CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 38081/97
by Jeremy J. A. HOWARTH
against the United Kingdom

The European Court of Human Rights (Fourth Section) sitting on 14 September 1999 as a Chamber composed of

Mr M. Pellonpää, *President*,
Sir Nicolas Bratza,
Mr G. Ress,
Mr I. Cabral Barreto,
Mr V. Butkevych,
Mrs N. Vajić,
Mr J. Hedigan, *Judges*,

with Mr V. Berger, *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 17 September 1997 by Jeremy J.A. Howarth against the United Kingdom and registered on 7 October 1997 under file no. 38081/97;

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

Having regard to the observations submitted by the respondent Government on 1 October 1998 and the observations in reply submitted by the applicant on 14 December 1998;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen, born in 1945. He is represented before the Court by Mr B. Spiro, solicitor, of Messrs Simons, Muirhead and Burton, London. The facts of the case, as submitted by the parties, may be summarised as follows.

A. Particular circumstances of the case

On 17 March 1993 the applicant was interviewed by officers of the Serious Fraud Office in connection with allegations of market rigging, theft and false accounting, alleged to have taken place in the course of the takeover of one company by the company in which the applicant, a chartered accountant, was involved.

The applicant was further interviewed on 27 April 1993 and 21 June 1993, and was formally charged on 30 July 1993.

The applicant's trial began in October 1994 and on 10 February 1995, after a trial lasting 63 days, the applicant was convicted of conspiracy to defraud and four counts of theft. The proceedings were adjourned for pre-sentence reports, and on 10 March 1995 the applicant was ordered to perform 220 hours community service. He was also ordered to pay compensation of ,151,042.36 within two years, with 12 months' imprisonment in default, and was further ordered to pay ,20,000.00 towards prosecution costs.

The applicant made a notice of appeal against conviction on 11 March 1995, and on 5 April 1995, the Attorney General made a reference to the Court of Appeal under Section 36 of the Criminal Justice Act 1988. In May 1995, legal aid was refused on financial grounds.

On 20 September 1995 the applicant, privately represented, submitted perfected grounds of appeal and his response to the reference. Leave to appeal against conviction was granted on 20 December 1995. A request for the legal aid position to be reconsidered was refused by a single judge in March 1996.

In October 1996, after a summary of the case had been prepared by the Criminal Appeal Office, the case was sent to the Listing Office, and on 20 January 1997 the hearing dates were fixed with counsel's clerks.

On 29 January 1997 the Attorney General served an amended Section 36 reference.

The applicant's appeal against conviction was dismissed by the Court of Appeal on 20 March 1997, and on 21 March, the Attorney General's reference was heard by the Court of Appeal. The Court of Appeal found as follows:

> "We grant leave in respect of each of these applications, as we consider the sentence imposed by Judge Mota Singh in respect of each of the defendants was unduly lenient. (...)
>
> Much has been said about the delay in this case. It does indeed seem a very long time. But it has to be borne in mind that much of the delay in the hearing of these applications has resulted from the fact that two of the defendants chose, as was their right, to appeal against conviction.

> We regard conduct of the sort involved here, that is to say working to create a false market in shares in companies involved in a City takeover, and in order to influence the fate of that takeover, as a very serious matter. Not only may it lead to a fraud on shareholders, but it causes considerable damage to the reputation of the City of London, which is very important to the whole country; and damage to the confidence of the public in its institutions.
>
> We consider it very unlikely, therefore, that when such conduct comes before the courts for sentence that a Community Service Order could ever be sufficient punishment. We have no hesitation in concluding that it was inappropriate, that is to say too lenient, in respect of the conduct in this case. True no actual false market was created, but it was not for want of trying.
>
> (...)
>
> Dealing first with Mr Ward. We view him as the instigator and leader of the operation. In our judgment, the right sentence which should have been passed on him by a trial judge upon conviction, additional to compensation and the costs order, was 3 years' imprisonment. We now start by taking into account that he did serve the period of community service that he was called upon to serve, and served it well apparently. Next we deduct from the sentence what has come to be known as the 'discount for double jeopardy'. After those deductions, we arrive at a sentence, to run from today, of 2 years' imprisonment. We further disqualify him from holding a directorship of a public company for a period of 7 years from today.
>
> Turning to Mr Howarth. He was an active and powerful second in command. The right sentence in his case, we believe, would have been 30 months' imprisonment. Again we do the discounting that we did in the case of Mr Ward; and we arrive at a sentence of 20 months' imprisonment, starting from today. We disqualify him from holding a directorship in a public company for 5 years."

The compensation and costs orders remained.

B. Relevant domestic law and practice

In addition to the general regime of appeals against decisions of the Crown Court, the Attorney General may, in certain circumstances and where it appears to him that a sentence of the Crown Court has been unduly lenient, apply to the Court of Appeal for leave to refer the case to it to review the sentence. The principal relevant provisions are to be found in Section 36 of the Criminal Justice Act 1988. An application for leave must be made within 28 days of the sentence. Where the Court of Appeal grants leave, it will consider a sentence "unduly lenient" where "it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate" (Attorney General's Reference No. 4 of 1989 , Cr. App. R(S) 517). The Court of Appeal has also commented that "before this Court granted an application of this sort, it must be shown that there was some error in principle in the judge's sentence ... that in the absence of a sentence being altered by this Court, public confidence would be damaged ... the Court should only grant leave in exceptional circumstances, and not in the borderline type of case" (Attorney General's Reference No. 5 of 1989 11 Cr. App. R(S) 489).

Where a person's sentence is increased, an allowance is made to reflect the additional period of anxiety imposed on an offender awaiting a second sentencing hearing.

COMPLAINTS

The applicant alleges violation of Articles 3 and 6 of the Convention. He claims that the hearing of the Attorney General's reference and the delay of two years between the original sentence and the new sentence were unjustified. In particular, he underlines that the trial judge was in the best position to assess the sentence, that he had completed the initial sentence before the Court of Appeal dealt with the Attorney General's reference, that he had re-established himself in business by the time the new sentence (with the disqualification order) was imposed, and that over seven years elapsed between the commission of the offences and the sentence.

PROCEDURE

The application was introduced on 17 September 1997 before the European Commission of Human Rights and registered on 7 October 1997.

On 21 May 1998 the Commission decided to communicate the application to the respondent Government and to put questions on the complaint concerning the length of the proceedings.

The Government's written observations were submitted on 1 October 1998. The applicant replied on 14 December 1998.

On 1 November 1998, by operation of Article 5 § 2 of Protocol No. 11 to the Convention, the case fell to be examined by the Court in accordance with the provisions of that Protocol.

THE LAW

Referring to both Articles 3 and 6 of the Convention, the applicant complains of the length of the proceedings in question.

The Court finds no indication of treatment attaining the "minimum level of severity" at which Article 3 of the Convention becomes relevant (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, § 162). Accordingly, the Court will consider the case exclusively in connection with Article 6 of the Convention, which provides, so far as relevant, that in "the determination ... of any criminal charge ... everyone is entitled to a ... hearing within a reasonable time".

According to the applicant, the length of the proceedings is in breach of the "reasonable time requirement" laid down in Article 6 § 1 of the Convention. The Government refute the allegation.

The applicant's complaint is directed particularly at the appeal proceedings, which began on 11 March 1995 with the lodging of the applicant's notice of appeal against conviction, and ended on 21 March 1997, when the Attorney General's reference was dealt with.

In this connection, the Government note that the case was complex, both in that the context was a disputed corporate takeover battle in which the trial lasted 63 days and generated over 500 pages of transcript, and in that the case was intertwined with the cases of his co-accused, in particular the case of Michael Ward. The Government also note that the applicant's, and his co-accused's, appeals had to be dealt with before the Attorney General's reference could be determined, as had those appeals been successful, the question of the reference would have become redundant. The Government accept that, from the Attorney General's reference in April 1995 until the reference was dealt with in March 1997, the applicant was faced with the uncertainty of not knowing whether his sentence would be increased, but point out that that uncertainty was balanced by the hope that his appeal against conviction would be successful. They further point out, *inter alia*, that the applicant's uncertainty and anxiety were expressly taken into account by the Court of Appeal and served to reduce the sentence which would otherwise have been imposed; that the fact that he had already completed his community service was similarly taken into account, and that as the Court of Appeal later found the sentence to be obviously wrong, the applicant must have known that there was a real possibility of an increased sentence from the lodging of the reference at the latest.

The applicant refers to the Parliamentary debates which took place when the legislation on prosecution appeals was introduced. He underlines that the Government of the day emphasised the very short, non-extendable time-limit for an application for leave to make a reference to be made, and that they stated that the Court of Appeal, too, would want any delay to be minimal (HC Deb, 23 October 1988). The Home Office Minister had earlier agreed that it would perhaps be intolerably harsh for the recipient of a non-custodial sentence to have a custodial sentence substituted "some months later ... every effort will be made to arrange the hearings of these cases as soon as possible" (HL Deb, 26 October 1987).

The applicant does not accept that the case was particularly complex. He notes, in particular, that all the transcripts were available from the moment he lodged his notice of appeal, and all the issues raised in the grounds of appeal had been canvassed at the trial, save his criticisms of the summing up. Further, the Attorney General was able to submit his reference within 28 days.

The applicant is of the view that the appeal, and the reference, could and should have been heard within six months. He submits information from the Criminal Appeal Office which suggests that his case was the longest reference ever where the original sentence was non-custodial. He notes that it took 10 months for leave to appeal against conviction to be granted, and submits that no reasons have been given for the 19 months between the lodging of the perfected grounds of appeal in September 1995 and the appeal.

The Court considers, in the light of the parties submissions, that the case raises complex issues of law and of fact under the Convention, the determination of which should depend on an examination of the merits of the application. The Court concludes therefore that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Court, by a majority,

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

Vincent Berger
Registrar

Matti Pellonpää
President