

FOURTH SECTION

**CASE OF APPLEBY AND OTHERS v. THE UNITED KINGDOM**

*(Application no. 44306/98)*

JUDGMENT

STRASBOURG

6 May 2003

**FINAL**

*24/09/2003*

In the case of **Appleby** and Others 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,  
Mrs E. Palm,  
Mrs V. Strážnická,  
Mr R. Maruste,  
Mr S. Pavlovski,  
Mr L. Garlicki, *judges*,  
and Mr M. O'Boyle, *Section Registrar*,

Having deliberated in private on 8 April 2003,

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

#### PROCEDURE

1. The case originated in an application (no. 44306/98) 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 three **United Kingdom** nationals, Mrs Eileen **Appleby**, Mrs Pamela Beresford and Mr Robert Alphonsus, and an environmental group, Washington First Forum, ("the applicants"), on 1 September 1998.
2. The applicants, who had been granted legal aid, were represented by Mr J. Welch, a lawyer working for Liberty in London. The **United Kingdom** Government ("the Government") were represented by their Agent, Mr C. Whomersley.
3. The applicants alleged that they had been prevented from meeting in the town centre, a privately owned shopping mall, to impart information and ideas about proposed local development plans. They relied on Articles 10, 11 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).
5. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court).
6. 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 (Rule 52 § 1). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.
7. A hearing on admissibility and the merits took place in public in the Human Rights Building, Strasbourg, on 15 October 2002 (Rule 54 § 3).

There appeared before the Court:

(a) *for the Government*  
Mr C. Whomersley, *Agent*,

Mr J. Crow, *Counsel*,  
Mrs J.-A. Mackenzie, *Adviser*;

(b) *for the applicants*  
Mr R. Singh QC,  
Mr A. Sharland, *Counsel*,  
Ms J. Sawyer, *Adviser*.

The applicants Mrs **Appleby** and Mrs Beresford were also present.

The Court heard addresses by Mr Crow and Mr Singh.

8. By a decision of 12 November 2002, the Chamber declared the application admissible.

9. The applicants made submissions on just satisfaction to which the Government replied.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

10. The first, second and third applicants were born in 1952, 1966 and 1947 respectively and live in Washington (Tyne and Wear), where the fourth applicant, an environmental group set up by the applicants, is also based.

11. The new town centre of Washington is known as “the Galleries” and is located within an area now owned by Postel Properties Limited (“Postel”), a private company. This town centre was originally built by the Washington Development Corporation (“the Corporation”), a body set up by the government of the **United Kingdom** pursuant to an Act of Parliament to build the “new” centre. The centre was sold to Postel on 30 December 1987.

12. The Galleries, as owned by Postel at the relevant time, comprised a shopping mall (with two hypermarkets and major shops), the surrounding car parks with spaces for approximately 3,000 cars and walkways. Public services were also available in the vicinity. However, the freehold of the careers’ office and the public library was owned by the Council, the social services office and health centre were leased to the Council by the Secretary of State and the freehold of the police station was held on behalf of Northumbria Police Authority. There was a post office within the Galleries and also the offices of the housing department, leased to the Council by Postel.

13. Around September 1997 the Council gave outline planning permission to the City of Sunderland College to build on a part of Princess Anne Park in Washington known as the Arena. The Arena is the only playing field in the vicinity of Washington town centre which is available for use by the local community. The first to third applicants, together with other concerned residents, formed the fourth applicant to campaign against the college’s proposal and to persuade the Council not to grant the college permission to build on the field.

14. On or around 14 March 1998 the first applicant, together with her husband and son, set up two stands at the entrance of the shopping mall in the Galleries, displaying posters alerting the public to the likely loss of the open space and seeking signatures to present to the Council on behalf of Washington First Forum. Security guards employed by Postel would not let the first applicant or her assistants continue to collect signatures on any land or premises owned by Postel. The applicants had to remove their stands and stop collecting signatures.

15. The manager of one of the hypermarkets gave the applicants permission to set up stands within that store in March 1998, allowing them to transmit their message and to collect signatures, albeit from a reduced number of people. However, the same permission was not granted in April 1998 when the applicants wanted to collect signatures for a further petition.

16. On 10 April 1998 the third applicant, as acting chair of Washington First Forum, wrote to the manager of the Galleries asking for permission to set up a stand and to canvass views from the public either inside the mall itself or in the adjacent car parks and offered to pay to be allowed to do so. In his reply of 14 April 1998, the manager of the Galleries refused access. His letter read as follows:

“... the Galleries is unique in as much as although it is the Town Centre, it is also privately owned.

The owner’s stance on all political and religious issues, is one of strict neutrality and I am charged with applying this philosophy.

I am therefore obliged to refuse permission for you to carry out a petition within the Galleries or the adjacent car parks.”

17. On 19 April 1998 the third applicant wrote again to the manager of the Galleries, asking him to reconsider his decision. His letter remained unanswered.

18. The fourth applicant continued to try and reach the public by setting up stands by the roadside on public footpaths and going to the old town centre at Concord which, however, is visited by a much smaller number of Washington residents.

19. The deadline for letters of representation to the Council regarding the building works was 1 May 1998. On 30 April 1998 the applicants submitted the 3,200 letters of representation they had obtained.

20. The fourth applicant has produced a list of associations and others which were given permission to carry out collections, set up stands and displays within the Galleries. These included: the Salvation Army (collection before Christmas), local school choirs (carol-singing and collection before Christmas), the Stop Smoking Campaign (advertising display and handing out of nicotine patches), the Blood Transfusion Service (blood collection), the Royal British Legion (collection for Armistice Day), various photographers (advertising and taking of photographs) and British Gas (staffed advertising display).

21. From 31 January to 6 March 2001, Sunderland Council ran a consultation campaign under the banner “Your Council, Your Choice”, informing the local residents of three leadership choices for the future of the Council and were allowed to use the Galleries for this purpose. This was a statutory consultation exercise carried out under section 25 of the Local Government Act 2000, which required local authorities to draw up proposals for the operation of “executive arrangements” and consult local electors before sending them to the Secretary of State. Some 8,500 people were reported as having responded to the survey.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

22. At common law, a private property owner may, in certain circumstances, be presumed to have extended an implied invitation to members of the public to come onto his land for lawful purposes. This is the case with commercial premises, such as shops, theatres and restaurants, as well as private premises (for example, there is a presumption that a house owner authorises people to come up the path to his front door to deliver letters or newspapers or for political canvassing). Any implied invitation may be revoked at will. A private person’s ability to eject people from his land is generally unfettered and he does not have to justify his conduct or comply with any test of reasonableness.

23. In *CIN Properties Ltd v. Rawlins* ([1995] 2 EGLR (Estates Gazette Law Reports) 130), where the applicants (young men) were barred from a shopping centre in Wellingborough as the private company owner CIN considered that their behaviour was a nuisance, the Court of Appeal held that CIN had the right to determine any licence which the applicants might have had to enter the centre. In giving judgment, Lord Phillips found that the local authority had not entered into any walkways agreement with the company within the meaning of section 18(1) of the Highways Act 1971 (later replaced by section 35 of the Highways Act 1980) which would have dedicated the walkways or footpaths as public rights of way and which would have given the local council the power to issue by-laws regulating the use of those rights of way. Nor was there any basis for finding an equitable licence. He also considered case-law from North America concerning the applicants' arguments for the finding of some kind of public right:

"Of more obvious relevance are two North American cases. In *Uston v. Resorts International Inc.* (1982) N.J. 445A.2d 370, the Supreme Court of New Jersey laid down as a general proposition that when property owners open their premises – in that case a gaming casino – to the general public in pursuit of their own property interests, they have no right to exclude people unreasonably but, on the contrary, have a duty not to act in an arbitrary or discriminatory manner towards persons who come on their premises. However, that decision was based upon a previous decision of the same court in *State v. Schmid* (1980) N.J. 423A 2d 615, which clearly turned upon the constitutional freedoms of the First Amendment. The general proposition cited above has no application in English law.

The case of *Harrison v. Carswell* (1975) 62 D.L.R. 3d 68 in the Supreme Court of Canada concerned the right of an employee of a tenant in a shopping centre to picket her employer in the centre, against the wishes of the owner of the centre. The majority of the Supreme Court held that she had no such right and that the owner of the centre had sufficient control or possession of the common areas to enable it to invoke the remedy of trespass. However, Laskin C.J.C., in a strong dissenting judgment held that since a shopping centre was freely accessible to the public, the public did not enter under a revocable licence subject only to the owner's whim. He said that the case involved a search for an appropriate legal framework for new social facts and –

'If it was necessary to categorise the legal situation which, in my view, arises upon the opening of a shopping centre, with public areas of the kind I have mentioned (at least where the opening is not accompanied by an announced limitation on the classes of public entrants), I would say that the members of the public are privileged visitors whose privilege is revocable only upon misbehaviour (and I need not spell out here what this embraces) or by reason of unlawful activity. Such a view reconciles both the interests of the shopping centre owner and of members of the public, doing violence to neither and recognising the mutual or reciprocal commercial interests of shopping centre owner, business tenants and members of the public upon which the shopping centre is based.'

I have already said that this was a dissenting judgment. Nevertheless counsel [for the applicants] submitted that we should apply it in the present case. I accept that courts may have to be ready to adapt the law to new social facts where necessary. However there is no such necessity where Parliament has already made adequate provision for the new social facts in question as it has here by section 18 of the Highways Act 1971 and section 35 of the Highways Act 1980. (*Harrison v. Carswell* makes no mention of any similar legislation in Canada.) Where Parliament has legislated and the Council, as representing the public, chooses not to invoke the machinery which the statute provides, it is not for the courts to intervene.

I would allow this appeal ... on the basis that CIN had the right, subject only to the issue under section 20 of the Race Relations Act 1976, to determine any licence the [applicants] may have had to enter the Centre."

### III. CASES FROM OTHER JURISDICTIONS

24. The parties have referred to case-law from the **United States** and Canada.

## A. The **United States**

25. The First Amendment to the Federal Constitution protects freedom of speech and peaceful assembly.

26. The **United States** Supreme Court has accepted a general right of access to certain types of public places, such as streets and parks, known as “public fora” for the exercise of free speech (*Hague v. Committee for Industrial Organisation*, 307 U.S. (**United States**: Supreme Court Reports) 496 (1939)). In *Marsh v. Alabama* (326 U.S. 501, 66 S.Ct. (Supreme Court Reporter) 276, 90 L.Ed. (**United States** Supreme Court Reports, Lawyers’ Edition) 265 (1946)), the Supreme Court also held that a privately owned corporate town (a company town) having all the characteristics of other municipalities was subject to the First Amendment rights of free speech and peaceable assembly. It has found that the First Amendment does not require access to privately owned properties, such as shopping centres, on the basis that there has to be “State action” (a degree of State involvement) for the amendment to apply (see, for example, *Hudgens v. NLRB*, 424 U.S. 507 (1976)).

27. The **United States** Supreme Court has taken the position that the First Amendment does not prevent a private shopping-centre owner from prohibiting distribution on its premises of leaflets unrelated to its own operations (*Lloyd Corp. v. Tanner*, 47 U.S. 551, 92 S.Ct. 2219, 33 L.Ed. 2d 131 (1972)). This did not however prevent State constitutional provisions from adopting more expansive liberties than the Federal Constitution to permit individuals reasonably to exercise free speech and petition rights on the property of a privately owned shopping centre to which the public was invited and this did not violate the property rights of the shopping-centre owner so long as any restriction did not amount to taking without compensation or contravene any other federal constitutional provisions (*Pruneyard Shopping Center v. Robbins*, 447 U.S. 74, 64 L.Ed. 2d 741, 100 S.Ct. 2035 (1980)).

28. Some State courts have found that a right of access to shopping centres could be derived from provisions in their State constitutions according to which individuals could initiate legislation by gathering a certain number of signatures in a petition or individuals could stand for office by gathering a certain number of signatures (see, for example, *Batchelder v. Allied Stores Int’l*, N.E. (West’s North Eastern Reporter) 2d 590 (Massachusetts, 1983); *Lloyd Corp. v. Whiffen*, 849 P. (West’s Pacific Reporter) 2d 446, 453-54 (Oregon, 1993); *Southcenter Joint Venture v. National Democratic Policy Comm.*, 780 P. 2d 1282 (Washington, 1989)). Some cases found State obligations arising due to State involvement, for example, *Bock v. Westminster Mall Co.*, 819 P. 2d 55 (Colorado, 1991) (the shopping centre was a State actor because of financial participation of public authorities in its development and the active presence of government agencies in the common areas), and *Jamestown v. Beneda*, 477 N.W. (West’s North Western Reporter) 2d 830 (North Dakota, 1991) (where the shopping centre was owned by a public body, although leased to a private developer).

29. Other cases cited as indicating a right to reasonable access to property under State private law were *State v. Shack*, 277 A. (West’s Atlantic Reporter) 2d 369 (New Jersey, 1971), where the court ruled that under New Jersey property law ownership of real property did not include the right to bar access to governmental services available to migrant workers, in this case a publicly funded non-profit lawyer attempting to advise migrant workers; *Uston v. Resorts International*, 445 A. 2d 370 (New Jersey, 1982), a New Jersey case concerning casinos where the court held that when property owners open their premises to the general public in pursuit of their own property interests they have no right to exclude people unreasonably (although it was acknowledged that the private law of most States did not require a right of reasonable access to privately owned property, p. 374); and *Streetwatch v. National Railroad Passenger Corp.*, 875 F. Supp. (West’s Federal Supplement) 1055 (Southern District of New York, 1995) concerning the ejection of homeless people from a railway station.

30. States in which courts ruled that free speech provisions in their constitutions did not apply to privately owned shopping centres included Arizona (*Fiesta Mall Venture v. Mechem Recall Comm.*, 767 P. 2d 719 (Court of Appeals, 1989)); Connecticut (*Cologne v. Westfarms Assocs*, 469 A. 2d 1201 (1984)); Georgia (*Citizens for Ethical Gov’t v. Gwinnet Place Assoc.*, 392 S.E. (West’s South Eastern Reporter) 2d 8 (1990)); Michigan (*Woodland v. Michigan Citizens Lobby*, 378 N.W. 2d 337 (1985)); Minnesota (*State of*

*Minnesota v. Wicklund et al.*, 7 April 1998 (Court of Appeals)); North Carolina (*State of North Carolina v. Felmet*, 273 S.E. 2d 708 (1981)); Ohio (*Eastwood Mall v. Slanco*, 626 N.E. 2d 59 (1994)); Pennsylvania (*Western Pa Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co.*, 515 A. 2d 1331 (1986)); South Carolina (*Charleston Joint Venture v. McPherson*, 417 S.E. 2d 544 (1992)); Washington (*Southcenter Joint Venture v. National Democratic Policy Comm.*, cited above; and Wisconsin (*Jacobs v. Major*, 407 N.W. 2d 832 (1987)).

## B. Canada

31. Prior to the entry into force of the Canadian Charter of Rights and Freedoms, the Canadian Supreme Court had taken the view that the owner of a shopping centre could exclude protesters (*Harrison v. Carswell*, 62 D.L.R. (Dominion Law Reports) 3d 68 (1975)). After the Charter entered into force, a lower court held that the right to free speech applied in privately owned shopping centres (*R. v. Layton*, 38 C.C.C. (Canadian Criminal Cases) 3d 550 (1986) (Provincial Court, Judicial District of York, Ontario)). However, an individual judge of the Canadian Supreme Court has since expressed the opposite view, stating *obiter* that the Charter does not confer a right to use private property as a forum of expression (McLachlin J, *Committee for Cth of Can. v. Canada* [1991] 1 SCR (Canada Supreme Court Reports) 139, 228).

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

32. Article 10 of the Convention provides:

“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.”

#### A. The parties' submissions

##### 1. The applicants

33. The applicants submitted that the State was directly responsible for the interference with their freedom of expression and assembly as it was a public entity that had built the Galleries on public land and a minister who had approved the transfer into private ownership. The local authority could have required that the purchaser enter into a walkways agreement, which would have extended by-law protection to access ways, but did not do so.

34. The applicants also argued that the State owed a positive obligation to secure the exercise of their rights within the Galleries. As the information and ideas which they wished to communicate were of a political nature, their expression was entitled to the greatest level of protection. Access to the town centre was essential for the exercise of those rights as it was the most effective way of communicating their ideas to the population, as was shown by the fact that the local authority itself used the Galleries to promote a political proposal regarding the reorganisation of local government. Yet, the applicants had been refused permission to use the Galleries to express their opposition to local government action, showing that the private owner was not neutral in its decisions as to who should be given permission. The finding of an

obligation would impose no significant financial burden on the State as it was merely under a duty to put in place a legal framework which provided effective protection for their rights of freedom of expression and peaceful assembly by balancing those rights against the rights of the property owner, as already existed in a number of areas. They considered that no proper balance had been struck as protection was afforded to property owners, who wielded an absolute discretion as to who should have access to their land, while no regard was given to individuals seeking to exercise their individual rights.

35. The applicants submitted that it was for the State to decide how to remedy this shortcoming and that any purported definitional problems and difficulties of application could be resolved by carefully drafted legislation. A definition of “quasi-public” land could be proposed that excluded, for example, theatres. They also referred to case-law from other jurisdictions (in particular the **United States**) where concepts of reasonable access or limitations on arbitrary exclusion powers of landowners were being developed, *inter alia*, in the context of shopping malls and university campuses, which gave an indication of how the State could approach the perceived problems.

## 2. The Government

36. The Government submitted that at the relevant time the town centre was owned by a private company, Postel, and that it was Postel, in the exercise of its rights as property owner, which refused the applicants permission to use the Galleries for their activities. They argued that, in those circumstances, the State could not be regarded as bearing direct responsibility for any interference with the applicants’ exercise of their rights. The fact that the land had previously been owned by the local authority was irrelevant.

37. In so far as the applicants claimed that the State’s positive obligation to secure their rights was engaged, the Government acknowledged that positive obligations were capable of arising under Articles 10 and 11 of the Convention. However, such obligations did not arise in the present case, having regard to a number of factors. The alleged breach did not have a serious impact on the applicants, who had many other opportunities of exercising their rights and used them to obtain thousands of signatures on their petition as a result. The burden imposed on the State by the finding of a positive obligation would also be a heavy one. When selling land, local authorities were not under any duty to enter into walkways agreements to render access areas subject to by-law regulation. The State’s ability to comply with such an obligation by entering into that type of agreement when selling State-owned land would depend entirely on obtaining the cooperation of the private-sector purchaser, who might reasonably not want to allow any form of canvassing on his land and might feel that customers of commercial services would be deterred by the presence of political canvassers, religious activists, animal rights campaigners, etc.

38. Furthermore, a fair balance had been struck between the competing interests in this case. The applicants, in the Government’s view only looked at one side of the balancing exercise, whereas legitimate objections could be raised by property owners if they were required to allow people to exercise their freedom of expression or assembly on their land, when means of exercising those rights were widely available on genuinely public land and in the media. As the facts of this case illustrated, the applicants could canvass support in public places, on the streets, in squares and on common land, they could canvass from door to door or by post, and they could write letters to the newspapers or speak on radio and television. The Government argued that it was not for the Court to prescribe the necessary content of domestic law by imposing some ill-defined concept of “quasi-public” land to which a test of reasonable access should be applied. That no problems arose from the balance struck in this case was shown by the fact that no serious controversy had arisen to date. The cases from the **United States** and Canada referred to by the applicants were not relevant, as they dealt with different legal provisions and different factual situations and, in any event, did not show any predominant trend in requiring special regimes to attach to “quasi-public” land.

## B. The Court’s assessment

### 1. General principles



39. The Court reiterates the key importance of freedom of expression as one of the preconditions for a functioning democracy. Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals (see *Özgür Gündem v. Turkey*, no. 23144/93, §§ 42-46, ECHR 2000-III, where the Turkish State was found to be under a positive obligation to take investigative and protective measures where the pro-PKK newspaper and its journalists and staff had been the victims of a campaign of violence and intimidation; see also *Fuentes Bobo v. Spain*, no. 39293/98, § 38, 29 February 2000, concerning the obligation on the State to protect freedom of expression in the employment context).

40. In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities (see, *inter alia*, *Rees v. the United Kingdom*, judgment of 17 October 1986, Series A no. 106, p. 15, § 37, and *Osman v. the United Kingdom*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, pp. 3159-60, § 116).

## 2. Application in the present case

41. The applicants were stopped from setting up a stand and distributing leaflets in the Galleries by Postel, the private company which owned the shopping centre. The Court does not find that the authorities bear any direct responsibility for this restriction on the applicants' freedom of expression. It is not persuaded that any element of State responsibility can be derived from the fact that a public development corporation transferred the property to Postel or that this was done with ministerial permission. The issue to be determined is whether the respondent State has failed in any positive obligation to protect the exercise of the applicants' Article 10 rights from interference by others – in this case, the owner of the Galleries.

42. The nature of the Convention right at stake is an important consideration.

43. The Court notes that the applicants wished to draw the attention of their fellow citizens to their opposition to the plans of the local authority to develop a playing field and thus to deprive their children of green areas to play in. This was a topic of public interest and contributed to debate about the exercise of local government powers. However, while freedom of expression is an important right, it is not unlimited. Nor is it the only Convention right at stake. Regard must also be had to the property rights of the owner of the shopping centre under Article 1 of Protocol No. 1.

44. The Court has noted the applicants' arguments and the references to the **United States** cases, which draw attention to the way in which shopping centres, although their purpose is primarily the pursuit of private commercial interests, are designed increasingly to serve as gathering places and events centres, with multiple activities concentrated within their boundaries. Frequently, individuals are not merely invited to shop but encouraged to linger and participate in a wide range of activities – from entertainment to community, educational and charitable events. Such shopping centres may assume the characteristics of the traditional town centre and indeed, in this case, the Galleries is labelled on maps as the town centre and either contains, or is close to, public services and facilities. As a result, the applicants argued that the shopping centre must be regarded as a "quasi-public" space in which individuals can claim the right to exercise freedom of expression in a reasonable manner.

45. The Government have disputed the usefulness or coherence of employing definitions of "quasi-public" spaces and pointed to the difficulties which would ensue if places open to the public, such as theatres or museums, were required to allow free access for purposes other than the cultural activities they offered.

46. The Court would observe that, although the cases from the **United States** in particular illustrate an interesting trend in accommodating freedom of expression to privately owned property open to the public,

the Supreme Court has refrained from holding that there is a federal constitutional right of free speech in a privately owned shopping mall. Authorities from the individual States show a variety of approaches to the public- and private-law issues that have arisen in widely differing factual situations. It cannot be said that there is as yet any emerging consensus that could assist the Court in its examination in this case concerning Article 10 of the Convention.

47. That provision, notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the exercise of that right. While it is true that demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other, the Court is not persuaded that this requires the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property (government offices and ministries, for instance). Where, however, the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of the Convention rights by regulating property rights. A corporate town where the entire municipality is controlled by a private body might be an example (see *Marsh v. Alabama*, cited at paragraph 26 above).

48. In the present case, the restriction on the applicants' ability to communicate their views was limited to the entrance areas and passageways of the Galleries. It did not prevent them from obtaining individual permission from businesses within the Galleries (the manager of a hypermarket granted permission for a stand within his store on one occasion) or from distributing their leaflets on the public access paths into the area. It also remained open to them to campaign in the old town centre and to employ alternative means, such as calling door-to-door or seeking exposure in the local press, radio and television. The applicants did not deny that these other methods were available to them. Their argument, essentially, was that the easiest and most effective method of reaching people was to use the Galleries, as shown by the local authority's own information campaign (see paragraph 21 above). The Court does not consider, however, that the applicants can claim that they were, as a result of the refusal of the private company, Postel, effectively prevented from communicating their views to their fellow citizens. Some 3,200 people submitted letters in support. Whether more would have done so if the stand had remained in the Galleries is speculation which is insufficient to support an argument that the applicants were unable otherwise to exercise their freedom of expression in a meaningful manner.

49. Balancing the rights in issue and having regard to the nature and scope of the restriction in this case, the Court does not find that the respondent State failed in any positive obligation to protect the applicants' freedom of expression.

50. Consequently, there has been no violation of Article 10 of the Convention.

## II. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

51. The relevant parts of Article 11 of the Convention provide:

“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others ...

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

52. The Court finds that largely identical considerations arise under this provision as were examined above under Article 10 of the Convention. For the same reasons, it also finds no failure to protect the applicants' freedom of assembly and, accordingly, no violation of Article 11 of the Convention.

### III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

53. Article 13 of the Convention provides:

“Everyone whose rights and freedoms as set forth in [the] 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.”

54. The applicants submitted that they had no remedy for their complaints, which disclosed arguable claims of violations of provisions of the Convention. Domestic law provided at that time no remedy to test whether any interference with their rights was unlawful. The case-law of the English courts indicated that the owner of a shopping centre could give a bad reason, or no reason at all, for the exclusion of individuals from its land. No judicial review would lie against the decision of such a private entity.

55. The Government accepted that, if contrary to their arguments, the State’s positive obligations were engaged and there was an unjustified interference under Articles 10 or 11 of the Convention, there was no remedy available to the applicants in domestic law.

56. The case-law of the Convention institutions indicates, however, that Article 13 cannot be interpreted as requiring a remedy against the state of domestic law, as otherwise the Court would be imposing on Contracting States a requirement to incorporate the Convention (see *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, p. 47, § 85). In so far, therefore, as no remedy existed in domestic law prior to 2 October 2000 when the Human Rights Act 1998 took effect, the applicants’ complaints fall foul of this principle. Following that date, it would have been possible for the applicants to raise their complaints before the domestic courts, which would have had a range of possible redress available to them.

57. In these circumstances, the Court finds no breach of Article 13 of the Convention in the present case.

#### FOR THESE REASONS, THE COURT

1. *Holds* by six votes to one that there has been no violation of Article 10 of the Convention;
2. *Holds* by six votes to one that there has been no violation of Article 11 of the Convention;
3. *Holds* unanimously that there has been no violation of Article 13 of the Convention.

Done in English, and notified in writing on 6 May 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O’Boyle Matti Pellonpää  
Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Mr Maruste is annexed to this judgment.

M.P.  
M.O’B.

## PARTLY DISSENTING OPINION OF JUDGE MARUSTE

To my regret I am unable to share the finding of the majority of the Chamber that the applicants' rights under Articles 10 and 11 of the Convention were not infringed. In my view, the property rights of the owners of the shopping mall were unnecessarily given priority over the applicants' freedom of expression and assembly.

The case raises the important issue of the State's positive obligations in a modern liberal society where many traditionally State-owned services like post, transport, energy, health and community services and others have been or could be privatised. In this situation, should private owners' property rights prevail over other rights or does the State still have some responsibility to secure the proper balance between private and public interests?

The new town centre was planned and built originally by a body set up by the government (see paragraph 11 of the judgment). At a later stage the shopping centre was privatised. The area was huge, with many shops and hypermarkets, and also included car parks and walkways. Because of its central nature, several important public services like the public library, the social services office, the health centre and even the police station were also located in or near to the centre. Through specific actions and decisions, the public authorities and public money were involved and there was an active presence of public agencies in the vicinity. That means that the public authorities also bore some responsibility for decisions about the nature of the area and access to and use of it.

There is no doubt that the area in its functional nature and essence is a *forum publicum* or "quasi-public" space, as argued by the applicants and clearly recognised also by the Chamber (see paragraph 44 of the judgment). The place as such is not something which has belonged to the owners for ages. This was a new creation where public interests and money were and still are involved. That is why the situation is clearly distinguishable from the "my home is my castle" type of situation.

Although the applicants were not complaining about unequal treatment, it is evident that they had justified expectations of being able to use the area as a public gathering area and to have access to the public and its services on an equal footing with other groups, including local government (see paragraphs 20 and 34 of the judgment) who had used the place for similar purposes without any restrictions.

The applicants sought access to the public to discuss with them a topic of a public, not private, nature and to contribute to the debate about the exercise of local government powers – in other words, for entirely lawful purposes. They acted as others did, without disturbing the public peace or interfering with business by other unacceptable or disruptive methods.

In these circumstances, it is hard to agree with the Chamber's finding that the authorities bear no direct responsibility for the restrictions applied to the applicants. In a strict and formal sense that is true. But it does not mean that there were no indirect responsibilities. It cannot be the case that through privatisation the public authorities can divest themselves of all responsibility to protect rights and freedoms other than property rights. They still bear responsibility for deciding how the forum created by them is to be used and for ensuring that public interests and individuals' rights are respected. It is in the public interest to permit reasonable exercise of individual rights and freedoms, including the freedoms of speech and assembly on the property of a privately owned shopping centre, and not to make some public services and institutions inaccessible to the public and participants in demonstrations. The Court has consistently held that, if there is a conflict between rights and freedoms, the freedom of expression takes precedence. But in this case it appears to be the other way round – property rights prevailed over freedom of speech.

Of course, it would clearly be too far-reaching to say that no limitations can be put on the exercise of rights and freedoms on private land or premises. They should be exercised in a manner consistent with respect for owners' rights too. And that is exactly what the Chamber did not take into account in this case. The public authorities did not carry out a balancing exercise and did not regulate how the privately owned *forum publicum* was to be used in the public interest. The old traditional rule that the private owner has an unfettered right to eject people from his land and premises without giving any justification and without any test of reasonableness being applied is no longer fully adapted to contemporary conditions and society. Consequently, the State failed to discharge its positive obligations under Articles 10 and 11.

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