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. 38330/97
by David GARNER
against the United Kingdom

The European Court of Human Rights (Third Section) sitting on 26 January 1999 as a Chamber composed of

Mr J-P. Costa, *President*,
Sir Nicolas Bratza,
Mr L. Loucaides,
Mr P. Kūris,
Mr W. Fuhrmann,
Mrs H.S. Greve,
Mr K. Traja,

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 7 January 1997 by David GARNER against the United Kingdom and registered on 27 October 1997 under file no. 38330/97;

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 citizen born in 1953 and resident in Saffron Walden, Essex, England.

The facts, as submitted by the applicant, may be summarised as follows :

A. The particular circumstances of the case.

The applicant was a solicitor who practised on his own account between 1984-1993 undertaking principally property transactions and residential conveyancing matters. He was instructed by Mr. Weekes between 1984 - 1989 to act upon the sale and purchase of various properties. The purchases were financed by mortgages and the applicant was also instructed by the lending institutions (including Building Societies) to ensure that all legal formalities were complied with.

On 9 September 1993, following a jury trial, the applicant was convicted of conspiracy to obtain property by deception contrary to s.1(1) of the Criminal Law Act 1977. He was sentenced to two years' imprisonment.

The indictment so far as it is relevant stated as follows:

" STATEMENT OF OFFENCE

Conspiracy to obtain property by Deception, contrary to s1(1) of the Criminal Law Act 1977

PARTICULARS OF THE OFFENCE

<The applicant> between 1st January 1986 and 30th September 1989 conspired with <Mr. Weekes> and others dishonestly to obtain mortgage advances from Building Societies and other lending institutions by deception, namely by false pretences of the following kinds:

1. That the mortgage applicants intended personally to occupy the properties which they were proposing to purchase.
2. The mortgage applicants did not intend to let the properties once they had purchased them....."

At the date of the trial, Mr. Weekes had died although a witness statement was taken from him before he died by a solicitor, in which Mr. Weekes admitted his own dishonesty but which was favourable to the applicant. The contents of the statement were confirmed by the solicitor at the trial. The applicant was in receipt of legal aid.

The applicant appealed against his conviction and sentence. The applicant alleged fundamental omissions in the presentation of his defence at his original trial including the fact that no defence experts or witnesses were called other than the applicant himself.

On 20 December 1996, the Court of Appeal dismissed the applicant's appeal and with it the applicant's request to call further evidence at the appeal. In respect of the latter, the

applicant sought to introduce evidence from a solicitor (Mr. Sharpe) experienced in advising on cases of mortgage fraud. The Court of Appeal noted that this evidence was directed at points on professional practice which had not been made by the "experienced advocate representing the <applicant> at his trial". It found that a good deal of that evidence would not have been admissible in any event and the evidence if called would not afford any grounds for allowing the appeal as the points made were :

> "no more than peripheral to the main issue in the case...the essential issue in this case, as it emerged from the evidence of the <applicant>....was simply whether or not <the applicant> knew what <Mr. Weekes> was doing.
>
> ....<the applicant> was denying that he had knowledge of what <Mr. Weekes> was doing. The assessment of that depended upon the assessment of <the applicant's> own evidence as to what he knew or deduced from the files and, in those cases where it was plain that he had actually signed a document which should have put him on notice, whether the jury believed his assertion that he had not read the document concerned.
>
> For all these reasons, we refuse the application to adduce the evidence of Mr. Sharpe."

Counsel for the prosecution at the appeal hearing conceded that following the decision of the House of Lords in R v. Preddy [1996] 3AER 483 the applicant's conviction under the 1977 Act could not stand. The House of Lords had held in that case that where, by deception, a defendant obtained a mortgage advance, whether made by telegraphic transfer or by cheque, a charge under s.15 of the Theft Act 1968 (obtaining property by deception) was not sustainable. The reason being that the debt was not a debt which had ever belonged to "another" as required by s.15 (see below). The Court of Appeal, pursuant to s.3 of the Criminal Appeal Act 1968, substituted the applicant's conviction of a statutory conspiracy to obtain property by deception with a conviction of conspiracy to defraud under s.12(1) of the Criminal Justice Act 1987. Counsel for the defence (ie. for the applicant) made submissions in respect of the proposed substitution. In its judgment, the Court of Appeal examined these objections. However, it rejected the defence counsel's submission that the jury could in theory have found the applicant guilty of conspiracy solely in respect of acts committed prior to the operation of the 1987 Act (and therefore outside the remit of that Act). The Court stated :

> "Further, whether the jury could on the indictment have found the defendant guilty of some other offence, turns upon s.6 of the Criminal Law Act 1967....
>
> <Counsel for the prosecution> argues that...<the indictment> ... impliedly amounts to or includes an allegation of conspiracy to defraud. Despite the fact that the statement of offence expressly refers to a conspiracy contrary to s.1(1) of the Criminal Law Act 1977, the particulars of offence charged are as apt to a conspiracy to defraud as to a conspiracy to obtain property by deception, the intended fraud being the intention dishonestly to obtain mortgage advances by the means thereafter enumerated, which call for no variation whichever offence be charged....
>
> Indeed <Counsel for the prosecution> submits that the jury must have been satisfied of facts proving <the applicant> guilty of conspiracy to defraud, given that they were satisfied on the facts before them, and upon identical issues as to knowledge and dishonesty, that <the applicant> knew that the mortgage advances were being obtained by deception.

It seems to us plain that those submissions are correct.

It seems plain to us that this was a case where the allegations in the indictment included an allegation of another offence namely, conspiracy to defraud between 20th July 1987 and 30th September 1989. The question of whether or not a verdict of guilty of that offence between those dates may be properly substituted, seems to us to depend upon the facts of the case and the nature of the evidence on which the jury convicted.

We see no possible prejudice or unfairness to <the applicant> if....we substitute a verdict of conspiring to defraud.....”

On 17 January 1997, counsel advised the applicant that there were no grounds of appeal to the House of Lords.

B. Relevant domestic law and practice

Section 15 of the Theft Act 1968 provides:

“(1) A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, shall on conviction on indictment be liable to imprisonment for a term not exceeding ten years.
(2) For the purposes of this section a person is to be treated as obtaining property if he obtains ownership, possession or control of it, and 'obtain' includes obtaining for another or enabling another to obtain or retain.....
(4)For the purposes of this section 'deception' means any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person.”

Section 1(1) of the Criminal Law Act 1977 provides:

“...If a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either -
a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or
b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible,
he is guilty of conspiracy to commit the offence or offences in question.”

The Criminal Law Act 1977 preserved the offence of conspiracy to defraud at common law until the passing of the Criminal Justice Act 1987. Section 12(1) of this Act says:

“If-

(a) a person agrees with any other person or persons that a course of conduct shall be pursued; and
(b) that course of conduct will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement if the agreement is carried out in accordance with their intentions,

the fact that it will do so shall not preclude a charge of conspiracy to defraud being brought against any of them in respect of the agreement."

Section 3 of the Criminal Appeal Act 1968 provides :

" (1) This section applies on an appeal against conviction where the appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Appeal that the jury must have been satisfied of the facts which proved him guilty of the other offence.

(2) The Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of the other offence, and pass such sentence in substitution for the sentence passed at the trial as may be authorised by law for the other offence, not being a sentence of greater severity."

Section 6(3) of the Criminal Law Act 1967 provides :

"Where, on a person's trial on indictment for any offence except treason or murder, the jury find him not guilty of the offence specifically charged in the indictment, but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence..., the jury may find him guilty of that other offence or of an offence which he could be found guilty on an indictment specifically charging that other offence."

COMPLAINTS

The applicant complains about his trial and appeal, invoking Article 6. In particular he complains about the failure of his legal representatives to call expert evidence on his behalf or to properly cross-examine prosecution witnesses and about the death of an allegedly key-witness 18 months before the trial. Under Article 6 § 3(a) the applicant complains that the Court of Appeal substituted the conviction of conspiracy to defraud with conspiracy to obtain property by deception which meant that he was never effectively informed of the charge against him. In respect of Article 7, he alleges that he was found guilty of conduct which was not criminal and which disclosed a breach of civil obligations and even then only in certain limited circumstances.

THE LAW

1. Article 6 of the Convention.

Article 6 so far as it is relevant provides :

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law....

3. Everyone charged with a criminal offence has the following minimum rights:

> a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;...
>
> c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> 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;"

a) Alleged breach of Article 6 § 3(c).

The applicant alleges that his defence lawyers failed to defend him properly at his trial at first instance in that they failed to call any expert witnesses on his behalf or properly to cross-examine witnesses against him. He submits that the State was notified of his complaints about the incompetence of his defence team when he appealed and that the State had a responsibility to ensure his lawyers were competent.

The Court recalls that lawyers are not State employees and cannot therefore directly engage the responsibility of the State under the Convention by their actions. Further the Court has stated (Eur. Court HR, Artico v. Italy judgment of May 13 1980, Series A no. 37, p. 18, § 36):

> "..a state cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes...."

Further, the Court has also stated (Eur. Court HR, Kamasinski v. Austria judgment of 19 December 1989, Series A no. 168, p. 33, § 65):

> "It follows from the independence of the legal profession from the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legally aided scheme or be privately financed."

However, there may be occasions where the State may be required to act and may not remain passive when problems with legal representation are brought to the attention of the relevant authorities. It will depend on the circumstances of the case whether the relevant authorities should act (see Eur. Court HR Daud v. Portugal judgment of 21 April 1998, Reports 1998-II, p.751, §§ 40-42) and whether, taking the proceedings as a whole, the defence can be regarded as "practical and effective" as required by Article 6 § 3 (c) (see eg. Eur. Court HR, Artico v. Italy judgment of 13 May 1980, Series A no. 37 p. 16, § 33 and Goddi v. Italy judgment of 9 April 1984, Series A no. 76, p. 11, § 27).

In the present case, the Court would observe that it appears that the decision of the defence team as to the type of evidence to be presented was a tactical one, based on the assessment, shared by the Court of Appeal, that as it was the honesty or state of knowledge of the applicant which was in issue it was his evidence which was the most crucial. The Court of Appeal considered whether further evidence should be allowed at the appeal but found the content of the new evidence to be peripheral to the issues in the case. The Court also notes

that the Court of Appeal made a reference to the "experienced advocate representing <the applicant> at trial and found no grounds for criticism. The Court finds, in the circumstances, no indication that the applicant's defence was not "practical and effective" as required by Article 6 § 3 (c) (see the Artico judgment of 13 May 1980, Series A no. 37 p. 16, § 33 and the Goddi v. Italy judgment of 9 April 1984, Series A no. 76, p. 11, § 27).

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

b) Alleged breach of Article 6 § 3(d)

The applicant also complains about the death of an allegedly key witness, Mr Weekes, 18 months before his trial, which deprived him of the opportunity to have him cross-examined. While the applicant has invoked Article 6 § 3(c) of the Convention, the Court considers that this more appropriately falls to be considered under Article 6 § 3(d) in light of the key principle of fairness enshrined under Article 6 § 1 (see eg. Eur. Court HR, Kamasinski judgment, op. cit., pp. 31-32, § 62).

There is however no indication that the State had any responsibility for the death of the witness (see Ferrantelli and Santangelo v. Italy judgment of 7 August 1996, Reports 1996-III, p. 950, §§ 51-52). The Court notes that evidence of the nature of the statement made by the deceased witness, which was favourable to the applicant, was admitted in evidence in the proceedings in any event. The Court is not persuaded in these circumstances that the inability of the applicant to have questions put to Mr Weekes deprived him of the opportunity of receiving a fair trial as guaranteed under Article 6 § 1 of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

c) Alleged breach of Article 6 § 3(a)

The applicant complains that the Court of Appeal substituted his conviction which meant that he was not effectively informed of the charge against him.

The Court notes that the substitution of the conviction of conspiracy to defraud reflected a House of Lords judgment as to the legal classification of mortgage frauds. The substituted conviction was based on the identical facts and misconduct as the original conviction. Since the material facts remained the same, the Court does not consider that the applicant can claim to be unaware of the nature and cause of action against him (see eg. Eur. Court HR, De Salvador Torres v. Spain judgment of October 24 1996, Reports 1996-V, p.1587, § 33).

The Court also finds that there is no indication that the applicant's ability to defend himself or to prepare himself against the allegations was affected in any way. The defence counsel at the appeal had the opportunity to argue why an amended conviction was not appropriate.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

2. Article 7 of the Convention

Article 7 § 1 provides :

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

The applicant complains that the substituted conviction means that he was never effectively informed of the charges against him. He also states that subsequent cases have shown that solicitors only have civil obligations to lending institutions in limited circumstances. He argues therefore that his conduct cannot be regarded as criminal if there is no civil obligation and where there is a civil obligation a breach is not automatically criminal.

The Court has stated that (Eur. Court HR, S.W. v. the United Kingdom judgment of 22 November 1995, Series A no. 335-B, p.42, § 36):

> "Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen."

The Court notes that the Court of Appeal found that the acts committed by the applicant were criminal and the essence of the two offences (that on which he was convicted at first instance and that substituted on appeal) was the same. The Court observes that the crime for which the applicant was convicted existed at the time of the conduct in question and that the Court of Appeal found that it fell within the ingredients of the offence. The Court finds that it was reasonably foreseeable that the conviction would be changed when applied to this particular case as the same facts and jury's findings formed the requisite elements of the substituted offence. Further, the Court recalls that there is no provision in the Convention which imposes any link between a breach of civil obligations and criminal offences.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

S. Dollé
Registrar

J. P. Costa
President