CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 42186/98
by Magdy OMAR
against the United Kingdom

The European Court of Human Rights (Third Section) sitting on 24 August 1999 as a Chamber composed of

Mr J.-P. Costa, *President*,
Sir Nicolas Bratza,
Mr L. Loucaides,
Mr P. Kūris,
Mrs F. Tulkens,
Mr K. Jungwiert,
Mrs H.S. Greve, *Judges*,

with Mrs S. Dollé, *Section Registrar*;

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

Having regard to the application introduced on 3 April 1998 by Magdy Omar against the United Kingdom and registered on 15 July 1998 under file no. 42186/98;

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

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British national, born in 1943 and living in London. He is represented before the Court by Clyde and Co., solicitors practising in London, and by Mr E. Fitzgerald QC, a barrister practising in London. The facts of the case, as submitted by the applicant, may be summarised as follows.

The applicant, who qualified as a doctor in Cairo, worked as a general practitioner ("GP") in Hampstead, London from 1978 until the events described below. In the second half of 1994 he developed a depressive illness as a result of financial pressures.

On 2 June 1995 an incident occurred when a patient, Ms H, then aged 27, was consulting the applicant at his surgery. The applicant had been treating Ms H for, *inter alia,* pelvic infection, irritable bowel syndrome and lower back pain, and on the day in question examined her internally and asked her to perform a back exercise on the floor (referred to by Ms H as "the cat"). On 3 or 4 June 1995 Ms H complained to the police that the applicant had indecently assaulted her during a consultation at his surgery on 2 June 1995, and on a number of other occasions over the preceding four years. She alleged, *inter alia*, that on 2 June 1995 the applicant had conducted an improper examination on the couch, inserting his fingers into her anus and vagina simultaneously while pressing his erection against her, and that he had rubbed her vagina while she, naked from the waist down, was carrying out the "cat" exercise on the floor. On 16 June 1995 Ms H, wearing a concealed tape recorder fitted by the police, visited the applicant and complained about the incident in question. The relevant parts of the transcript of the tape recording of this conversation read as follow:

"O: ... Are you coming just for a check-up or there's a new problem you want to tell me about?
H: Erm I've come to ask you erm a few questions.
O: Surely.
H: Erm it's about my internal examinations.
O: Mm.
H: Erm when you, I like feel a bit funny about when you do them. Erm you do the front and then you do the back,
O: Mm.
H: and then sometimes you do the front as well and I feel like it's causing me to -
O: Infection.
H: Yeah.
O: No, doesn't because I use different fingers to start with. [Further discussion about likelihood of examinations causing infection]
H: OK.
O: Why, why you thought about this and all you're worried about this thing.
H: Oh just also because you keep making me do the cat thing. I mean my back's sort of like alright now.
O: Is good.
H: Erm last time erm when you put by fingers in my bottom.
O: ...
H: erm and it wasn't very nice and
O: ...
H: You'd already done it on the bed.
O: I do apologise. I have to admit that I don't want to upset you at all. I like you very much and the last thing I want to do in this world is to upset you, OK.
H: Mm hm.
O: So I apologise if the examination you didn't like.
H: I erm.
O: I promise I would not do it again.
H: And -

O: That alright?
H: Erm when you examined me I could feel that you had an erection and then you kissed me as well last time that I was here.
O: Yes I do apologise. You er I, I have to admit that I do like you and I do apologise.
H: But I, I mean you're my doctor and
O: ... I'm wrong.
H: you shouldn't
O: ... what I'm saying
H: really never done it.
O: I, I there is no two ways about it, I am, I'm wrong and I do apologise. I hope you forgive me.
H: OK.
O: Is that alright?
H: Yeah.
O: ... I, I, I don't mean to upset you, hurt you in any way.
H: Right.
O: Er technically speaking as a doctor I should not like my patients so much like you. You know are my patient and I should not treat you, you know so er apologies.
H: OK.
O: Thank you. What can I do today, tell me?
H: Erm that's all, I just wanted to erm like, cause I've been like really worried and everything.
O: Worried about
H: About it.
O: About the infection again.
H: No, just about erm how you was examining me and everything.
O: Er no, no I, I really do apologise. I, I, I, the last thing I want to do is to upset you.
H: OK.
O: You know it's, it's human nature that I like you and I should not, I should be able to even if I like you I should feel able to be more controlled than that. I hope you accept my apologies.
H: OK.
O: Alright. Erm do you feel you, you still can trust me and be my patient or -
H: Erm not really sure.
O: Alright er I, I leave it to you completely, I mean I, as I'm saying, I accept it in good faith what you said and er if I examine my own heart I know I was wrong.
H: OK.
O: so mmmm, but still if you feel I can help you in any way I will. I, I still like you and I do my best for you so, so if ever you wanted, er, I have to admit I let myself my feeling get the better of me and that was wrong. [Discussion about H's father's health].
... Did you discuss this problem with anyone else?
H: No.
O: Truly.
H: Yeah.
O: Good, it's between us. I hope you could keep it that way. I'm saying I, I really am ashamed of myself. Truly not because I like you cause it's human nature to like you but to allow my feeling to get the better of me, er you, one should usually be more controlled that that. [Further general conversation.]"

Later the same day, and before being informed that his conversation with Ms H had been recorded, the applicant was interviewed by DS Valentine at Hampstead Police Station. During the course of the interview he admitted, *inter alia*, that on 2 June, he lost control of himself and touched Ms H on the bottom while she was performing the "cat" exercise.

The applicant was charged with indecently assaulting Ms H on five separate occasions between November 1994 and June 1995. He pleaded not guilty to all five charges, and gave evidence at the trial. He stated, *inter alia*, that on 2 June 1995 he had given Ms H an internal examination and that she had then demonstrated the "cat" exercise on the floor. He had placed his hands on her lower back to assist her in the exercise, but had noticed that she was becoming sexually aroused. He had therefore become embarrassed and brought the consultation to an end, kissing Ms H paternally on the cheek before she left. He stated that his

apparent admissions of guilt during the two interviews on 16 June 1995 were false confessions: because he had been suffering from stress and depression, and because as a doctor he knew that depression can effect memory and cause a person to act out of character, he had come to doubt his own recollection of what had occurred on 2 June 1995, and, when confronted with Ms H's accusations (the exact nature of which he was not at that time aware) he began to believe that he must have done something wrong, although he could not recall what this had been. Being a religious and morally upright person, he had preferred to satisfy his own conscience by taking responsibility upon himself for whatever might have occurred, rather than blaming Ms H. When he subsequently learned the full extent of the allegations against him, however, he realised that they could not have been true and that they must have sprung from some emotional or sexual disturbance on the part of the complainant. He did not call expert medical evidence to support this explanation, because he was advised by the counsel acting for him at the trial that it would be inadmissible.

During the summing-up, the trial judge directed the jury as to the definition of "indecent assault" in English law, particularly in the context of a doctor treating a patient. Thus, he told the jury that "a mere touching" may constitute an assault if the touching were unlawful, and that the patient's lack of consent would render the touching unlawful. Lack of consent could be implied if the touching was unnecessary and improper. As to "indecency", the judge directed the jury as follows:

> "What is left for you? Indecency. Well, there is no magical rule about indecency. The law is sensible enough to say, we have twelve ordinary, decent, sensible people to decide what is indecent or not and it is you, ladies and gentlemen, you will decide what is indecent".

The judge continued:

> "So, what are you going to have to say to yourself as you consider each of these counts, was there unnecessary touching as alleged? Was that unnecessary touching in circumstances of indecency and, if it was, that is an indecent assault, ladies and gentlemen".

On 13 February 1996 the applicant was convicted of indecently assaulting Ms H on 2 June 1995 and acquitted of the other four charges on the indictment. On 3 May 1996 he was sentenced to six months' imprisonment, of which he served three months. In sentencing the applicant, the trial judge remarked:

> "It has been urged upon me by [counsel for the defence] that I accept your version of events, later retracted, that you lost control and merely touched the young lady's bottom and that you kissed her when she arose. She, of course, said that it went beyond that and that you stroked her vaginal area when she was in the 'cat' position. Let me say that in the totality of matters it does not matter which I sentence on. What I accept is that that particular assault was, if any indecent assault can ever be, at the lower end of the scale".

On 13 February 1997 the applicant was granted leave to appeal against conviction to the Court of Appeal. In its judgment of 7 October 1997, the Court of Appeal ruled that expert medical evidence could have been called at trial to confirm the applicant's explanation for his admissions on 16 June 1995 but, after hearing this evidence and rebuttal evidence called by the Crown, concluded that the conviction was safe, for the following reasons:

> "We return to the central question: whether in the light of all the evidence, including particularly the new medical evidence, we consider the appellant's conviction unsafe? We accept that the appellant was suffering in June 1995 from a significant depressive illness. We accept that such illness may have symptoms such as were described by the expert witnesses. We accept that admissions made by a person

> suffering from a significant depressive illness may render those admissions unreliable. It is not, however, in our judgment within the grounds of reasonable possibility that the admissions made by the appellant to the complainant and then to the police officer were or may have been unreliable. We are indeed satisfied that the reliability of these admissions is not vitiated by an exaggerated willingness on the part of the appellant to accept guilt, or by feelings of guilt or worthlessness, or by lack of memory, or want of concentration or confusion. In our judgment these were clear and unqualified admissions of guilt and we entertain no doubt about their reliability. It follows that we must, albeit with considerable regret having regard to the appellant's high reputation until these events, dismiss this appeal".

The applicant sought leave to appeal to the House of Lords on the grounds that a mistake had occurred in the Court of Appeal's judgment and that it would be in the public interest for the House of Lords to hear the case for introducing safeguards into the law to prevent the recurrence of such a mistake. On 10 March 1998 the Court of Appeal refused to certify that a point of public importance was involved in the decision and refused leave to appeal to the House of Lords.

On 6 and 7 April 1998 the applicant appeared before the National Health Services Tribunal to respond to the Local Authority's application for an order for his suspension from the list of local GPs following his conviction for indecent assault. The applicant submitted that he was innocent of the offence of which he had been convicted. In its decision of 21 April 1998, the Tribunal held that, as a matter of public policy, it should accept the conviction as conclusive proof of guilt, but also found, in the applicant's favour, that he was unlikely to reoffend and that he should not be prevented from resuming his practice. Although the applicant disagrees with the basis on which the Tribunal reached its decision, he cannot appeal against the decision since the Tribunal found in his favour.

COMPLAINTS

The applicant complains that his conviction for indecent assault was not governed by "law" with the degree of clarity, accessibility and foreseeability required by Articles 5 § 1 and 7 § 1 of the Convention, and that he was therefore deprived of a fair trial in breach of Article 6 § 1.

He also raises a number of other complaints under Article 6 § 1. First, he contends that he could not be said to have had a fair trial when the available evidence supported his innocence beyond reasonable doubt. In addition, he submits that the trial judge, in his summing-up, wrongly summarised his defence, and that the Court of Appeal adopted this incorrect summary in its judgment.

Finally, the applicant complains that the police recording of his conversation with H in his consulting room amounted to an interference with his rights under Article 8 of the Convention.

THE LAW

1. The applicant submits that the exact basis of his conviction was unclear, since it was open to the jury to find him guilty of indecent assault even if they did not accept the prosecution's version of events, provided that they found that, in some way, the facts disclosed that he touched H unnecessarily and inappropriately in circumstances of indecency.

He complains that, in the circumstances of his case, this gave rise to violations of Articles 5 § 1 and 7 § 1.

Article 5 § 1(a) of the Convention provides:

"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a. the lawful detention of a person after conviction by a competent court; ..."

Article 7 § 1 of the Convention states:

"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

The applicant points out that, since the jury was not required to specify the basis on which they found him guilty of indecent assault on 2 June 1995, their verdict was open to a number of different interpretations. Thus, they may have accepted all Ms H's allegations, namely that the applicant simultaneously inserted his fingers into her anus and vagina and pressed his erection against her while she lay on the couch, and that he touched her vagina while she performed the "cat" position on the floor. On the other hand, they may have accepted only some of her allegations, for example that the applicant lost control and touched her vagina or bottom while she was performing the floor exercise. It was, however, equally possible that the jury accepted the applicant's version of events, that he pressed the applicant's lower back to assist her in the exercise and concluded the consultation by giving her a peck on the cheek, but that the jury considered that this touching was unnecessary and, by their standards, indecent.

The applicant submits that his conviction of indecent assault was not governed by "law" with the sufficient degree of clarity, accessibility and foreseeability required by Articles 5 § 1 and 7 § 1, given that the jury were not given any definition of "indecency" or directed that there had to be indecent intent or motive on the part of the applicant; that the jury were not required to find that the applicant had used force or violence; that the question whether a touching was unlawful depended on the jury's deciding whether or not it was necessary; and that the jury were not required to specify the factual basis of their finding of guilt.

The Court recalls that Articles 5 § 1(a) and 7 each require that the definition of an offence under national law meet the standard of "lawfulness" set by the Convention (see the Steel and Others v. the United Kingdom judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VII, § 54 and the S.W. v. the United Kingdom judgment of 22 November 1995, Series A no. 335-B, § 35). This concept requires, *inter alia,* that the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Moreover, a norm cannot be regarded as "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may

entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see the Sunday Times v. the United Kingdom (no. 1) judgment of 26 April 1979, Series A no. 30, § 49).

Applying these principles to the present case, the Court notes that under English law an indecent assault in the context of a doctor's treatment of a patient is defined as an unnecessary touching in circumstances of indecency. The words "unnecessary", "touching" and "indecency" are all ordinary and readily understood English words. The Court considers that it must have been foreseeable to the applicant that, if he touched one of his patients in a manner or to an extent which was not required for the purposes of treatment, and if that touching was such that most ordinary people would consider it to be indecent, he would be liable to be convicted of an offence of indecent assault and punished accordingly. It follows that the definition of "indecent assault" in English law is sufficiently clear for the purposes of Articles 5 § 1(a) and 7 § 1 of the Convention (cf. the above-mentioned Steel and Others judgment, § 55, and the Kokkinakis v. Greece judgment of 25 May 1993, Series A no. 260-A, § 40).

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected in accordance with Article 35 § 4.

2. The applicant further submits that, given the uncertain factual basis of his conviction for indecent assault, it was difficult for him to challenge the safeness of his conviction or the appropriateness of his penalty on appeal. He complains of a breach of Article 6 § 1 of the Convention, which states:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... ."

In addition, the applicant raises a number of other complaints under Article 6 § 1. First, he submits that his trial and conviction could not have been fair since all the evidence supported his innocence beyond reasonable doubt. Secondly, he alleges that the Court of Appeal's judgment was erroneous, since the court based its understanding of his defence on the trial judge's summing-up, which incorrectly summarised his case. He complains that there is no established procedure in the United Kingdom for correcting serious mistakes of this nature. Thirdly, he asserts that reasons should have been given for the Court of Appeal's refusal of leave to appeal to the House of Lords. Finally, he complains that he was denied the opportunity to appeal against the findings of the National Health Service Tribunal.

With regard to the applicant's complaint that the lack of any specific finding of fact by the jury prevented him from effectively appealing against conviction and sentence, the Court notes that the applicant's defence at trial, supported by medical evidence before the Court of Appeal, was that he had never assaulted Ms H and that his admissions to her and to the police on 16 June 1995 were false confessions brought on by depression and his misconception of the situation. In these circumstances, the applicant has not demonstrated to the satisfaction of the Court how knowledge of the exact basis on which the jury found him guilty of an assault on 2 June 1995 could have assisted him or affected the manner in which he presented his appeal. Moreover, the Court notes that the trial judge made it clear that he sentenced the

applicant on the basis that the indecent assault fell at the lower end of the scale of gravity, and that, had a longer sentence of imprisonment appropriate to a more serious offence been imposed, it would have been open to the applicant to appeal against sentence. In these circumstances, the Court does not consider that the applicant was deprived of a fair hearing before the Court of Appeal in breach of Article 6 § 1.

In examining the applicant's complaint that his trial at first instance must have been unfair since it resulted in his conviction whereas, in his submission, the evidence tended to support his innocence, the Court recalls that it is not open to the Court to substitute its assessment of the facts for that of the domestic courts. Its task is to ascertain whether the proceedings in their entirety were fair (see the Edwards v. the United Kingdom judgment of 16 December 1992, Series A no. 247-B, p. 35, § 34). Having considered the facts of the present case, the Court does not find any evidence that the proceedings against the applicant were unfair.

Turning to the applicant's complaints about the lack of any appeal from the Court of Appeal's judgment or from the decision of the National Health Service Tribunal's decision, the Court notes that the applicant does not allege that either of these tribunals failed to comply with the requirements of Article 6 § 1, and that that Article does not guarantee a right of appeal from a decision by a court complying with it. Moreover, the Court notes that the Court of Appeal, in reaching its decision, accepted that the applicant was suffering from a significant depressive illness during the relevant period, and that such an illness might have the effect of vitiating the reliability of a confession. Finally, the Court does not consider that the Court of Appeal's failure to give full reasons for its decision to refuse leave to appeal to the House of Lords, which may be granted only where the case raises a point of public importance, deprived the applicant of a fair trial as guaranteed by Article 6 § 1.

It follows that this part of the application also is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected in accordance with Article 35 § 4.

3. Finally, the applicant complains that the tape recording of his conversation with H in his consulting room on 16 June 1995 breached his rights under Article 8 of the Convention, which states:

> "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."

He submits that the powers of the police to tape record conversations between doctor and patient are insufficiently defined and that it would be reasonable for the police to invade the privacy of the consulting room only if they had probable cause to believe that a crime had been committed.

The Court observes that under Article 35 § 1 of the Convention, it "may only deal with [a] matter after all domestic remedies have been exhausted ... and within a period of six months from the date on which the final decision was taken". It notes that the incident about which the applicant complains took place on 16 July 1995 and that he does not appear to have raised any complaint about the tape recording of his conversation with Ms H before any domestic authority. In particular, the applicant did not raise any question about the lawfulness of the tape recording during the course of the criminal proceedings. Assuming that there were no domestic remedies available to the applicant in respect of this matter, the Court is nonetheless unable to consider this complaint since the application was introduced on 3 April 1998, more than six months after the event in question.

It follows that this part of the application is inadmissible under Article 35 § 1 of the Convention and must be rejected in accordance with Article 35 § 4.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

S. Dollé
Registrar

J.-P. Costa
President