures' applied by the BBC are carried out by, or at the insistence of, the Security Service of the United Kingdom Government."

She submits that these measures are not "in accordance with the law" as required by Article 8 para. 2 (Art. 8-2) since the relevant law (if any) is not adequately accessible or formulated with sufficient precision. The applicant also argues that the post in question had no implications for national security and therefore could not be justified under this provision as being in the interests of national security. Further, there were no safeguards applied to ensure the "procedures" operated fairly and effectively.

The applicant also claims that she has no effective remedy before a national authority in respect of the matters of which she complains. She accordingly invokes Article 13 in conjunction with Article 8 (Art. 13 + Art. 8) of the Convention.

The applicant, in her observations in reply dated 12 June 1987 and 29 January 1988, further complains under Article 10 (Art. 10) of the Convention. She contends that the refusal to appoint her because of her association with the Scotland-China Association amounts to a penalty for the expression of her views. She further submits that the Security Service interfered with her right to impart information and ideas to the public by advising that she should not be employed as a reporter. Finally, she submits that the continuing situation created by the practice and procedure of the obtaining, retention and potential use of information about her private life by the Security Service constitutes a breach of Article 10 (Art. 10) of the Convention.

OBJECT OF THE APPLICATION

The applicant's object is:

- (1) to obtain a finding by the organs established under the Convention that she is a victim of a violation of Articles 8 and 13 (Art. 8, Art. 13) of the Convention;
- (2) to obtain confirmation that no data concerning her private activities are retained by the BBC or, if they are, to know the contents of such data so that she can check their accuracy.

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PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 7 February 1986 and registered on 26 February 1986. It was first considered by the Commission on 18 July 1986 when it was decided that the Government should be invited to submit written observations on the admissibility and merits of the application insofar as it raised issues under Articles 8 and 13 (Art. 8, Art. 13) of the Convention. These observations were submitted by the respondent Government on 9 February 1987. The applicant's observations in reply were submitted on 12 June 1987.

By a decision of 28 October 1987 the President of the Commission granted a request from the respondent Government to submit further observations in respect of the issues raised in the application. These further observations were submitted on 26 November 1987 and were communicated to the applicant for observations in reply. The applicant's observations in reply were submitted on 29 January 1988 and a supporting affidavit was further submitted on 19 February 1988.

SUBMISSIONS OF THE PARTIES

Respondent Government

As to Fact

The Government note the applicant's claim that the check by the Security Service took place prior to the applicant's accepting alternative employment. They make the following observations with reference to the applicant's submissions on this issue: -

- a possible explanation for the BBC's delay in contacting the Security Service after the applicant had been selected by the Board in late 1976 may be the fact that, on a previous application by the applicant for an appointment with the BBC, the BBC had obtained in December 1975 an assessment from the Security Service to the effect that there were no security considerations against offering the applicant the job. The fact remains that it was not until February 1977 that the BBC made enquiries of the Security Service and the Service responded to the enquiry on 16 March 1977;
- the BBC's letter of 7 March 1977 merely informed the applicant that she had not been selected for the job and gave no reason for rejecting her application. The letter does not show that the assessment by the Security Service must have occurred at an earlier date;
- the Government are unable to comment on the recollection of Mr. Hetherington or of the applicant as to when either was told of the reasons for her non-appointment, save to repeat that it was not until 16 March 1977 that the Security Service responded to the BBC's request for an assessment;
- the Government do not accept that there is any inconsistency between the account of the facts given by the Government and the applicant's claim to have resigned from the Scotland-China Association in February 1977;
- the first request made by the BBC to the Security Service in relation to the applicant's job application in 1976 was made in February 1977. No prior requests of an oral or

written nature were made and no response to the request, whether written or oral, was given by the Security Service prior to 16 March 1977.

#### Domestic law and practice

The BBC is an independent corporate body which was incorporated by Royal Charter granted in exercise of the Royal Prerogative on 20 December 1926. The objects of the BBC include the provision of radio and television broadcasting services (Article 3 (a)) and, for this purpose, the BBC is empowered to acquire from the Secretary of State a licence for such period subject to such terms as he might prescribe. The conduct of the Corporation's affairs is the responsibility of the Governors who are, by Article 1 of the Charter, expressed to be members of the Corporation.

The status under domestic law of the BBC was fully considered by the Court of Appeal in the case of *British Broadcasting Corporation v. Johns* [1965] 1 Ch. 32 in which the Court was required to determine whether the BBC was an instrument of Government which was entitled to the immunities and privileges of the Crown, in particular, in relation to taxation. The Court of Appeal concluded that the BBC was not a servant or agent of the Crown and did not enjoy any of the privileges or immunities of the Crown. The reasons of the Court can be summarised as follows:

- neither the Crown nor Parliament had asserted a monopoly over broadcasting or asserted that it should be within the province, or a function, of Government;
- in determining how broadcasting should be regulated, Parliament had specifically chosen not to make it a function of Government by, for instance, imposing a duty on a Government Minister to organise a broadcasting service. Instead the BBC had been created by Charter and had been given an independent legal personality which was licensed to carry out a broadcasting service. The BBC had been deliberately incorporated in the form in which it was created because it was considered to be in the public interest that broadcasting should not be conducted by a Government agency;
- the mere fact that the BBC was created by Charter does not make the Corporation an agent of the Crown. There was nothing in the terms of the BBC's Charter to constitute the BBC as such an agent. Equally, the licence and agreement was drafted so as to make clear that broadcasting services were to be provided by the BBC as an independent contractor and not as a Government agent;
- although the licence and agreement contained provisions under which the Postmaster-General could exercise control over the stations and transmissions of the BBC in their technical aspects, the general conduct and operation of broadcasting remained free from the control of the Government.

The system of carrying out security checks on BBC employees in respect of employees was introduced in 1937. Their purpose was to protect the BBC from penetration by those who might pose a threat to security and to safeguard official classified information held by the BBC. The Security Service provides a service to the BBC in connection with these checks.

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At the time of the applicant's application for employment the security vetting procedures were applied to current affairs staff on the ground of the overriding requirement to preserve the impartiality and integrity of the BBC's News Service. However, consistently with the provisions of the BBC's Charter (Article 12) (Art. 12) it is the BBC which decides whom to appoint to any post or whether to invoke a security checks procedure. Neither the Security Service nor any other external agency has the right of veto on the appointment or promotion of any member of staff. The BBC's security officer, who implements the procedure and liaises with the Security Service, is a BBC employee who is responsible only to BBC management.

In October 1985 the criteria for invoking the checks were revised to apply only to members of the staff who were necessarily involved in sensitive areas who required access to official classified information. In the domestic services they now apply only to staff involved in the planning and preparation of the war-time broadcasting service and who therefore have access to official classified information.

The six months rule (Article 26 of the Convention) (Art. 26)

The Government contend that the applicant raises for the first time in her reply to the Government's observations the following complaints:

- that the role of the Security Service in 1976-1977 in relation to her job application constituted a breach of Article 8 of the Convention (Art. 8) ;
- that the Government had failed to fulfil the positive obligations inherent in effective respect for the rights guaranteed by Article 8 (Art. 8);
- that there was a breach of Article 10 (Art. 10) of the Convention in her case in that she was being penalised for expressing her views in circumstances which could not be justified under the second paragraph of this provision.

The Government submit that, while the six months rule could be held to be satisfied in relation to the complaint in the original application which was directed exclusively to the acts of the BBC, it is not met by the above new complaints.

Article 8 (Art. 8) of the Convention

The Government submit that there is no factual basis on which the applicant can complain that the obtaining, retention or application of information about her adversely affected her prospects in her application to the BBC. They point out that the applicant had accepted alternative employment before any security checks had even been initiated by the BBC. Moreover, there is no factual basis for the complaint as to the continuing retention of information about her by the BBC since she has been informed that all of the information gathered about her has since been destroyed.

It is further submitted that, in any event, the acts of the BBC do not engage the responsibility of the United Kingdom Government under the Convention. The BBC enjoys a separate legal personality and autonomy of administration and management and is not a department of Government. The Government refer to the analysis of the

status of the BBC by the Court of Appeal in the Johns case (loc. cit.).

In particular, the control and management of the BBC is vested by the Charter in the Governors of the Corporation who are appointed by the Queen-in-council and do not perform their duties as servants or agents of the State. Furthermore, the Governors' managerial functions are carried out wholly independently of Government control.

The respondent Government thus submit that this complaint should be rejected as incompatible with the Convention *ratione personae* or alternatively should be dismissed as manifestly ill-founded.

#### Article 10 (Art. 10) of the Convention

The Government state that the applicant has at all times been free to hold and express opinions, whether of a political nature or otherwise, and has not substantiated her complaint under this provision. No evidence has been adduced to show that the provision of information to the BBC by the Security Service concerning the applicant's membership of the Scotland-China Association was aimed at penalising the applicant for exercising her right to express opinions.

#### Article 13 (Art. 13) of the Convention

It is submitted that the applicant's claim of a breach of Article 8 (Art. 8) in respect of the acts of the BBC is incompatible with the Convention *ratione personae* or, alternatively, the claim is manifestly ill-founded. It follows that the applicant has no arguable claim to be a victim of a violation by the Government of this provision. Accordingly, Article 13 (Art. 13) of the Convention is inapplicable in respect of this complaint.

#### The Applicant

##### As to Fact

The applicant disputes the Government's contention that the BBC's enquiries to the Security Services were made after the applicant had accepted alternative employment. She points out that

- she was selected by the Board for the job in late 1976 and there is no explanation for the delay until March 1977;
- the BBC wrote to the applicant on 7 March 1977 informing her that she had not been selected for the job. The relevant letter shows that the vetting by the Security Services must have occurred at an earlier date;
- Mr. Alastair Hetherington (then Controller of BBC Scotland) recalls that he was told of the security reasons for her non-appointment soon after the referral of the interviewing board's decision for clearance to the Personnel Department in London;
- the Government fail to provide an explanation why the Security Service gave further consideration to the matter. The true reason lies in Mr. Hetherington's protests. Moreover it is possible that oral requests had been made to the Security Service prior to the first written request;
- the reason relied on by the Security Service, namely the

applicant's position in the Scotland-China Association pre-dates March 1977 since she resigned from that Association in February 1977.

With respect to the Government claim that the Security Service advised against appointment because of her association with the Scotland-China Association, the applicant submits that either this was a perverse decision since there was no reason whatsoever for suspecting the bona fides of a person because of contact with that organisation or the Security Service confused that organisation with another organisation.

The Scotland-China Association was formed in 1966 and involves many eminent persons and Chinese scholars. The Association never adopted any political position on events in China and did not accept funds from the Chinese Government.

#### Six months rule

As regards the applicant's complaints of the obtaining, retention and application of such information by the BBC and the Security Service in 1976 to 1977 she could not have been aware of the practice and procedure as applied to her until she read the article in the Observer of 18 August 1985. The applicant submits that the time does not run for the purposes of Article 26 (Art. 26) until the victim of an alleged violation becomes aware or should reasonably be aware of the taking of the final decision. Accordingly, the relevant date for the purposes of Article 26 (Art. 26) is the date of the Observer article, i.e. 18 August 1985.

As far as the applicant complains of the still continuing situation created by the practice and procedure of obtaining and retaining information about her private life by the Security Service as being contrary to Article 10 (Art. 10), the six months rule is irrelevant.

Insofar as the applicant complains of the obtaining, retention and application of information by the BBC and the Security Service in 1976 to 1977, the applicant accepts that she did not specifically complain in her original application of a breach of Article 10 (Art. 10). However, she does not seek to rely on any additional facts. She maintains that the same facts constitute a violation of Article 8 (Art. 8) as well as Article 10 (Art. 10). Moreover, it was not until she became aware of the contents of the Government's observations that she knew that the reason for the adverse reports upon her by the Security Service was alleged to be to satisfy "the overriding requirement to preserve the impartiality and integrity of the BBC's News Service". The applicant was entitled to complain of a breach of Article 10 (Art. 10) based partly on information disclosed for the first time in the Government's observations.

#### Article 8 (Art. 8) of the Convention

To the extent that the substance of the applicant's complaint relates to the actions of the BBC it is submitted that such actions engage the responsibility of the Government by virtue of the positive obligations inherent in an effective respect for private life. Such actions also engage the responsibility of the United Kingdom for the following reasons:

(1) the practice of carrying out security checks on BBC employees, and the procedures relating thereto, have been agreed at a senior level in the Home Office, the Security Service and the BBC so as to give effect to the "overriding requirement to preserve the impartiality and integrity of the BBC's News Service";

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(2) the relevant practice and procedures applied to the BBC as one of the country's most important public institutions in relation to the provision in the public interest of public service broadcasting;

(3) although the BBC enjoys a separate legal personality and an autonomy of administration, it has been entrusted by the Secretary of State with the performance of public functions, subject to conditions prescribed by the Secretary of State, on behalf of the United Kingdom;

(4) the character of the BBC as a public authority is further evidenced by a clause 13.7 of the current BBC licence which contains the following proviso:

"The Corporation shall at all times refrain from sending any broadcasting matter expressing the opinion of the Corporation on current affairs or matters of public policy"

and by the fact that a resolution by the Board of Governors of the BBC, annexed to the licence, reaffirms the Board's objectives "to treat controversial subjects with due impartiality and they intend to continue this policy both in the Corporation's News Service and in the more general field of programmes dealing with matters of public policy";

(5) the duties imposed upon the BBC by these provisions are similar to the duties imposed upon the other main broadcasting body of the United Kingdom - the Independent Broadcasting Authority (IBA) which is obliged by Section 4(1) of the Broadcasting Act 1981 to comply with the requirement that a sufficient amount of time in the programmes is given to news and news features and that all news given in the programmes is presented with due accuracy and impartiality. Moreover, the fact that the BBC's public duties are prescribed by the Secretary of State, whereas the IBA's public duties are prescribed by Parliament does not affect the "public" character of the BBC for the purposes of the United Kingdom's obligations under the Convention;

(6) the public character of both the BBC and the IBA is further evidenced by the fact that each is a "broadcasting body" as defined by Section 54(3) of the Broadcasting Act 1981 complaints about whose allegedly unjust or unfair treatment or unwarranted infringements of privacy in sound or television broadcasts are considered and adjudicated upon by the Broadcasting Complaints Commission under Section 54 of that Act;

(7) the courts of the United Kingdom have decided that, in determining whether the decisions of a particular body were subject to judicial review, the court was not confined to considering the source of that body's powers and duties but could also look at their nature. Accordingly, if a duty imposed on a body, whether expressly or by implication, was a public duty, the body was exercising public law functions and a court had jurisdiction to entertain an application for judicial review. (See *R. v. Broadcasting Complaints Commission, ex parte Owen* [1985] 2 All ER 522 (Divisional Court) and *R. v. Panel on Take-overs and Mergers, ex parte Datafin* [1987] 1 All ER 564 (Court of Appeal));

(8) the case of *British Broadcasting Corporation v. Johns* [1965] 1 Ch. 32, merely decided that the BBC is not the servant or agent of the Crown and does not enjoy the privileges and immunities of the Crown. The *Johns* case did not decide that the BBC was immune to judicial review as a public law body, still less that it is not a public authority;

(9) the Court of Justice of the European Communities has recently examined whether the Chief Constable of the Royal Ulster Constabulary was a public authority so as to be bound by the principle of equal treatment for men and women guaranteed by Council Directive No. 76/207/EEC of 9 February 1976. The Government had argued that the Chief Constable is constitutionally independent of the State and that in the particular case he was involved only as an employer. The Court of Justice found that whatever the relationship of the Chief Constable might be with other organs of the State "such a public authority, charged by the State with the maintenance of public order and safety, does not act as a private individual. It may not take advantage of the failure of the State, of which it is an emanation, to comply with community law."

The applicant contends that this principle applies *mutatis mutandis* in relation to compliance with the law of the Convention by the BBC. The BBC is a public authority charged by the Secretary of State with the performance of public service broadcasting functions. The applicant's complaints are directed against the BBC in its capacity as a public authority and not as a private employer performing exclusively private functions.

The applicant recalls that, to the extent that the Security Service was responsible for the matters she complains of, her complaint is directed to the acts of the Security Service for which the Government are clearly responsible. She submits that the obtaining, retention and use of personal information about her without having an opportunity to refute it amounts to an interference with her right to respect for private life as guaranteed by Article 8 para. 1 (Art. 8-1) of the Convention (Eur. Court H.R., Leander judgment of 26 March 1987, Series A no. 116, p. 22 para. 48). She further claims that the obtaining, retaining and use of such information did adversely affect her prospects of obtaining employment because they resulted in a negative assessment by the Security Service and a long delay after she had been interviewed by the BBC Scotland. The applicant would have preferred to work for the BBC in Scotland both because of the nature of the work and because she wished to remain in Scotland.

She further submits that obtaining and continuing retention of such personal information about her is not "in accordance with the law" as required by Article 8 para. 2 (Art. 8-2) of the Convention (see p. 23 para. 51 of the Leander case, *loc. cit.*). She also contends that the interference with her respect for private life was not necessary in a democratic society in the interests of national security and that it did not correspond to a pressing social need and was not proportionate to any legitimate aim pursued. Moreover, there exist no adequate and effective safeguards against abuse under the law of the United Kingdom. She maintains that these submissions have not been addressed by the respondent Government in their observations and that the Government's submissions are silent as to whether such a file of personal information is held by the Security Service.

#### Article 10 (Art. 10) of the Convention

It is submitted that the Security Service interferes with the applicant's right to impart information and ideas to the public by advising that she should not be employed as a reporter/presenter in current affairs programmes. The BBC further interfered with her right to impart information and ideas to the public by accepting the advice of the Security Service. Unlike the position in the Leander case, the practices and procedures complained of were concerned with the content of the information and ideas imparted by the BBC to the public and the Security Service's view that someone like the applicant should not be

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concerned with such communication. Accordingly, an interference with the exercise of freedom of expression by journalists rather than access to the public service is at the heart of this issue.

Article 13 (Art. 13) of the Convention

It is submitted that the applicant's claims of breaches of Articles 8 and 10 (Art. 8, Art. 10) are arguable and give rise to prima facie issues under the Convention. The absence of effective remedies before a national authority is a central element in the applicant's complaint to the Commission.

THE LAW

1. The applicant complains of the obtaining and application of personal information about her by the BBC and the Security Service. She further complains of the continued retention of such information. In particular, she complains that the information on file about her personal background was used to deny her a job as a reporter with the BBC in Scotland in 1977. She invokes Articles 8, 10 and 13 (Art. 8, Art. 10, Art. 13) of the Convention.

Six months rule (Article 26 of the Convention) (Art. 26)

The respondent Government first submit that the applicant raised the following aspects of her complaint for the first time in her reply dated 12 June 1987 to the Government's observations and that they should be rejected on the basis of the six month rule having regard to the date of the introduction of the application (7 February 1986):

1. that the role of the Security Service in carrying out the Security check in 1976-1977 constituted a breach of Article 8 (Art. 8);
2. that the Government had failed to fulfil the positive obligation inherent in Article 8 (Art. 8);
3. that she was, in effect, penalised for the 'expression' of her views in breach of Article 10 (Art. 10).

The Government note that the 'final decision', for the purposes of Article 26 (Art. 26), is the obtaining from the Security Service and alleged use by the BBC of personal information concerning the applicant in relation to her application for employment by the BBC in 1976-1977. The above submissions are made on the assumption that Article 26 (Art. 26) could be held to be satisfied, having regard to the fact that the applicant claims to have discovered the facts relating to the security check on her background in the article in the Observer newspaper of 18 August 1985.

Article 26 (Art. 26) of the Convention reads as follows:

"The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

The Commission notes that in accordance with constant case-law the 'final decision' for purposes of the six months rule must normally be regarded as the date of the acts or decisions complained

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of where there exists no domestic remedy in respect of the complaint (see No. 8206/78, Dec. 10.7.81, D.R. 25 p. 147). The Commission further recalls that the six months rule contained in this provision does not apply to a complaint which concerns a continuing situation (see No. 6852/76, Dec. 5.12.78, D.R. 15 p. 5). Finally, the Commission observes that the running of the six months period might be interrupted or suspended by the existence of special circumstances and, in any event, can only begin to run from the moment the applicant learns of the act or decision of the public authority of which he complains (see No. 9991/82, Dec. 12.7.84, D.R. 39 p. 147).

In the present case, it is not disputed by the respondent Government that there is no remedy under the law of the United Kingdom in respect of the matters complained of. It follows, therefore, that the final decision for purposes of Article 26 (Art. 26) in respect of the applicant's complaint concerning the compilation and use of personal information about her in 1976-1977 must relate back to the acts of the BBC and the Security Service in 1977. However, the Commission notes that it is not disputed by the Government that the applicant first learned that a security check had been carried out in respect of her candidature for a post in the BBC in an article in the Observer newspaper on 18 August 1985. In these circumstances, the Commission considers that the absence of knowledge on the applicant's part of the matters which form the subject of the complaint constitute special circumstances which interrupt the running of the six months period.

The Commission further observes that the six months rule does not apply to that part of the applicant's complaint under Articles 8 and 10 (Art. 8, Art. 10) of the Convention which relates to the continued retention of personal information about the applicant since such a complaint concerns a continuing situation.

The Commission accordingly finds that the six months period, where it applies, begins to run from 18 August 1985. It must now turn to the Government's specific objections under this head as formulated above.

As regards the first aspect mentioned by the Government, the Commission notes that the relevant part of the applicant's original memorial to the Commission reads as follows:

"(19) Ms. Hilton believes that the security 'procedures' applied by the BBC are carried out by, or at the insistence of, the security services of the United Kingdom Government."

The Commission is therefore satisfied that the applicant had raised this complaint concerning the role of the Security Service at the outset of her application.

As regards the second aspect, the Commission considers that this constitutes a legal submission in respect of the applicant's main complaint under Article 8 (Art. 8) of the Convention as opposed to the introduction of a new factual element in the case or a new head of complaint.

Finally, as regards the third aspect, the Commission notes that the applicant's complaint under Article 10 (Art. 10) of the Convention was raised for the first time in her observations in reply dated 12 June 1987. However, the Commission observes that this complaint was based on the facts of the case as set out in the original memorial to the Commission. It is not based on additional factual material introduced for the first time in the applicant's observations in reply.

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The Commission recalls, in this context, that "Article 25 (Art. 25) requires that individual applicants should claim to be the victim 'of a violation of the rights set forth in the Convention'; it does not oblige them to specify which Article, paragraph or sub-paragraph or even which right they are praying in aid" (see Eur. Court H.R., Guzzardi judgment of 6 November 1980, Series A no. 39, p. 22 para. 61). Moreover, the Commission and Court possess an inherent power to decide upon the characterisation in law to be given to a matter (loc. cit., at p. 23 para. 63).

It follows, therefore, that it is open to an applicant to make new complaints based on the essential facts as originally presented, at a subsequent stage of the procedure, and that the six months rule is not opposable to such new complaints.

The Commission concludes that the application, as a whole, satisfies the six months requirement in Article 26 (Art. 26) of the Convention.

2. Article 8 (Art. 8) of the Convention

The Commission notes that the applicant's complaints under this head fall into two parts. First, she complains that as a result of a security check carried out by the BBC and the Security Service based on personal information which had been compiled and retained about her and which she had no opportunity to refute she was denied a job with the BBC in 1977. Second, she complains of the compilation, continued retention and potential use of personal information about her.

The applicant submits that the compilation and use of information in 1977 and the continued retention of such information constitutes an interference with her right to respect for private life which is not "in accordance with the law" or justified under paragraph 2 of Article 8 (Art. 8).

The Government do not contest that the applicant can claim to be a victim of a breach of this provision. However, they contend that the applicant could not have been prejudiced by the security check which was carried out since she had accepted alternative employment in January 1977 before the BBC had requested a security check on 14 February 1977.

They further submit that, in any event, the acts of the BBC do not engage the responsibility of the United Kingdom since it is not a department of Government. Finally, they point out that there is no factual basis for her complaint as to the continuing retention of information by the BBC since she had been informed that the BBC has destroyed all of the information gathered about her. In their submissions the Government do not address that aspect of the applicant's complaint relating to the continuing retention of information about her by the Security Service.

The applicant maintains that the security check was carried out before February 1977 and that the reason she accepted the job in London was because she had been informed that her candidature with the BBC had been turned down. She further submits that the BBC is a public authority for which there is state responsibility and that in any event the acts of the Security Service engage the responsibility of the respondent State.

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

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. As regards the applicant's first complaint, the Commission notes that there is substantial disagreement between the parties as to when the request for a security check was actually made by the BBC. The applicant contends that she accepted the offer of the job as a journalist in London in January 1977 because she knew by that time that she was not successful in her job application to the BBC. She admits, however, that she is uncertain as to the precise dates of the relevant events. In support of her account of the facts she submits an affidavit sworn on 15 February 1988 by Mr. Alastair Hetherington who was Controller of BBC Scotland during the relevant time.

Mr. Hetherington states in his affidavit that he has no reason to believe that there was any unusual delay in referring the applicant's "particulars" to the Personnel Department in London after the Interview Board's recommendation and that he was notified of the negative report and outcome within a week after the referral had been made to London. On the other hand, he concedes that he cannot recall the exact timing of events and his affidavit mentions few dates in support of his recollection of the relevant events.

The Government maintain that the enquiry of the security service by the BBC concerning the applicant was not made until 14 February 1977 by which date the applicant had accepted alternative employment. They, therefore, contest that the applicant suffered any prejudice as a result of the Security Service check.

The applicant points to a number of circumstantial elements which, she claims, support her contention. She submits that the BBC letter of 7 March 1977 informing her that she had not been selected for the job shows that the Security Service check must have occurred at an earlier date. However, this letter, which has been submitted to the Commission, merely informed the applicant that she had not been selected for the job and provides no indication of when a check occurred.

She further suggests that the security check must have occurred at an earlier date since the reason relied on by the Security Services - the fact that she was Secretary to the Scotland-China Association - predates March 1977. She had, in fact, resigned from the Association, in February 1977. The Commission, however, agrees with the Government, that this is not inconsistent with the Government's claim that the request for a security check was made on 14 February 1977.

The applicant further points out that she was recommended for the post in late 1976 but there is no explanation for the delay in contacting the Security Service and notifying her of the outcome until March 1977. The Government provide the tentative explanation that the delay in contacting the Security Service may be explained by the fact that on a previous job application by the applicant the Security Service had advised that there were no security considerations against offering the applicant the job. In any event the Commission cannot draw any firm conclusions from this delay as to the date of the

request by the BBC to the Security Service.

Finally, the applicant suggests that a previous oral request for security clearance may have been made prior to the written request. She adds that the Government offer no explanation as to why the Security Service gave further consideration to the matter, submitting that the true reason lies in the protests by Mr. Hetherington on behalf of the applicant. The Government deny that any prior written or oral requests were made and explain that the reason for the further consideration of the matter lay in the fact that the applicant had resigned as Secretary of the Scotland-China Association. In the light of her resignation, the BBC was advised on 26 April 1977 that the applicant should not necessarily be debarred from employment with the BBC.

The Commission again sees no inconsistency between the Government's version of events and the further consideration of the applicant's position in the light of her resignation from the secretaryship of the Association.

The Commission has had regard to the fact that the above factual dispute relates to events which occurred more than eleven years ago. It is therefore not surprising that the recollection of the exact pattern of events is difficult. Nevertheless against the above background, in particular, the admitted difficulty that the applicant and Mr. Hetherington have of recalling the timing of events, the Commission finds that the applicant has not substantiated her claim that the security check took place before February 1977. The Commission accepts, therefore, the Government's statement that the check was requested by the BBC on 14 February 1977 after the applicant had decided to accept an offer of employment with a newspaper in London.

In the light of this finding the Commission considers that it is unnecessary to express a view on whether the acts of the BBC give rise to the responsibility of the United Kingdom under the Convention.

It follows that the applicant's first complaint under this head that information concerning her personal background was used by the BBC and the Security Service to her detriment must be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

B. It remains to examine the applicant's more general complaint under this provision relating to her allegation concerning the compilation and continued retention of personal information about her by both the BBC and the Security Service

The Commission does not consider that a security check per se constitutes an interference with the right to respect for private life guaranteed by this provision. An interference with the right to respect for private life only occurs when security checks are based on information about a person's private affairs. Moreover it is not necessary that the person actually show that such information has been used to his detriment (See Eur. Court H.R., Leander judgment of 26 March 1987, Series A no. 116, p. 22 para. 48).

In the present case the question arises whether the applicant has sufficiently proved the compilation and retention of such a dossier.

As regards the BBC the Commission considers that there is no indication from the case-file that the information compiled by the BBC in respect of the applicant's job application in 1977 contained any

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material other than information contained in documents relating to her application for employment. Moreover, it notes that the applicant has been informed by the BBC in a letter dated 2 December 1985 that no files exist in respect of her job application in 1977.

In these circumstances the Commission does not consider that the applicant has substantiated her complaint under this provision in so far as it relates to the compilation and continued retention of personal information by the BBC.

It follows that it is again not incumbent on the Commission to express a view on whether the acts of the BBC give rise to the responsibility of the United Kingdom under the Convention.

With regard to the alleged continued retention of personal information by the Security Service, the Commission notes that this complaint has not been made *expressis verbis* by the applicant until her supplementary observations in reply dated 29 January 1988. The Government, in their submissions, have interpreted this complaint as relating to the continued retention of information by the BBC alone. The Commission, nevertheless, considers that this complaint can be reasonably inferred from the applicant's general complaint relating to the continued retention of information made in her original application.

In this connection the Commission considers that the applicant has not substantiated her allegation that the Security Service compiled and continue to maintain a file of personal information about her.

However, the Commission recalls that "an individual may, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of secret measures ... without having to allege that such measures were in fact applied to him" (Eur. Court H. R., *Klass* judgment of 6 September 1978, Series A no. 28, p. 18, para. 34).

The Court in the *Klass* case added that the relevant conditions were "to be determined in each case according to the Convention right or right alleged to have been infringed, the secret character of the measures objected to, and the connection between the applicant and those measures" (*ibid.*).

This approach was followed by the Commission in a similar case against Luxembourg (See Nos. 10439-41/83, 10452/83, 10512-13/83, Dec. 10. 5. 85, to be published in D. R.).

The Commission does not consider that this passage can be interpreted so broadly as to encompass every person in the United Kingdom who considers that the Security Service may have compiled information about them.

The Commission considers that the *Klass* case falls to be distinguished from the present case in that there existed a legislative framework in that case which governed the use of secret measures and that this legislation potentially affected all users of postal and telecommunications services. In the present case the category of persons likely to be affected by the measures in question is significantly narrower.

On the other hand, the Commission considers that it should be possible in certain cases to raise a complaint such as is made by the applicant without the necessity of proving the existence of a file of personal information. To fall into the latter category the Commission

is of the opinion that applicants must be able to show that there is, at least, a reasonable likelihood that the Security Service has compiled and continues to retain personal information about them.

In the present case the Commission recalls that the security check which is at the basis of the applicant's complaint occurred in 1977. It is apparent that the Security Service recommended that the applicant not be eligible for appointment to the BBC because of her secretaryship of the Scotland-China Association. Once the applicant ceased to be the Secretary to this Association the Security Service recommended that there were no further obstacles to her appointment. There is no indication that the Security Service then had or have retained any information of a personal character relating to the applicant. The evidence is only to the effect that it was known that she was Secretary of the Scotland-China Association. The Commission has not been apprised of any reason since that date as to why the Security Service should continue to show further interest in the applicant. Nor is there any indication that the applicant, as a journalist, or in any other capacity, belongs to a category of persons that might be the subject of such interest. The Commission recalls that the only reason for her present fears lies in the Observer Newspaper report of 18 August 1985 which informed her for the first time of the security check in 1977. The Commission is therefore of the opinion that the applicant has not shown that there is at least a reasonable likelihood that the Secret Service has compiled and continues to retain personal information about her.

The Commission concludes that there has been no interference with the applicant's right to respect for private life since she has not substantiated her allegation. It follows that that the above complaint must also be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. Article 10 (Art. 10) of the Convention

The applicant complains under this provision that the refusal to appoint her to the BBC job constitutes, in effect, a penalty for the expression of her views. She further complains that by advising that she should not be employed as a reporter, the Security Service interfered with her right to impart information and ideas to the public. She has also suggested, in her submissions, that a further Article 10 (Art. 10) issue arises in respect of the continuing situation created by the practice and procedure of the obtaining, retention and potential use of information about her private life by the Security Service. She has not elaborated her complaint in this respect.

Article 10 (Art. 10) of the Convention provides as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for

maintaining the authority and impartiality of the judiciary."

The Commission recalls that it has rejected as inadmissible for non-substantiation, the applicant's complaint that she failed to secure the BBC job because of the negative report from the Security Service as well as her allegations concerning the continuing retention and potential use of personal information by the Security Service. It follows that the above complaints which are founded on the same allegation must also be dismissed on the same basis. These complaints must therefore be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

4. Article 13 (Art. 13) of the Convention

The applicant complains under this provision that she lacks an effective remedy under the law of the United Kingdom in respect of her complaints. This provision states as follows:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Commission recalls that for Article 13 (Art. 13) to apply the claim that a provision of the Convention has been breached must be an 'arguable' one.

The Commission notes that it has rejected the applicant's complaints under Articles 8 and 10 (Art. 8, Art. 10) of the Convention on the basis that she has not substantiated her allegations of an interference with these rights. In such circumstances the Commission does not consider that the applicant's claims can be described as 'arguable' (see, in this context, Eur. Court H.R., Boyle and Rice judgment of 27 April 1980, paras. 51 - 86; and Plattform "Ärzte für das Leben" judgment of 21 June 1988, paras. 24 - 39).

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

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission

President of the Commission

(H. C. KRÜGER)

(C. A. NØRGAARD)