CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 33506/05
by R.
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 4 January 2007 as a Chamber composed of:

Mr J. CASADEVALL, *President*,
Sir Nicolas BRATZA,
Mr G. BONELLO,
Mr K. TRAJA,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Mr J. ŠIKUTA, *judges*,
and Mr T.L. EARLY, *Section Registrar*,

Having regard to the above application lodged on 15 September 2005,

Having deliberated, decides as follows:

THE FACTS

A. The circumstances of the case

The applicant is a British citizen born in 1987 and resident in Chester-le-Street. He is represented by Gordon Brown Associates, solicitors practising in Chester-le-Street.

In November 2001, five girls at the applicant's school alleged that he had committed indecent assaults on them. The applicant then aged 14 was suspended from school pending investigation.

On 5 December 2001, the school informed the police of the allegations.

Between 13 December 2001 and 9 January 2002, the police interviewed the five complainants.

On 11 January 2002, the applicant was summoned to the police station. He was arrested on suspicion of indecent assault and caution. The police interviewed him in the absence of a legal representative but with his stepfather present. The police had asked whether they wanted a solicitor present but they stated that they did not. The applicant admitted to "horseplay" and actions amounting to indecent assault in respect of three girls. The applicant was released pending further assessment of the case.

On 29 January 2002, the applicant attended the police station where Acting Inspector Pullen informed him that the police had decided to deal with him by way of a warning under section 65 of the Crime and Disorder Act 1998. The Inspector did not ask the applicant if he consented to the warning and the applicant was duly warned regarding the allegations of all five complainants. Neither the applicant nor his stepfather were advised by the police that a consequence of the warning was that the applicant would be required to sign onto the Sex Offenders Register, which warning was required by paragraph 73 of the guidance issued by the Secretary of State.

On 6 February 2002, R. refused to sign the register.

On 23 April 2002, the applicant issued an application for judicial review of the decision to warn him under section 65, complaining effectively that he had been subject to a public declaration of guilt by an administrative process to which he had not consented.

On 10 June 2002, Mr Justice Sullivan refused his application.

On 25 July 2002, the Divisional Court upheld his appeal and granted permission. The case was joined with the case "U". Issues were raised, *inter alia*, under Articles 6, 8 and 14 of the Convention.

On 13 November 2002, following a hearing, the Divisional Court held that the imposition of the warning without informed consent or a waiver amounted to a *prima facie* breach of Article 6 §§ 1 and 2 of the Convention. Lord Justice Latham found the admissions made by R. had been reliable and not made in response to any inducement and the police were entitled to rely on them for the purposes of applying the section 65 scheme. As regards the

failure of the police to obtain the applicant's informed consent to a warning, he did not consider that this rendered the decision to administer the warning unlawful under domestic law as the scheme under the 1998 Act did not require the young offender's consent. However, as regarded Article 6, he found that the Secretary of State was right to concede that Article 6 was engaged and that the police would have been entitled to decide not to prosecute and discontinue the proceedings. In the applicant's case though, he was required to subject himself to a procedure which had the effect of publicly pronouncing his guilt of the offence of indecent assault. That was the consequence of the final warning being recorded on the Police National Computer (PNC) and available to all those with access to it. This *prima facie* infringed Articles 6 § 1 and 2. The procedures for cautions and warnings did not have to breach Article 6, being a sensible means of ensuring resources were not wasted and seeking to prevent youth re-offending. It was possible for a mechanism to be provided by which a person waived his right to have his case dealt with by a court; this required informed consent and there was nothing in the 1998 Act requiring the police to proceed without the consent of the offender. The appropriate practice was to ensure that, before a reprimand or warning was administered, the offender and his parent, carer or appropriate adult should be told of the consequences and asked whether or not they consented to that course being taken. As there had been no informed consent in this case, there had been a breach of Article 6 and the decision had to be quashed.

The Divisional Court certified two points of general public importance to be referred to the House of Lords.

On 17 March 2005, the House of Lords overturned the Divisional Court judgment. Lord Bingham found that there was nothing in the Act which envisaged that the consent of the young offender be obtained and concluded that the only reasonable inference was that Parliament had intended to dispense with such need for consent. He expressed doubt that Article 6 had been engaged, considering that arrest was not sufficient and that the applicant had neither been charged nor informed that criminal proceedings were likely. On the assumption that there had been a criminal charge, he thought that it was inescapable that it ceased to exist when a firm decision was taken by the police not to prosecute. The warning procedure did not involve any penal or punitive element. Further, the record on the PNC was far from a public announcement or declaration of guilt, access being limited to a relatively small number of police, prison and probation officers and agencies fulfilling public functions. Access to the Sex Offenders' Register was similarly controlled and in neither case did members of the public have access. Thus, he was of the clear opinion that the warning did not involve the determination of a criminal charge and his fair trial rights were not engaged. He did not consider that the scheme infringed the United Nations Convention on the Rights of the Child (1989).

Without dissenting, Lady Hale and Lord Steyn expressed concern that the decision was inconsistent with children's rights under international law. Lady Hale thought that the system imposed consequences that could be explained away individually as preventative but cumulatively had seriously modified a child's legal status. She found, however, no public pronouncement of guilt and no determination of a criminal charge.

B. Relevant domestic law and practice

The Crime and Disorder Act 1998 sets out the overall aim of the youth justice system to prevent offending and re-offending by children and young persons, *inter alia*, by diverting them from their offending behaviour before entering the court system. It replaced the system of cautions for children and young persons with a structured approach. Depending on the seriousness of the offence, a reprimand is normally given for a first offence and a final warning for a second offence; thereafter the young offender should generally be charged. Following a final warning, the police have a duty to refer the young offender to a youth offending team in order to determine whether or not to provide an intervention programme. Neither a caution nor a reprimand/warning can be given unless the offender has admitted the relevant offence(s).

The critical difference between the informal system of cautions and the system of warnings was that a caution can only be given if the offender gives his informed consent to being cautioned. Neither the 1998 Act nor the guidance issued by the Secretary of State makes any provision for consent.

Section 65 provides, as regards reprimands and warnings:

> "1. Subsections (2) to (5) below apply where-
>
> (a) a constable has evidence that a child or young person ("the offender") has committed an offence;
>
> (b) the constable considers that the evidence is such that, if the offender were prosecuted for the offence, there would be a realistic prospect of his being convicted;
>
> (c) the offender admits to the constable that he committed the offence;
>
> (d) the offender has not previously been convicted of an offence; and
>
> (e) the constable is satisfied that it would not be in the public interest for the offender to be prosecuted.
>
> (2) Subject to subsection (4) below, a constable may reprimand the offender if the offender has not previously been reprimanded or warned.
>
> (3) The constable may warn the offender if-
>
> (a) the offender has not been previously warned; or
>
> (b) where the offender has previously been warned, the offence was committed more than two years after the date of the previous warning and the constable considers

> the offence to be not so serious as to require a charge to be brought; but no person may be warned under paragraph (b) more than once.
>
> (4) Where the offender has not been previously reprimanded, the constable shall warn rather than reprimand the offender if he considers the offence to be so serious as to require a warning.
>
> (5) The constable shall –(a) where the offender is under the age of 17, give any reprimand or warning in the presence of an appropriate adult...

Section 66 provides for the effects of reprimands and warnings, *inter alia* that where an offender has been warned the constable shall refer the person to a youth offending team who should assess them and arrange as appropriate for them to participate in a rehabilitation programme.

Where a child or young person has been warned or reprimanded in respect of an offence covered by the sexual offenders' legislation, they become subject to the notification requirements. In the case of indecent assault, the offender will be registered for two and a half years (the Sex Offenders Act 1997, sections 1(4) and 4(2)).

A reprimand or warning is not regarded as a conviction under domestic law.

COMPLAINTS

The applicant complains that the warning scheme amounted to the determination both of a criminal charge and of his civil rights and obligations and the matter should have been considered by an independent and impartial tribunal unless he had given his informed consent to be warned and consequently waived his rights to a fair trial. The scheme, in his view, allowed the State to impose on a child or young person a rehabilitative process and punitive consequences, to which the child has no right of challenge. This possibility is excluded for adults, and for children in Scotland. He submits that it is a system of administrative punishment inconsistent with the United Nations Convention on the Rights of the Child (1989) which requires appropriate measures and legal safeguards to apply to children and that it contravenes the Standard Minimum Rules for the Administration of Juvenile Justice 1985 (the Beijing Rules) which states that any diversionary process involving children and young persons must have the consent of that child or young person or his appropriate adult (Rule 11(3)). He further draws attention to the concerns of the Parliamentary Joint Committee which in scrutinising the bill was not satisfied that it was consistent with the UNCRC but stated that their concerns were "eased" by the decision of the Divisional Court in this case which confirmed the requirement for informed consent. The scheme is thus in breach of Article 6 of the Convention.

THE LAW

The applicant complains that a criminal charge, and his civil rights and obligations, were determined without a hearing before an independent and impartial tribunal, and without his having waived such a procedure. He invokes Article 6 of the Convention, which provides as relevant:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The Court must determine, first, the extent to which Article 6 is, if at all, applicable.

As regards the criminal head, criminal proceedings are said to have begun with "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", a definition that also corresponds to the test of whether "the situation of the [suspect] has been substantially affected" (*Eckle v. Germany*, judgment of 15 July 1982, Series A no. 51, § 73). The Court considers therefore that the criminal proceedings against the applicant began with his arrest on 11 January 2002 by the police since this was his first official notification of an allegation that he had committed a criminal offence.

As to the termination of criminal proceedings, there is no right under Article 6 of the Convention to a particular outcome or, therefore, to a formal conviction or acquittal following the laying of criminal charges (*Deweer v. Belgium*, judgment of 27 February 1980, Series A no. 35, § 49 referring to the Commission's report of 5 October 1978, Series B no. 33, § 58; *Withey v. the United Kingdom* (dec.), no. 59493/00, ECHR 2003-X). Generally such proceedings end with an official notification to the accused that he or she is no longer to be pursued on those charges such as would allow a conclusion that the situation of that person could no longer be considered to be substantially affected (*X v. the United Kingdom*, no. 8233/78, Commission decision of 3 October 1979, §§ 64 and 65, unreported). While this is commonly brought about by an acquittal or a conviction (including a conviction upheld on appeal), the Court also recognised, in the above-cited *Deweer* case by reference to the Commission Report, that proceedings could end through a unilateral decision taken in favour of the accused including when the prosecution formally decided not to prosecute and when the trial judge terminated the proceedings without a ruling. More recently, the Court has found that criminal proceedings ended when the prosecution informed the accused that it had discontinued the proceedings against him (*Slezevicius v. Lithuania*, no. 55479/00, § 27, 13 November 2001) and when a domestic court found that an accused was unfit to stand trial by reason of his

psychiatric condition (*Antoine v. the United Kingdom* (dec.), no. 62960/00, ECHR 2003-VII (extracts)), even though in both cases there remained a theoretical possibility that the accused could one day be proceeded against on the relevant charges.

In the present case, the Court observes that the police decided not to prosecute, and the applicant was so informed; instead they issued a warning to the applicant in respect of the offences which he had admitted committing. The question arises in this case whether the criminal charge thereby was dropped or was in fact determined.

The Court will have regard, in this context, to the three guiding criteria as to whether there has been a determination of a criminal charge: the classification of the matter in domestic law, the nature of the charge and the penalty to which the person becomes liable (*Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, § 82, ECHR 2003-X, citing *Engel and Others v. the Netherlands*, judgment of 8 June 1976, Series A no. 22, pp. 34-35, §§ 82-83). It notes, as to the first, that according to domestic law, a warning is not a criminal conviction. As to the second, the purpose of the warning is, largely, preventative and does not pursue the aims of retribution and deterrence. Lastly, no fine or restriction of liberty is imposed. The applicant in this case was required to sign on a register and was referred to the youth offending team for possible intervention, measures which the Court finds preventative in nature (see also *Antoine v. United Kingdom*, cited above, the lack of criminal conviction or any punitive sanction being the most decisive elements in the proceedings following a finding of unfitness to plead). The Court finds therefore that the warning applied to the applicant did not involve the determination of a criminal charge within the meaning of Article 6 § 1 of the Convention. Nor did it involve any public official declaration of guilt of criminal offence which could offend Article 6 § 2.

Turning, lastly, to the civil head, the Court notes that it is not apparent from the papers submitted that the applicant raised, or pursued, this aspect of his complaint through the various instances of domestic proceedings. In any event, even assuming exhaustion of domestic remedies, it finds no indication that the warning applied to the applicant determined any of his civil rights or obligations within the meaning of Article 6 § 1 of the Convention.

It follows that the complaints raised in this application are, respectively, incompatible *ratione materiae* with the provisions of the Convention and manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

T.L. EARLY
Registrar

Josep CASADEVALL
President