CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 40084/98
by Nasir CHOUDHARY
against the United Kingdom

The European Court of Human Rights (Third Section) sitting on 4 May 1999 as a Chamber composed of

Mr J-P. Costa, *President*,
Mr L. Loucaides,
Mr P. Kūris,
Mrs F. Tulkens,
Mr W. Fuhrmann,
Mrs H.S. Greve,
Mr K. Traja, *Judges*,

with Mrs S. Dollé, *Section Registrar*;

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

Having regard to the application introduced on 19 December 1997 by Nasir CHOUDHARY against the United Kingdom and registered on 3 March 1998 under file no. 40084/98;

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

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British national, born in 1955 and currently detained in HM Prison Buckley Hall, Rochdale. The facts of the case, as submitted by the applicant, may be summarised as follows.

A. Particular circumstances of the case

On 7 March 1996, in Manchester Crown Court, the applicant was convicted of conspiracy to supply heroin.

The Crown's case was that GB and his brother HB were introduced to the applicant by R. The applicant offered them a car and large sums of money for delivering goods. He did not reveal what the goods were, but he did warn the brothers that the work could result in a prison sentence. The brothers told the applicant that they would consider his offer, and then informed the police of what had taken place. HB had no further involvement, but GB acted as an informer, providing the police with information which allowed then to mount an operation of surveillance and telephone tapping, showing that the applicant and another man, K, were involved in the movement of large amounts of heroin between London and Manchester. GB was to be the main prosecution witness, but he disappeared shortly before the trial. At the last minute, therefore, HB was called to give evidence about the initial conversations. GB was then traced and brought to court, where he refused to give evidence and was treated as a hostile witness.

The evidence against the applicant consisted of HB's testimony about the conversation where the applicant offered the brothers work and warned them that it might result in a prison sentence; surveillance evidence showing that, on one occasion when GB had returned from London to Manchester by train carrying a bag containing heroin hidden in a loaf of bread, the applicant had followed GB in a car from the station for three miles; a telephone conversation between the applicant and GB later that same evening, intercepted by a tap on GB's telephone, when the applicant mentioned a package which he wanted GB to deliver and told GB, *inter alia*, to expect a black man at 9 p.m. and to be careful because the applicant feared that he had been followed earlier; and surveillance evidence which showed that, a week later, GB placed a suit bag containing heroin into the applicant's car, that the applicant returned to his car some time later and drove off with GB, and that when the car was later searched the suit bag was found but the loaf of bread in which the heroin had been hidden had been removed. The prosecution also relied on the fact that the applicant admitted taking GBP 60,000 to a house in Liverpool, where it was found by the police.

At the trial, the applicant objected to the record of the telephone conversation between himself and GB being admitted in evidence. He contended that the call had been intercepted unlawfully, since no warrant had been obtained and since GB had not consented to its interception (see section 1 of the Interception of Communications Act 1985 below). In his submission, it followed that any evidence relating to this allegedly unlawful interception was inadmissible under section 9 of the 1985 Act, since it would "tend to suggest that an offence under section 1 [of the 1985 Act had] been ... committed". The trial judge found that GB had consented to the interception and that the telephone conversation was admissible.

In connection with the GBP 60,000 left by the applicant in a house in Liverpool, the judge directed the jury:

> "The question is whether you can consider the existence of the money and the claim by [the applicant] for it as being relevant to the issue as to whether [the applicant] was part of the conspiracy to supply drugs. It is for you to decide whether the money was indicative of an ongoing trading in drugs and you should regard the existence of this money as relevant only if you reject any innocent explanation put forward by [the applicant]; that means that you are sure the money was not saved from his takings [in his shop] and not handed over by him in connection with the purchase of gum arabic from Nigeria. if there is any possibility of the money being in [the applicant's] possession for reasons other than drug-dealing, then this evidence won't prove anything. But if you conclude the money was indicative not only of past dealing but an ongoing dealing in drugs then you can take into account the existence of this money together with the drugs in considering whether the necessary intention has been proved."

The applicant appealed against conviction to the Court of Appeal, on the ground, first, that the trial judge erred in admitting the record of the telephone conversation. In its judgment of 5 February 1997, the Court of Appeal held that section 9(1)(a) of the 1985 Act did not constitute a statutory bar to the admissibility of the substance of a consensual interception. Moreover, since the fact that evidence has been obtained unlawfully is generally irrelevant under English law to the question of its admissibility, cross-examination to show that the interception was not consensual could not in any case be entertained. The applicant's second ground of appeal concerned the trial judge's direction to the jury in respect of the GBP 60,000 left by the applicant in a house in Liverpool. the Court of Appeal dismissed this ground of appeal also, holding that the direction had been quite proper.

The applicant sought leave to appeal to the House of Lords. His petition was refused by the House of Lords on 1 July 1997.

B. Relevant domestic law and practice

1. The interception of telephone calls

The Interception of Communications Act 1985 ("the 1985 Act") provides in section 1 (as relevant):

> "(1) Subject to the following provisions of this section, a person who intentionally intercepts a communication in the course of its transmission by post or by means of a public telecommunication system shall be guilty of an offence.
>
> (2) A person shall not be guilty of an offence under this section if:
> (a) the communication is intercepted in obedience to a warrant issued by the Secretary of State under section 2 below; or
> (b) that person has reasonable grounds for believing that the person to whom, or the person by whom, the communication is sent has consented to the interception. ..."

The existence of reasonable grounds for believing that one of the parties to the call consents to the interception is ultimately a question of fact to be tried on evidence; the grounds on which the person acted must be sufficient to induce the required belief in a reasonable person (see Halsbury's Statutes, 4th edition, volume 45, p. 306).

The 1985 Act also provides for the establishment of a Tribunal, to whom any person who believes, *inter alia*, that communications made by or to him may have been intercepted in the course of their transmission by means of a public telecommunications system, may apply (section 7). If the application does not appear to the Tribunal to be frivolous or vexatious, it is under a duty to determine whether a warrant has been issued, and if so,

whether it was issued in accordance with the 1985 Act. It is not, however, empowered to determine whether an allegedly consensual interception complied with section 1 (2)(b) of the 1985 Act.

2. Admissibility of evidence relating to the interception of telephone calls

Section 9 of the 1985 Act provides:

> "(1) In any proceedings before any court or tribunal no evidence shall be adduced and no question in cross-examination shall be asked which (in either case) tends to suggest:
> (a) that an offence under section 1 above has been or is to be committed by any of the persons mentioned in subsection (2) below; or
> (b) that a warrant has been or is to be issued to any of those persons.
>
> (2) The persons referred to in subsection (1) above are:
> (a) any person holding office under the Crown; ..."

Under English law, in the absence of a clear legislative bar, all logically probative evidence is admissible. The fact that evidence, including a record of a telephone conversation, may have been obtained unlawfully, for example through the commission of trespass or of a criminal offence, does not render it inadmissible (see *R. v. Sang* [1980] Appeal Cases p. 402 and *R. v. Khan* [1996] 3 Weekly Law Reports, p. 162). Under section 78 of the Police and Criminal Evidence Act 1984, a judge has a discretion to exclude admissible evidence on which the prosecution proposes to rely if it appears that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, its admission would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

COMPLAINTS

The applicant complains, under Article 8 of the Convention, that the interception of the telephone conversation between himself and GB violated his right to respect for his private life and correspondence.

In connection with his trial, he complains that GB tricked him into making certain incriminating statements on the telephone and that the reliance by the prosecution on the record of this conversation violated Article 6 §§ 1 and 2. He complains under Article 6 § 3(d) that, as a result of section 9 of the 1985 Act, he was prevented from cross-examining witnesses about the legality of the recorded telephone evidence. In addition, he complains that the judge's decision to allow the prosecution to rely on the previously undisclosed statement of HB breached his right to a fair trial and to adequate time and facilities for the preparation of his defence under Article 6 §§ 1 and 3(b). Finally, he complains that the admission of the evidence about the GBP 60,000 left by him in the house in Liverpool violated his right to a fair trial under Article 6 § 1 because the mere possession of such a large amount of money in a drugs case was highly prejudicial to him.

THE LAW

1. The applicant's first complaint is that the interception of the telephone conversation between himself and GB violated his right to respect for his private life and correspondence, contrary to Article 8 of the Convention, which provides:

> "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 Court notes that there is no doubt in this case that a private telephone conversation between the applicant and another man was intercepted and recorded by the police. It is clear, therefore, that there has been an interference by a public authority with the applicant's Article 8 rights to respect for his private life and correspondence (see the Halford v. the United Kingdom judgment of 25 June 1997, *Reports of Judgments and Decisions* 1997-III, p. 1016, §§ 44 and 48). Such an interference will constitute a violation of Article 8 unless it is in accordance with the law and necessary in a democratic society in pursuit of a legitimate aim.

The Court recalls that the expression "in accordance with the law" in Article 8 § 2 necessitates compliance with domestic law, which must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in and conditions on which public authorities are empowered to resort to secret measures such as telephone tapping (see the above-mentioned Halford judgment, p. 1017, § 49).

The Court considers that section 1 of the 1985 Act makes it sufficiently clear for the purposes of Article 8 § 2 that a citizen risks having his telephone conversations lawfully intercepted by agents of the State where there are reasonable grounds for believing that one of the parties to the call has consented to the interception (cf. the above-mentioned Halford judgment, p. 1017, § 51).

The applicant alleges, however, that the interception amounted to an offence under section 1 of the 1985 Act since it was carried out without a warrant and since GB, the other party to the call, did not consent. He submits, in support of this contention, that no written evidence of GB's consent to the interception was produced in court, that GB was in London when the police entered the house where he was staying and connected the recording equipment to the telephone, that GB did not own the house, which he was looking after for a friend, or subscribe to the telephone line, and that GB refused to give evidence at the trial and had to be arrested before he could be brought to court.

The Court recalls that it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law. However, since failure to comply with domestic law entails a breach of Article 8, the Court can and should exercise a certain power of review in this matter (see, *mutatis mutandis*, the Steel and Others v. the United Kingdom judgment of 23 September 1998, *Reports* 1998, p. ..., § 56). It notes that under section 1(2)(b) of the

1985 Act, it is lawful for a person to intercept a telephone call where the interceptor has reasonable grounds for believing that the person to whom, or the person by whom, the communication is sent has consented to the interception. The existence of reasonable grounds is a question of fact to be decided on the available evidence. In the present case, the other party to the telephone conversation, GB, was, at the time of the interception, assisting the police as an informer. According to the applicant, the trial judge found, as a matter of fact, that the police officer who intercepted the call had reasonable grounds to believe that GB consented. In these circumstances, the Court is satisfied that the interception was carried out in accordance with English law.

The applicant's sole ground of complaint under Article 8 § 2 is that the interception was unlawful; he does not contend that it did not pursue a legitimate aim or that it was not "necessary in a democratic society". In any event, the Court recalls its constant case-law that the existence of some law granting powers of interception of communications to aid the police in their function of investigating and detecting crime may be "necessary in a democratic society ... for the prevention of disorder or crime" (see, for example, the Malone v. the United Kingdom judgment of 2 August 1984, Series A no. 82, pp. 36-37, § 81).

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

2. In addition, the applicant alleges various breaches of Article 6 §§ 1, 2 and 3 (b) and (d). Article 6 provides (as relevant):

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights: ...
>
> b. to have adequate time and facilities for the preparation of his defence; ...
>
> d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ..."

In connection with the fairness of his trial, the applicant complains, first, that GB tricked him into making certain incriminating statements on the telephone and that the admission in evidence of the record of this conversation denied him a fair trial and breached the presumption of innocence, contrary to Article 6 §§ 1 and 2.

The Court recalls, at the outset, that while Article 6 of the Convention guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law (see the Schenk v. Switzerland judgment of 12 July 1988, Series A no. 140, p. 29, § 46). The applicant's complaint, however, in essence concerns the right not to incriminate oneself which, although not specifically mentioned in Article 6 of the Convention, is a generally recognised international standard which lies at the heart of a fair procedure under Article 6. Its rationale

lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. Thus, the right not to incriminate oneself presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense, the right is closely linked to the presumption of innocence in Article 6 § 2 of the Convention. The right not to incriminate oneself is primarily concerned, however, with respecting the will of the accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing (see the Saunders v. the United Kingdom judgment of 17 December 1996, *Reports* 1996-VI, pp. 2064-2065, §§ 68-69).

The Court considers it significant that, at the time of his telephone conversation with GB, the applicant was unaware that the call was being intercepted by the police. The allegedly incriminating statements made by him in the course of this conversation, were, therefore, made freely, and not as a result of any coercion or compulsion applied to the applicant by the State authorities. For this reason, the record of the conversation is akin to a pre-existing document or a bodily sample, to which the right not to incriminate oneself does not extend. While the applicant claims that he was tricked by GB into making the statements in question, this allegation is not sufficient in itself to necessitate the exclusion of the record, since it would have been open to the applicant to put this argument to the jury, who were required to assess the reliability and probative value of the recorded conversation together with all the other evidence presented in the case.

The applicant also complains, under Article 6 § 3(d), that, as a result of section 9 of the 1985 Act, he was prevented from cross-examining witnesses about the legality of the recorded telephone evidence. The applicant has not elaborated on this complaint or explained how the prohibition in section 9 of the 1985 Act deprived him of a fair trial. In this respect, the Court notes that the question whether or not GB consented to the interception, and thus whether or not the interception was lawful under section 1 of the 1985 Act, was immaterial to the issue whether it should be admitted in evidence at the trial. Moreover, since it is the applicant's case that he was tricked by GB into making the alleged incriminatory statements, it is difficult to see how evidence tending to show that GB had not consented to the interception of the call would have assisted his defence.

In addition, the applicant complains that the admission of the evidence about the GBP 60,000 left by him in the house in Liverpool violated his right to a fair trial under Article 6 § 1 because the mere possession of such a large amount of money in a drugs case was highly prejudicial to him.

The Court reiterates that questions of the admissibility of evidence are generally a matter for regulation under national law (see the above-mentioned Schenk judgment, loc. cit.). It does not find it established that the applicant was deprived of his right to a fair trial by the decision to admit in evidence that the applicant left a large sum of money in a house in Liverpool, particularly in view of the trial judge's summing-up, which *inter alia* reminded the jury of the defence's explanations with regard to the money.

It follows that the matters complained of cannot be seen to have deprived the applicant of his rights under Article 6 of the Convention, and that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It must therefore be rejected in accordance with Article 35 § 4.

3. Finally, the applicant complains that the judge's decision to allow the prosecution to rely on the previously undisclosed statement of HB breached his right to a fair trial and to adequate time and facilities for the preparation of his defence under Article 6 §§ 1 and 3 (b).

The Court observes that this complaint was not raised before the Court of Appeal. This part of the application must, therefore, be declared inadmissible for failure to exhaust domestic remedies, in accordance with Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

S. Dollé
Registrar

J-P. Costa
President