

APPLICATION/REQUÊTE N° 14838/89

A v/FRANCE

A c/FRANCE

DECISION of 5 March 1991 on the admissibility of the application

DECISION du 5 mars 1991 sur la recevabilité de la requête

Article 8, paragraph 1 of the Convention

- a) Communication by telephone is included in the concepts of private life and correspondence*
- b) Question whether the recording of a telephone conversation allegedly made with the help of the police and in breach of domestic law infringes the right to respect for private life (Complaint declared admissible)*

Article 26 of the Convention

- a) An applicant who has exhausted a remedy which is apparently effective and sufficient cannot be required to try others which are available but probably ineffective*
- b) In France a criminal complaint against a person who has made a recording allegedly in breach of domestic law is an effective remedy*
- c) In the case of a decision of the Indictments Chamber of a French Court of Appeal discontinuing criminal proceedings an appeal to the Court of Cassation invoking an admissible ground of appeal which may lead to the contested decision being quashed constitutes an effective remedy. In these circumstances it is the judgment of the Court of Cassation which constitutes the final domestic decision from which the six month period runs*

(TRANSLATION)

THE FACTS

The facts of the case, as submitted by the parties, may be summarised as follows

The applicant is a French national born in 1927. She is a doctor resident in Paris. She is represented before the Commission by Mr Henri Dussaud, a lawyer practising in Paris.

In July 1980 a man called G went to police headquarters in Paris where he informed Inspector B of an alleged plan to murder V, who was at that time a prisoner in the La Sante prison. The applicant was alleged to be the instigator of this plan. G volunteered to make a telephone call to the applicant in the inspector's presence to discuss how V was to be killed. On 22 September 1981, during the investigation of charges later brought against the applicant, Inspector B made the following statement:

"G. called [the applicant] at 10.30 p.m. from my office. He led her to speak about this case and the conversation lasted a good quarter of an hour. I recorded what was said with a tape-recorder and have kept the tape, which is at your disposal."

On 9 November 1981 the applicant lodged a criminal complaint against G. and Inspector B, together with an application to join the proceedings as a civil party. She claimed that they had committed the offence defined by Articles 368 and 369 of the Criminal Code in that they had recorded "with any kind of device words spoken in a private place by another person without that person's consent" and that the same acts constituted "an offence under Article L.42 of the Post and Telecommunications Code punishable by the penalties prescribed by Article 378 of the Criminal Code" (1).

On 28 January 1985 the investigating judge dealing with the case decided to discontinue the proceedings. On 22 October 1985 the Indictments Chamber of the Paris Court of Appeal upheld that decision.

The applicant appealed to the Court of Cassation.

On 11 May 1987 the Court of Cassation quashed the judgment given on 22 October 1985 by the Indictments Chamber of the Court of Appeal on the ground that the composition of the court had been unlawful. The Court of Cassation sent the case back to the Indictments Chamber of the Court of Appeal, differently constituted, for a new decision in accordance with the law.

(1) *Criminal Code*

Article 368 – It is an offence, punishable by a term of imprisonment of not less than two months and not more than one year and by a fine of not less than 2,000 and not more than 50,000 francs, or by one of the above penalties only, deliberately to invade the privacy of another person

1 by intercepting, recording or transmitting with any kind of device words spoken in a private place by another person without that person's consent

Article 369 – It is an offence, punishable by the penalties prescribed in Article 368, knowingly to keep, to bring or cause to be brought to the attention of the public or of a third person, or to use publicly or otherwise, any recording or document obtained by means of the offences defined in that article

Article 378 – .. Any person who reveals secrets entrusted to him by reason of his status or profession, or of his temporary or permanent duties, except in those cases where he is obliged or authorised by law to lay an information, shall be liable to a term of imprisonment of not less than one month and not more than six months and to a fine

Post and Telecommunications Code

Article L.42 – Any person who, without the authorisation of the initiator of a conversation or the recipient of the call, divulges, publishes or uses the contents of correspondence transmitted by radio-communication or reveals its existence shall be liable to the penalties prescribed in Article 378 of the Criminal Code.

On 13 January 1988 the Indictments Chamber again upheld the decision to discontinue the proceedings, ruling as follows

‘The transcription of the tape-recording made by G in the office of Inspector B reveals that, apart from a few spontaneous remarks having no connection with the general subject of the conversation, the words spoken at her home by the appellant allude to a plan to commit murder and to a smuggling operation G deliberately steered the conversation towards these two subjects and systematically brought the appellant back to them during the call The appellant was thus subjected to an interrogation in which G tried to get her to confirm his allegations to the inspector The mutually corroborative statements of B and G establish that the latter agreed to the disclosure of this conversation

I *On the question of an invasion of the civil party's privacy*

In the first place, the offence punishable under Article 368 of the Criminal Code requires an actual invasion of another person's privacy Unlawful photography or voice recording must have captured situations, activities, attitudes or words revealing states of mind, feelings, opinions or occupations which there is a legitimate desire to confine to a restricted circle, and which relate to family life, affective relations, financial matters, thought, health and leisure

That does not apply to remarks relating to a criminal conspiracy likely to lead to a murderous assault and a disturbance of the peace

Consequently, in this case, the words spoken by the appellant at her home and recorded without her knowledge by G, who had called her with the sole purpose of talking about a plan to murder V of which she was allegedly the instigator, and who had systematically kept the conversation on that subject and that of a smuggling operation, fall outside the sphere of private life

It follows that G is not guilty of invasion of privacy

Secondly, the retention and disclosure of recordings or documents obtained by stealth or without the knowledge of another person are punishable under Article 369 para 1 of the Criminal Code only when they relate to that person's private life

The tape recording of the conversation between the civil party and G concerns remarks which manifestly have no connection whatsoever with the private lives of the persons involved

Consequently, B is not guilty of the offence imputed to him

II *On the question of a disclosure of the content of a telephone conversation*

While it is an offence under Article 42 of the Post and Telecommunications Code for a third person to divulge the content of telephone calls of which he

has private knowledge, either of the interlocutors may agree to disclosure, which then ceases to be criminal.

In the present case, it being noted that the civil party has not criticised the discontinuation decision in this respect, B. is not guilty of the offence in question, since it was established during the proceedings that G had implicitly agreed to the possible disclosure of the telephone conversation by handing over voluntarily the recording made on his own initiative for that very purpose."

The applicant appealed to the Court of Cassation. Firstly, she contested the lawfulness of the composition of the Indictments Chamber of the Court of Appeal ; secondly, she claimed that there had been an invasion of her privacy on the grounds that the words she had spoken in a private place had been recorded without her consent and that in any case the recorded conversation contained spontaneous remarks relating to her private life alone.

The Court of Cassation dismissed the argument relating to the composition of the Court of Appeal and declared inadmissible the argument relating to the grounds for the decision to discontinue the proceedings. In its judgment of 8 November 1988 it ruled as follows :

"After studying the wording of the impugned judgment the Court of Cassation is satisfied that the Indictments Chamber, before upholding the contested decision, analysed all the facts criticised by the civil party, answered the main arguments raised in her pleadings and set out the grounds for its finding that the constituent elements of the offences of which the defendants stood accused had not all been established

Under Article 575 of the Code of Criminal Procedure (1), in the absence of an appeal by the prosecution a civil party is barred from contesting independently the merits of such grounds in support of an appeal to the

(1) *Code of Criminal Procedure*

Article 575 - A civil party may not appeal to the Court of Cassation against judgments of the Indictments Chamber unless the prosecution has so appealed

However, an independent appeal on the part of a civil party is admissible in the following cases

1. When, in its judgment, the Indictments Chamber holds that there is no case to answer ,
- 2 When it is held in the judgment that the civil party's action is inadmissible .
3. (Ord No 60-529 of 4 June 1960) When, as the result of an objection upheld in the judgment, the criminal charges are dismissed ;
- 4 When the Indictments Chamber, either of its own motion or acting on an objection to jurisdiction by the parties, rules that the court dealing with the case lacks jurisdiction ,
- 5 When the judgment fails to address any one of the charges ,
- 6 When, because the form of the judgment does not satisfy the essential conditions, it can have no legal existence

Court of Cassation against a judgment of that type, even if those grounds contain errors of law or are contradictory
It follows that this ground of appeal is inadmissible.”

COMPLAINTS

The applicant complains that she was the victim of a violation of her right to respect for her private life and correspondence, and relies on Article 8 of the Convention

She maintains that the recording of the telephone conversation in question constituted an interference by a public authority with the exercise of her right to respect for her private life. She also asserts that the recording was unlawful under French law in that Inspector B. had not been authorised by a judge to carry out a telephone tap.

... ..

THE LAW

The applicant complains that she was the victim of a violation of her right to respect for her private life and correspondence, on account of the recording of her telephone conversation. She relies on Article 8 of the Convention, which provides as follows :

“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.”

The respondent Government maintain that the applicant has not exhausted domestic remedies according to the generally recognised rules of international law. They observe in this connection that the applicant instituted proceedings which had no prospects of success, for the following reasons

Article L.42 of the Post and Telecommunications Code makes it an offence to divulge the contents of telephone calls without the authorisation of the initiator

of a conversation or the recipient of the call. In this case, however, it is not disputed that the applicant's interlocutor authorised the recording of the conversation, since he made the recording himself. Moreover, Article 368 of the Criminal Code prohibits the recording of words spoken in a private place by another person without that person's consent and with the deliberate intention of invading his privacy. According to the Government, however, in this case there was neither intention to invade nor actual invasion of the applicant's privacy, so that the charges pressed by the applicant were bound to be dismissed.

The Government maintain that the applicant did on the other hand have two effective remedies she could have used but did not. She could have instituted civil proceedings against G. under Articles 9, 1382 and 1383 of the Civil Code. Article 9 enunciates the principle that everyone has the right to respect for his private life. Articles 1382 and 1383 oblige anyone whose actions cause prejudice in any way to another to make reparation to that other. The Government assert that Article 9 guarantees respect for private life as a whole, not just privacy. Moreover, in so far as the applicant alleged that the recording had been made with the assistance of Inspector B., she could have sought compensation from the State in respect of the prejudice she suffered.

The Government conclude that the applicant has not exhausted domestic remedies.

The applicant maintains that she has exhausted domestic remedies in this case. She observes that the Government's argument concerning the ineffectualness of the remedies she chose to exercise turns on a restrictive interpretation of the concept of private life, whereas there is no basis in the case-law for such an interpretation. Moreover, the fact that under the Criminal Code it is also an offence to attempt to record words spoken by another person in a private place without that person's knowledge shows, according to the applicant, that the legislature did not intend the content of the words intercepted to form one of the elements necessary for commission of the complete offence.

The applicant further maintains that Article 9 of the Civil Code is mainly relied on as a means of securing interim relief in order to protect one's private life and that in any case, even if an action on the basis of that provision is possible, it by no means prevents the victim from choosing the criminal approach when the events which led to the action are the result of acts precisely defined as offences under the Criminal Code. Lastly, the applicant maintains that the Government contradict themselves in maintaining on the one hand that she could have brought an action against the State while on the other hand denying that Inspector B. participated in the recording.

The applicant argues on that basis that she chose the remedy which most closely corresponded to the objective situation

Under Article 26 of the Convention "the Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law. That condition is satisfied when the applicant makes use of the remedies available to him in national law to assert his rights under the Convention and obtain redress for the situation he complains of. Moreover, in determining whether an applicant has complied with the requirements of the above provision the Commission must take into consideration the remedies a person might reasonably be required to exercise. When the applicant has exercised an apparently effective and sufficient remedy, he cannot be required to try others which may be available but are probably ineffective (cf. No. 9248/81, Dec. 10.10.83, D.R. 34 p. 78).

In the present case the applicant lodged a criminal complaint against those she considered to be the perpetrators of an offence under Article 368 of the Criminal Code of which she was allegedly the victim. The Commission notes that the provision in question specifically makes it an offence to record words spoken in a private place by another person without that person's consent. It refers to its constant case-law to the effect that the lodging of a criminal complaint against the person responsible for a recording allegedly made in breach of national law is an effective remedy and that where such a complaint is not lodged the person concerned cannot be held to have exhausted domestic remedies according to the generally recognised rules of international law (cf., *mutatis mutandis* No. 10862/84, *Schenk v. Switzerland*, Dec. 6.3.86, D.R. 46 p. 123). It considers that the Government have not proved in this case that such a complaint had absolutely no prospects of success from the outset and consequently sees no valid reason to assert that the criminal approach chosen by the applicant was not effective in the present case.

In addition, the Commission considers that the other remedies advocated by the Government are based on provisions of national law having a more general scope than that contained in Article 368 of the Criminal Code. Reliance thereon in connection with a civil action against G. or an action against the State cannot be considered to hold out to the applicant better prospects of success unless it is possible to say on the basis of established case-law that the term "private life" is interpreted much more broadly in the context of Article 9 of the Civil Code than in that of Article 368 of the Criminal Code. However, the Government's submissions by no means justify such a conclusion.

It follows that the applicant used a remedy which was effective and sufficient for the purposes of Article 26 of the Convention and that the Government's objection in that respect must be rejected.

The Government further maintain that the application is out of time. They maintain in particular that the Court of Cassation's judgment of 8 November 1988 cannot be regarded as the "final decision" marking the point at which the six month period provided for in Article 26 of the Convention began to run, since the appeal on points of law lodged by the applicant was not an effective remedy. The Government observe in this connection that a party claiming damages is barred from appealing on points of law against a decision by the Indictments Chamber to discontinue proceedings or challenging the reasons for such a decision. In the present case, therefore, that part of the applicant's appeal on points of law which challenged the reasons for the decision to discontinue proceedings was inadmissible and, consequently, ineffective. The relevant final decision with respect to the complaint relating to Article 8 of the Convention is therefore the Court of Appeal's judgment of 13 January 1988. The application, however, was introduced on 15 February 1989, i.e. more than six months after the decision in question.

The applicant admits that the Court of Cassation could not under any circumstances criticise the grounds on which the Indictments Chamber of the Court of Appeal had reached its decision to discontinue the proceedings. She maintains, however, that the other points raised in her appeal to the Court of Cassation might have been upheld. If the Court of Cassation had quashed the judgment of the Court of Appeal, that would have led to a fresh examination of the whole case by the Court of Appeal. The applicant argues on that basis that the appeal on points of law was an effective remedy.

The Commission observes that the applicant raised two points in her appeal: one of these concerned the reasons for the decision to discontinue proceedings, while the other concerned the composition of the Indictments Chamber of the Court of Appeal which gave the impugned judgment. It notes that the part of the appeal which concerned the grounds of the decision to discontinue was declared inadmissible, but that the argument relating to the composition of the Indictments Chamber was dismissed as ill founded. The Commission further observes that in its judgment of 11 May 1987 the Court of Cassation upheld a complaint relating to the unlawful composition of the Indictments Chamber of the Court of Appeal which gave the first discontinuation decision in the present case. Although this judgment did not concern the grounds for the discontinuation decision, the quashing of the lower court's judgment led to a fresh examination of the whole case by a differently constituted Court of Appeal. That being the case, the Commission considers that as the applicant's second appeal on points of law

contained an admissible ground of appeal it might have led to the quashing of the impugned judgment, it notes in that connection that the respondent Government have not in any way alleged that the appeal in question was brought with the intention of protracting the proceedings. Consequently, although the latest decision with regard to the complaint relating to Article 8 of the Convention was that given by the Court of Appeal on 13 January 1988, the Commission considers that the six month period provided for in Article 26 of the Convention did not begin to run until the date when that decision became final, i.e. 8 November 1988, the date when the appeal against it was dismissed. The present application was introduced on 15 February 1989, that is within the period of six months from the above-mentioned date. The Government's objection that the application is out of time must accordingly be rejected.

With regard to the merits of the applicant's complaint, the Government do not deny that telephone conversations are covered by the term "private life" used in Article 8 of the Convention. They observe, however, firstly, that the recording of the conversation in question was made with the agreement of the applicant's interlocutor and, secondly, that the conversation recorded concerned only preparations for a criminal enterprise, which cannot be held to relate to a citizen's private life. Accordingly, the Government deny that the recording in question infringed the applicant's right to respect for her private life. In addition, unlike the cases concerning systematic interception of a person's telephone conversations which have previously been examined by the Commission and the Court, the present case concerns an arranged conversation whose limits were defined in advance and which covered facts having nothing to do with the applicant's private life.

Furthermore, the Government deny that the recording in question was made by a public authority. Admittedly, Inspector B gave assistance with the interception, but it was nevertheless carried out on the initiative and by the choice of G.

On that basis the Government argue that the recording in question did not constitute interference by a public authority with the applicant's exercise of her right to respect for her private life.

The applicant contests the Government's arguments. She maintains that the recording of the conversation in question infringed her right to respect for her private life and that it was made with the agreement and help of the police.

The Commission has conducted a preliminary examination of the application. It notes that the application raises complex factual and legal issues which

require an examination of the merits and can accordingly not be held to be manifestly ill-founded. Moreover, the application is not inadmissible on any other grounds.

For these reasons, unanimously, the Commission

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.