

## Osman v United Kingdom

a (87/1997/871/1083)

EUROPEAN COURT OF HUMAN RIGHTS

BERNHARDT (PRESIDENT), VILHJÁLMSSON, DE MEYER, FOIGHEL, PEKKANEN, MORENILLA,  
FREELAND, BAKA, LOPES ROCHA, WILDHABER, MIFSUD BONNICI, MAKARCZYK, GOTCHEV,  
b JAMBREK, JUNGWIERT, KURIS, LOHMUS, CASADEVALL, PANTIRU AND TOUMANOV JJ

22 JUNE, 28 OCTOBER 1998

c *Life – Protection of right – Positive obligation – Alleged failure of authorities to protect right to life of first applicant’s husband and of second applicant from threat posed by individual – Convention for the Protection of Human Rights and Fundamental Freedoms 1950, art 2.*

*Fair trial – Access to court – Lawfulness of restrictions on applicants’ right of access to a court to sue authorities for damage caused by said failure – Convention for the Protection of Human Rights and Fundamental Freedoms 1950, art 6(1).*

d The second applicant, A, was a pupil at a school where P was a teacher. P formed a disturbing attachment to A. Following a complaint by another pupil’s mother that P had followed her son home and had spread rumours that her son’s friendship with A was of a sexual nature, the school began an investigation into P’s conduct.  
e The police were informed of P’s conduct and visited the school on several occasions but did not intervene. It was decided that A should be transferred to another school but, while the transfer was being arranged, it was discovered that files relating to A and to staff disciplinary matters had been stolen from the school office. There then appeared around the school graffiti of a sexual nature relating to A. The school questioned P about the incidents but he denied any involvement.  
f In April 1987 P changed his name to that of A. In May the school spoke to the police again. Between May and June P was examined on three occasions by an education authority psychiatrist who concluded that P was not mentally ill and recommended a transfer to another school. A series of acts of vandalism directed against A’s home occurred between May and October each of which was reported to the police. In August P was dismissed from the school but allowed to resume teaching duties at other local schools. Towards the end of 1987 a police officer spoke to P concerning the acts of vandalism against A’s home. In December, the police questioned P again following an incident where P’s car collided with a van in which A’s friend was a passenger. P was further interviewed at his own request by officers of the education authority to whom he admitted that he felt totally  
g self-destructive. The police were informed. Later in the same month, the police arrived at P’s house with the intention of arresting him in connection with the acts of vandalism against A’s home. P was not at home since he was teaching. The education authority was directed to ask P to contact the police but from the following day P went missing. Between January and March 1988 P travelled around England occasionally returning to his home address. In January he stole a  
h gun from a parked car. That information did not come to the attention of the police in charge of P’s case since there was nothing to connect him with the theft. In  
i March 1988, P shot and killed A’s father and seriously wounded A. P was

convicted of manslaughter and sentenced to be detained in a mental hospital. Subsequently A and his mother, the first applicant, brought a negligence action alleging that the police had failed to act on clear indications that P was a danger to A's family. Applying the rule established in *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53 the Court of Appeal ruled that the police were immune from suit and refused the applicants leave to appeal. The applicants complained to the European Commission of Human Rights that the failure of the police to act on indications prior to the shooting that P represented a serious threat to the physical safety of their family and their inability to obtain an adjudication on their subsequent negligence action against the police gave rise to violations of their rights to life, a fair trial, family life and an effective remedy under arts 2<sup>1</sup>, 6(1)<sup>2</sup>, 8<sup>3</sup> and 13<sup>4</sup> of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950. The Commission found that there had been no violation of art 2 (ten votes to seven); that there had been a violation of art 6(1) (12 votes to 5); that there had been no violation of art 8 (ten votes to seven); and that no separate issue arose under art 13 (12 votes to 5). It referred the case to the European Court of Human Rights. The government disputed, *inter alia*, the applicability of art 6(1).

**Held** – (1) (By a majority) The positive obligation imposed by art 2 to protect the right to life by suppressing offences against the person required the authorities to do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they had or ought to have had knowledge. However, the scope of that obligation was limited by the need not to impose an impossible burden on the authorities and to ensure that the police exercised their powers to control and prevent crime in a manner which fully respected due process and other guarantees legitimately restraining the scope of their actions. On the facts in the instant case, there was no stage in the sequence of the events leading up to the shooting when it could be said that the police knew or ought to have known that the lives of A's family were at real and immediate risk from P. While the applicants had highlighted a series of missed opportunities which might have enabled the police to neutralise the threat posed by P, it could not be said that those measures, judged reasonably, would have had such effect or that a domestic court would have convicted him on the basis of the evidence adduced before it. The police could not, therefore, be criticised for attaching weight to the presumption of innocence or failing to use powers of arrest, search and seizure having regard to their reasonably held view that they lacked at relevant times the required standard of suspicion to use those powers or that any such action would have produced concrete results. Accordingly there had been no violation of art 2 and, consequently, no breach of the right to respect for private and family life under art 8, with regard to A's physical integrity (see pp 321 *efhi*, 323 *hi* and 324 *ab*, post).

(2) Article 6(1) secured to everyone the right to have any claim relating to civil rights and obligations brought before a court. English common law accorded the plaintiff the right to submit to a court a claim in negligence against a defendant and to request that court to determine the constituent elements of such a negligence claim, namely: the foreseeability of the damage sustained; the existence of a relationship of proximity between the parties; and whether it was fair, just and

1 Article 2 is set out at p 317 *gh*, post.

2 Article 6(1), so far as material, is set out at p 325 *h*, post.

3 Article 8 is set out at p 324 *fg*, post.

4 Article 13 is set out at p 330 *hi*, post.

reasonable to impose a duty of care in the circumstances. The latter criterion was invoked in *Hill* to shield the police from liability in the context of the investigation and suppression of crime. The rule however did not doom to failure such a civil action from the outset but allowed a domestic court to make a considered assessment on the basis of the arguments before it as to whether a particular case was suitable for the application of the rule. Accordingly the applicants in the instant case had a right derived from the law of negligence to seek an adjudication on the admissibility and merits of an arguable claim that they were in a relationship of proximity to the police, that the harm sustained was foreseeable and that, in the circumstances, it was fair, just and reasonable not to apply the exclusionary rule established in *Hill*. The assertion of that right was sufficient to ensure the applicability of the right to have a civil claim brought before a court. Accordingly, notwithstanding the fact that the Court of Appeal in applying the exclusionary rule established in *Hill* had dismissed the applicants' civil action as showing no cause of action, art 6(1) was applicable (see p 327 *a b c d e f g*, post).

(3) Contracting states were entitled to regulate the right of access to a court to the extent that such regulation did not impair the very essence of the right. Thus, any such regulation had to pursue a legitimate aim and the means employed had to be proportionate to that aim. Although the maintenance of police effectiveness in the prevention of disorder and crime could be accepted as legitimate aims under the convention, domestic courts had to be free to consider other public interest considerations that might pull against the application of an exclusionary rule such as that at issue. Failing that, no distinction would be made between degrees of negligence or of harm suffered and there would be no consideration of the justice of a particular case. In the instant case, the Court of Appeal construed the rule as affording the police a blanket immunity from civil suit in respect of their acts and omissions in the investigation and suppression of crime. Since its decision was given in the context of interlocutory proceedings and it had assumed, for the purpose of those proceedings, that the facts as pleaded in the applicants' statement of claim were true, there was never any determination of the case on its merits. Moreover, the applicants complied with the proximity test, which in itself was sufficiently rigid to restrict the number of actionable negligence cases against the police, and the case involved allegations of grave negligence which called for examination on the merits. Such an application of the rule, therefore, amounted to an unjustifiable restriction on the right to have a determination on the merits of a claim against the police in deserving cases, and the availability of alternative routes for securing compensation did not mitigate the loss of the right to bring an action against the police in negligence and to argue the justice of the case. It followed that the application of the exclusionary rule in the instant case constituted a disproportionate restriction on the applicants' right of access to a court and there had, therefore, been a violation of art 6(1). No separate issue arose under art 13 (see pp 329 *b c d e f g h i* and 330 *a b c d e f g*, post); *Tinnelly & Sons Ltd v UK* (1998) 4 BHRC 393 applied.

#### Cases cited

- Aerts v Belgium* (1998) 5 BHRC 382, ECt HR.
- Ashingdane v UK* (1985) 7 EHRR 528, ECt HR.
- Bentham v Netherlands* (1983) 6 EHRR 283, ECt HR.
- Dawson v Vansandau* (1863) 11 WR 516, DC.
- Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, [1970] 2 All ER 294, HL.

- DPP v P* [1991] 2 AC 447, (R v P) [1991] 3 All ER 337, HL.
- Fayed v UK* (1994) 18 EHRR 393, ECt HR.
- Glinski v McIver* [1962] AC 726, [1962] 1 All ER 696, HL. a
- Golder v UK* (1975) 1 EHRR 524, ECt HR.
- Hicks v Faulkner* [1878] 8 QBD 167, DC.
- Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53, [1988] 2 All ER 238, HL.
- Ireland v UK* (1978) 2 EHRR 25, ECt HR.
- Kirkham v Chief Constable of the Greater Manchester Police* [1990] 2 QB 283, [1990] 3 All ER 246, CA. b
- Klass v Germany* (1978) 2 EHRR 214, ECt HR.
- Knightley v Johns* [1982] 1 All ER 851, [1982] 1 WLR 349, CA.
- LCB v UK* (1998) 4 BHRC 447, ECt HR.
- McCann v UK* (1995) 21 EHRR 97, ECt HR.
- McLeod v UK* (1998) 5 BHRC 364, ECt HR. c
- Pierre-Bloch v France* (1997) 26 EHRR 202, ECt HR.
- R v Dytham* [1979] 2 QB 722, [1979] 3 All ER 641, CA.
- Rigby v Chief Constable of Northamptonshire* [1985] 2 All ER 985, [1985] 1 WLR 1242, DC.
- Shaaban Bin Hussien v Chong Fook Kam* [1970] AC 942, [1969] 3 All ER 1626, PC. d
- Sporrong v Sweden* (1982) 5 EHRR 35, ECt HR.
- Swinney v Chief Constable of Northumbria* [1997] QB 464, [1996] 3 All ER 449, CA.
- Tempest v Snowden* [1952] 1 KB 130, [1952] 1 All ER 1, CA.
- Tinnelly & Sons Ltd v UK* (1998) 4 BHRC 393, ECt HR. e

#### Application

In an application (no 23452/94) to the European Commission of Human Rights on 10 November 1993 Mrs Mulkiye Osman and her son, Ahmet Osman, complained that the failure of the police to act on indications that a known individual represented a serious threat to the physical safety of their family, and their inability to obtain an adjudication on their subsequent negligence action against the police, gave rise to violations of their rights under arts 2 (life), 6(1) (fair trial), 8 (family life) and 13 (effective remedy) of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Rome, 4 November 1950; TS 71 (1953); Cmnd 8969). The Commission declared the application admissible on 17 May 1996 and on 22 September 1997 referred the case to the European Court of Human Rights. The facts are set out in the judgment of the court. f

28 October 1998. **The EUROPEAN COURT OF HUMAN RIGHTS** delivered the following judgment.

#### PROCEDURE

1. The case was referred to the court by the European Commission of Human Rights on 22 September 1997, within the three-month period laid down by arts 32(1) and 47 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Rome, 4 November 1950; TS 71 (1953); Cmnd 8969). It originated in an application (no 23452/94) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under art 25 by two British nationals, Mrs Mulkiye Osman and her son, Ahmet Osman, on 10 November 1993. g



a The Commission's request referred to arts 44 and 48 and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the court in accordance with art 46. The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent state of its obligations under arts 2, 6, 8 and 13 of the convention.

b 2. In response to the enquiry made in accordance with r 33(3)(d) of Rules of Court A, the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (r 30).

c 3. The Chamber to be constituted included ex officio Sir John Freeland, the elected judge of British nationality (art 43 of the convention), and Mr R Ryssdal, the then President of the Court (r 21(4)(b)). On 25 September 1997, in the presence of the registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr R Macdonald, Mr A B Baka, Mr L Wildhaber, Mr K Jungwiert, Mr J Casadevall and Mr V Toumanov (art 43 in fine of the convention and r 21(5)). Subsequently, Mr R Bernhardt, the then Vice-President of the Court, replaced Mr Ryssdal as President of the Chamber following the latter's death.

d 4. As President of the Chamber at the time (r 21(6)), Mr Ryssdal, acting through the registrar, consulted the agent of the United Kingdom, the applicants' lawyer and the delegate of the Commission on the organisation of the proceedings (rr 37(1) and 38). Pursuant to the order made in consequence, the registrar received the government's and the applicants' memorials on 5 and 24 March 1998 respectively, the applicants having been granted an extension by the President of the Chamber of the deadline for submission of their memorial. The applicants filed with the registry on 9 April and 8 June 1998 further details of their claims for just satisfaction under art 50 of the convention. The government's observations in reply to these claims were filed with the registry on 18 June 1998.

e 5. In accordance with the decision of the new President of the Chamber, Mr Bernhardt, the hearing took place in public in the Human Rights Building, Strasbourg, on 22 June 1998. The court had held a preparatory meeting beforehand.

f There appeared before the court: (a) for the government, Mr M Eaton, Deputy Legal Adviser, Foreign and Commonwealth Office, (agent), Mr J Eadie, Barrister, Mr S Freeland, Barrister, (counsel), Ms R Davies, Home Office, Mr P Edmundson, Home Office, (advisers); (b) for the Commission, Mr C L Rozakis, (delegate); (c) for the applicants, Mr B Emmerson, Barrister, Mr N Ahluwalia, Barrister, g Mr A B Clapham, Barrister, (counsel), Mrs N Mole, Ms L Christian, Solicitor, (advisers).

The court heard addresses by Mr Rozakis, Mr Emmerson and Mr Eadie.

h 6. Following deliberations on 26 June 1998 the Chamber decided to relinquish jurisdiction forthwith in favour of a Grand Chamber (r 51(1)).

i 7. The Grand Chamber to be constituted included ex officio the President of the Court, Mr Bernhardt, who was elected to this office following the death of Mr Ryssdal, and the Vice-President, Mr Thór Vilhjálmsson, who was elected to this office in succession to Mr Bernhardt, as well as all other members and substitute members of the Chamber which had relinquished jurisdiction, the latter being Mr I Foighel, Mr J Makarczyk, Mr M A Lopes Rocha and Mr R Pekkanen (r 2(2)(a) and (b)). On 28 June 1998, in the presence of the registrar, the President drew by lot the names of the eight judges called on to complete the Grand Chamber, namely Mr J De Meyer, Mr J M Morenilla, Mr G Mifsud Bonnici,

Mr D Gotchev, Mr P Jambrek, Mr P Kuris, Mr U Lohmus and Mr T Pantiru. Subsequently, Mr Macdonald, a member of the original Chamber, withdrew from the Grand Chamber, being unable to take part in the further consideration of the case.

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8. On 26 June 1998, having consulted the agent of the government and the delegate of the Commission, the President acceded to the applicants' request for legal aid (r 4 of the addendum to Rules A).

9. Having taken note of the opinions of the agent of the government, the delegate of the Commission and the applicants, the Grand Chamber decided on 27 July 1998 that it was not necessary to hold a further hearing following the relinquishment of jurisdiction by the original Chamber.

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#### AS TO THE FACTS

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##### I. *The circumstances of the case*

###### A. The applicants

10. The applicants are [GRO-C] citizens resident in London. The first applicant, Mrs Mulkiye Osman, was born in Cyprus in 1948. She is the widow of Mr Ali Osman who was shot dead by Mr Paul Paget-Lewis on 7 March 1988. The second applicant, Ahmet Osman, is her son, born in England in 1972. He was a former pupil of Paul Paget-Lewis at Homerton House School. Ahmet Osman was wounded in the shooting incident which led to the death of his father.

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The applicants complaints are directed at the failure of the authorities to appreciate and act on what they claim was a series of clear warning signs that Paul Paget-Lewis represented a serious threat to the physical safety of Ahmet Osman and his family. There is disagreement between the applicants and the respondent state on essential aspects of the circumstances leading to the tragedy. The applicants have disputed in this respect the completeness of the facts as found by the Commission.

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###### B. The events to the end of March 1987

###### 1. *The initial complaints against Paget-Lewis*

11. In 1986 the headmaster of Homerton House School, Mr John Prince, noticed that one of his teaching staff, Paul Paget-Lewis, had developed an attachment to Ahmet Osman, a pupil at the school. According to a statement which he made to the police on 10 March 1988, Mr Prince indicated that he 'made a point of personally keeping an eye on the situation'. As a result of this attachment, Paget-Lewis informed Mr Prince that he intended to leave the school and become a supply teacher. Mr Kenneth Perkins, a deputy head teacher, spoke with Paget-Lewis and managed to persuade him to remain at the school.

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12. In January 1987 Mrs Green, the mother of Leslie Green, another pupil at the school and the applicants' neighbour, telephoned Mr Fleming—another deputy head teacher—to complain that Paget-Lewis had been following her son home after school and harassing him. She alleged that Paget-Lewis had been spreading rumours that her son had engaged in deviant sexual practices and that he objected to her son's friendship with Ahmet Osman. Mrs Green made a formal complaint to this effect to Mr Prince on 2 March 1987.

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*2. The various interviews regarding the complaints**a**(a) Leslie Green*

13. On 3 March 1987 Mr Perkins interviewed Leslie Green, who confirmed that Paget-Lewis had been following him and had been spreading rumours of a sexual nature about him because of his friendship with Ahmet Osman.

*b**(b) Ahmet Osman*

14. Also on 3 March 1987 Mr Fleming interviewed Ahmet Osman. In the typed record of this interview dated 6 March 1987, Ahmet confirmed that Paget-Lewis had warned him about Leslie Green, accusing Leslie of sexual misconduct with another boy at the school. Ahmet also reported to Mr Fleming during the interview that on one occasion Paget-Lewis had followed Leslie and himself home in his car. He also stated that Paget-Lewis had asked him to come and see him in his classroom at lunch times, apparently to learn Turkish, and that Paget-Lewis had taken photographs of him and given him money, a pen and a Turkish dictionary. However, he later took the pen and deliberately snapped it in half during a lesson.

*c**(c) Paget-Lewis**d*

15. On 6 March 1987 Mr Perkins interviewed Paget-Lewis. In the course of the interview Paget-Lewis stated that he had a special relationship with Ahmet Osman which had developed over a period of a year and which Leslie Green was trying to disrupt and that he was so upset on one occasion that he confronted Leslie and accused the boy of being a sexual deviant. He admitted that he had followed Leslie home on one occasion and had waited outside his parents' house for 45 minutes. Paget-Lewis mentioned to Mr Perkins that he had told Leslie Green that he would become 'very angry' if anything happened to his relationship with Ahmet, although he indicated to Mr Perkins that this was not to be seen as a threat. He also acknowledged that he had given Ahmet money and presents, and had taken photographs of him for 'sentimental reasons'. In a later memorandum dated 5 May 1988, Mr Perkins described Paget-Lewis as having been in a highly irrational state during this interview and unwilling to admit that his behaviour displayed a serious lack of wisdom and professionalism.

*e**f**g*

16. On 9 March 1987 Paget-Lewis submitted a written statement to Mr Perkins regarding the complaint made by Mrs Green. In his memorandum of 5 May 1988 Mr Perkins stated that he found the statement 'disturbing' since it showed clearly that Paget-Lewis was 'overpoweringly jealous' of the friendship between Ahmet Osman and Leslie Green and provided clear evidence that he 'was not in control of his emotions' (see para 15, above). Leslie was presented as devious, malicious and an evil influence.

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Mr Perkins again interviewed Paget-Lewis on his written statement during which he pointed out his concerns about the content of the statement and suggested to Paget-Lewis that he seek psychiatric help. Mr Perkins informed Mr Prince of everything which had happened up until that date.

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17. Prior to 13 March 1987 Mr Prince had an informal discussion with Paget-Lewis in which he admitted telling pupils at the school that Leslie Green had engaged in acts of oral sex with Ahmet Osman in revenge for rumours spread by Leslie concerning his relationship with Ahmet.

On 13 March 1987 Mr Prince formally interviewed Paget-Lewis on the basis of the notes of the interview between Paget-Lewis and Mr Perkins. The

contemporaneous notes taken of the meeting reveal that Paget-Lewis admitted that he had become attached to Ahmet Osman; that he had accused Leslie Green of trying to turn Ahmet against him; and that he had parked outside Leslie's house to show that he was not to be scared away. Paget-Lewis denied that he had accused Leslie of deviant sexual practices. The notes of the meeting conclude with the sentence 'the situation has now escalated and Mr Prince has no confidence in his own ability to contain it'.

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(d) *Leslie Green and his mother*

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18. Mr Prince was informed on 16 March 1987 in an interview with Leslie Green and his mother that Paget-Lewis had been spying on Ahmet Osman and that Paget-Lewis had told Ahmet that 'he knew where his mother worked and how much money she earned and that if Ahmet left school, he would find him'.

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(e) *Ahmet Osman*

19. During this period another deputy head teacher, Mr Youssouf, also interviewed Ahmet Osman on a number of occasions. These interviews revealed that Paget-Lewis had told Ahmet that he would be able to find him if he left the school. Paget-Lewis claimed to have discovered Ahmet's previous address and the name of his previous school and said he had visited the area and had spoken to his former neighbours.

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(f) *The Osman family*

20. On 17 March 1987 Mr Prince met with the Osman family to explain his concerns about the interest Paget-Lewis had taken in Ahmet. He explained that the school was quite satisfied that nothing improper had taken place between Paget-Lewis and Ahmet. He told them that the school would monitor the situation closely to ensure that Ahmet would be safe. Ahmet was told never to be alone with Paget-Lewis. During this meeting Ahmet's mother expressed her wish that her son should be transferred to another school.

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3. *Contacts between the school and the police during this period*

21. According to the diary of Mr Prince between 3 March 1987 and 17 March 1987 he met with PC Williams on four occasions. The applicants state that during these meetings information concerning Paget-Lewis' conduct towards Ahmet Osman was passed on to the police. The government state that PC Williams had no recollection of being told about the presents which Paget-Lewis had given to Ahmet or that Paget-Lewis had followed Ahmet home. PC Williams did not keep any record of the meetings, nor did he make any report concerning the nature and extent of the information that was communicated to him, or if he did no such record now exists. The government stress that all concerned were satisfied that there was no sexual element to Paget-Lewis' attachment to Ahmet and the matter could be dealt with internally by the school.

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4. *The graffiti incident*

22. By 17 March 1987 graffiti had appeared at six locations around the school which read 'Leslie, do not forget to wear a condom when you screw Ahmet or he will get Aids'. The words had been written with spray paint and a stencil.

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- a 23. Following the discovery of the graffiti, Mr Perkins interviewed Paget-Lewis and asked him if he was responsible. He denied this. However, Mr Perkins noted in his report that Paget-Lewis knew the precise wording and the exact locations of all the graffiti.

5. *The stolen files*

- b 24. On 19 March 1987 a further discussion took place between Mr Prince and the Osman family regarding Ahmet's transfer to another school. For his safety Mr Prince told Ahmet not to give his new school address to anyone from Homerton House. While attempting to arrange his transfer, Mr Youssouf discovered that the files relating to Ahmet and Leslie Green had been stolen from the school office. The file relating to staff disciplinary matters was also found to be missing.

- c Mr Perkins considered that the stolen files were the likely source of the information that Paget-Lewis had acquired about Ahmet Osman's previous address and school (see para 19, above). He subsequently questioned Paget-Lewis, who denied any involvement in the theft and denied having made any comments about Ahmet's previous address and school or visiting the area in which Ahmet used to live.

- d 25. On 23 March 1987 Ahmet Osman was transferred to a different school, but owing to curriculum difficulties he had to return to Homerton House 14 days later.

C. The events between April and August 1987

1. *Paget-Lewis changes name*

- e 26. On 14 April 1987, Paget-Lewis changed his name by deed poll to Paul Ahmet Yildirim Osman. On 1 May 1987, Mr Prince wrote to the Inner London Education Authority (the ILEA) informing them that Paget-Lewis had changed his name and that he was worried that some psychological imbalance might pose a threat to the safety of Ahmet Osman. He also stated that he was of the opinion that Paget-Lewis should be removed from the school as soon as possible.

2. *Further contacts between the school and the police*

- g 27. On 4 May 1987 Mr Prince spoke with two police officers, Det Ch Insp Newman and Det Insp Clarke. According to the applicants during this meeting the headmaster informed them of the missing files and the graffiti incident and discussed the fact that Paget-Lewis' real name was Ronald Stephen Potter. He had previously changed his name by deed poll to name himself after a pupil called Paget-Lewis whom he had taught at Highbury Grove School. The government state that the two police officers have no recollection of having been informed of these matters.

3. *The contacts with the ILEA*

- i 28. Following his letter of 1 May 1987 Mr Prince wrote to the Head of Discipline at the ILEA in a letter dated 8 May 1987 stating that while he believed Paget-Lewis needed medical help, his continued presence in the school jeopardised the welfare, safety and education of the pupils (see para 26, above). An internal memorandum from the Head of Discipline at the ILEA dated the same day makes reference to 'a fear that [Paget-Lewis] might seek to take the boy out of the



country' and that the police are investigating the complaint that 'he has removed certain files about the matter from the school'.

Undated notes written by the same official between 14 April and 8 May 1987 indicate that it was feared that Ahmet Osman may be harmed and that by changing his name Paget-Lewis may abscond with the boy. The notes refer to the fact that the police had stated that Mr Prince should contact them if Ahmet goes missing for more than an hour. In addition, the police would investigate the disappearance of the missing files, search Paget-Lewis' home and check up on his background.

The government deny that the police said that they should be contacted if Ahmet went missing or that they intended to search Paget-Lewis' house.

*4. The conclusions of the ILEA psychiatrist following the first meeting with Paget-Lewis*

29. On 19 May 1987 Paget-Lewis was seen by Dr Ferguson, the ILEA psychiatrist. Dr Ferguson was provided with inter alia the documents showing Paget-Lewis' change of name; the records of the interviews conducted in March 1987; the memorandum prepared by Mr Perkins on 5 May 1987 (see para 15, above). Dr Ferguson reported:

'This teacher must indeed give cause for concern. He does not present ill in formal terms, nor does he seem sexually deviant. He does have personality problems, and his judgment regarding his friendship with a pupil is reprehensibly suspect.'

Dr Ferguson recommended that Paget-Lewis remain teaching at the school but that he should receive some form of counselling and psychotherapy.

*5. The attacks on the applicants' property*

30. On or about 21 May 1987, a brick was thrown through a window of the applicants' house. The police were informed and a police officer was sent to the house and completed a crime report. On two occasions in June 1987 the tyres of Ali Osman's car were deliberately burst. Both incidents were reported to the police, but no police records relating to the offences can be found.

*6. Dr Ferguson's further interviews with Paget-Lewis*

31. On 1 June 1987 Mr Prince requested Paget-Lewis to take sick leave. On 2 June 1987 Paget-Lewis was examined again by Dr Ferguson. He described a continuing strong urge to speak with Ahmet Osman and said that he felt angry that Ahmet seemed content with the situation of non-contact. Dr Ferguson concluded that under the circumstances, Paget-Lewis should remain away from Homerton House and was designated temporarily unfit to work.

Paget-Lewis subsequently informed Mr Perkins that he would be taking medical leave for the remainder of the school term. He then left Homerton House and did not return again.

32. On 16 June 1987, following a further interview with Paget-Lewis, Dr Ferguson recommended that he should no longer teach at Homerton House and that transfer on medical grounds was strongly and urgently recommended.

*7. Mrs Green's further complaints against Paget-Lewis*

- a* 33. On 4 June 1987 Mrs Green telephoned Mr Perkins making further complaints about Paget-Lewis following her son. She also informed him that she had sent her son to stay with her sister.

*8. Paget-Lewis' suspension from teaching duties and subsequent reinstatement*

- b* 34. On 18 June 1987, Paget-Lewis was suspended pending an ILEA investigation for 'unprofessional behaviour' towards Ahmet Osman. He submitted a statement dated 6 July 1987 in which, inter alia, he admitted taking photographs of Ahmet and giving him money but denied stealing files or painting graffiti. He accused Mr Perkins of lying about him and said that Mr Perkins has stated his intention of breaking him.

- c* 35. On 7 August 1987, the ILEA sent a letter to Paget-Lewis officially reprimanding and severely warning him but lifting the suspension. The letter also stated that he was not to return to Homerton House. Shortly afterwards he began working as a supply teacher at two other local schools, Haggerston School and Skinners School.

- d* D. Events between August and December 1987

*1. The criminal damage to the Osmans' property*

- e* 36. In August or September 1987, a mixture of engine oil and paraffin was poured on the area outside the Osman family home. On 18 October 1987, the windscreen of Ali Osman's car was smashed. During November 1987, in a series of incidents, the applicants' front door lock was jammed with superglue, dog excrement was smeared on their doorstep and on their car, and on more than one occasion the light bulb was stolen from the light in the outside porch. Around this time all the windows of their car were also broken. All these incidents were reported to the police and on two occasions Ali Osman visited Hackney police station to discuss the vandalism and criminal damage to his property.

- f* 37. At some point during November 1987, PC Adams visited the Osmans' home and then spoke to Paget-Lewis about the acts of vandalism. In a later statement to the police, Paget-Lewis alleged that he told PC Adams that the loss of his job was so distressing that he felt that he was in danger of doing something criminally insane. The government deny that this was said, and refer to the fact that during the interview with PC Adams Paget-Lewis denied any involvement in the acts of vandalism and criminal damage. No detailed records were made by PC Adams of his contacts with Paget-Lewis or the Osman family. Any entries in notebooks or duty registers (crime reports or parade books) could not later be traced by the Metropolitan Police Solicitor's Department.

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*2. The vehicle collision involving Paget-Lewis*

- i* 38. On 7 December 1987 a car driven by Paget-Lewis collided with a van in which Leslie Green was a passenger. According to the driver of the van, Paget-Lewis claimed that his accelerator had jammed and that he could not help what happened. After the police arrived at the scene of the accident they cautioned Paget-Lewis, and provided him with a form requesting him to produce his driving documents.

39. On 10 December 1987 Paget-Lewis attended Hackney police station and produced his driving documents for inspection. Since he failed to produce a road worthiness (MOT) certificate for his car he was cautioned by the police.

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40. In a statement taken by the police on 22 December 1987 from the driver of the van that had been allegedly rammed by Paget-Lewis, the driver recalled that after the accident Paget-Lewis had said: 'I'm not worried because in a few months I'll be doing life.'

3. *Contacts between Det Sgt Boardman and the ILEA*

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41. On 8 December 1987 following the collision incident, Det Sgt Boardman contacted the ILEA stating that he wished to interview Paget-Lewis and the headmaster. The applicants state that Det Sgt Boardman assured the ILEA that the Osman family would be protected. The government deny that such an assurance was given.

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An ILEA memorandum dated 8 December 1987 referred to the harassment of the Osman family and Paget-Lewis' alleged admission of responsibility for the van collision saying that Leslie Green had lured Ahmet Osman away from his affections. It noted that the police were pursuing enquiries but that if nothing was heard the matter should be 'chased'. It concluded with the note 'Families getting police protection'.

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4. *Det Sgt Boardman interviews the Green and the Osman families and visits the school*

42. On 9 December 1987 Det Sgt Boardman took a detailed statement from Leslie Green and his mother concerning inter alia the fact that Paget-Lewis had followed Leslie home, the acts of harassment and the graffiti which had appeared at the school. In his statement Leslie claimed that Paget-Lewis had threatened to 'get him' whether it took 'thirty days or thirty years'. He also said that he had not been to school for two weeks as he was afraid to travel there and that he had moved in with his aunt, so as to be safe from Paget-Lewis.

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43. On 14 December 1987 Det Sgt Boardman visited Homerton House and inspected the graffiti. A police photographer took photographs of the graffiti.

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44. On or about 15 December 1987 Det Sgt Boardman visited the Osman family and discussed the criminal damage and Paget-Lewis' relationship with Ahmet. The applicants allege that Det Sgt Boardman told the family that he knew Paget-Lewis was responsible for the acts of vandalism, and gave them assurances that he would cause the incidents to stop. The government deny that Det Sgt Boardman said that he knew Paget-Lewis was responsible, and that he gave assurances as to the family's safety.

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5. *Det Sgt Boardman's report on the case*

45. In his report on the case which was completed on or about 15 December 1987, Det Sgt Boardman observed:

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'It should be pointed out at this stage that there is no evidence to implicate Paget-Lewis in either of these offences [the graffiti at the school] or the acts of vandalism against Osman's address, although there is no doubt in everybody's mind that he was in fact responsible and this was just another example of his spite.'

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*6. Paget-Lewis is interviewed by the ILEA officers*

- a* 46. On 15 December 1987 Paget-Lewis was interviewed by officers of the ILEA at his own request. An ILEA memorandum dated 15 December 1987 recorded that Paget-Lewis felt in a totally self-destructive mood, stating that it was all a symphony and the last chord had to be played. He admitted being deeply in debt and as a result was selling all his possessions. He blamed Mr Perkins for all his troubles but would not do a 'Hungerford'<sup>5</sup> in a school but would see him at his home.
- b* The memorandum stated that the concerns of the ILEA should be passed on to the police and noted that a call was made to Det Sgt Boardman, who was unavailable. Nevertheless, a detailed message was left with the receptionist.

- c* One of the officers of the ILEA recalled later in a statement dated 9 March 1988 that Paget-Lewis spoke in a manner which was very disturbing, said that he blamed Mr Perkins for the loss of his job, that he knew where he lived and that he was going to do something though not at the school. The other officer recalled in her statement of 9 March 1988 that Paget-Lewis had stated that he was going to do something that would be 'a sort of Hungerford'. She recalled that as a result of this conversation she informed the police and the school that she considered that the head and deputy head were at risk of violence.

- d* Although the applicants state that the content of the interview was passed on to the police, the government deny that mention was made of the 'Hungerford' reference or that there was any suggestion that the Osmans might be in danger.

*7. Det Sgt Boardman's reaction to the ILEA message and the decision to arrest Paget-Lewis*

- e* 47. On 15 December 1987 after receiving the ILEA officer's message Det Sgt Boardman sent a telex to the local police station near Mr Perkin's home referring to the fact that vague threats had been made and that the school authorities were very concerned (see para 46, above). He asked them to pay casual attention to the address, giving a brief description of Paget-Lewis and the registration number of his car.

- f* 48. On 16 December 1987 Det Sgt Boardman contacted the ILEA with a view to tracing Paget-Lewis and was provided with his address. He requested the official at the ILEA to ask Paget-Lewis to contact the police. On the same day, Det Sgt Boardman met with Mr Prince and Mr Perkins. The applicants state that he assured Mr Prince that the police would undertake the necessary measures to protect both Mr Perkins and the applicants. A diary entry of Mr Prince dated 16 December 1987 refers to Det Sgt Boardman and contains a heading 'OSMAN/PERKINS/POLICE PRESENCE ARRANGED' and a note that the ILEA had called 'to finalise arrangements re protection for Perkins/Osman families'. According to the government no assurance of protection was given.
- g* Det Sgt Boardman received the impression from his meetings with Mr Prince and Mr Perkins that Paget-Lewis was angry at being removed from the school but that the anger was directed against the deputy head, who in any case did not feel in danger.

- h* 49. On 17 December 1987 Det Sgt Boardman and other police officers arrived at Paget-Lewis' house with the intention of arresting him on suspicion of criminal

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<sup>5</sup> Hungerford was the scene of a 1987 massacre in which a gunman killed 16 persons before committing suicide.

damage. Paget-Lewis was absent. The police were unaware that he was teaching at Haggerston School that day.

50. On 18 December 1987 pursuant to the request of the police, the ILEA sent a letter to Paget-Lewis requesting him to contact Det Sgt Boardman. The same day the ILEA informed the police that Paget-Lewis had not attended Haggerston School. He did not return to the school again.

E. The events between January and October 1988

1. *Attempts to trace the whereabouts of Paget-Lewis*

51. In early January 1988 the police commenced the procedure of laying an information before the Magistrates' Court with a view to prosecuting Paget-Lewis for driving without due care and attention. In addition, Paget-Lewis' name was put on the Police National Computer as being wanted in relation to the collision incident and on suspicion of having committed offences of criminal damage.

52. On 8 January an officer of the ILEA rang Det Sgt Boardman for an update on the case but he was unavailable. Three days later he returned her call saying there had been no progress.

53. Between January and March 1988 Paget-Lewis travelled around England hiring cars in his adopted name of Osman and was involved in a number of accidents. He spent time at his home address during this period and continued to receive mail there.

54. On 17 January 1988 Paget-Lewis broke into a car parked near a clay-pigeon shoot near Leeds in Yorkshire and stole a shotgun. He sawed off both barrels. While the theft was reported to the local police, because there was nothing to connect the incident to Paget-Lewis the theft did not come to the attention of the Metropolitan police dealing with the case.

2. *Paget-Lewis is sighted near the Osman home*

55. On 1, 4 and 5 March 1988 Leslie Green saw Paget-Lewis wearing a black crash helmet near the applicants' home. According to the applicants, Mrs Green informed the police on each occasion, but her calls were not returned. The government accept that, on 5 March 1988, Det Sgt Boardman received a message which stated 'phone Mrs Green' but since there was no phone number on the note he did not connect the message with the mother of Leslie Green.

3. *The fatal shootings and the arrest of Paget-Lewis*

56. On 7 March 1988 Paget-Lewis was seen near the applicants' home by a number of people. At about 11 pm Paget-Lewis shot and killed Ali Osman and seriously wounded Ahmet. He then drove to the home of Mr Perkins where he shot and wounded him and killed his son.

57. Early the next morning Paget-Lewis was arrested. On being arrested he stated: 'why didn't you stop me before I did it, I gave you all the warning signs?'

58. Later that day Paget-Lewis was interviewed by the police. According to the record of the interview, Paget-Lewis said that he had been planning the attacks ever since he lost his job, and for the previous two weeks he had been watching the Osmans' house. Although he considered Mr Perkins as his main target, he also regarded Ali and Ahmet Osman as being responsible for his losing his position at Homerton House. Paget-Lewis stated that he had been hoping in the back of his mind that the police would stop him. He admitted holding the family at gunpoint



a as they returned to the house, making Ali and Ahmet Osman kneel down in the kitchen, turning out the light and shooting at them. He denied that on earlier occasions he had damaged the windows of the Osmans' house but admitted that he had let down the tyres of their car as a prank. He also denied responsibility for the graffiti and taking the files from the school office.

4. *Paget-Lewis is convicted of manslaughter*

b 59. On 28 October 1988 Paget-Lewis was convicted of two charges of manslaughter having pleaded guilty on grounds of diminished responsibility (see para 73, below). He was sentenced to be detained in a secure mental hospital without limit of time pursuant to s 41 of the Mental Health Act 1983.

F. Judicial proceedings against the police for negligence

c 60. An inquest was held into the death of Ali Osman after the conclusion of the criminal proceedings. Since a person had been convicted in connection with the death, the coroner did not hold a full inquest (s 16 of the Coroner's Act 1988).

d 61. On 28 September 1989 the applicants commenced proceedings against, inter alios, the Commissioner of Police of the Metropolis (the Commissioner) alleging negligence in that although the police were aware of Paget-Lewis' activities since May 1987 they failed to apprehend or interview him, search his home or charge him with an offence before March 1988. Orders for discovery of documents were made on 24 April 1990.

62. On 19 August 1991 the Commissioner issued an application to strike out the statement of claim on the ground that it disclosed no reasonable cause of action. The High Court judge dismissed the application.

e 63. On 7 October 1992 the Court of Appeal upheld the appeal by the Commissioner (see *Osman v Ferguson* [1993] 4 All ER 344). In its judgment, the court held that in light of previous authorities no action could lie against the police in negligence in the investigation and suppression of crime on the grounds that public policy required an immunity from suit.

f 64. McCowan LJ found, inter alia ([1993] 4 All ER 344 at 350):

'In my judgment the plaintiffs [the applicants] have therefore an arguable case that as between [the second applicant] and his family, on the one hand, and the investigating officers, on the other, there existed a very close degree of proximity amounting to a special relationship.'

g 65. However, having regard to the judgment of the House of Lords in the case of *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53, from which he found no relevant distinction, he considered that the matters in issue were failures in investigation of crime and thus public policy doomed the action to failure (see paras 90–92, below). He rejected the argument that where the class of victim was sufficiently proximate and sufficiently small the public policy argument might not apply. He found that Lord Keith in the case of *Hill v Chief Constable of West Yorkshire* had treated public policy as a separate point that is not reached unless there is a duty of care.

h The second judge in the Court of Appeal, Beldam LJ, also held that on grounds of public policy the claims were not maintainable but refrained from expressing an opinion as to whether the facts, if proved, were sufficient to establish a relationship sufficiently proximate to found a duty of care. Simon Brown LJ agreed with the judgment of McCowan LJ. The applicants' claim was accordingly struck out.

66. The Court of Appeal refused leave to appeal to the House of Lords and the application to the House of Lords for leave to appeal was refused on 10 May 1993.

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G. The Commission's findings of fact

67. The domestic courts had not established the full facts of the case since Paget-Lewis pleaded guilty to the charges against him and a full inquest was not conducted into the death of Ali Osman (see para 60, above). Furthermore, the applicants' civil action against the police was struck out as showing no reasonable cause of action (see para 65, above). Having examined the submissions and materials of the parties especially as regards the facts in dispute the Commission proceeded to the establishment of the facts of the case. Its findings may be summarised as follows.

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68. As to the four meetings which took place between the police and the school between 3 March and 17 March 1987, the Commission was satisfied that the police were made aware of the substance of the events and of the school's concerns about the disturbing attachment which Paget-Lewis was showing towards Ahmet Osman as well as Paget-Lewis' worrying reaction towards Leslie Green (see para 21, above).

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Furthermore, Mr Prince had in all probability informed Det Ch Insp Newman and Det Insp Clarke on 4 May 1987 about the graffiti incident, the theft of the school files and Paget-Lewis' change of name, even if both officers had no recollection of having been told about the first two matters (see para 27, above). Like the meetings between PC Williams and Mr Prince, no police notes appear to have been taken. However, the Commission did not find it established that at this stage the police had made any commitment to searching Paget-Lewis' home or were seriously concerned about the possibility of Paget-Lewis kidnapping Ahmet. These hypotheses emerge from the memoranda drawn up by the ILEA officers around this time and were probably based on the contacts which the officers had with Mr Prince and not on any direct contact between the officers and the police (see para 28, above).

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69. While all the vandalism on the Osmans' home and property between May and November 1987 had been reported to the police and the family had informed the police of its concern that Paget-Lewis was behind the attacks, the only step taken during that period was to invite Paget-Lewis to the police station for an interview (see para 37, above). In the Commission's opinion, little reliance could be placed on Paget-Lewis' later assertions that he told PC Adams during the interview that he was in danger of doing something criminally insane. No police notes or records of this meeting which took place on an unspecified date could be traced.

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70. Following the alleged ramming incident, the police immediately interviewed the Greens and the Osmans and photographed the graffiti at the school (see paras 38-43, above). Although Det Sgt Boardman in his undated report had stated that there was no evidence that Paget-Lewis was responsible for the graffiti and the attacks on the Osmans' home the police had nevertheless taken the view that he was presenting a sufficient threat that formal steps should be taken against him (see para 45, above). Thus the decision was taken on 16 December 1987 to arrest Paget-Lewis on suspicion of criminal damage.

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The Commission was also satisfied that there was no evidence that Paget-Lewis had made any direct or indirect threats against the Osmans during his meeting with the ILEA officers on 15 December 1987 (see para 46, above). It placed greater

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a weight on the contemporaneous notes of the meeting rather than on the statement of one of the officers taken several months later that Paget-Lewis threatened at the meeting to commit a 'Hungerford massacre'. According to the notes of the meeting, Paget-Lewis is reported as having stated that he would not do a 'Hungerford' at the school but would see the deputy at home. In the Commission's view, this would explain why the police requested that a casual watch should be kept on Mr Perkins' address. Furthermore, despite the wording of the ILEA memorandum of 8 December and of Mr Prince's rather cryptic diary entry on b 16 December 1987 it seemed unlikely that the police had referred to or promised police protection to the Osman family especially since none was in fact envisaged or provided (see paras 41 and 48, above). The school authorities had probably received this impression from the assurances given by the police that the necessary measures were being taken to deal with the situation including the vague threats c made against Mr Perkins.

71. The Commission did not find it established that the letter sent by the ILEA to Paget-Lewis at the request of the police following the failed arrest attempt on 17 December 1987 caused Paget-Lewis to disappear (see para 50, above). It was also satisfied that the police took no further active steps to trace the whereabouts d of Paget-Lewis from 18 December 1987 to March 1988 apart from placing his name on the Police National Computer in January 1988. In addition, there were no contemporaneous records to support the assertion that Mrs Green had informed the police about Paget-Lewis being seen by her son around the Osman home in early March 1988 (see para 55, above). It may have been the case that Mrs Green merely left a message with the police station that Det Sgt Boardman should ring her back. e In that event, it was not surprising that Det Sgt Boardman had not been able to make a connection between a Mrs Green and the Paget-Lewis file since the case had been dormant for three months.

f II. *Relevant domestic law*

A. The criminal law

1. *Murder*

g 72. The offence of murder is committed if a person of sound mind unlawfully kills any human being with malice afterthought. The mental element of murder, 'malice afterthought', is established if it is proved that there was, on the part of the accused, an intention to kill, an intention to cause grievous bodily harm or an intention to do an act knowing it to be highly probable that the act will cause death h or grievous bodily harm. The sentence for murder is life imprisonment.

2. *Manslaughter*

i 73. The offence of manslaughter is committed if the victim is unlawfully killed by a person who, by reason of abnormality of mind, suffered from diminished responsibility—ie who suffered from such abnormality of mind as substantially impaired his mental responsibility for his acts. The sentence of manslaughter is imprisonment for life or for any shorter term.

## B. Criminal procedure

1. *Search warrants*

74. The power to obtain a warrant to search for items that have been used, or are intended for use, in committing criminal damage is governed by s 6(1) of the Criminal Damage Act 1971 which provides:

‘If it is made to appear by information on oath before a justice of the peace that there is reasonable cause to believe that any person has in his custody or under his control or on his premises anything which there is reasonable cause to believe has been used or is intended for use without lawful excuse—(a) to destroy or damage property belonging to another; or (b) to destroy or damage any property in a way likely to endanger the life of another, the justice may grant a warrant authorising any constable to search for and seize that thing.’

2. *Police powers of arrest and detention*

75. In order for an arrest to be lawful it must first satisfy either s 24 or s 25 of the Police and Criminal Evidence Act 1984.

76. Under s 24 a police officer may arrest any person whom he has reasonable grounds to believe is guilty of an arrestable offence. All offences which carry a maximum sentence of five years imprisonment or more are considered arrestable offences (s 24(1)).

77. Under s 25 a police officer may arrest without warrant any person whom he has reasonable grounds to suspect is guilty of a non-arrestable offence provided that one of the general interest conditions apply. These include: (a) that the constable has reasonable grounds for doubting whether a name furnished by the relevant person as a name is in fact his real name (see s 25(3)(a)); (b) that the constable has reasonable grounds to believe that an arrest is necessary to prevent the relevant person causing physical injury to any person or causing loss or damage to property (see s 25(3)(d)(i) and (ii)); and (c) that the constable has reasonable grounds to believe that an arrest is necessary to protect a child or other vulnerable person from the relevant person (see s 25(3)(e)).

78. In determining whether the available information is sufficient to give rise to a reasonable suspicion, the test to be applied is that laid down by the House of Lords in *Shaaban Bin Hussien v Chong Fook Kam* [1970] AC 942 at 948:

‘Suspicion in its ordinary meaning is a state of conjuncture or surmise where proof is lacking: “I suspect but I cannot prove”. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is at the end.’

3. *The decision to charge*

79. Where a person is arrested for an offence without a warrant, or under a warrant not endorsed for bail, the custody officer at the police station where he is detained after his arrest must determine whether he has sufficient evidence to charge the person for the offence for which he has been arrested (see s 37(1)(b) of the 1984 Act). In reaching this decision the custody officer must have ‘reasonable and probable’ cause to prosecute. In *Hicks v Faulkner* [1878] 8 QBD 167 at 171, Hawkins J interpreted this requirement to mean—

a 'an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser to the conclusion that the person was probably guilty of the crime imputed.'

b 80. The custody officer is not required to be sure that the accused person is guilty before charging him (see *Tempest v Snowden* [1952] 1 KB 130). Nor is it necessary for a charging officer to believe that the prosecution will result in a conviction (see *Dawson v Vansandau* (1863) 11 WR 516). The charging officer is simply required to make an assessment of whether there is sufficient evidence to withstand examination in the course of 'a fair and impartial trial' (see *Glinski v McIver* [1962] AC 726).

c 81. If the custody officer does not have sufficient evidence to charge, the arrested person must be released either on bail or without bail. However, if the custody officer has reasonable grounds to believe that the suspect's detention is necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him, the custody officer may authorise the suspect's further detention (see s 37(2) of the 1984 Act).

#### d 4. Pattern of offending

e 82. In determining whether to bring criminal charges against a person, the custody officer may take into account evidence disclosing a pattern of offending. However, in *DPP v P* [1991] 2 AC 447 the House of Lords stated that admissibility of such evidence is to be determined by the degree of its probative worth. The Lord Chancellor, Lord Mackay of Clashfern, said ([1991] 2 AC 447 at 460):

f '... the essential feature of evidence which is to be admitted is that its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime ... Once the principle is recognised that what has to be assessed is the probative force of the evidence in question, the infinite variety of circumstances in which the question arises demonstrates that there is no single manner in which this can be achieved. Whether the evidence has sufficient probative weight to outweigh its prejudicial effect must in each case be a question of fact and degree.'

g He continued ([1991] 2 AC 447 at 462):

h 'Where the identity of the perpetrator is in issue, and evidence of this kind is important in that connection, obviously something in the nature of what has been called in the course of argument a signature or other special feature will be necessary. To transpose this requirement to other situations where the question is whether a crime has been committed, rather than who did commit it, is to impose an unnecessary and improper restriction upon the application of the principle.'

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### 5. Bail

83. Section 38 of the 1984 Act provides that where an arrested person is charged with an offence, the custody officer shall order his release from police detention, either on bail or without bail, unless, *inter alia*, his name or address cannot be ascertained; detention is necessary for the person's own protection or to prevent him causing physical injury to any other person or damage to property; or the person arrested will fail to appear in court to answer bail. a

84. If the custody officer decides not to release the defendant, he must be produced before a Magistrates' Court within 24 hours after his arrest who shall either commit him in custody or release him on bail. Pursuant to s 13 of Sch 1, Pt 1 to the Bail Act 1976: b

'The defendant need not be granted bail if the Court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would—(a) fail to surrender to custody, or (b) commit an offence while on bail, or (c) interfere with witnesses or otherwise obstruct the course of justice, either in relation to himself or any other person.'

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In taking this decision the Magistrates' Court is required, pursuant to s 9 of Sch 1, Pt 1, to have regard to such of the following considerations as appear to it to be relevant, namely: d

'(a) the nature and seriousness of the offence ... (b) the character, antecedents, associations and community ties of the defendant; (c) the defendant's record as respects the fulfilment of his obligations under previous grants of bail in criminal proceedings; (d) except in the case of a defendant whose case is adjourned for inquiries or a report, the strength of the evidence of his having committed the offence or having defaulted.'

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### C. Mental Health

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85. Section 136 of the 1983 Act provides:

'(1) If a constable finds in a place to which the public have access a person who appears to him to be suffering from mental disorder and to be in immediate need of care or control, the constable may, if he thinks it necessary to do so in the interests of that person, or for the protection of other persons, remove that person to a place of safety ... (2) A person removed to a place of safety under this section may be detained there for a period not exceeding 72 hours for the purpose of enabling him to be examined by a registered medical practitioner and to be interviewed by an approved social worker and of making any necessary arrangements for his treatment or care.'

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86. Both the Magistrates' Court and the Crown Court have the power to remand an accused person to a specified hospital for the preparation of a report on his mental condition. Section 35(2) defines an accused person as follows: h

'(a) in relation to the Crown Court, any person who is awaiting trial before the court for an offence punishable with imprisonment or who has been arraigned before the court for such an offence and has not yet been sentenced or otherwise dealt with for the offence on which he has been arraigned; (b) in

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- a* relation to a Magistrates' Court any person who has been convicted by the court of an offence punishable on summary conviction with imprisonment and any person charged with such an offence if the court is satisfied that he did the act or made the omission charged or he has consented to the exercise by the court of the powers conferred by this section.'

If these requirements are met the court may, pursuant to s 35(3), remand the accused person to a hospital for a report if:

- b* '(a) the court is satisfied on the written or oral evidence of a registered medical practitioner, that there is reason to suspect that the accused person is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment; and (b) the court is of the opinion that it would be impracticable for a report on his mental condition to be made if he were remanded on bail ...'
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87. The Crown Court may remand an accused person to a specified hospital for treatment, if it is satisfied on the evidence of two medical practitioners that he is suffering from mental illness or severe mental impairment of a nature or degree which makes it appropriate for him to be so detained (s 36(1)).

- d* 88. Following conviction for an offence punishable with imprisonment, both the Magistrates' Court and the Crown Court have the power under s 38(1) to make an interim hospital order, where:

- e* '... the court before or by which he is convicted is satisfied, on the written or oral evidence of two registered medical practitioners (a) that the offender is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment; and (b) that there is reason to suppose that the mental disorder from which the offender is suffering is such that it may be appropriate for a hospital order to be made in his case ...'

- f* Pursuant to s 37(2) both the Magistrates' Court and the Crown Court may also admit an offender to a hospital if:

- g* '(a) the court is satisfied, on the written or oral evidence of two registered medical practitioners, that the offender is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment and that ... (i) the mental disorder from which the offender is suffering is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment and, in the case of psychopathic disorder or mental impairment, that such treatment is likely to alleviate or prevent a deterioration of his condition ... (b) the court is of the opinion, having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him, that the most suitable method of disposing of the case is by means of an order under this section.'
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D. Actions against the police for negligence

- i* 89. In the case of *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, the owners of a yacht damaged by Borstal boys who had escaped from the supervision of prison officers sought to sue the Home Office alleging negligence by the prison

officers. The House of Lords held that in the particular case a duty of care could arise. Lord Diplock said ([1970] AC 1004 at 1070–1071):

‘I should therefore hold that any duty of a Borstal officer to use reasonable care to prevent a Borstal trainee from escaping from his custody was owed only to persons whom he could reasonably foresee had property situated in the vicinity of the place of detention of the detainee which the detainee was likely to steal or to appropriate and damage in the course of eluding immediate pursuit and capture.’

90. In *Hill v Chief Constable of West Yorkshire*, the mother of a victim of the Yorkshire Ripper instituted proceedings against the police alleging that they had failed properly to exercise their duty to exercise all reasonable care and skill to apprehend the perpetrator of the murders and to protect members of the public who might be his victims. Lord Keith in the House of Lords found ([1989] 1 AC 53 at 62):

‘The alleged negligence of the police consists in a failure to discover his identity. But if there is no general duty of care owed to individual members of the public by the responsible authorities to prevent the escape of a known criminal or to recapture him, there cannot reasonably be imposed upon any police force a duty of care similarly owed to identify and apprehend an unknown one. Miss Hill cannot for this purpose be regarded as a person at special risk simply because she was young and female. Where the class of potential victims of a particular habitual criminal is a large one the precise size of it cannot in principle affect the issue. All householders are potential victims of an habitual burglar, and all females those of an habitual rapist. The conclusion must be that although there existed reasonable foreseeability of likely harm to such as Miss Hill if Sutcliffe were not identified and apprehended, there is absent from the case any such ingredient or characteristic as led to the liability of the Home Secretary in the *Dorset Yacht* case. Nor is there present any additional characteristic such as might make up a deficiency. The circumstances of the case are therefore not capable of establishing a duty of care owed towards Miss Hill by the West Yorkshire Police.’

91. While he considered this sufficient to dispose of the appeal, Lord Keith went on to set out public policy objections to the existence of an action in negligence against the police in the performance of their duties in the investigation and suppression of crime ([1989] 1 AC 53 at 63):

‘Potential existence of such liability may in many instances be in the general public interest, as tending towards the observance of a higher standard of care in the carrying on of various different types of activity. I do not, however, consider that this can be said of police activities. The general sense of public duty which motivates police forces is unlikely to be appreciably reinforced by the imposition of such liability so far as concerns their function in the investigation and suppression of crime. From time to time they make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it. In some instances the imposition of liability may lead to the exercise of a function being carried on in a

a detrimentally defensive frame of mind. The possibility of this happening in relation to the investigative operations of the police cannot be excluded. Further it would be reasonable to expect that if potential liability were to be imposed it would be not uncommon for actions to be raised against police forces on the ground that they had failed to catch some criminal as soon as they might have done, with the result that he went on to commit further crimes. While some such actions might involve allegations of a simple and straightforward type of failure—for example that a police officer negligently tripped and fell while pursuing a burglar—others would be likely to enter deeply into the general nature of a police investigation, as indeed the present action would seek to do. The manner of conduct of such an investigation must necessarily involve a variety of decisions to be made on matters of policy and discretion, for example as to which particular line of inquiry is most advantageously to be pursued and what is the most advantageous way to deploy the available resources. Many such decisions would not be regarded by the courts as appropriate to be called in question, yet elaborate investigation of the facts might be necessary to ascertain whether or not this was so. A great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the action and the attendance of witnesses at the trial. The result would be significant diversion of police manpower and attention from their most important function, that of the suppression of crime. Closed investigations would require to be reopened and retraversed, not with the object of bringing any criminal to justice but to ascertain whether or not they had been competently conducted.’

e 92. Lord Templeman commented ([1989] 1 AC 53 at 65):

f ‘... if this action lies, every citizen will be able to require the court to investigate the performance of every policeman. If the policeman concentrates on one crime, he may be accused of neglecting others. If the policeman does not arrest on suspicion a suspect with previous convictions, the police force may be held liable for subsequent crimes. The threat of litigation against a police force would not make a policeman more efficient. The necessity for defending proceedings, successfully or unsuccessfully, would distract the policeman from his duties. This action is misconceived and will do more harm than good.’

g 93. In *Swinney v Chief Constable of Northumbria* [1997] QB 464, the plaintiff had passed on information in confidence to the police about the identity of a person implicated in the killing of a police officer, expressing her concern that she did not want the source of the information to be traced back to her. The information was recorded, naming the plaintiff, in a document which was left in an unattended police vehicle, which was broken into with the result that the document was stolen, came into the possession of the person implicated and the plaintiff was threatened with violence and arson and suffered psychiatric damage. The plaintiff’s claim in negligence against the police was struck out but allowed on appeal by the High Court judge. The chief constable appealed contending that the police owed no duty of care or alternatively that public policy precluded the prosecution of the claim since the police were immune for claims arising out of their activities in the investigation or suppression of crime. The Court of Appeal dismissed the appeal.

In his judgment Hirst LJ referring to the cases of *Dorset Yacht* and *Hill v Chief Constable of West Yorkshire* stated that he could not accept a claim of blanket immunity for the police in this case, but that there were other considerations of public policy in this case, namely, the need to protect springs of information, to protect informers and to encourage them to come forward (see paras 89–92, above). On the facts of the case, it was arguable that the police had assumed a responsibility of confidentiality towards the plaintiff. The case should therefore proceed to trial.

94. Ward LJ held that it was arguable that ([1997] QB 464 at 486):

‘... (2) there is a special relationship between the plaintiffs and the defendant, which is sufficiently proximate; proximity is shown by the police assuming responsibility, and the plaintiffs relying upon that assumption of responsibility, for preserving the confidentiality of the information which, if it fell into the wrong hands, was likely to expose the first plaintiff and members of her family to a special risk of damage from the criminal acts of others, greater than the general risk which ordinary members of the public must endure with phlegmatic fortitude; (3) it is fair, just and reasonable that the law should impose a duty, there being no overwhelming dictate of public policy to exclude the prosecution of this claim. On the one hand there is, as more fully set out in *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53, 63 an important public interest that the police should carry out their difficult duties to the best of their endeavours without being fettered by, or even influenced by, the spectre of litigation looming over every judgment they make, every discretion they exercise, every act they undertake or omit to perform, in their ceaseless battle to investigate and suppress crime. The greater public good rightly outweighs any individual hardship. On the other hand, it is incontrovertible that the fight against crime is daily dependent upon information fed to the police by members of the public, often at real risk of villainous retribution from the criminals and their associates. The public interest will not accept that good citizens should be expected to entrust information to the police, without also expecting that they are entrusting their safety to the police. The public interest would be affronted were it to be the law that members of the public should be expected, in the execution of public service, to undertake the risk of harm to themselves without the police, in return, being expected to take no more than reasonable care to ensure that the confidential information imparted to them is protected.’

95. The police have been held liable in negligence or failure in their duties in other cases. In *Kirkham v Chief Constable of the Greater Manchester Police* [1989] 2 QB 283, the Court of Appeal upheld a finding of liability in negligence under the Fatal Accidents Act 1976 where the police had taken a man into custody, knew he was a suicide risk but did not communicate that information to the prison authorities. The man, diagnosed as suffering from clinical depression had committed suicide in remand prison. The police, which had assumed responsibility for the man, had owed a duty of care, which they had breached with the result that his death had ensued.

96. In *Rigby v Chief Constable of Northamptonshire* [1985] 2 All ER 986, the High Court found the police liable to pay damages for negligence in that they had fired a gas canister into the plaintiffs’ premises in order to flush out a dangerous psychopath. There had been a real and substantial fire risk in firing the canister



a into the building and that risk was only acceptable if there was fire-fighting equipment available to put the fire out at an early stage. No equipment had been present at the time and the fire had broken out and spread very quickly. Negligence was also found in *Knightley v Johns* [1982] 1 All ER 851 where a police inspector at the site of an accident failed to close a tunnel and ordered officers to go back through the tunnel in the face of traffic, thereby leading to a further accident.

b 97. In *R v Dytham* [1979] 1 QB 722, where a police officer stood by while a man died outside a club in a murderous assault, the Court of Appeal upheld the conviction of the officer for wilful neglect to perform a duty.

#### PROCEEDINGS BEFORE THE COMMISSION

c 98. The applicants applied to the Commission on 10 November 1993, complaining that there had been a failure to protect the lives of Ali and Ahmet Osman and to prevent the harassment of their family, and that they had no access to court or effective remedy in respect of that failure. The applicants relied on arts 2, 6, 8 and 13 of the convention.

d 99. The Commission declared the application (no 23452/94) admissible on 17 May 1996. In its report of 1 July 1997 (art 31), it expressed the opinion that there had been no violation of art 2 of the convention (ten votes to seven); that there had been a violation of art 6(1) of the convention (12 votes to 5); that there had been no violation of art 8 of the convention (ten votes to seven); and that no separate issue arose under art 13 of the convention (12 votes to 5).<sup>6</sup>

#### FINAL SUBMISSIONS TO THE COURT

e 100. The applicants maintained in their memorial and at the oral hearing that the facts of the case disclosed breaches by the respondent state of its obligations under arts 2, 6, 8 and 13 of the convention. They requested the court to find accordingly and to award them just satisfaction under art 50.

The government for their part requested the court to find that there had been no breach of any of the articles relied on by the applicants.

f

#### AS TO THE LAW

##### I. *Alleged violation of art 2 of the convention*

g 101. The applicants asserted that by failing to take adequate and appropriate steps to protect the lives of the second applicant and his father, Ali Osman, from the real and known danger which Paget-Lewis posed, the authorities had failed to comply with their positive obligation under art 2 of the convention, which provides as relevant:

h ‘(1) Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.’

i 102. The government maintained that the facts of the case did not bear out the applicants’ allegation and for that reason there had been no breach of art 2. The Commission agreed with the government’s arguments.

6 The full text of the Commission’s opinion and of the three dissenting opinions contained in the report accompany the official published version of this judgment.

## A. Arguments of those before the court

1. *The applicants*

103. The applicants contended that a most careful scrutiny of the events leading to the tragic shooting incident revealed that the police were several times put on notice that the lives of Ali and Ahmet Osman were at real risk from the threat posed by Paget-Lewis. Despite the clear warning signals given the police failed to take appropriate and adequate preventive measures to secure effective protection for their lives from that risk. While disagreeing with the standard of care formulated by the government, they submitted that even on the basis of that overly-strict standard the obvious inadequacy of the police response over a period of 14 months must be considered to amount to a grave dereliction of the authorities' duty to protect life and a substantial contributing factor to the death of Ali Osman and the wounding of the second applicant (see para 107, below).

104. The applicants argued that by May 1987 the police, on the basis of their contacts with the headmaster of the school, Mr Prince, must be taken to have been fully aware that Paget-Lewis was an unbalanced, obsessive and aggressive individual who had stalked Ahmet Osman, taken photographs of him, plied him with gifts and even assumed his name (see paras 21 and 27, above). Further, they were plainly made aware that Paget-Lewis was strongly suspected of being responsible for the graffiti incident and the theft of the school files. However, these warning signs were never taken seriously by the police even though they must have known of Mr Prince's assessment of the situation, in particular his view that Paget-Lewis was psychologically unbalanced (see para 26, above). In spite of the existence of compelling circumstantial evidence linking Paget-Lewis with the theft of the school files and the spraying of graffiti close to the school, the police did not investigate these matters further (see paras 22–24, above).

The applicants further submitted that this inertia on the part of the police in the face of clear indications that the life of a vulnerable child was at real risk from the danger posed by Paget-Lewis was compounded by their failure to apprehend the significance of the eight reported attacks on the home and property of the Osman family between May and November 1987 marking an escalation in an already life-threatening situation. In brief, nothing was done to establish that Paget-Lewis was the author of this campaign of harassment and intimidation threatening the security of the family. It was only on 17 December 1987, and 10 days following the ramming incident, that a decision was finally taken to arrest Paget-Lewis (see para 38, above). Even then the police seriously mishandled the situation by giving Paget-Lewis the opportunity to avoid arrest and abscond, and then failing to inform the Osman family of this occurrence and to keep a watch on their home.

105. The applicants emphasised that Paget-Lewis had on three separate occasions stated that he intended to commit a murder and each of his statements came to the attention of the police (see paras 37, 40 and 46, above). However, the police once again failed to take seriously what was conclusive proof that the lives of the Osman family were at risk from an unstable, obsessive, disturbed and dangerous individual. The fact that no records were ever kept of the police visits to the school in March and May 1987 nor of the attacks on the home and property of the family confirmed in the applicants' view the casual and careless approach of the authorities to the investigation of a very grave threat to life and explained their failure to make use of their powers to prevent that threat from materialising by arresting Paget-Lewis on suspicion of being responsible for the graffiti incident,

a the theft of the school files or the attacks on the Osmans' home, or searching his home for evidence of his involvement in these offences or by having him compulsorily admitted to a psychiatric hospital for assessment.

b 106. For the above reasons, the applicants concluded that the authorities had failed in the circumstances to comply with their positive obligation under art 2 of the convention. They further contended that there had never been any effective official investigation into the authorities' failure in this respect. Their civil action in negligence against the police foundered on the successful invocation by the Commissioner of the rule of police immunity (see para 63, above). In their view, this gave rise to a separate violation of art 2.

## 2. *The government*

c 107. The government did not dispute that art 2 of the convention may imply a positive obligation on the authorities of a contracting state to take preventive measures to protect the life of an individual from the danger posed by another individual. They emphasised however that this obligation could only arise in exceptional circumstances where there is a known risk of a real, direct and immediate threat to that individual's life and where the authorities have assumed responsibility for his or her safety. In addition, it had to be shown that their failure to take preventive action amounted to gross dereliction or wilful disregard of their duty to protect life. Finally, it must be established on sound and persuasive grounds that there is a causal link between the failure to take the preventive action of which the authorities are accused and that that action, judged fairly and realistically, would have been likely to have prevented the incident in question.

e 108. On that basis, and having regard to the facts of the instant case, the government argued that the police could not be taken at any relevant time to have appreciated that Paget-Lewis represented a real and immediate threat to the lives of the Osman family. He had never threatened either Ali or Ahmet Osman in word or deed and both before and after his arrest he had consistently denied that he had been responsible for the theft of the school files, the graffiti in the area around the school and the acts of vandalism on the home and property of the family. Significantly, the ILEA, after investigating the complaints against Paget-Lewis, considered that a reprimand was sufficient action and he was allowed to assume teaching duties in another school. The fact that Dr Ferguson, the ILEA psychiatrist, had concluded on the basis of a complete case file that Paget-Lewis was fit to teach confirmed that the latter manifested no clear signs of mental illness which would have suggested that he posed a real and immediate danger to the lives of the Osmans (see para 29, above).

h 109. In the government's submission, the police response at each stage of the events in the light of their knowledge and information at the relevant times was reasonable. At no time was there sufficient evidence on which to lay charges against Paget-Lewis on suspicion of having committed acts of criminal damage or to search his home to secure proof of such. Det Sgt Boardman conducted a complete review of the case file in December 1987 but was forced to concede that, in the absence of a confession statement, there was no evidence on which to lay charges against Paget-Lewis.

i 110. The government averred that the weakness of the applicants' case before the court lay not only in their assessment of the police action from the standpoint of hindsight but also in their erroneous interpretation of certain events in order to impute to the police knowledge of the danger posed by Paget-Lewis to the Osman

family or to accuse them of gross negligence. In this latter respect they challenged inter alia the applicants' unfounded assertions that the police had promised protection to the family on the basis of the ILEA memorandum of 8 December 1987 or that the ILEA letter of 17 December 1987 caused Paget-Lewis to abscond before he could be arrested or that no police records had been kept of the incidents reported to them (see paras 41, 50 and 105, above). As to the latter allegation, they pointed to the fact that Det Sgt Boardman was fully apprised of the entire case file in December 1987 (see para 109, above).

### 3. *The Commission*

111. Having regard to its own findings in this case, the Commission considered that there were no factors which, judged reasonably, rendered it foreseeable at the time with any degree of probability that Paget-Lewis would carry out an armed attack on the Osman family (see paras 67–71, above). While noting that it was to be regretted that the police did not keep or preserve records of their meetings with the school and the ILEA officials and with Paget-Lewis himself, it did not consider that this failure prevented a proper assessment of the risk to the Osman family or posed an obstacle to effective steps being taken; nor did the failure to take any additional investigative steps suggest any seriously defective response to the threat posed by Paget-Lewis as perceived at the time. The Commission concluded that the circumstances of the case did not disclose any fundamental disregard by the police of the duties imposed by law in respect of the protection of life.

112. As to the applicants' argument that their inability to sue the police in negligence amounted to a breach of art 2, the Commission was not satisfied that the limited nature of the exclusion of a duty of care in relation to negligence actions against the police demonstrated any lack of protection to the right to life in the domestic law of the respondent state (see paras 90–97 and 106, above).

## B. The court's assessment

### 1. *As to the establishment of the facts*

113. The court notes that there was never any independent judicial determination at the domestic level of the facts of the instant case. The Commission on the basis of the pleadings of the parties and the oral hearing which it held in the case made its own findings on the course of events in the case up until the time of the armed attack by Paget-Lewis on Ali and Ahmet Osman on 7 March 1988 (see paras 67–71, above). According to the applicants, the Commission overlooked in its findings of fact the importance of certain events which they claim have a bearing on the level of knowledge which can be imputed to the police in respect of the seriousness of the danger which Paget-Lewis represented for the lives of the Osman family (see para 10, above).

114. The court observes that it is called on to determine whether the facts of the instant case disclose a failure by the authorities of the respondent state to protect the right to life of Ali and Ahmet Osman, in breach of art 2 of the convention. In addressing that issue, and having due regard to the Commission's role under the convention in the establishment and verification of the facts of a case, it will assess this issue in accordance with its usual practice in the light of all the material placed before it by the applicants and by the government or, if necessary, material obtained of its own motion (see *Ireland v UK* (1978) 2 EHRR 25 at 78 (para 160) and *McCann v UK* (1995) 21 EHRR 97 at 165–166 (para 173)).

2. *As to the alleged failure of the authorities to protect the rights to life of Ali and Ahmet Osman*

- a 115. The court notes that the first sentence of art 2(1) enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *LCB v UK* (1998) 4 BHRC 447 at 456 (para 36)). It is common ground that the state's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the court that art 2 of the convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties.

- d 116. For the court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in arts 5 and 8 of the convention.

- f In the opinion of the court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person, it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (see para 115, above). The court does not accept the government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life (see para 107, above). Such a rigid standard must be considered to be incompatible with the requirements of art 1 of the convention and the obligations of contracting states under that article to secure the practical and effective protection of the rights and freedoms laid down therein, including art 2 (see, mutatis mutandis, *McCann v UK* (1995) 21 EHRR 97 at 160 (para 146)). For the court, and having regard to the nature of the right protected by art 2, a right fundamental in the scheme of the convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case.



On the above understanding the court will examine the particular circumstances of this case.

117. The court observes, like the Commission, that the concerns of the school about Paget-Lewis' disturbing attachment to Ahmet Osman can be reasonably considered to have been communicated to the police over the course of the five meetings which took place between 3 March and 4 May 1987, having regard to the fact that Mr Prince's decision to call in the police in the first place was motivated by the allegations which Mrs Green had made against Paget-Lewis and the school's follow-up to those allegations (see paras 21 and 27, above). It may for the same reason be reasonably accepted that the police were informed of all relevant connected matters which had come to light by 4 May 1987 including the graffiti incident, the theft of the school files and Paget-Lewis' change of name.

It is the applicants' contention that by that stage the police should have been alert to the need to investigate further Paget-Lewis' alleged involvement in the graffiti incident and the theft of the school files or to keep a closer watch on him given their awareness of the obsessive nature of his behaviour towards Ahmet Osman and how that behaviour manifested itself. The court for its part is not persuaded that the police's failure to do so at this stage can be impugned from the standpoint of art 2 having regard to the state of their knowledge at that time. While Paget-Lewis' attachment to Ahmet Osman could be judged by the police officers who visited the school to be most reprehensible from a professional point of view, there was never any suggestion that Ahmet Osman was at risk sexually from him, less so that his life was in danger. Furthermore, Mr Perkins, the deputy headmaster, alone had reached the conclusion that Paget-Lewis had been responsible for the graffiti in the neighbourhood of the school and the theft of the files. However Paget-Lewis had denied all involvement when interviewed by Mr Perkins and there was nothing to link him with either incident. Accordingly, at that juncture, the police's appreciation of the situation and their decision to treat it as a matter internal to the school cannot be considered unreasonable.

Like the Commission, the court is not persuaded either that the ILEA official's memorandum and internal notes written between 14 April and 8 May are an accurate reflection of how the discussions between Mr Prince and the police officers wound up (see paras 28 and 68, above).

118. The applicants have attached particular weight to Paget-Lewis' mental condition and in particular to his potential to turn violent and to direct that violence at Ahmet Osman. However, it is to be noted that Paget-Lewis continued to teach at the school up until June 1987. Dr Ferguson examined him on three occasions and was satisfied that he was not mentally ill. On 7 August 1987 he was allowed to resume teaching, although not at Homerton House (see para 35, above). It is most improbable that the decision to lift his suspension from teaching duties would have been made if it had been believed at the time that there was the slightest risk that he constituted a danger to the safety of young people in his charge. The applicants are especially critical of Dr Ferguson's psychiatric assessment of Paget-Lewis. However, that assessment was made on the basis of three separate interviews with Paget-Lewis and if it appeared to a professional psychiatrist that he did not at the time display any signs of mental illness or a propensity to violence it would be unreasonable to have expected the police to have construed the actions of Paget-Lewis as they were reported to them by the school as those of a mentally disturbed and highly dangerous individual.

a 119. In assessing the level of knowledge which can be imputed to the police at the relevant time, the court has also had close regard to the series of acts of vandalism against the Osmans' home and property between May and November 1987 (see paras 30 and 36–37, above). It observes firstly that none of these incidents could be described as life-threatening and secondly there was no evidence pointing to the involvement of Paget-Lewis. This was also the view of Det Sgt Boardman in his report on the case in mid-December 1987 having interviewed the Green and Osman families, visited the school and taken stock of the file (see paras 42–45, above). The completeness of Det Sgt Boardman's report and the assessment he made in the knowledge of all the allegations made against Paget-Lewis would suggest that even if it were to be assumed that the applicants are correct in their assertions that the police did not keep records of the reported incidents of vandalism and of their meetings with the school and the ILEA officials, this failing could not be said to have prevented them from apprehending at an earlier stage any real threat to the lives of the Osman family or that the irrationality of Paget-Lewis' behaviour concealed a deadly disposition. The court notes in this regard that when the decision was finally taken to arrest Paget-Lewis it was not based on any perceived risk to the lives of the Osman family but on his suspected involvement in acts of minor criminal damage (see para 49, above).

d 120. The court has also examined carefully the strength of the applicants' arguments that Paget-Lewis on three occasions communicated to the police, either directly or indirectly, his murderous intentions (see para 105, above). However, in its view these statements cannot be reasonably considered to imply that the Osman family were the target of his threats and to put the police on notice of such. The applicants rely in particular on Paget-Lewis' threat to 'do a sort of Hungerford' which they allege he uttered at the meeting with the ILEA officers on 15 December 1987 (see para 46, above). The government have disputed that these words were said on that occasion, but even taking them at their most favourable to the applicants' case, it would appear more likely that they were uttered with respect to Mr Perkins whom he regarded as principally to blame for being forced to leave his teaching post at Homerton House. Furthermore, the fact that Paget-Lewis is reported to have intimidated the driver of the car with which he collided on 7 December 1987 that he was on the verge of committing some terrible could not reasonably be taken at the time to be a veiled reference to a planned attack on the lives of the Osman family deed (see paras 38–40, above). The court must also attach weight in this respect to the fact that, even if Paget-Lewis had deliberately rammed the vehicle as alleged, that act of hostility was in all probability directed at Leslie Green, the passenger in the vehicle. Nor have the applicants adduced any further arguments which would enhance the weight to be given to Paget-Lewis' claim that he had told PC Adams that he was in danger of doing something criminally insane (see para 37, above). In any event, as with his other cryptic threats, this statement could not reasonably be construed as a threat against the lives of the Osman family.

i 121. In the view of the court the applicants have failed to point to any decisive stage in the sequence of the events leading up to the tragic shooting when it could be said that the police knew or ought to have known that the lives of the Osman family were at real and immediate risk from Paget-Lewis. While the applicants have pointed to a series of missed opportunities which would have enabled the police to neutralise the threat posed by Paget-Lewis, for example by searching his home for evidence to link him with the graffiti incident or by having him detained

under the 1983 Act or by taking more active investigative steps following his disappearance, it cannot be said that these measures, judged reasonably, would in fact have produced that result or that a domestic court would have convicted him or ordered his detention in a psychiatric hospital on the basis of the evidence adduced before it. As noted earlier, the police must discharge their duties in a manner which is compatible with the rights and freedoms of individuals (see para 116, above). In the circumstances of the present case, they cannot be criticised for attaching weight to the presumption of innocence or failing to use powers of arrest, search and seizure having regard to their reasonably held view that they lacked at relevant times the required standard of suspicion to use those powers or that any action taken would in fact have produced concrete results.

122. For the above reasons, the court concludes that there has been no violation of art 2 of the convention in the circumstances of this case.

*3. As to the alleged breach by the authorities of a procedural obligation under art 2*

123. The court considers that the essence of the applicants' complaint under this head concerns their inability to secure access to a court or other remedy to have an independent assessment of the police response to the threat posed by Paget-Lewis to the lives of the Osman family (see para 106, above). The court considers it appropriate therefore to consider this grievance in the context of the applicants' complaints under arts 6 and 13 of the convention (see, mutatis mutandis, *McCann v UK* (1995) 21 EHRR 97 at 163 (para 160)).

*II. Alleged violation of art 8 of the convention*

124. The applicants contended that the failure of the police firstly to bring an end to the campaign of harassment, vandalism and victimisation which Paget-Lewis waged against their property and family and secondly, and in particular, to avert the wounding of the second applicant constituted a breach of art 8 of the convention, which stipulates:

'(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.'

125. The applicants maintained that they could not have been expected to obtain a civil injunction to prevent Paget-Lewis from intimidating their family and attacking their home and property since any such request would have been futile. They pleaded in this respect that they would have been unable to provide a court with any proof that Paget-Lewis was responsible for the acts of vandalism given that the police had never taken any steps to investigate the incidents which they had reported.

At the oral hearing the applicants informed the court that their main complaint under art 8 concerned the failure of the police to secure the second applicant's personal safety, an issue which the Commission had not addressed. In the applicants' submission, even if it were to be accepted that the police could not have foreseen that Paget-Lewis would have carried out a near-fatal attack on the life of

*a* Ahmet Osman, the risk of some harm being caused to him was nevertheless foreseeable. In their view that was in itself sufficient to engage the responsibility of the authorities under art 8.

*b* 126. The Commission found that the applicants' complaints concerning the failure of the authorities to protect their home and property against the attacks allegedly perpetrated by Paget-Lewis did not give rise to a breach of art 8 since in its view it would have been open to the applicants to seek an injunction against Paget-Lewis.

*c* As to the complaint that the police failed to protect the second applicant's physical integrity, the delegate of the Commission informed the court at the hearing that the Commission had in fact addressed this grievance. For the reasons which led it to conclude that there had been no violation of art 2, it found that the complaint under art 8 could not be sustained either.

*d* 127. The government agreed with the Commission on both points.

*e* 128. The court recalls that it has not found it established that the police knew or ought to have known at the time that Paget-Lewis represented a real and immediate risk to the life of Ahmet Osman and that their response to the events as they unfolded was reasonable in the circumstances and not incompatible with the authorities' duty under art 2 of the convention to safeguard the right to life. In the court's view, that conclusion equally supports a finding that there has been no breach of any positive obligation implied by art 8 of the convention to safeguard the second applicant's physical integrity.

*f* 129. As to the applicants' contention that the police failed to investigate the attacks on their home with a view to ending the campaign of harassment against the Osman family, the court reiterates that the police had taken the view that there was no evidence to implicate Paget-Lewis and for that reason charges could not be laid against him. It is to be noted in this respect that Paget-Lewis was questioned by PC Adams sometime in November 1987, but he denied all responsibility. Det Sgt Boardman also confirmed in his report that there was no evidence on which to mount a prosecution case against Paget-Lewis (see para 45, above). In the light of new developments in the case, an attempt was in fact made to arrest and question Paget-Lewis on 17 December 1987 on suspicion of criminal damage including with respect to the acts of vandalism directed at the applicants' home and property (see para 49, above). However, that attempt failed.

*g* 130. The court concludes accordingly that the facts of the case do not disclose the breach by the authorities of any positive obligation under art 8 of the convention.

### *III. Alleged violation of art 6(1) of the convention*

*h* 131. The applicants alleged that the dismissal by the Court of Appeal of their negligence action against the police on grounds of public policy amounted to a restriction on their right of access to a court in breach of art 6(1) of the convention, which provides to the extent relevant: 'In the determination of his civil rights and obligations ... everyone is entitled to a ... hearing by [a] ... tribunal.'

*i* 132. The Commission agreed with the applicants' arguments in this respect. The government however contended that the applicants could not rely on art 6(1), maintaining in the alternative that there had been no breach of that provision in the circumstances of the case.



## A. Applicability of art 6(1)

133. The government maintained that the applicants could not rely on any substantive right in domestic law to sue the police for their alleged failure to prevent Paget-Lewis from shooting dead Ali Osman and seriously wounding the second applicant. They explained that whether or not the police can be considered to owe a plaintiff a duty of care in a particular context depended not only on proof of proximity between the parties and the foreseeability of harm but also on the answer to the question whether it was fair, just and reasonable to impose a duty of care on the police. The Court of Appeal had answered the latter question in the negative, being satisfied that there were no other public policy considerations which would have led it to reach a different conclusion. Accordingly, since the applicants had failed to establish an essential ingredient of the duty of care under domestic law they did not have any substantive right for the purposes of the applicability of art 6(1). Any other conclusion would result in the impermissible creation by the convention institutions of a substantive right where none in fact existed in the domestic law of the respondent state.

134. The applicants replied that the Court of Appeal had accepted their proposition that there was a special relationship of proximity between them and the police since the police knew that Paget-Lewis was conducting a campaign of victimisation against the Osman family and that the second applicant was especially at risk from the threat posed by Paget-Lewis to his life. The applicants maintained that although they had established all the constituent elements of the duty of care, the Court of Appeal was constrained by precedent to apply the doctrine of police immunity developed by the House of Lords in *Hill v Chief Constable of West Yorkshire* to strike out their statement of claim (see para 90, above). In their view the doctrine of police immunity was not one of the essential elements of the duty of care as was claimed by the government, but a separate and distinct ground for defeating a negligence action in order to ensure, inter alia, that police manpower was not diverted from their ordinary functions or to avoid overly cautious or defensive policing.

135. The Commission agreed with the applicants that art 6(1) was applicable. It considered that the applicants' claim against the police was arguably based on an existing right in domestic law, namely the general tort of negligence. The House of Lords in *Hill v Chief Constable of West Yorkshire* modified that right for reasons of public policy in order to provide an immunity for the police from civil suit for their acts and omissions in the context of the investigation and suppression of crime. In the instant case, that immunity acted as a bar to the applicants' civil action by preventing them from having an adjudication by a court on the merits of their case against the police.

136. The court recalls at the outset that art 6(1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the article embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before courts in civil matters constitutes one aspect only (see *Golder v UK* (1975) 1 EHRR 524 at 536 (para 36)).

137. The court notes with reference to this fundamental principle that the respondent government have disputed the applicability of art 6(1) to the applicants' claim. They allege that the applicants did not have any substantive right under domestic law given that the Court of Appeal, in application of the exclusionary rule established by the House of Lords in *Hill v Chief Constable of*



*West Yorkshire*, dismissed their civil action against the police as showing no cause of action (see para 65, above).

- a 138. The court would observe that the common law of the respondent state has long accorded a plaintiff the right to submit to a court a claim in negligence against a defendant and to request that court to find that the facts of the case disclose a breach of a duty of care owed by the defendant to the plaintiff which has caused harm to the latter. The domestic court's enquiry is directed at determining whether the constituent elements of a duty of care have been satisfied, namely: whether the damage is foreseeable; whether there exists a relationship of proximity between the parties; and whether it is fair, just and reasonable to impose a duty of care in the circumstances (see paras 94 and 133, above).

- c It is to be noted that the latter criterion, which has been relied on by the government in support of their contention that the applicants have no substantive right under domestic law, is not of sole application to civil actions taken against the police alleging negligence in the investigation and suppression of crime, but has been considered and applied in other spheres of activity. The House of Lords in *Hill v Chief Constable of West Yorkshire* declared for the first time that this criterion could be invoked to shield the police from liability in the context of the investigation and suppression of crime (see paras 90–92, above). Although the applicants have argued in terms which suggest that the exclusionary rule operates as an absolute immunity to negligence actions against the police in the context at issue, the court accepts the government's contention that the rule does not automatically doom to failure such a civil action from the outset but in principle allows a domestic court to make a considered assessment on the basis of the arguments before it as to whether a particular case is or is not suitable for the application of the rule. They have referred to relevant domestic case law in this respect (see para 94, above).

- f 139. On that understanding the court considers that the applicants must be taken to have had a right, derived from the law of negligence, to seek an adjudication on the admissibility and merits of an arguable claim that they were in a relationship of proximity to the police, that the harm caused was foreseeable and that in the circumstances it was fair, just and reasonable not to apply the exclusionary rule outlined in *Hill v Chief Constable of West Yorkshire*. In the view of the court the assertion of that right by the applicants is in itself sufficient to ensure the applicability of art 6(1) of the convention.

- g 140. For the above reasons, the court concludes that art 6(1) is applicable. It remains to be determined whether the restriction which was imposed on the exercise of the applicants' right under that provision was lawful.

#### B. Compliance with art 6(1)

- h 141. According to the applicants the public interest considerations invoked by the House of Lords in *Hill v Chief Constable of West Yorkshire* as justification for the police immunity rule and on which the government have based their case could not be sustained. Thus, the argument that exposing the police to actions in negligence would result in a significant diversion of manpower from their crime suppression function sits ill with the fact that the immunity is limited to negligence actions involving the investigation and suppression of crime and not to cases of assault or false imprisonment which could equally be said to give rise to a diversion of manpower.

As to the contention that the threat of liability for negligence would lead to defensive or over-cautious policing, they maintained that this consideration has never been invoked to protect other vital public services such as hospitals, ambulances and the fire brigade from negligence actions. They also disputed the validity of the argument that a negligence action against the police would have the undesirable effect of re-opening closed investigations in order to ascertain whether they had been conducted competently. In their submission if a negligent investigation has resulted in a wholly preventable death there are cogent reasons to re-examine the conduct of the police. The applicants further contended *inter alia* that the imposition of liability in negligence on the police in respect of the investigation and suppression of crime would serve to enhance standards among officers, especially where the activity in question concerned the protection of the right to life.

142. In their alternative submission the applicants asserted that even if it could be said that the immunity pursued a legitimate aim or aims, its operation offended against the principle of proportionality. They reasoned in this respect that the immunity was complete and as such did not distinguish between cases where the merits were strong and those where they were weak. In the instant case, involving the protection of a child and the right to life and where the damage caused was grave, the requirements of public policy could not dictate that the police should be immune from liability. Furthermore, the combined effect of the strict tests of proximity and foreseeability provided limitation enough to prevent untenable cases ever reaching a hearing and to confine liability to those cases where the police have caused serious loss through truly negligent actions.

143. The government replied that the exclusionary rule which defeated the applicants' civil action pursued the legitimate aim or aims outlined by the House of Lords in *Hill v Chief Constable of West Yorkshire*, in particular the avoidance of defensive policing and the diversion of police manpower (see para 91, above). In the government's view it was central to the reasoning of the House of Lords in *Hill v Chief Constable of West Yorkshire* that the imposition of a duty of care in the context in question carried with it a real risk that effective policing for the benefit of the public at large would be undermined.

144. Further, the rule was a proportionate response to the attainment of those aims and fell well within the respondent state's margin of appreciation. They emphasised that the exclusion was not a blanket exclusion of liability but a carefully and narrowly focused limitation which applied only in respect of the investigation and suppression of crime, and even then not in every case (see para 93, above). Thus, in the instant case, the Court of Appeal had considered that there were no competing public policy considerations at stake which would have outweighed the general public policy consideration that it would not be fair, just and reasonable to impose a duty of care on the police.

145. The government further stressed in defence of the proportionality of the restriction on the applicants' right to sue the police that they could have taken civil proceedings against Paget-Lewis. Moreover, they had in fact sought to sue Dr Ferguson but subsequently abandoned their action against him. In either case they had full access to a court.

146. The Commission accepted that the impugned rule may be considered to pursue the legitimate aims suggested by the government (see para 143, above). However, it agreed with the essence of the applicants' arguments for countering the government's justification for the application of the rule (see paras 141–142,

a above). The Commission noted, in particular, that the applicants claimed to have satisfied the proximity component of the duty of care, which had not been satisfied by the plaintiff in *Hill v Chief Constable of West Yorkshire*. However, they were denied the opportunity of establishing the factual basis of their claim in adversarial proceedings through the operation of an immunity rule which, moreover, did not distinguish between negligence having trivial effects and that, as in this case, with catastrophic results.

b 147. The court recalls that art 6(1) embodies the 'right to a court', of which the right of access, that is, the right to institute proceedings before a court in civil matters, constitutes one aspect.

c However, this right is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the state. In this respect, the contracting states enjoy a certain margin of appreciation, although the final decision as to the observance of the convention's requirements rests with the court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with art 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality d between the means employed and the aim sought to be achieved (see, most recently, *Tinnelly & Sons Ltd v UK* (1998) 4 BHRC 393 at 415–416 (para 72)).

e 148. Against that background the court notes that the applicants' claim never fully proceeded to trial in that there was never any determination on its merits nor on the facts on which it was based. The decision of the Court of Appeal striking out their statement of claim was given in the context of interlocutory proceedings initiated by the Commissioner and that court assumed for the purposes of those proceedings that the facts as pleaded in the applicants' statement of claim were true. The applicants' claim was rejected since it was found to fall squarely within the scope of the exclusionary rule formulated by the House of Lords in *Hill v Chief Constable of West Yorkshire*.

f 149. The reasons which led the House of Lords in *Hill v Chief Constable of West Yorkshire* to lay down an exclusionary rule to protect the police from negligence actions in the context at issue are based on the view that the interests of the community as a whole are best served by a police service whose efficiency and effectiveness in the battle against crime are not jeopardised by the constant risk of exposure to tortious liability for policy and operational decisions.

g 150. Although the aim of such a rule may be accepted as legitimate in terms of the convention, as being directed to the maintenance of the effectiveness of the police service and hence to the prevention of disorder or crime, the court must nevertheless, in turning to the issue of proportionality, have particular regard to its scope and especially its application in the case at issue. While the government h have contended that the exclusionary rule of liability is not of an absolute nature and that its application may yield to other public policy considerations, it would appear to the court that in the instant case the Court of Appeal proceeded on the basis that the rule provided a watertight defence to the police and that it was impossible to prise open an immunity which the police enjoy from civil suit in respect of their acts and omissions in the investigation and suppression of crime i (see para 144, above).

151. The court would observe that the application of the rule in this manner without further enquiry into the existence of competing public interest

considerations only serves to confer a blanket immunity on the police for their acts and omissions during the investigation and suppression of crime and amounts to an unjustifiable restriction on an applicant's right to have a determination on the merits of his or her claim against the police in deserving cases.

In its view, it must be open to a domestic court to have regard to the presence of other public interest considerations which pull in the opposite direction to the application of the rule. Failing this, there will be no distinction made between degrees of negligence or of harm suffered or any consideration of the justice of a particular case. It is to be noted that in the instant case *McCowan LJ* appeared to be satisfied that the applicants, unlike the plaintiff *Hill*, had complied with the proximity test, a threshold requirement which is in itself sufficiently rigid to narrow considerably the number of negligence cases against the police which can proceed to trial (see para 64, above). Furthermore, the applicants' case involved the alleged failure to protect the life of a child and their view that that failure was the result of a catalogue of acts and omissions which amounted to grave negligence as opposed to minor acts of incompetence. The applicants also claimed that the police had assumed responsibility for their safety. Finally, the harm sustained was of the most serious nature.

152. For the court, these are considerations which must be examined on the merits and not automatically excluded by the application of a rule which amounts to the grant of an immunity to the police. In the instant case, the court is not persuaded by the government's argument that the rule as interpreted by the domestic court did not provide an automatic immunity to the police.

153. The court is not persuaded either by the government's plea that the applicants had available to them alternative routes for securing compensation (see para 145, above). In its opinion the pursuit of these remedies could not be said to mitigate the loss of their right to take legal proceedings against the police in negligence and to argue the justice of their case. Neither an action against *Paget-Lewis* nor against *Dr Ferguson*, the *ILEA* psychiatrist, would have enabled them to secure answers to the basic question which underpinned their civil action, namely why did the police not take action sooner to prevent *Paget-Lewis* from exacting a deadly retribution against *Ali* and *Ahmet Osman*. They may or may not have failed to convince the domestic court that the police were negligent in the circumstances. However, they were entitled to have the police account for their actions and omissions in adversarial proceedings.

154. For the above reasons, the court concludes that the application of the exclusionary rule in the instant case constituted a disproportionate restriction on the applicants' right of access to a court. There has accordingly been a violation of art 6(1) of the convention.

#### *IV. Alleged violation of art 13 of the convention*

155. The applicants complained that they had no effective remedy enabling them to have an adjudication on their claim that the authorities had not done all that was required of them under art 2 to protect the lives of *Ali* and *Ahmet Osman*. They relied on art 13 of the convention, which 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.'

a 156. The applicants submitted that the only effective mechanism in the circumstances for holding the authorities accountable for their failure in the instant case to comply with their positive obligation under art 2 of the convention would have been a civil action in negligence against the police. However the pursuit of that remedy was blocked when the Court of Appeal accepted the Commissioner's plea of police immunity and struck out their statement of claim.

b 157. The Commission considered that no separate issue arose under art 13 in view of its finding of a violation of art 6(1) of the convention. The government invited the court to follow this view should it be minded to find a breach of art 6(1).

c 158. The court agrees with the Commission's opinion on this complaint having regard to its own conclusion that the applicants' rights under art 6(1) have been violated. It recalls in this respect that the requirements of art 13 are less strict than, and are here absorbed by, those of art 6 (see, most recently, *Tinnelly & Sons Ltd v UK* (1998) 4 BHRC 393 at 417 (para 77)).

V. *Application of art 50 of the convention*

159. The applicants claimed just satisfaction under art 50 of the convention, which provides:

d '(50) If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.'

e

A. *Pecuniary and non-pecuniary damage*

f 160. The applicants in their memorial requested the court to award them compensation for pecuniary and non-pecuniary loss calculated by reference to the appropriate level of compensation which would have been payable in the domestic courts if their claim had been permitted to proceed and had succeeded in full.

g 161. In their supplementary submissions received at the registry on 9 June 1998 the applicants provided detailed estimates of what each of them might have been expected to receive from a domestic court by way of compensation. They indicated however that these were only to be seen as guidance for the benefit of the court and that they were content for the court to make its own assessment of the appropriate level of just satisfaction in accordance with its established principles.

h 162. The government maintained in their primary submission that the applicants' detailed claims should be rejected since they were submitted out of time and were in any event unsubstantiated and inflated. In the alternative, they considered that a finding of a violation of any or all of the articles of the convention invoked by the applicants would in itself constitute sufficient just satisfaction.

163. The delegate of the Commission did not comment on this branch of the art 50 issue.

i 164. The court notes that it conducts its assessment of what an applicant is entitled to by way of just satisfaction in accordance with the principles laid down in its own case law under art 50 and not by reference to the principles or scales of assessment used by domestic courts. The applicants accept this to be the case (see para 161, above). The court does not consider it necessary therefore to answer the government's objections to the admissibility of their supplementary submissions.



In any event, the court cannot speculate as to the outcome of the domestic proceedings had the applicants' statement of claim not been struck out. It considers nevertheless that the applicants were denied the opportunity to obtain a ruling on the merits of their claim for damages against the police. Deciding on an equitable basis it awards each of the applicants the sum of £10,000.

#### B. Costs and expenses

165. The applicants claimed a total amount of £46,976.78 by way of costs and expenses incurred in bringing their case before the convention institutions. They provided details of the number of lawyers who worked on the case, the hourly rates charged and the nature of the work involved as well as disbursements. The applicants were in receipt of legal aid from the Council of Europe.

166. The government considered inter alia that the details supplied by the applicants showed a considerable overlap between the time spent by the solicitors and legal advisers on the case and the time spent by counsel. They contended that the claim should be reduced on that account. They suggested that a sum of £27,216.43 would represent a more reasonable claim in the circumstances, this amount being subject to any award of legal aid by the Council of Europe and to apportionment to reflect anything other than a finding of violation of each of the articles under which a complaint has been made.

167. The delegate did not comment on this limb of the art 50 claim either.

168. Having regard to the specifications provided by the applicants, to the fact that their complaints under arts 2 and 8 have not been substantiated and to equitable considerations, the court awards the applicants the sum of £30,000 together with any value-added tax (VAT) that may be chargeable, less the F 28,514 already paid in legal aid by the Council of Europe.

#### C. Default interest

169. According to the information available to the court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7.5% pa.

#### FOR THESE REASONS, THE COURT

(1) *Holds* by 17 votes to 3 that there has been no violation of art 2 of the convention;

(2) *Holds* by 17 votes to 3 that there has been no violation of art 8 of the convention;

(3) *Holds* unanimously that art 6(1) of the convention is applicable in this case and has been violated;

(4) *Holds* by 19 votes to 1 that it is unnecessary to examine the applicants' complaints under art 13 of the convention;

(5) *Holds* unanimously (a) that the respondent state is to pay the applicants, within three months, £10,000 each by way of compensation for loss of opportunity; (b) that the respondent state is to pay the applicants, within three months, £30,000 in respect of costs and expenses together with any VAT that may be chargeable, less F 28,514 to be converted into pounds sterling at the rate applicable on the date of delivery of the present judgment; (c) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;

(6) *Dismisses* by 19 votes to 1 the remainder of the applicants' claim for just satisfaction.

## CONCURRING OPINION OF FOIGHÉL J

a I agree with the conclusion of the majority that there has been no violation of art 2 of the convention in this case.

b I also agree with that there has been a violation of art 6(1) on account of the disproportionate impact of the restriction on the applicants' rights of access to a court guaranteed by that convention provision (see para 154, above). However, as regards the prior issue of the *applicability* of art 6(1), I have based myself on a different line of reasoning to that used by the court.

c In the first place, and irrespective of whether the domestic rule which defeated the applicants' civil action in this case is framed in terms of a substantive or procedural bar, the applicants had first and foremost a convention right under domestic law to submit their claim to a court and to have a determination on it. The fact that the applicants' claim failed to get off the ground does not displace the right guaranteed them by art 6(1) of the convention. In my view, what is decisive for the applicability of art 6(1) in this case is that the applicants had a right to a determination on their claim that their rights to life should have been protected by the police, which claim could not be considered devoid of merit from the outset. In my opinion, the fact that they were adjudged by the Court of Appeal in application of the rule in *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53 to have no cause of action, or as the government have formulated it, no substantive right to sue the police, is irrelevant for the purposes of the applicability of art 6(1). That decision is an issue which is independent of the question of the applicability of art 6(1).

e I am of course aware that the court up until now has understood the expression 'civil rights' in art 6(1) as rights which exist under domestic law. For me, however, this does not exclude other rights whose existence cannot be a matter of doubt. The fundamental nature of an applicant's right to submit a civil claim to a court cannot be determined exclusively by domestic law considerations on whether or not such a right exists in a particular set of circumstances. In this respect, I would recall that the court has stressed on occasions that it is sufficient for an applicant to show that there are at least arguable grounds which point to the recognition of the right at issue under domestic law (see, inter alia, *Fayed v UK* (1994) 18 EHR 393 at 429–430 (para 65)), and in the final analysis it is for the court in the exercise of its supervisory jurisdiction and on the basis of convention criteria to rule on whether the applicant has shown this to be the case. I would also note that the requirement that there be a dispute (contestation) over a civil right in order to bring art 6(1) into play has been construed by the court in its case law to cover not only disputes concerning the scope of a right but also its very existence under domestic law (see *Ashingdane v UK* (1985) 7 EHRR 528 at 546 (para 55)).

h Furthermore, and of even greater importance, is the fact that the domestic law of the contracting states must secure the enjoyment of the rights and freedoms laid down in the convention and its protocols (see art 1 of the convention). This includes the right to life. In the instant case, the applicants have relied on a civil action against the police to establish that their right to life was breached on account of the culpable failure of the police to prevent the tragedy which befell them. In my view that right, derived from the convention, secures them in consequence their right to the protection of art 6(1) of the convention.

i For the above reasons, I have been led to conclude that art 6(1) is applicable in this case.

## CONCURRING OPINION OF SIR JOHN FREELAND J

1. To the reasons given in the judgment for the finding of a violation of art 6(1), I would add only briefly in explanation of my own vote in that sense.

2. I so voted because of the way in which, in practice, the public policy exception from liability enunciated by the House of Lords in *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53 operated in this case to block the claims of the applicants in their actions against the police in negligence (see paras 90–92, above). I accept, as indeed does para 150, above, that the aim of the exception is legitimate in terms of the convention; and I also accept that the exception may in other cases be applied proportionately to that aim. The difficulty for me arises primarily from the fact that in the present case it appears to have been applied as if conferring on the police a blanket exemption from liability in negligence so far as concerns their function in the investigation and suppression of crime, to the exclusion of any examination by the court of considerations which might pull in another direction.

3. In this latter respect the present case stands in marked contrast to the later Court of Appeal case of *Swinney v Chief Constable of Northumbria* [1997] QB 464, where the court had regard to the possible existence of other, and countervailing, considerations of public policy—in particular, as relevant in the circumstances of that case, the need to preserve the springs of information, to protect informers, and to encourage them to come forward (see paras 93–94, above). The court also considered it arguable, on the facts pleaded in that case, that there had been a voluntary assumption of responsibility by the police (a similar argument has been advanced by the applicants in the present case).

4. I also note that in *Hill v Chief Constable of West Yorkshire* the plaintiff lost her action on two grounds, either of which would have been enough to defeat it—first, the absence of the necessary proximity and, secondly, the public policy exception. In the present case, however, McCowan LJ, with whom Simon Brown LJ agreed, expressed the view that the plaintiffs had an arguable case that there existed a very close degree of proximity amounting to a special relationship (the third member, Beldam LJ, preferred to express no opinion on the point at that stage); and the court proceeded to strike out the claim against the police on the sole ground of the public policy exception.

5. The weight thus attached to the exception in this case, together with its broad reach and the exclusive application given to it, combined in my view to produce a disproportionate limitation on the applicants' right of access to court. I therefore concurred in the conclusion stated in para 154, above. For me the exception, operating in this way, is an inappropriately blunt instrument for the disposal of claims raising human rights issues such as those of the present case.

## CONCURRING OPINION OF JAMBREK J

1. I agreed with the court's unanimous conclusion that art 6(1) of the convention is applicable to the applicants' claim and with the reasons given in the judgment in support thereof.

2. However, in my opinion, a more extensive interpretation of the term 'civil rights and obligations' than the one applied by the court in this case and in its case law in general, would only require the court to be satisfied that a right existed under domestic law—in the instant case, a right derived from the general tort of negligence or the duty of care owed by the police to the plaintiff. The only condition for the court's recognition of a right as a 'civil' right, thereby guaranteeing an applicant the right of access to a domestic court as protected by

a art 6(1), would be that the right at issue is recognised in the national legal system as an individual right within the sphere of general individual freedom. Seen in these terms, the right of everyone to a fair trial by a court of law would also protect the individual in his or her relations with the authorities of the state.

b 3. Had the court taken this interpretation of the term 'civil rights' as its starting point, it would not have been necessary for it to examine in the instant case whether the exclusionary rule imposed on the exercise of the right operated in an absolute manner or whether it allowed the domestic courts to make a considered assessment as to whether a particular case should be allowed to proceed to a consideration on the merits before a domestic court and thus guaranteeing a plaintiff access to a court for this purpose (see para 138, above). Nor would it have been necessary for the court to establish whether the applicants could arguably claim that in the circumstances it was fair, just and reasonable not to apply the exclusionary rule in

c *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53 (see para 139, above).

d 4. My reasoning has been informed by the dissenting opinions of Mr Melchior and Mr Frowein in the decision of the European Commission of Human Rights in *Bentham v Netherlands* (1983) 6 EHRR 283 and by van Dijk J's chapter on 'The interpretation of "civil rights and obligations" by the European Court of Human Rights—one more step to take' in Matscher and Petzold *Protecting Human Rights: The European Dimension—Studies in Honour of Gerard J Wiarda* (1988), pp 131–143.

e 5. In *Sporrong v Sweden* (1982) 5 EHRR 35 at 58 (para 87), the court ruled that, since the applicants' case could not be heard by a tribunal competent to determine all the aspects of the matter, there had for that reason been a violation of art 6(1) of the convention. In *Golder v UK* (1975) 1 EHRR 524 at 536 (para 35) the court also stressed that the guarantees embodied in art 6(1) of the convention could be frustrated by national legislators if the right to a court were not considered to be implied in that provision:

f '... a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain cases of civil actions an entrust it to organs dependent on the Government.'

The situation as described in the facts of the present case comes close to the concerns expressed by the court in this quotation.

g 6. I therefore also agree with van Dijk J's assessment that if the court were to take this additional step, and thereby no longer restrict the meaning of 'civil rights and obligations' to 'private rights and obligations', the certainty and foreseeability of its case law would be enhanced. Furthermore, if 'civil rights and obligations' were to be understood as 'all those rights which are individual rights under the national legal system and fall within the sphere of general individual freedom' (see the dissenting opinion of Mr Melchior and Mr Frowein in *Bentham v Netherlands* (1983) 6 EHRR 283), the court's case law would conform better to the object and purpose of art 6 and of the convention as a whole, that is to say respect for the requirement of the rule of law as interpreted by the court in, for example, *Klass v Germany* (1978) 2 EHRR 214 at 235 (para 55) wherein it held:

i 'The rule of law implies, *inter alia*, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort,



judicial control offering the best guarantee of independence, impartiality and a proper procedure.'

a

PARTLY DISSENTING, PARTLY CONCURRING OPINION OF DE MEYER J, JOINED BY LOPES ROCHA AND CASADEVALL JJ

In this sad case there was enough evidence that for several months before 7 March 1988 the authorities of the respondent state were well aware of the strange and worrying behaviour of Mr Paget-Lewis. Both the ILEA<sup>7</sup> and the police<sup>8</sup> knew, at least since the spring of 1987,<sup>9</sup> that he was obsessed with Ahmet Osman. They knew that he was harassing the Osman family and the Green family,<sup>10</sup> and that he was increasingly threatening them as well as Mr Perkins.<sup>11</sup> They knew that some harm had already been caused.<sup>12</sup> From December 1987 they could have had hardly any doubts that further, more serious, harm was to be foreseen.<sup>13</sup>

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c

They took, however, almost no action to avert impending danger and to protect those concerned.<sup>14</sup>

They should have taken Mr Paget-Lewis into custody before it was too late in order to have him cared for properly. Instead they let things go until he killed two persons and wounded two others.

d

Mr Paget-Lewis himself asked the police arresting him why they did not stop him before he acted as he did and reminded them that he had given all the warning signs.<sup>15</sup> He was right.

In my view, therefore, the authorities of the respondent state, by failing to do what they should have done,<sup>16</sup> have violated the applicants' right to life and also their right to private and family life.

e

7 The management of Homerton House School noticed since 1986 Mr Paget-Lewis' 'attachment' to Ahmet Osman and they were informed in January 1987 that he was harassing Leslie Green (see the government's memorial (paras 1.5–1.7)). They viewed the events seriously and investigated the matter in March 1987 (see the Commission's report (para 96)). Mr Prince's letter of 1 May 1987 to Mrs May shows that the problem was known at the headquarters of the ILEA before May 1987 (see Annex A to the applicants' memorial, no 4, p 17).

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8 Mr Prince met with PC Williams on 3, 9, 13 and 17 March 1987 (see the extracts of his diary, Annex A to the applicants' memorial, no 1, pp 1–10). The government admit that, on these occasions, 'no doubt the substance of the concerns was made known to PC Williams' (see the government's memorial (para 1.13)).

9 See the Commission's report (para 96).

10 See the Commission's report (paras 20–25).

11 The graffiti incident, the theft of the files and Mr Paget-Lewis' change of name occurred already in March to April 1987 (see the Commission's report (paras 27–29 and 96)). Then followed, in May to November 1987, the 'vandalising attacks' on the home and car of the Osman family, for which 'there was no doubt in everybody's mind he was in fact responsible' (see the Commission's report (paras 32, 33, 37, 39 and 96), the government's memorial (para 1.42) and Det Sgt Boardman's memo of 16 December 1987, Annex D to the government's memorial p 5 (para 18)) and also on the Green family (see Annex A to the applicants' memorial, no 7, pp 24–26, and Annex B to the government's memorial pp 37–38), on 7 December 1987 the ramming of the van in which Leslie Green was a passenger and Mr Paget-Lewis' statement to Mr Price that 'in a few months' he would 'be doing life' (see the Commission's report (paras 41 and 96), Annex A to the applicants' memorial, and Annex B to the government's memorial pp 41–42), on 15 December 1987, at the meeting with Mr David and Mrs May, Mr Paget-Lewis' saying that he would 'not do a "Hungerford" in a school', but 'see Perkins at home' (see the Commission's report (paras 47 and 96), and Annex A to applicant's memorial, no 8, pp 27–29), on 18 December 1987 his disappearance from school (see the Commission's report (paras 53 and 96)), between January and March 1988 his roaming around and being involved in 'a number of accidents' (see the Commission's report (para 58)), and finally on 1, 4 and 5 March 1988 his presence in a crash helmet near the applicants' home (see the Commission's report (paras 60 and 96)). All these facts were known to the police before 7 March 1988.

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- a There was of course also a violation of the applicants' right to a court, since the Osmans were denied any possibility to have their claims concerning the failures of the police properly examined by a tribunal. Whether or not they could rely on any substantive right thereto in domestic law is irrelevant, since they were asserting that they were the victims of a violation of fundamental (and therefore also civil)<sup>17</sup> rights, which had to be secured to them under arts 1, 2 and 8 of the convention, notwithstanding anything to the contrary in domestic law or practice, and since
- b their right to have their case heard in court was also such a right (see arts 1 and 6 of the convention). It was likewise irrelevant whether the immunity of the police was or was not absolute, since the very principle of such immunity is not acceptable under the rule of law. The refusal to consider the applicants' action was therefore an obvious denial of justice.<sup>18</sup>

c PARTLY DISSENTING, PARTLY CONCURRING OPINION OF LOPES ROCHA J

I regret that I am unable to share the majority's view that there has been no violation of arts 2 and 8 of the convention.

- d My interpretation of the facts—which is the same as De Meyer J's—leads me to conclude that the police underestimated the danger Mr Paget-Lewis presented for the life and physical integrity of Mr Ahmet Osman and, in all probability, of his close relatives.

In my opinion, it is not possible to say, as the government did, that there was no causal link between the failure to take preventive action, of which the authorities are accused, and the events that occurred.

- e A quite different approach is required to determine liability for an omission from that required to determine liability for an act. The former must be determined according to generally accepted rules. It has to be decided whether the assault originated from the failure to take a particular measure or measures where the assailant's previous behaviour already pointed to a likelihood that he would act aggressively towards someone of whom he was particularly fond.

f 12 See the Commission's report (paras 32–33, 37, 39 and 41). See also Mrs Green's statement to Det Sgt Boardman on 9 December 1987 (Annex B to the government's memorial pp 37–38).

g 13 See the Commission's report (para 47). See also the ILEA memorandum dated 15 December 1987 (Annex A to the applicants' memorial, no 8 pp 27–29) relating the meeting of Mr Paget-Lewis with Mrs May and Mr David. According to that document, Mr Paget-Lewis had: 'spoken in the following terms: He feels in a totally self-destructive mood ... it is all a symphony and the last chord has to be played ... he is deeply in debt and is selling all his possessions ... Nick Perkins is the cause of all his troubles, has said he is sexually deviant ... He wouldn't do a "Hungerford" in a school, but will see Perkins at home.' The memorandum adds that this information was passed on to the police. See also the statement of Mr Price to Det Sgt Boardman on 22 December 1987 (Annex B to the government's memorial pp 41–42). According to that statement, Mr Paget-Lewis had said, immediately after the collision of 9 December 1987: 'I'm not worried about all this because in a few months I'll be doing life.' After the shootings, he recalled, in one of his statements to Det Sgt Boardman on 8 March 1988, that he had earlier warned the police (PC Adams) that 'there was a danger of me doing something criminally insane unless things were mended between me and the Osmans'. (See Annex B to government's memorial p 77.) It is rather obvious that these utterances ought to have been taken more seriously.

h 14 In December 1987, after the van incident, the police decided to arrest Mr Paget-Lewis, but, having not found him at his home, they did not even try to find him at his school before he disappeared. They took no further steps to trace him, except for asking the ILEA to request him to contact Det Sgt Boardman and putting him in January 1988 on the Police National Computer. It is most surprising that they could not get hold of him whilst he was travelling around in hired cars and getting involved in several accidents (see the Commission's report (paras 50, 52, 57, 58, and 96)).

i 15 See the Commission's report (para 62). See also his statement to Det Sgt Boardman on 8 March 1988 (Annex B to the government's memorial p 98)

In the instant case, there was strong evidence of aggressive behaviour on the part of Mr Paget-Lewis suggesting that at the first opportunity he would act violently. It should not be forgotten that he displayed rather strange traits of personality and was known to the police, although there was some doubt over whether he was homosexual.

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Given, too, the professional experience one is entitled to expect of them, the police could legitimately be required to exercise caution and to take measures to protect the people at risk. Failure to take such measures renders the police and the state concerned liable. There has therefore been a breach of the aforementioned articles.

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16 In another case (*McLeod v UK* (1998) 5 BHRC 364), the representative of the government of the United Kingdom observed that 'there is a pressing social need to prevent disorder or crime' and that more 'particularly, in circumstances where there is a genuine and reasonable belief that there is a risk of disorder or crime, there is then a pressing social need to take steps to prevent it'. He added that 'it is much more desirable to prevent such disorder or crime than to await its development and only then take steps to contain it'. (See the verbatim record of the hearing held on 18 May 1998, Doc Cour/Misc (98)).

17 See, mutatis mutandis, *Aerts v Belgium* (1998) 5 BHRC 382 at 403 (para 59) and my separate opinion in *Pierre-Bloch v France* (1997) 26 EHRR 202.

18 The dismissal of their civil action was also a violation of art 13 of the convention, as they were thereby denied what would have been 'an effective remedy before a national authority' and it has not been shown, or even alleged, that any other remedy of that kind was available. Such a remedy had indeed to be ensured to them 'notwithstanding that the violation ha[d] been committed by persons acting in an official capacity'.