



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

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 35712/97  
by Frederick and David BARCLAY  
against the United Kingdom

The European Court of Human Rights (Third Section) sitting on 18 May 1999 as a Chamber composed of

Mr J-P. Costa, *President*,  
Sir Nicolas Bratza,  
Mr L. Loucaides,  
Mr P. Kūris,  
Mr W. Fuhrmann,  
Mrs H.S. Greve,  
Mr K. Traja, *Judges*,

with Mrs S. Dollé, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 1 April 1997 by Frederick and David BARCLAY against the United Kingdom and registered on 22 April 1997 under file no. 35712/97;

Having regard to the reports provided for in Rule 49 of the Rules of Court;

Having regard to the observations submitted by the respondent Government on 4 March 1998, the observations in reply submitted by the applicants on 21 April 1998, and the further comments submitted by the parties on 15 May 1998, 5 June 1998, 3 July 1998 and 15 July 1998;

Having deliberated;

Decides as follows:

## THE FACTS

The applicants are British citizens, born in 1934. They are twin brothers, resident in Monaco. They own an island, Brecqhou, in the Channel Islands. They also own "The European" newspaper. They are represented before the Court by Mrs J. McDermott, solicitor, of Messrs Lovell White Durrant, with Mr D. Pannick QC. The facts of the application, as submitted by the parties, may be summarised as follows.

### A. Particular circumstances of the case

The applicants bought Brecqhou in order to build a private residence there for themselves and their family.

In August 1995, a producer of the television programme "The Spin" wrote to the applicants' lawyers requesting an interview with the applicants on the issue of The European and their home on Brecqhou. The request was referred to the Editor in Chief of The European, who offered to answer questions concerning the newspaper, and stated that the applicants did not wish to be interviewed and that they refused permission for anyone to enter Brecqhou without their express permission.

The producer nevertheless arranged for a reporter on The Spin to be taken to the island in a small boat, and for his unauthorised landing to be filmed by a film crew. When challenged about his landing, the reporter told an employee of the building contractors that he had come for a meeting with the applicants. The reporter then walked about the island until challenged by a Mr Field. The reporter initially told Mr Field that he did not have any recording equipment on him, but later produced a radio, a voice microphone and a battery pack. Mr Field then sought to escort the reporter off the island. In order to secure the reporter's departure, Mr Field used the reporter's radio to speak to a person, identified by the reporter as his producer, to ask for the reporter to be picked up again. The producer informed Mr. Field that he no longer had the boat, with the result that the applicants had to arrange for a boat to be chartered, at their expense, to ensure the reporter's return to Sark.

The applicants complained about the invasion of privacy to the Broadcasting Complaints Commission (BCC), which denied jurisdiction unless and until the relevant issue of The Spin was broadcast. The applicants' challenge by way of judicial review to that decision of the BCC failed on 2 October 1996, leave to apply for judicial review having been granted on 23 February 1996. In his judgment on the application for judicial review, Mr Justice Sedley agreed that on a proper construction of Section 143 of the Broadcasting Act 1990, the BCC had no role to play until a broadcast had occurred. He observed:

"The law of England and Wales at present places no general constraints upon invasions of privacy as such. Section 143 of the Broadcasting Act 1990 unambiguously limits the power of the [BCC] to adjudication upon complaints of infringement of privacy against the BBC arising out of programmes which have been broadcast. If an unwarranted infringement of privacy has been committed by the BBC otherwise than in connection with the obtaining of material included in a broadcast programme - whether because the nexus is insufficient or because no programme has been broadcast - the Commission is without adjudicative power. It cannot therefore entertain an anticipatory complaint even where, once the programme is broadcast, the complaint is bound to succeed. It

follows that in this field and to this extent, as elsewhere in English law, the individual is without an effective remedy before a national authority if the right to respect for his or her private and family life is violated."

Leave to appeal was refused.

On 16 December 1996, the BCC delivered its adjudication on the applicants' complaint following the broadcast of *The Spin*, which had taken place on 4 October 1995. The BCC found, *inter alia*, that "in landing on the Barclays' private island and in broadcasting footage obtained, the BBC unwarrantably infringed the Barclays' privacy".

In separate proceedings relating to a different broadcast, the Rennes Court of Appeal on 24 January 1997 awarded the applicants FF10,000.00 against the reporter.

B. Relevant domestic law

The Broadcasting Complaints Commission (BCC) was created in its present form by the Broadcasting Act 1990 (the 1990 Act). By Section 143 of the 1990 Act, its function is to consider and adjudicate upon complaints of:

- (a) unjust or unfair treatment in programmes to which this Part applies, or
- (b) unwarranted infringement of privacy in, or in connection with the obtaining of material included in, such programmes.

The relevant Part of the 1990 Act applies to "any television or sound programme broadcast by the BBC or after [1 January 1991] ...".

Under Section 146 of the 1990 Act, where the BCC has considered and adjudicated upon a complaint, it may give the following directions, namely:

"directions requiring [the BBC] to publish the matters mentioned in subsection (2) in such manner, and within such period, as may be specified in the directions".

Section 146 (2) provides that:

"Those matters are -

- (a) a summary of the complaint; and
- (b) the BCC's findings on the complaint or a summary of them."

## **COMPLAINTS**

The applicants allege violations of Articles 8 and 13 of the Convention. They complain that the absence of adequate protection of their privacy against the public broadcast of a BBC television programme filmed on their private island denies them the protection required under the Convention.

## **PROCEDURE**

The application was introduced on 1 April 1997 and registered on 22 April 1997.

On 27 October 1997 the European Commission of Human Rights decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 4 March 1998, after an extension of the time-limit and further observations were submitted on 15 May 1998 and again on 3 July 1998. The applicants replied on 21 April 1998 to the initial observations and on 5 June and 15 July 1998 to the later observations.

On 1 November 1998, by operation of Article 5 § 2 of Protocol No. 11 to the Convention, the case fell to be examined by the Court in accordance with the provisions of that protocol.

## **THE LAW**

1. The applicants allege that their right to privacy was interfered with, in breach of Article 8 of the Convention.

Article 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."

The Government submit that the alleged invasion of privacy occurred when Mr Sweeney landed on Brecqhou, not when the BBC broadcast their programme, and that therefore the applicants' complaint is in fact a complaint of trespass and not of breach of privacy. Adequate protection exists under English law to protect the applicants from the alleged trespass, for example, in the form of an injunction to prevent the trespass occurring. The Government argue that the conversation between Mr Garside and the BBC producer should have alerted the applicants to a possible trespass and on the basis of Mr Garside's failure to call back, a court could have held that that was a sufficient ground for making an order to restrain the BBC from unlawfully visiting the island. Further, following the trespass, the applicants would have been entitled to bring proceedings for trespass claiming damages and a permanent injunction. The Government therefore submit that the applicants have failed to exhaust the domestic remedies available to them in accordance with Article 35 § 1 of the Convention.

The Government also argue that Article 8 does not apply to the applicants' complaint because at the time of the trespass they had no connection with the island which could constitute a private or family life. They were not resident on the island but in Monaco, the

island was a construction site with a few builders and the applicants themselves were not even present on the island when the alleged invasion of privacy occurred.

They further submit that the subsequent broadcast of the programme did not interfere with the applicants' private or family life either.

In the alternative, if Article 8 is applicable to the complaint that the programme was broadcast, the Government contend that the interference was very trivial, that the programme only showed a few seconds footage of Mr Sweeney's arrival on the island and that this triviality is reflected in the low level of damages (FF 10,000.00) awarded by the Rennes Court of Appeal against Mr Sweeney in relation to a similar broadcast in France. They contend that such an infringement is too trivial to amount to a violation.

The applicants maintain that their complaint is not about the fact that someone unlawfully trespassed on their private property but that they were unable to prevent the broadcast of a television programme showing footage of their island which thereby interfered with their right to privacy.

They complain that there is no right to privacy in the United Kingdom. The absence of a privacy law, and the especially intrusive nature of the broadcasting media, led Parliament to seek to provide special protection for those whose privacy is invaded by broadcasters. This duty was delegated to the BCC, however, the scope of their jurisdiction is narrow and they cannot prevent a programme from being shown, they can only deal with programmes that have already been broadcast, and, in any event, they have no power to award damages where they do find that an unwarranted breach of privacy has occurred. Contrary to the Government's submission, it would not be possible to base an application for an injunction seeking to prevent the showing of the film relying on an action in trespass (see *Kaye v. Robertson* [1991] FSR 62). This contrasts with a recent case before the European Commission of Human Rights (No. 28851/95 and 28851/95, Dec. 16.1.98, D. R. 92-A, p. 56) where the applicants' complaint that their privacy had been interfered with was inadmissible because they could have applied for an injunction based on a breach of confidence to restrain the publication of newspaper articles about their private lives.

The applicants contend that the island is their private property where they were building their future residence and which they regularly visited to inspect the building works. The attempt by a journalist to film the island on which their home was being built and to broadcast that film, which showed about a minute of footage of the building works and the island, was an invasion of their privacy. The applicants point out that the BCC (a domestic tribunal which held an oral hearing to consider the question) itself found that the programme, once broadcast, did unwarrantably infringe the applicants' privacy.

The Court recalls that the Article 8 of the Convention guarantees the right to "respect for ... private and family life". The Convention organs have had to determine the scope of the concept of "private life" within the meaning of Article 8 § 1 of the Convention on several occasions (as, for example, the *Gaskin v. the United Kingdom* judgment of 7 July 1989, Series A no. 160, concerning access to case records held by a local authority; the *Niemietz v. Germany* judgment of 16 December 1992, Series A no. 251, p. 33, § 29 in connection with the "right to establish and develop relationships with other human beings"; the *Laskey, Jaggard and Brown v. the United Kingdom* judgment of 19 February 1997, Reports 1997-I, no. 29, concerning sexual activity and orientation, and the *M.S. v. Sweden* judgment of 27 August

1997, Reports 1997-IV, no. 44, concerning access to medical records). In all those cases, however, there was a clear or uncontested link between the matters complained of and the respective applicants' right to respect for their private life.

The Court accepts that an interference with an applicant's private life could result from an unauthorised entry into and filming on premises where the applicant had established his home life. However, the mere ownership of property is not sufficient to render it a "home" for the purposes of Article 8; nor does unauthorised entry onto property owned by another, without more, necessarily entail any interference with respect for private life.

The Court notes that, at the relevant time, the applicants did not have a private or family life or home on Brecqhou. They were in the process of having a house built so they were not living on the island and there was only a construction site with builders working there. The applicants were not on the island when the film was taken. The film shows the island where the reporter landed, and the building site.

The Court thus considers that the presence of the reporter on the island cannot, itself, therefore have interfered with the applicants' right to respect for their private and family life, or their home.

The applicants see a link between the invasion of the island and their right to respect for their private life in the finding of the BCC that there had been an unjustified infringement of their privacy, and they see a link between the broadcast of the programme and their right to respect for their private life in that same finding. They consider that the fact that they could not prevent the broadcast or challenge any resulting interference itself gave rise to a violation of Article 8.

The Court does not accept the applicants' contentions. It notes that the BCC found an infringement of the applicants' right to privacy, but further notes that the BCC did not make - and was not required to make - any distinction between "privacy" and "private property". Further, the BCC did not itself make any findings which could be interpreted as going beyond matters which relate to private property, rather than private life. The principal passage in this respect reads as follows:

"... the Barclays (whose reasons for seeking to protect their privacy were explained to the [BCC]) had made it clear that they did not consent to any visit and, having considered all the circumstances, the [BCC] are of the view that the visit was indeed an infringement of their privacy."

Even when taking into account the applicants' reasons for wishing to protect their privacy - security reasons and the distinction which they drew between matters of public interest and matters which the public found interesting - the Court is unable to find any factual basis for an interference with the applicants' right to respect for their private life in the present case, whether by reference to the reporter's presence on the island, or the subsequent events before the BCC.

It follows that there was no interference with the applicants' right to respect for their private life or, indeed, with any other interest protected by Article 8 § 1 of the Convention.

It follows that this part of the application is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3, and that it must be rejected pursuant to Article 35 § 4 of the Convention.

2. The applicants also complain that they had no effective remedy under domestic law to prevent an infringement of their right to privacy and invoke Article 13 of the Convention.

Article 13 provides 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."

In respect of the complaint by the applicants that they had no effective remedy by which they could have prevented the broadcast of a programme, the Government accept that there is no general cause of action for breach of privacy in English law but submit that the right to privacy is nonetheless fully protected by a number of specific remedies for specific wrongs. The specific cause of action of trespass existed in the present case and this remedy, if pursued, would have provided the applicants with adequate protection of their rights under the Convention.

The applicants submit that their complaint under Article 13 of the Convention is closely linked to that under Article 8. They had no remedy to protect their right to privacy since the BCC had no power of redress until after the film had been broadcast and there was no alternative avenue of redress available to the applicants. The Government have therefore failed to effectively protect their rights under the Convention.

However, the Court has found that the applicants' complaints under Article 8 are incompatible with the provisions of the Convention. The Court finds that they are not "arguable" within the meaning of the case-law of the Court in this connection (see the *Powell and Rayner v. the United Kingdom* judgment of 21 February 1990, Series A no. 172, p. 14, § 33).

It follows that this part of the application is also incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3, and that it must be rejected pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court, unanimously,

**DECLARES THE APPLICATION INADMISSIBLE.**

S. Dollé  
Registrar

J-P. Costa  
President