



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

CASE OF LAMBERT v. FRANCE

(88/1997/872/1084)

JUDGMENT

STRASBOURG

24 August 1998

In the case of Lambert v. France¹,

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) and the relevant provisions of Rules of Court A², as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,

Mr L.-E. PETTITI,

Mr A. SPIELMANN,

Mr N. VALTICOS,

Sir John FREELAND,

Mr L. WILDHABER,

Mr K. JUNGWIERT,

Mr M. VOICU,

Mr V. BUTKEVYCH,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 23 April and 27 July 1998,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights (“the Commission”) on 22 September 1997 and by the French Government (“the Government”) on 24 October 1997, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 23618/94) against the French Republic lodged with the Commission under Article 25 by a French national, Mr Michel Lambert, on 8 February 1994.

The Commission’s request referred to Articles 44 and 48 and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46); the Government’s application referred to Article 48. The object of the request and of the application was to obtain a decision as to

Notes by the Registrar

1. The case is numbered 88/1997/872/1084. The first number is the case’s position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case’s position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules of Court A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 8 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included *ex officio* Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b)). On 25 September 1997, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr B. Walsh, Mr A. Spielmann, Mr N. Valticos, Mr L. Wildhaber, Mr K. Jungwiert, Mr M. Voicu and Mr V. Butkevych (Article 43 *in fine* of the Convention and Rule 21 § 5). Subsequently Sir John Freeland, substitute judge, replaced Mr Walsh, who had died on 9 March 1998 (Rule 22 § 1).

4. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 23 December 1997 and 12 January 1998 and the Government's memorial on 20 March 1998.

5. On 30 March 1998 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 20 April 1998. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*

Mr B. NEDELEC, <i>magistrat</i> , on secondment to the Legal Affairs Department, Ministry of Foreign Affairs,	<i>Agent,</i>
Mr A. BUCHET, <i>magistrat</i> , Head of the Human Rights Office, European and International Affairs Department, Ministry of Justice,	<i>Adviser;</i>

(b) *for the Commission*

Mr J.-C. SOYER,	<i>Delegate;</i>
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(c) *for the applicant*

Mr O. DE NERVO, of the *Conseil d'Etat*
and Court of Cassation Bar,

Counsel.

The Court heard addresses by Mr Soyer, Mr de Nervo and Mr Nedelec.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. Mr Lambert, a French national born in 1957, lives at Buzet-sur-Tarn.

A. The judicial investigation and interception of the applicant's telephone conversations

8. In the course of a judicial investigation into offences of theft, burglary, handling the proceeds of theft and aggravated theft, and unlawful possession of Class 4 weapons and ammunition, an investigating judge at Riom issued a warrant on 11 December 1991 instructing the gendarmerie to arrange for the telephone line of a certain R.B. to be tapped until 31 January 1992.

9. By means of standard-form written instructions ("*soit transmis*") dated 31 January, 28 February and 30 March 1992, the investigating judge extended the duration of the telephone tapping until 29 February, 31 March and 31 May 1992 respectively.

10. As a result of this tapping and the interception of some of his conversations, the applicant was charged with handling the proceeds of aggravated theft; he was held in custody from 15 May to 30 November 1992, when he was released subject to judicial supervision.

B. The proceedings brought by the applicant

1. The application to the Indictment Division of the Riom Court of Appeal

11. In an application of 5 April 1993 the applicant's lawyer applied to the Indictment Division of the Riom Court of Appeal for a ruling that the extensions of 31 January and 28 February 1992 were invalid, arguing that they had been ordered merely by standard-form written instructions without any reference to the offences which justified the telephone tapping, and that

the four-month period which could have been authorised in the warrant of 11 December 1991 had expired on 11 April 1992.

12. In a judgment of 25 May 1993 the Riom Court of Appeal dismissed Mr Lambert's application on the following grounds:

"... by Articles 100, 100-1 and 100-2 of the Code of Criminal Procedure [see paragraph 15 below] taken together, decisions to intercept telecommunications messages must be in writing and contain all the information necessary for identifying the link to be monitored, the offence that justifies the interception and the duration of the interception, which must not exceed four months but may be extended subject to the same formal requirements and maximum duration.

In the instant case it is beyond doubt that the warrant of 11 December 1991 complies with the requirements of the above-mentioned Articles in so far as it specifies the number of the link to be monitored, a duration of less than four months and the offences that justified interception, the criminal penalties for which were greater than two years' imprisonment.

It is also clear that the decisions to extend the duration of the interception, which were issued in standard-form instructions, were in writing and mentioned the number of the link concerned; that they are an extension of the original decision of 11 December 1991 and necessarily referred to it; and that the duration of their validity was less than four months. They thus comply with the requirements of Article 100-2 of the Code of Criminal Procedure."

2. The appeal to the Court of Cassation

13. The applicant appealed on a point of law against the judgment of 25 May 1993, arguing, as his only ground of appeal, that Article 8 of the Convention and Articles 100 et seq. of the Code of Criminal Procedure had been infringed because the extensions of the duration of the telephone tapping in issue, by means of standard-form written instructions, did not contain any reasons.

14. In a judgment of 27 September 1993 the Court of Cassation affirmed the decision appealed against and held that the applicant had "no *locus standi* to challenge the manner in which the duration of the monitoring of a third party's telephone line was extended" and that accordingly "the grounds of appeal, which contest[ed] the grounds on which the Indictment Division [had] wrongly considered it must examine [the] objections of invalidity and subsequently dismissed them, [were] inadmissible".

II. RELEVANT DOMESTIC LAW

15. The relevant provisions of the Code of Criminal Procedure (Law no. 91-646 of 10 July 1991 on the confidentiality of telecommunications messages) read as follows:

Article 100

“In the case of a serious crime or other major offence attracting a sentence of at least two years’ imprisonment, the investigating judge may, where necessary for the investigation, order the interception, recording and transcription of telecommunications messages. Such operations shall be carried out under his authority and supervision.

Decisions to intercept shall be in writing. They shall not constitute judicial decisions and no appeal shall lie against them.”

Article 100-1

“Decisions made pursuant to Article 100 shall contain all the information necessary for identifying the link to be monitored, the offence that justifies the interception and the duration of the interception.”

Article 100-2

“Such decisions shall be valid for a maximum duration of four months. Their validity may be extended only subject to the same procedural requirements and maximum duration.”

Article 100-3

“The investigating judge or a senior detective (*officier de police judiciaire*) acting on his instructions may call upon any qualified official of any department or body under the authority or supervision of the Minister for Telecommunications, or any qualified official of an authorised network operator or provider of telecommunications services, for the purpose of installing monitoring equipment.”

Article 100-4

“The investigating judge or the senior detective acting on his instructions shall draw up a report on each of the interception and recording operations. This report shall give the date and time of the beginning and end of each operation.”

Article 100-5

“The investigating judge or the senior detective acting on his instructions shall transcribe messages useful for establishing the truth. A report of the transcription shall be drawn up and the transcription placed in the case file.

Any messages in a foreign language shall be transcribed in French with the help of an interpreter called upon for this purpose.”

Article 100-6

“The Public Prosecutor or Principal Public Prosecutor shall ensure that the recordings are destroyed when prosecution becomes time-barred.

A formal report of the destruction shall be drawn up.”

Article 100-7

“The telephone line of a member of Parliament or senator shall not be tapped unless and until the Speaker of the relevant House has been informed by the investigating judge.

The home or office telephone lines of a member of the Bar shall not be tapped unless and until the chairman of the Bar has been informed by the investigating judge.

Any interception carried out in breach of the requirements of this Article shall be null and void.”

PROCEEDINGS BEFORE THE COMMISSION

16. Mr Lambert applied to the Commission on 8 February 1994. He alleged that the interception of certain telephone conversations which were used against him amounted to interference with his private life and correspondence, contrary to Article 8 of the Convention; he also maintained that he had not had an effective remedy in the Court of Cassation, contrary to Article 13 of the Convention.

17. The Commission declared the application (no. 23618/94) admissible on 2 September 1996. In its report of 1 July 1997 (Article 31), it expressed the opinion by twenty votes to twelve that there had been a violation of Article 8 of the Convention and by twenty-seven votes to five that it was unnecessary to consider the case under Article 13 of the Convention also. The full text of the Commission’s opinion and of the two dissenting opinions contained in the report is reproduced as an annex to this judgment¹.

1. *Note by the Registrar.* For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission’s report is obtainable from the registry.

FINAL SUBMISSIONS TO THE COURT

18. In their memorial the Government submitted that “the application lodged by Mr Lambert should be dismissed”.

19. The applicant asked the Court to

“hold that there has been a violation of Article 8 of the ... Convention;

award him 500,000 francs by way of just satisfaction”.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

20. Mr Lambert submitted that the Court of Cassation’s decision to refuse him any standing to complain of the interception of some of his telephone conversations, on the ground that it was a third party’s line that had been tapped, had infringed Article 8 of the Convention, which provides:

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

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

A. Whether there was any interference

21. The Court points out that as telephone conversations are covered by the notions of “private life” and “correspondence” within the meaning of Article 8, the admitted measure of interception amounted to “interference by a public authority” with the exercise of a right secured to the applicant in paragraph 1 of that Article (see, among other authorities, the following judgments: *Malone v. the United Kingdom*, 2 August 1984, Series A no. 82, p. 30, § 64; *Kruslin v. France* and *Huvig v. France*, 24 April 1990, Series A no. 176-A and B, p. 20, § 26, and p. 52, § 25; *Halford v. the United Kingdom*, 25 June 1997, *Reports of Judgments and Decisions* 1997-III, pp. 1016–17, § 48; and *Kopp v. Switzerland*, 25 March 1998, *Reports* 1998-II, p. 540, § 53). In this connection, it is of little importance

that the telephone tapping in question was carried out on the line of a third party.

The Government did not dispute this.

B. Justification for the interference

22. Such interference will contravene Article 8 unless it is “in accordance with the law”, pursues one or more of the legitimate aims referred to in paragraph 2 and furthermore is “necessary in a democratic society” in order to achieve them.

1. Was the interference “in accordance with the law”?

23. The expression “in accordance with the law” within the meaning of Article 8 § 2 requires, firstly, that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law.

(a) Whether there was a statutory basis in French law

24. The Court notes that the investigating judge ordered the telephone tapping in question on the basis of Articles 100 et seq. of the Code of Criminal Procedure (see paragraphs 12 and 15 above).

25. The interference complained of therefore had a statutory basis in French law.

(b) “Quality of the law”

26. The second requirement which derives from the phrase “in accordance with the law” – the accessibility of the law – does not raise any problem in the instant case.

27. As to the “foreseeability of the law”, the Government maintained that following the Court’s judgments in the *Kruslin* and *Huvig* cases (see paragraph 21 above), the French legislature had remedied the omissions and weaknesses of domestic law on telephone tapping by adopting safeguards in respect of the persons whose telephones could be tapped, the duration of interception, the requirements for drawing up reports, and the communication or destruction of recordings.

28. The Court considers, as the Commission did, that Articles 100 et seq. of the Code of Criminal Procedure, inserted by the Law of 10 July 1991 on the confidentiality of telecommunications messages, lay down clear, detailed rules and specify with sufficient clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities (see the *Kruslin* and *Huvig* judgments cited above, pp. 24–25, §§ 35–36, and

p. 56, §§ 34–35, respectively, and, as the most recent authority and *mutatis mutandis*, the Kopp judgment cited above, pp. 541–43, §§ 62–75).

2. Purpose and necessity of the interference

29. The Court shares the opinion of the Government and the Commission and considers that the interference was designed to establish the truth in connection with criminal proceedings and therefore to prevent disorder.

30. It remains to be ascertained whether the interference was “necessary in a democratic society” for achieving those objectives. Under the Court’s settled case-law, the Contracting States enjoy a certain margin of appreciation in assessing the existence and extent of such necessity, but this margin is subject to European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court (see, *mutatis mutandis*, the Silver and Others v. the United Kingdom judgment of 25 March 1983, Series A no. 61, pp. 37–38, § 97, and the Barfod v. Denmark judgment of 22 February 1989, Series A no. 149, p. 12, § 28).

31. When considering the necessity of interference, the Court stated in its Klass and Others v. Germany judgment of 6 September 1978 (Series A no. 28, pp. 23 and 25–26, §§ 50, 54 and 55):

“The Court must be satisfied that, whatever system of surveillance is adopted, there exist adequate and effective guarantees against abuse. This assessment has only a relative character: it depends on ... [among other things] the kind of remedy provided by the national law.

...

It therefore has to be determined whether the procedures for supervising the ordering and implementation of the restrictive measures are such as to keep the ‘interference’ resulting from the contested legislation to what is ‘necessary in a democratic society’.

... In addition, the values of a democratic society must be followed as faithfully as possible in the supervisory procedures if the bounds of necessity, within the meaning of Article 8 § 2, are not to be exceeded. One of the fundamental principles of a democratic society is the rule of law, which is expressly referred to in the Preamble to the Convention... 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...”

32. The applicant said that he had wished to complain of the circumstances in which the investigating judge had ordered the extensions of the duration of the telephone tapping (see paragraph 13 above), but the Court of Cassation’s decision had deprived him of any practical possibility of using the remedies provided by law to penalise irregularities committed by the authorities.

33. In the Government's submission, the interference complained of had been "necessary in a democratic society". In the instant case the telephone tapping had been one of the principal means of investigation contributing to the establishment of the truth and, in particular, to proving the involvement of various individuals, including the applicant, in large-scale illicit dealing in furniture. Furthermore, Mr Lambert had been able to avail himself of a remedy in the Indictment Division, and a further remedy in the Court of Cassation was quite unnecessary to satisfy the requirement of "effective control".

34. The Court must accordingly ascertain whether an "effective control" was available to Mr Lambert to challenge the telephone tapping to which he had been made subject.

35. It notes, firstly, that the Court of Cassation in its judgment of 27 September 1993 held that the applicant had "no *locus standi* to challenge the manner in which the duration of the monitoring of a third party's telephone line was extended" and that accordingly "the grounds of appeal, which contest[ed] the grounds on which the Indictment Division [had] wrongly considered it must examine [the] objections of invalidity and subsequently dismissed them, [were] inadmissible".

36. In its ruling the Court of Cassation therefore went beyond the ground relied on by the applicant concerning the extension of the duration of the telephone tapping and held that a victim of the tapping of a telephone line not his own has no standing to invoke the protection of national law or Article 8 of the Convention. It concluded that in the instant case the Indictment Division had been wrong to examine the objections of invalidity raised by the applicant as the telephone line being monitored had not been his own.

37. Admittedly, the applicant had been able to avail himself of a remedy in respect of the disputed point in the Indictment Division, which held that the investigating judge's extension of the duration of the telephone tapping had been in accordance with Articles 100 et seq. of the Code of Criminal Procedure (see paragraph 12 above), and it is not the Court's function to express an opinion on the interpretation of domestic law, which is primarily for the national courts to interpret (see the *Kruslin* and *Huvig* judgments cited above, p. 21, § 29, and p. 53, § 28, respectively). However, the Court of Cassation, the guardian of national law, criticised the Indictment Division for having examined the merits of Mr Lambert's application.

38. As the Court has already said (see paragraph 28 above), the provisions of the Law of 1991 governing telephone tapping satisfy the requirements of Article 8 of the Convention and those laid down in the *Kruslin* and *Huvig* judgments. However, it has to be recognised that the Court of Cassation's reasoning could lead to decisions whereby a very large number of people are deprived of the protection of the law, namely all those who have conversations on a telephone line other than their own. That

would in practice render the protective machinery largely devoid of substance.

39. That was the case with the applicant, who did not enjoy the effective protection of national law, which does not make any distinction according to whose line is being tapped (Articles 100 et seq. of the Code of Criminal Procedure – see paragraph 15 above).

40. The Court therefore considers, like the Commission, that the applicant did not have available to him the “effective control” to which citizens are entitled under the rule of law and which would have been capable of restricting the interference in question to what was “necessary in a democratic society”.

41. There has consequently been a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

42. The applicant also alleged a violation of Article 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.”

43. In view of the preceding conclusion (see paragraph 41 above), the Court does not consider that it need rule on the complaint in question.

III. APPLICATION OF ARTICLE 50 OF THE CONVENTION

44. Article 50 of the Convention provides:

“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.”

A. Non-pecuniary damage

45. Mr Lambert sought 500,000 French francs (FRF) for non-pecuniary damage.

46. The Government considered that any finding of a violation would constitute sufficient just satisfaction.

47. The Delegate of the Commission expressed no view on the matter.

48. The Court considers that the applicant undeniably sustained non-pecuniary damage and awards him the sum of FRF 10,000 under this head.

B. Costs and expenses

49. The applicant also claimed FRF 15,000 in respect of the costs and expenses incurred in the proceedings before the Court.

50. The Government considered that the amount claimed was not unreasonable and wished to leave the matter to the Court's discretion.

51. The Delegate of the Commission did not express a view.

52. Making its assessment on an equitable basis and with reference to its usual criteria, the Court awards the sum claimed.

C. Default interest

53. According to the information available to the Court, the statutory rate of interest applicable in France at the date of adoption of the present judgment is 3.36% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention;
2. *Holds* that it is unnecessary to examine the complaint based on Article 13 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months, 10,000 (ten thousand) French francs for non-pecuniary damage and 15,000 (fifteen thousand) French francs in respect of costs and expenses;
 - (b) that simple interest at an annual rate of 3.36% shall be payable on those sums from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 August 1998.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the concurring opinion of Mr Pettiti is annexed to this judgment.

Initialled: R. B.
Initialled: H. P.

CONCURRING OPINION OF JUDGE PETTITI

(Translation)

I voted in favour of the view that there had been a violation of Article 8 of the Convention for the reasons set out in the judgment, which strengthen the Court's settled case-law since the judgments in the König, Malone, Kruslin and Huvig cases. By way of putting in context the importance of this line of authority, I would also refer to my concurring opinion in the Malone judgment and to the advisory opinion I gave to the Luxembourg Parliament.

Intercepting telephone conversations is one of the most serious temptations for State authorities and one of the most harmful for democracies.

Originally, reason of State or national security were put forward in the attempt to justify interceptions, particularly in the sphere of so-called administrative telephone tapping that is sometimes used to evade the rules governing judicial telephone tapping.

Abuses, however, are becoming more and more unacceptable, taking the form of monitoring wholly private conversations on the pretext of spying on political entourages.

In several member States the supervision systems set up to control the monitors have proved inadequate and defective.

Will it be necessary in the future, in order to protect privacy, to require people to get into "bubbles", in imitation of the practice of some embassies, in order to preclude any indiscretions? That would be to give in to Big Brother.

The European Court's case-law on telephone tapping is undoubtedly one of the most positive aspects of its work to safeguard fundamental rights.