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. 48521/99
by Mark ARMSTRONG
against the United Kingdom

The European Court of Human Rights, sitting on 25 September 2001 as a Chamber composed of

Mr J.-P. COSTA, *President*,
Mr W. FUHRMANN,
Mr L. LOUCAIDES,
Sir Nicolas BRATZA,
Mrs H.S. GREVE,
Mr K. TRAJA,
Mr M. UGREKHELIDZE, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 17 May 1997 and registered on 2 June 1999,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the Court's partial decision of 10 October 2000,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mark Armstrong, is a British national, born in 1965 and detained in HM Prison Everthorpe. He is represented before the Court by Ms. Bridget Petherbridge of Kingsley Napley, solicitors, of London. The respondent Government are represented by Mr C. Whomersley of the Foreign and Commonwealth Office.

A. The circumstances of the case

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

1. Covert surveillance

On 27 April 1995, the applicant was arrested and charged on two counts with conspiracy to supply Class A and Class B drugs respectively. On 27 January 1997, he and his co-defendants (Kevin Douglas, Paul Anthony Easingwood, Keith Gleeson and Andrew David Dalton) pleaded guilty to the charges after the trial judge ruled disputed evidence admissible.

The evidence at issue resulted from a covert surveillance operation involving observation and recording of conversations in the home of Kevin Douglas allegedly from October 1994 until January 1995 and in April 1995. According to the applicant, the authority for such surveillance had been sought and granted on the purported grounds that the drug operation conducted by the defendants was of such sophistication that conventional evidence gathering techniques were fruitless. He claimed that it was not the Chief Constable who authorised the warrant, but rather the Chief Superintendent.

The defendants challenged the admissibility of the evidence on grounds of improper compliance with the Home Office Guidelines and argued that the judge should exercise his discretion under section 78 of the Police and Criminal Evidence Act 1984 ("PACE") to exclude the recordings. A *voir dire* regarding the assertions was conducted. The taped conversations constituted the sole evidence against the applicant.

Upon the trial judge's ruling on the admissibility of the evidence, the defendants pleaded guilty to the relevant charges on the indictment.

On 6 February 1997, the applicant was sentenced to nine years' imprisonment.

The applicant applied for leave to appeal against conviction and sentence out of time. On 28 January 1999, the applicant's application to seek leave to appeal against conviction and sentence out of time was refused by Mr. Justice Hooper and Lord Justice Rose.

2. Control of correspondence

The applicant claims that his correspondence with his solicitor, the Criminal Cases Review Commission, the Court of Appeal and this Court is regularly opened and scrutinised by the prison authorities.

A letter dated 19 March 1999 from this Court was opened by the prison authorities. The applicant submitted a complaint to the prison authorities on 7 September 1999. On 14 December 1999, Prison Headquarters replied that the envelope had not been marked Rule 37A nor was it clear that it was confidential. The envelope had been marked with the ECHR motif but for security reasons it was necessary to open it. In his report (case no. 10125/00) of 19 April 2000, the Prisons Ombudsman noted that it appeared to be the practice at the Wolds Prison to open letters from the Commission or Court though that practice had ceased. He found in the case of this letter that the prison had no strong grounds for suspecting that the letter was not genuine and therefore was not persuaded that there were sufficient grounds to justify opening it. He recommended that the Prison Service apologise to the applicant.

On or about 13 April 1999, a package from the European Court of Human Rights was opened by a prison officer. The applicant lodged a complaint with the Head of Residence at the Wolds Prison on 16 April 1999. Dissatisfied with the response, he applied to the Prison Service Headquarters. On 9 October 1999, the Headquarters replied that the matter had been investigated and that all mail was being handled in accordance with Standing Orders. He applied to the Prisons Ombudsman. According to the Ombudsman's report (case no. 11553/99) of 13 January 2000, prison records revealed that the applicant did receive "1 x pack from European Commission of Human Rights" on 13 April 1999, which was opened, after having been x-rayed, as allegedly nothing indicated from where it had come, other than the "European Stars" in one corner. The Ombudsman expressed surprise that there should be any doubt as correspondence from the Commission and Court was readily identifiable. He found no evidence that the letter was deliberately opened in breach of Prison Rules and recommended that prison staff take greater care and be reminded of the applicable regulations.

The applicant submitted a complaint that two letters from his solicitor dated 2 June 1999 and 5 August 1999 had been opened at HMP Everthorpe. This complaint was not answered by the prison authorities. In his report of 19 April 2000 (case no. 10125/00), the Prisons Ombudsman was told by the prison that they were unable to give any explanation for why they were opened. He expressed disappointment that the staff could not identify the reasons as, whenever a prisoner's legal mail was opened, it was important to keep a record of the reasons. In the absence of reasons, he could not be satisfied that there were sufficient grounds to open them and upheld the complaint. He recommended that the Director of the Prison remind staff of

the applicable rules and that he conduct a review of the prison's procedures to ensure that the request/complaints forms were answered properly.

The applicant lodged further complaints regarding the alleged theft of his mail as two visiting orders were never received by his girlfriend. Prison authorities rectified the situation by reissuing the orders and the Ombudsman in his report (case no. 11533/99) concluded there was no proof that the applicant's mail was deliberately being interfered with or that the prison was responsible for the letters going astray in the post.

On 10 May 2000, the Area Manager of the Prison Service wrote to the applicant concerning the Ombudsman's findings about the handling of his legal correspondence at The Wolds and Everthorpe Prisons:

> "I note that the Ombudsman has upheld your complaint and has made a number of related recommendations. It has been decided to accept these recommendations. I would like to offer you my sincere apologies on behalf of the Prison Service that your correspondence has not been handled correctly in accordance with the established policy and for the insufficient reply to your subsequent request/complaint. I would re-assure you that measures are being taken to remind staff of the correct procedures for handling prisoners' mail and request/complaints in order to prevent similar occurrences in the future."

B. Relevant domestic law and practice

The Home Office Guidelines

Guidelines on the use of equipment in police surveillance operations (the Home Office Guidelines of 1984) provide that only chief constables or assistant chief constables are entitled to give authority for the use of such devices. The Guidelines are available in the library of the House of Commons and are disclosed by the Home Office on application.

In each case, the authorising officer should satisfy himself that the following criteria are met: a) the investigation concerns serious crime; b) normal methods of investigation must have been tried and failed, or must from the nature of things, be unlikely to succeed if tried; c) there must be good reason to think that the use of the equipment would be likely to lead to an arrest and a conviction, or where appropriate, to the prevention of acts of terrorism; d) the use of equipment must be operationally feasible. The authorising officer should also satisfy himself that the degree of intrusion into the privacy of those affected by the surveillance is commensurate with the seriousness of the offence.

The Guidelines also state that there may be circumstances in which material so obtained could appropriately be used in evidence at subsequent court proceedings.

The Police Act 1997

The 1997 Act provides a statutory basis for the authorisation of police surveillance operations involving interference with property or wireless telegraphy. The relevant sections relating to the authorisation of surveillance operations, including the procedures to be adopted in the authorisation process, entered into force on 22 February 1999.

Prison Rules and Instructions concerning legal correspondence

The relevant regulations, as updated in April 1999, are contained in Rule 39, which states that :

> (1) A prisoner may correspond with his legal adviser and any court and such correspondence may only be opened, read or stopped by the governor in accordance with the provisions of this rule;
>
> (2) Correspondence to which this rule applies may be opened if the governor has reasonable cause to believe that it contains an illicit enclosure…
>
> (3) Correspondence to which this rule applies may be opened, read or stopped if the governor has reasonable cause to believe its contents endanger prison security or the safety of others or are otherwise of a criminal nature.
>
> (4) A prisoner shall be given the opportunity to be present when any correspondence to which this rule applies is opened and shall be informed it is or any enclosure is to be read and stopped…
>
> (6) In this rule "court" includes the European Commission of Human Rights, the European Court of Human Rights and the European Court of Justice…"

Standing Order 5B states:

> "Prison Rule 37A[now Rule 39] … applies to all correspondence between an inmate and his or her legal adviser or a court (including the European bodies referred to in the Rules). Such correspondence carries special privileges under the Rules and may not be read or opened for examination unless in accordance with instructions laid down by Prison Service Headquarters…"

Instruction to Governors (IG) 113/1995 specifies :

> "4. Correspondence between a prisoner and the European Commission or Court of Human Rights will normally pass unopened, unexamined and unread. …
>
> 4.2 All mail received from the European Commission or the European Courts is readily identifiable, i.e. the envelope is clearly stamped, bearing the words "European Commission, Strasbourg" or "European Court of Justice" in both English and French. Such correspondence should be passed to the prisoner unopened unless there is reason to believe that the letter (or parcel – some papers may be very bulky) did not originate from these sources."

COMPLAINTS

The applicant complains of violations of Article 8 of the Convention as regards the use of covert audio devices within the private home of Kevin Douglas which recorded the applicant's telephone conversations.

The applicant further complains under Article 8 of the Convention of:

- the opening and screening of his correspondence in prison with the European Court of Human Rights;

- the opening and screening of his correspondence in prison with his solicitors.

Finally the applicant complains that there is no effective remedy in domestic law for the said violations of Article 8 of the Convention, as required by Article 13.

THE LAW

Concerning the use of a covert surveillance device

The applicant complains under Articles 8 and 13 of the Convention that covert recordings were made by the police of his telephone conversations. These provisions provide as relevant:

Article 8:

> "1. Everyone has the right to respect for his private …life.. 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."

Article 13:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Government concede, in the light of the Court's judgment in *Khan v. the United Kingdom* (no. 35394/97 [Section 3] ECHR 2000-V) that the covert recording of the applicant's telephone conversations amounted to an interference with his right to private life guaranteed by Article 8 of the Convention and that the measures were not "in accordance with the law" as required by the second paragraph of that provision. Likewise, the

Government accept there was a breach of Article 13 in respect of the covert recording.

Having regard to the applicant's complaints and the Government's concession, the Court finds that serious questions of fact and law arise, the determination of which should depend on an examination of the merits. This part of the application cannot be regarded as manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

Concerning the opening of the applicant's correspondence by the prison authorities

The applicant complains that his correspondence with the Court and with his solicitors has been unjustifiably opened and read in his absence, contrary to Articles 8 and 13 (set out above).

While the Government accept that the applicant's correspondence with the Court and his solicitors has been opened by the prison authorities and do not seek to justify this interference, they submit that the applicant has not exhausted domestic remedies as required by Article 35 § 1 of the Convention as he did not commence judicial review proceedings seeking an order against the prison authorities in relation to the interference with his correspondence.

The applicant submits that the reality of the situation is that the Prison Ombudsman post has been created as part of a public policy to provide a non-legalistic and accessible form of dispute resolution. There is an expectation and pressure on prisoners to use this method. Furthermore, it was wholly unrealistic and against the Government's public policy, e.g. to restrict legal aid and reduce litigation, to expect a prisoner to instruct lawyers, apply for legal aid and seek to introduce judicial review proceedings every time a letter has been unlawfully opened. In addition, he argues that having used the Ombudsman he is not required to use other remedies.

The Court does not deem it necessary to determine this issue because, anyway, it finds the complaint manifestly ill-founded for the following reasons:

The Court notes that the applicant's correspondence with the Convention organs was on occasions opened in error by the prison administration, in breach of the various Rules and Instructions, and for which he received a formal written apology and an assurance that steps would be taken to prevent any further incorrect application of procedures. The Court recalls that a prisoner's channels of communication to the Convention organs should be free from all unnecessary constraints (no. 13590/88, Campbell v. the United Kingdom, Comm. Report 12.07.90, § 69). However, the facts of the present case do not lead to the conclusion that it was the deliberate

intention of the authorities to deny, on a systematic basis, the applicant's right to respect for his correspondence ensured by Article 8 of the Convention. The interferences were rather incidental errors (cf. *Touroude v. France,* no. 35502/97 [Section 3] [decision] 3.10.2000).

In these circumstances, the Court finds that breach of the applicant's rights was acknowledged by the authorities and sufficient redress afforded. Consequently, the applicant may no longer claim to be a victim of a violation of Article 8 of the Convention (see also *William Faulkner v. the United Kingdom*, no. 37471/97, [Section 3] [decision] 18.9.2001). Nor can any arguable claim be regarded as arising in that regard under Article 13 of the Convention (see the Boyle and Rice v. the United Kingdom judgment of 27 April 1988, Series A no. 131, p. 24, § 54). Accordingly, this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the applicant's complaints concerning the use of the covert surveillance device;

Declares inadmissible the remainder of the application.

S. DOLLÉ
Registrar

J.-P. COSTA
President