(TRANSLATION)

THE FACTS

The facts of the case, as they have been submitted by the parties, may be summarised as follows:

1. The applicant, a Swiss national who was born in 1912 and lives in Tartegnin (Vaud Canton) was detained in the geriatric hospital of Chamblon when his application was introduced. He is represented by Mr. Dominique Poncet, of the Geneva Bar.

2. In 1947 the applicant married J. Pierrelouis, who was born in 1927. In 1972 serious disagreements arose between the couple. They ceased living together and in 1974 the applicant lodged a divorce petition. These proceedings were terminated, following an agreement between the parties, by a divorce decree granted on 10 September 1981.

3. On 28 February 1981, the applicant went to Annemasse where, under the false name of Pierre Rochat, Lyons, he instructed an advertising agency to publish the following advertisement:

> "Wanted: former member of the Foreign Legion or similar for occasional assignments; offer with telephone number, address and *curriculum vitae* to R.T.Z. 81 poste restante CH Basel 2."

From the replies to this advertisement the applicant selected a certain R.P. whom he met on several occasions and to whom he entrusted several assignments, including one in Haiti in May 1981. On several occasions P. received money from the applicant.

At the beginning of June 1981, the applicant underwent an operation in hospital. P. arrived in Switzerland on 12 June 1981 and telephoned Mrs. Schenk on

the following 18 June. He met her the next day and informed her that the applicant had instructed him to kill her. After having considered the possibility of killing the applicant or, alternatively, that Mrs. Schenk should disappear to allow P. to collect his fee, on 20 June 1981 they went together to the investigating judge of the Vaud Canton, who opened an investigation.

4. On 20 June 1981, the investigating judge of the Vaud Canton interviewed P. and then instructed Inspectors Rochat and Messerli to question him more thoroughly, which they did on the same day.

The judge interviewed Mrs. Schenk "orally", in other words her statements were not taken down.

P. and Mrs. Schenk were again questioned by Vaud police on 21 June 1981.

5. On 22 June 1981, the judge issued a formal request for assistance to the French authorities. He asked that, in connection with an investigation which he was conducting against persons unknown for attempted murder, a number of enquiries should be made and that Inspector Messerli should be authorised to participate in the operations requested. In particular the judge considered that:

> "It is necessary to discover P.'s activities from March to June 1981 in Paris and to obtain information regarding his character. It is also necessary to determine whether it is true that P. saw Schenk, whom he was supposed to have met at the Grand Hotel, and with whom he allegedly went to buy an air ticket for Haiti."

On 23 June 1981, the competent authority of the requested State, the Criminal Investigation Department of the Paris police, decided to execute the request for assistance.

On 24 June 1981, in execution of the request for assistance, P. was interviewed by the French police in the presence of Inspector Messerli of the Vaud police. At this interview, P. stated *inter alia* as follows:

> "Mr. Pierre Schenk will certainly contact me before long to ask for the details of the murder of his wife, Josette Schenk. He is supposed to send me or to bring me the agreed amount of 40,000 dollars. I came here at your request and it is now up to you to give me instructions as to how I should act when Mr. Schenk contacts me."

6. P., who was expecting the applicant to telephone him at any moment, installed at his mother's home at Houilles a cassette recorder connected by a microphone to the telephone's second earphone. On 26 June 1981, the applicant called P. from a telephone kiosk in Saint-Loup. P. recorded this communication. Half an hour later he told the French police of it. Two hours later he handed the cassette over to the police after having travelled from Houilles to Paris.

On 11 September 1981, the applicant sent a letter to the investigating judge contesting the authenticity of the recording of the telephone conversation. The judge then ordered an expert examination of the recording. The report of this examination was submitted on 18 November 1981.

7. On 1 July 1981, the applicant had been charged with incitement to murder and placed under a detention order by the investigating judge.

On 6 August 1981, the Vaud police drew up a report which was communicated to the investigating judge on the following day.

On 1 October 1981, P. was again interviewed by the French police in the presence of Inspector Messerli of the Vaud police. According to the record of this interview, P. stated, *inter alia*, as follows:

> "I fixed up this apparatus on 23 June 1981 because I knew that Pierre Schenk was going to contact me to ask me what I had done about the "contracts" which he had given me. I also wanted to obtain some evidence that I was supposed to kill Mrs. Josette Schenk ... Immediately after having received this call, I telephoned the Criminal Division of the Paris police. I left a message and Inspector Messerli called me back and I played the recording to him. The call came around 9.30 a.m. I took the train and I must have arrived at 36 Quai des Orfèvres before 12 noon and there I handed the cassette over to the police officer, Inspector Messerli."

Notwithstanding the contents of the recording, the investigating judge considered that P.'s declarations were not wholly reliable and ordered the applicant's discharge on 3 February 1982.

However, on 23 February 1982 the prosecuting authorities of the Vaud Canton appealed against this order. The applicant replied to this appeal by a statement of 8 March 1982.

The applicant was committed for trial in the Rolle Criminal Court on a charge of attempted incitement to murder.

8. The applicant was not in detention when he appeared at the trial which began on 9 August 1982. At the outset the applicant lodged a preliminary plea for the removal of the disputed recording from the file. The applicant argued in substance that the recording had neither been authorised or ordered by the competent authority, nor made by it.

The Rolle Criminal Court dismissed the applicant's preliminary plea, finding, *inter alia*, as follows:

> "[The recording] was made by R.P., a man in the accused's hire who stated that he had made the recording in the following circumstances:
>
> 'I put the cassette in my recorder (...) Using the original microphone, I connected it up to the second earphone of the telephone in my mother's flat. I used brown-coloured sellotape to attach the microphone to the earphone;'

This recording was not authorised or ordered by the competent authorities;

Accordingly, by recording Pierre Schenk without his knowledge, P. could have committed an offence under Article 179 ter of the Criminal Code;

However, this is not sufficient ground for ordering the removal of the recording from the file;

Article 179 ter of the Code is applicable only where a complaint is laid, and Pierre Schenk has laid no such complaint;

Thus P. is no longer liable to proceedings under that Article;

In any event the contents of the recording could have been included in the file, either because the investigating judge had had P.'s telephone tapped, or simply because it would be sufficient to take evidence from P. regarding the contents of the recording;

Accepting the accused's view would necessitate discarding a large proportion of the evidence in the files."

9. On 13 August 1982, the Rolle Criminal Court found the applicant guilty of attempted incitement to murder. He was given the minimum statutory sentence, namely ten years' imprisonment. The following is clear from the judgment:

The applicant had entrusted to P., *inter alia*, an assignment consisting in obtaining information regarding Josette Schenk, his ex-wife. According to the applicant he was supposed to provide him with information on the following questions:

— How much money Mrs. Schenk had inherited from her father;

— Whether she was having a house built in Haiti and whether she had any resources in that country, in particular as a result of a relationship; and

— Whether she had had any contact with the drugs world.

According to P. he was supposed to go to Haiti to kill Mrs. Schenk for a sum of $ 40,000. He was to cover his tracks.

It is common ground that he received from the applicant 8,667 FF in the form of a tourist package for Haiti and 4,000 SF for his expenses. In April 1982 P. left for Haiti where Mrs. Schenk spent three-quarters of the year. P.'s assignment was unsuccessful since Mrs. Schenk left Haiti at the beginning of May. The applicant instructed P. to come to Switzerland to continue his assignment.

On 24 May 1981, P. sent R.T.Z. 81 a telegram worded as follows: "Contact necessary". At the time P. did not know who R.T.Z. was. On 1 June 1981, the applicant sent 3,500 SF to P. On 12 June P. came to Switzerland. On 18 June he contacted Mrs. Schenk by telephone, after having decided, according to his version of events, to abandon what he alleged to have been his assignment, i.e. Mrs. Schenk's murder. On 19 June P. met Mrs. Schenk and explained to her that he had been instructed to kill her. After a certain amount of explanation, Mrs. Schenk realised that the order

came from the applicant. P. then suggested to Mrs. Schenk that she should disappear for a period so that he could collect his fee. Failing that, he proposed killing the applicant.

Finally, they went to the police and on 20 June 1981 the investigation commenced. On 20 June P. was interviewed in Switzerland and on 24 June by the French police. P., who was expecting a telephone call from the applicant, put a cassette in the recorder which he had had for about a year and which belonged to his brother. Using the recorder's original microphone he connected the apparatus directly to the second earphone of the telephone in his mother's flat. He attached the microphone to the earphone by means of sellotape.

On 26 June 1981 the applicant called from a telephone kiosk. The communication was recorded by P. In the recording an unidentified person is heard to reply to the applicant's telephone call and to pass him to P. The applicant asks P. what he has been doing and the following dialogue ensues:

R.P.: Well. The jo...

P. Schenk: I was wondering what you had been d..., what you had been up to.

R.P.: Yes, no, there were some small problems and I did not, I could not do the job until the 23rd.

P. Schenk: The 23rd?

R.P.: Yes, Monday 23rd, Mon..., Mon..., I think it was the 23rd.

P. Schenk: Where did it happen?

R.P.: What?

P. Schenk: Where did it happen?

R.P.: Well I went to fetch some friends in Italy because we did not manage to do the, because as you told me there were, the neighbours were always there, etc. ... I went twice and I was seen twice so I waited until she left to go to the clinic and we arranged to bump into her car so that she'd have to stop and talk about the damage and then, it was like that, but I don't know because the body, we took the car and we and I took it to near Montreux. I don't know if it has been discovered yet because I haven't seen it in the Press.

P. Schenk: But what are you going to do now?

R.P.: Sorry?

P. Schenk: What's going to happen now?

R.P.: Well now I am going to do the Paris one, aren't I?

P. Schenk: What?

R.P.: I'll do Paris.

P. Schenk: No, I mean about the job?

R.P.: Well I don't know. You see the job's done and that's it.

P. Schenk: The job's been done and there's been no news, that's odd.

R.P.: I haven't seen it in the papers either, but it's as I said, I hid it, I didn't leave it like that ...

P. Schenk: OK, this is what we'll do; I'll call you in in eight days' time.

R.P.: In eight days?

P. Schenk: Will you be there in eight days?

R.P.: Yes, I'll be in Paris, yes.

P. Schenk: Yes, yes, I, I, I follow you.

R.P.: OK.

P. Schenk: Good, because I haven't heard, I haven't heard anything.

The telephone conversation ends with concluding remarks from both the parties. P. received the call at about 9.30 a.m. At 10 a.m. he called the Criminal Division of the Paris police and around 12 noon, having travelled from Houilles to Paris, he handed the cassette over to the inspector responsible for the investigation.

This cassette underwent an expert examination, according to which:

— the tape of the cassette had not been "tampered with"; in other words, edited by the traditional means of cutting and sticking;

— the characteristics of the recording corresponded exactly to the recorder;

— the tape did not have any traces of other recordings capable of use;

— the background noise of the recording was very loud, which was to be expected, given the type of material used and the recording technique. However, as a result it was not possible to state that it was not a copy.

The expert stated that it was possible that the conversation had first been recorded and that the tape had then been "tampered with", in other words, passages had been removed, the order of the words altered or passages from other recordings added. The resulting tape could then have been copied on the cassette recorder which was the subject of the examination. The expert stated further that he had "found no evidence" to suggest that it was such a copy. That did not mean that it was not one, only that it would have required a very competent operator with sophisticated equipment and plenty of time at his disposal. At the trial, the expert provided a further clarification of his opinion. He stated that he had detected four points of discontinuity; that he had not been able to prove that there had been a cut; that he was almost sure that it had not been tampered with; and that to do so would have required a day's work, even with the necessary equipment to hand. The expert stated further that in the most favourable circumstances both with regard to the equipment available and the position of the passage to be removed the removal of such a passage required one hour to one and a half hour's work. He had not detected the removal of a passage.

Giving evidence on this recording, the accused admitted that it was his voice. He stated that he did not remember any reference to a body and that he had the impression that the recording had been shortened.

The Court, on the basis of the expert's findings, accepted that the recording in the file was an accurate reproduction of the conversation between the applicant and P. on 26 June 1981. It considered that in view of the absence of evidence that the recording had been tampered with, and of the short time available to P. between the telephone conversation and when he handed over the cassette to the police, the possibility that the recording had been tampered with could be ruled out.

P.'s character was not easy to establish. He had been born in 1947 and had had a number of somewhat ill-defined jobs. He had worked as a stuntman and had had various problems with the French and Italian authorities. Legally he was resident in Italy, but he in fact lived in Houilles. It appeared that he had on occasion collaborated with the police, in particular with the Italian police on matters related to drugs.

The Court, by a majority, reached the conclusion that the applicant had given P. the assignment of killing Josette Schenk. The Court's view was founded partly on the recording of the telephone conversation of 26 June 1981. It also took account of the other evidence in the file: the extreme nature of the precautions which the accused had taken; the fact that for years the accused had had to pay an allowance to his wife although her misconduct, which the accused was aware of but unable to prove, would probably have resulted in a different assessment of the position; the improbability of sending a man who claimed to be a former member of the Foreign Legion, without any training, to Haiti, and then to Switzerland, to obtain relatively innocuous information which was of dubious relevance for the purpose of the divorce proceedings; the fact that after the failure of the Haiti assignment, there was no reason to send P. to Switzerland, where he had no contacts; the fact that the applicant had spent more than 10,000 SF to obtain, according to his version of events, fairly unimportant information; finally, the fact that the accused had never taken any steps to lay a complaint for malicious accusation.

The applicant advanced the theory that P. had tampered with the recording and had used it to some extent with Mrs. Schenk's co-operation. There was, however, no evidence in the file to support this theory. Moreover the applicant, who was hard of hearing (he suffered from a 50% hearing loss), had claimed that he had not understood what P. was saying on the telephone. This assertion was not consistent with the applicant's concise and clear questions, nor with the fact that he had never said that he had not heard or that he had misheard what P. had said to him. It was therefore on the basis of all those considerations that the Court had reached the conclusion that the assignment given to P. had been to kill Mrs. Schenk.

10. The applicant appealed, claiming *inter alia* that the disputed recording had not been ordered or effected by the competent authority and that it had been the principal evidence on which the Rolle Criminal Court had based its decision.

In his preliminary submission of 23 September 1982 contending that the Court of Cassation should dismiss the appeal, the principal prosecutor of the Vaud Canton expressed the view that "the disputed recording was made in the context of criminal proceedings and at the request of police officers".

11. On 15 November 1982 the Criminal Court of Cassation of the Vaud Canton dismissed the appeal. The following reasons were given:

The contested judgment had stated expressly that the Court had relied partly on the disputed recording. Moreover there was no doubt that the recording had been such as to influence the outcome of the criminal proceedings in a way which had perhaps been decisive, and which at the very least was not insignificant.

It was not possible to exclude automatically all evidence whose source was unlawful or criminal. However, the quest for the truth should not be carried out at the expense of principles, which were sometimes more important. According to precedent, the use of evidence which had been obtained unlawfully was excluded only where such evidence could not have been obtained under existing law; not where the infringement was only of a procedural rule not intended or likely to prevent evidence being obtained. However, the distinction between unlawfulness and procedural irregularity was often fine. The criterion established by precedent was considered unsatisfactory by academic opinion. Generally speaking it was accepted that the investigating authorities were prohibited from using force, threats or from resorting to false statements or misleading questions.

Examination of the foregoing in the light of Article 6 para. 2 of the European Convention on Human Rights did not give rise to different conclusions. According to Article 8 para. 2 of the Convention, interference by a public authority in private life and correspondence was permissible only in certain conditions. In the Klass judgment the European Court of Human Rights had taken the view that the existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications was, under exceptional conditions, necessary in a democratic society. It had recognised that, as regards the fixing of the conditions under which the system of surveillance was to be operated, the legislature enjoyed a certain discretion. In an earlier case the Committee of Ministers, agreeing with the opinion expressed by the Commission, had considered that the tape recordings of a private conversation unbeknown to the participants or one of them constituted in principle an interference with privacy, but that, having regard to the particular circumstances of the case, the use by the court in question of the recording of the evidence did not infringe the right to a fair hearing, guaranteed under Article 6 para. 1 of the Convention (No. 2645/65, Yearbook 14 p. 903). More recently the Commission had observed that the fact that the authorities charged with telephone tapping generally did not fully respect the directives given to them — however regrettable this might be — did not by itself constitute a violation of the Convention, in particular of Article 8 (No. 8290/78, Dec. 13.12.79, D.R. 18 p. 176). It was worth noting further

that the Commission had accepted on the one hand that police officers might take confidential information from persons with a legitimate interest in remaining anonymous, otherwise much information needed if crimes were to be punished would never be brought to the knowledge of the prosecuting authorities, and, on the other hand, that the statements of an informant were admissible, where the jury's attention had been drawn to the status of a statement made under oath and not corroborated during the proceedings in court and the applicant had been able to produce in court various witnesses who contested that the events in question had occurred (No. 8117/78, Dec. 4.5.79, D.R. 16 p. 200).

Since the above-mentioned rules concerned the investigating authorities, they could not as such apply to evidence obtained unlawfully by private individuals. Certain methods which were unacceptable for the former were not necessarily so for the latter. Academic opinion accepted for example that the victim of threats or blackmail might find it necessary in order to obtain difficult evidence to make a secret recording of the perpetrator's statements. As regards the acts of a private investigator, opinion was divided. Precedent had left this question open.

The recording by the police of a telephone conversation in Switzerland would have been unlawful without the authorisation of a judge. However, such authorisation could have been granted in connection with an investigation instituted as a result of a crime, by virtue of Article 179 octies of the Criminal Code. The disputed recording did not in itself constitute prohibited evidence. Although it might be that, as the applicant claimed, even in the absence of any complaint, a private recording of P.'s telephone conversation with him was, in itself, in the nature of an offence, on the other hand the rule infringed, Article 179 bis of the Criminal Code, protected individual privacy and was not designed to eliminate the risk of mistake. Moreover, with reference to the balance of interests and rights at stake, the difference between authorised tapping and unauthorised recording was not sufficient in itself to justify attaching more importance to the protection of privacy than to the general interest in exposing a person guilty of a serious crime. The method used by P. to obtain the applicant's incriminating statements was undoubtedly contrary to the rules of good faith, since it amounted to stating untruthfully that the killer's assignment had been accomplished, which was as if P. had laid a trap for the applicant. However, although the authorities were prohibited from inciting a person to commit an offence, the strategy of inducing an offender to confess to a crime was permissible. Thus the use of violence and even deceit to obtain a statement was unlawful. On the other hand, it was permissible to use a trick. Such practice was common on the part of the authorities where, for example, the lives of hostages were at stake. Moreover, such a method might be lawful in one case and immoral in another. It followed that the means used in this case remained within acceptable limits as determined by the requirements of the fight against crime. In addition, the deceit concerned only one matter, namely the completion of the act contemplated.

Finally, under Swiss law, the contested evidence was admissible and did not infringe the applicant's fundamental rights. Although the recording was made and taken possession of by the police in France, it was unnecessary to consider any more extensive rights which might exist under foreign law. Moreover, France also recognised telephone tapping and the recording of telephone conversations, even though the French Criminal Code likewise penalised such a recording where it was not authorised by the competent authority. Furthermore, although in France attempted incitement was not an offence, under the European Convention on Mutual Assistance in Criminal Matters Switzerland could have made a formal request for such surveillance to be carried out. Unlike Switzerland, France had not adopted a reservation making the execution of any formal request for assistance requiring a coercive measure conditional on the punishable nature of the alleged offence in the requesting and requested countries. Telephone surveillance was regarded as equivalent to such a measure.

The applicant argued further that authorised tapping would have provided all the guarantees as to whether the recording was accurate and complete. An authorised recording inevitably constituted more telling evidence than a private recording, in view of the risk of manipulation in the second case. However, in this case the circumstances of the recording were known and an expert report, for the purpose of which the cassette and the recorder had been examined, had been avilable to the Court. The Court had also known how much time had elapsed between the recording and the handing over of the recorded tape to the police. It had thus been able to assess the value of the evidence with regard to its authenticity. The use of a trick or subterfuge was similarly likely to affect the weight attributed to evidence obtained in such a manner. The first instance court had however been in a position to assess the weight to be attached to the applicant's statements in the light of such a *modus operandi* since, moreover, the recording had reproduced a complete telephone conversation. In this respect too, the contested evidence might be accepted.

12. The applicant lodged two appeals against this judgment of the Vaud Criminal Court of Cassation in the Federal Court, a public law appeal and an appeal on a point of law. The two appeals were similar in substance insofar as they concerned the complaints regarding the disputed recording of the telephone conversation.

13. The Federal Court examined the applicant's complaints in respect of the disputed recording in connection with the public law appeal. This appeal was dismissed on 7 September 1983. The Court held as follows:

The disputed recording did indeed constitute an offence under Article 179 ter of the Criminal Code. However, P. had made the recording in order to establish the truth of his statements, while he was the subject of a criminal investigation for murder. If a complaint had been lodged under Article 179 ter, it was not certain that the proceedings would have resulted in the imposition of a sentence. But this question might remain open. The provisions of the Criminal Code and the Vaud Act

implementing the Criminal Code concerning telephone surveillance defined lawful and unlawful surveillance and fixed the penalties imposed for the latter. They contained no rules concerning the validity of such surveillance as evidence in a trial.

It was true that Swiss law authorised this infringement of the rights to privacy and the secrecy of communications in the form of telephone tapping only where such a measure had been ordered by the competent authority, approved by a judge. To conclude therefrom that any evidence derived from unauthorised tapping might never in any circumstances be used as evidence would be to adopt too absolute a position and would often lead to absurd results. In such a situation it was necessary to weigh up on the one hand the State's interest in having a specific suspicion confirmed or disproved, and, on the other, the legitimate interest of the person concerned in the protection of his personal rights. To do this, all the relevant circumstances should be taken into consideration.

In the Federal Republic of Germany the Federal Constitutional Court had reached the same conclusion. In a case where a person was suspected of tax evasion, deception, and forgery, that court had refused to accord any weight to a recording made privately. However, it had taken the view that the result would have been different had the higher interests of the community imperatively required that the guarantee of protection for the personal interest of the person concerned be abandoned. Thus in general it was not contrary to constitutional law in cases of necessity to allow a court to use a recording made by a third person and capable of identifying a criminal or establishing the innocence of a person wrongly accused, where serious offences were at issue such as crimes involving death or personal injury, serious infringements of the constitutional order and attacks on democratic freedoms and infringements against legal property of the same importance (Entscheidungen des BVG, 34 -- 1973, p. 238 *et seq*, in particular p. 249).

In this case it was necessary to compare, on the one hand, the interest in confirming or disproving the specific suspicions of incitement to murder weighing on Schenk and, on the other, the interest which he had in preserving the secrecy of his conversation with P. Inevitably, the public interest requiring that the proof be established in the matter of an offence relating to murder overrode Schenk's interest in maintaining the secrecy of a telephone conversation which in no way infringed his privacy, but related exclusively to the completion of an assignment entrusted to P. The need to protect a person's private life could not have the effect of excluding such a recording from a criminal file when there existed a strong suspicion concerning a very serious offence.

Moreover it was interesting to note that Swiss law authorised the telephone surveillance of an individual suspected of being involved with a crime. Clearly, such surveillance was subject to authorisation by a judge, but the recording of a conversation was not, as such, evidence which the State would have refrained from using as a matter of principle and in order to protect the higher interests of the individual.

This type of evidence could not be compared with a truth drug, force or torture, which were subject to an absolute prohibition as a matter of public policy. Accordingly, there would have been no legal obstacle preventing the same recording from being made lawfully in Switzerland on the line of the telephone kiosk in the hospital where Schenk was staying and from being included in the file. It followed that an infringement of personal rights which did not constitute a breach of the constitution under Swiss law — where certain conditions were fulfilled — might be classified as minor where it could have been ordered in accordance with Article 179 octies (2) of the Criminal Code (cf. ATF 96 I 440).

In this case, since Schenk was strongly suspected of having participated in a crime intended to result in a person's death, since the judge would have been entitled to order the recording of his conversation of 26 June 1981 with P., since it was the latter who had made that recording while he was being investigated for attempted murder or homicide, and since the conversation had not concerned facts of a private nature, the Rolle Criminal Court had been entitled to refuse to exclude the tape from the file and to assess it as evidence without infringing Swiss constitutional law; nor in so doing had the Court infringed Articles 6 and 8 of the Convention.

14. The applicant's appeal on a point of law was also rejected by a judgment of the Criminal Court of Cassation of the Federal Court dated 7 September 1983.

In its judgment the Court made the following observations in relation to the telephone conversation recorded between P. and the applicant:

> "On 26 June 1981 Schenk called P. from a telephone kiosk in the hospital. P. gave him to understand that he had not been able to do the 'job' until 23 June 1981, that the body had been taken to near Montreux and that the silence of the Press suggested to him that it had not yet been discovered. Schenk then stated that he would telephone him again eight days later".

15. On 6 July 1983 the applicant applied for a stay of execution of his sentence on the grounds of his health. Since August 1983 he has served his sentence in the geriatric hospital at Chamblon.

On 7 December 1983, the Head of the Vaud Department of Justice, Police and Military Affairs, refused to grant a stay of the execution of the sentence.

The applicant lodged an administrative law appeal with the Federal Court.

On 21 February 1984 the Federal Court dismissed the applicant's appeal.

16. On 5 December 1984 the applicant was granted a partial pardon by the Great Council (Parliament) of the Vaud Canton, whereby he was accorded remission of the outstanding sentence, in particular on the ground of his health. He was released on 8 December 1984.

COMPLAINTS

The applicant's **complaints** may be summarised as follows:

17. The applicant complains of an infringement of his right to respect for his private life and his correspondence, including the right to the secrecy of telephone communications. He relies on Article 8 paras. 1 and 2 of the Convention.

The applicant also complains of an infringement of his right to a fair hearing as a result of the use of the disputed recording as evidence. He relies on Article 6 paras. 1 and 3 of the Convention.

The applicant complains further that his guilt was not proved "according to the law" within the meaning of Article 6 para. 2 of the Convention. He alleges a breach of the principle of the presumption of innocence.

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THE LAW

1. The applicant complains of violation of his right to respect for his private life and his correspondence by the secret recording of a telephone conversation. He relies on Article 8 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 Government contend that the disputed recording was made by a private individual without any participation on the part of the police so that this complaint should be declared inadmissible as being incompatible *ratione personae* with the provisions of the Convention. The Government note in addition that the applicant did not institute criminal proceedings under Article 179 ter of the Criminal Code so that this complaint should, in any event, be rejected on the ground of non-exhaustion of domestic remedies.

The applicant claims that the police participated in the recording and that, accordingly, the complaint is not incompatible with the provisions of the Convention. In addition, he considers that he exhausted the domestic remedies in this connection. In his view the existence of a complaint does not determine whether an act is punishable but is a condition for the institution of criminal proceedings.

Consequently, the offence exists even if no complaint is laid. Moreover, he had no interest in lodging a complaint in view of the fact that he was going to be discharged.

The Commission must first address the question whether the disputed act constitutes an interference in the exercise of the right secured under Article 8 para. 1. It observes that according to precedent both before the Commission and in the European Court of Human Rights telephone communications are covered by the notions of "private life" and "correspondence" within the meaning of Article 8 para. 1 of the Convention (cf. Eur. Court H.R., Klass and others judgment of 6 September 1978, Series A no. 28, para. 41). Accordingly, the applicant may rely on the right guaranteed by that provision.

Interference in the exercise of such rights is only permissible when it is by a public authority and if it is in accordance with the law and necessary in a democratic society for one of the reasons listed in Article 8 para. 2.

The question whether and to what extent the police participated in the recording, in other words whether the interference which is the subject of the applicant's complaint was by a public authority, is a matter of dispute between the parties. The Commission considers that this question may remain open since the complaint should be declared inadmissible for the following reasons.

According to 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 ...".

In this instance the applicant failed to lay a complaint before the competent Swiss authorities against the person or persons responsible for the recording. He has therefore not exhausted the remedies available to him under Swiss law. Furthermore, examination of the case has disclosed no special circumstances which could have exempted the applicant from the need to exhaust domestic remedies, according to the generally recognised rules of international law in the matter. In particular, the argument that the applicant was going to be discharged so that he had no interest in laying a complaint which would have attracted publicity to the case, was not a circumstance which exempted him from the need to lay a complaint.

It follows that the applicant has failed to comply with the condition concerning the exhaustion of domestic remedies and this part of his application must be rejected in accordance with Article 27 para. 3 of the Convention.

2. The applicant complains of a violation of his right to a fair trial as a result of the use of the recording as evidence. He relies on Article 6 paras. 1 and 3 of the Convention.

Article 6 para. 1 provides as follows:

"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 ...".

The applicant also complains that since an unlawful recording was used in evidence, his guilt was not proved "according to the law" within the meaning of Article 6 para. 2 of the Convention which provides as follows:

"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The Government consider that the applicant has not exhausted the domestic remedies since he did not use all the means available to him to contest the lawfulness of the recording. The Government contend that in any event the complaints are inadmissible as manifestly unfounded. The judge assesses evidence freely. Evidence obtained unlawfully is not automatically excluded. It may be accepted in the light of circumstances and, in particular, in the light of the interests at stake. Furthermore, use of the recording cannot infringe the principle of the presumption of innocence.

The applicant takes the view that the use in evidence of a secret recording, which in this instance had been found to be unlawful by the Federal Court, was incompatible with the notion of fair trial.

The Commission considers that, in this respect, the applicant had exhausted the domestic remedies. The applicant unsuccessfully sought in the criminal court to have the recording removed from the file. He lodged an appeal alleging that the recording was illegal and that it had been the main evidence on which the Criminal Court based its decision. Finally he lodged a public law appeal against the use of the recording as evidence.

The Commission observes that Article 6 para. 1 does not lay down rules as to evidence, as such, and in particular as to its admissibility and probative value, these questions being essentially dependent on domestic legislation (see No. 7450/76, Dec. 28.2.77, D.R. 9 p. 108). The Commission does not examine whether the courts have correctly assessed the evidence, but whether evidence has been presented in such a manner as to guarantee a fair trial (see No. 6172/73, Dec. 7.7.75, D.R. 3 p. 77). It appears from the file that the recording was not obtained in accordance with the law. The Federal Court acknowledged that the recording constituted an "unauthorised recording of conversations" (Article 179 ter of the Criminal Code). In addition, it appears from the file that although the recording was not the only evidence, it was of such a nature as to exert a decisive influence in the applicant's conviction.

The Commission considers that the use of evidence which has not been obtained in accordance with the law gives rise to complex problems in relation to the notion of a fair trial. Furthermore, the Commission is of the opinion that the applicant's complaint based on Article 6 para. 2 in fact falls within the notion of "fair trial" and that, accordingly, at this stage of the proceedings it is not necessary to separate the complaints, which relate to the same set of facts. The Commission takes the view that the applicant's complaints raise problems of sufficient complexity and importance to require an examination of the merits of the case and, accordingly, that the complaints cannot be declared manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

For these reasons, the Commission

DECLARES INADMISSIBLE the complaint concerning the making of the disputed recording;

DECLARES ADMISSIBLE the remainder of the application, without prejudging the merits of the case.