AS TO THE ADMISSIBILITY OF

Application No. 13564/88
by P.L.
against Norway

The European Commission of Human Rights sitting in private on 8 June 1990, the following members being present:

MM. C.A. NØRGAARD, President
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 12 November 1987 by P.L. against Norway and registered on 28 January 1988 under file No. 13564/88;

Having regard to the report provided for in Rule 40 of the Rules of Procedure of the Commission;

Having regard to the observations submitted by the respondent Government on 8 December 1989 and the observations submitted in reply by the applicant on 23 February 1990;

Having deliberated;

Decides as follows:

THE FACTS

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

The applicant is a Norwegian citizen, born in 1942. He resides at Trondheim, Norway. Before the Commission the applicant is represented by Mr. Geir Hovland, a lawyer practising in Oslo, Norway.

A. The particular facts of the case

At the end of 1979 the applicant experienced problems with his telephone and a friend of his, employed by the National Telecommunications Company (Televerket), examined the matter and noticed that wires attached to the applicant's telephone line at the telephone exchange centre were leading directly to the local police station.

Due to this the applicant assumed that his telephone was being tapped and as he could see no legal basis upon which such telephone tapping could be carried out he submitted, on 13 December 1979, a complaint to the Control Committee for Security and Intelligence Service (Kontrollutvalget for overvåkings- og sikkerhetstjenesten).

On 14 January 1980 the applicant and his representative met with the Control Committee and presented the case orally. On 16 January 1980 the Control Committee informed the applicant as follows:

(Translation)

"The Control Committee has in a subsequent meeting of the 14th of this month examined your complaint. The Committee should inform you as follows:

Generally speaking the Control Committee's examination of a case as the present one includes the following:

1. The Committee should examine whether the complainant's telephone has actually been tapped by the Police Security Service.

2. If this is the case the Committee should examine whether the tapping has the required basis in a decision of the court and whether the tapping has taken place within the limits of the decision, first and foremost as regards its duration.

3. The court's decision cannot be challenged by the Control Committee. But the Committee should consider whether the surveillance of which the tapping in question is a part, falls within the tasks of the Police Security Service according to their instructions and ensure that it does not have its basis in membership of a legal political organisation or a legal political activity.

The Control Committee has examined (the applicant's) complaint in accordance with these guidelines. The Control Committee cannot explain the concrete circumstances regarding its investigation in public. The Control Committee has not found anything which can give rise to criticism of the Police Security Service."

Not satisfied with this information the applicant instituted proceedings against the Ministry of Justice in the Oslo City Court (Oslo Byrett) where he requested the Court to find that the telephone tapping was illegal. He furthermore claimed compensation amounting to a maximum of 100,000 Norwegian crowns. By judgment of 3 April 1984 the Oslo City Court found in favour of the Ministry of Justice and accordingly rejected the applicant's claim for compensation. This judgment was upheld by the Eidsivating Court of Appeal (Eidsivating Lagmannsrett) on 1 February 1985.

The applicant appealed against the latter's judgment to the Supreme Court (Høyesterett). In its judgment of 15 May 1987 the Supreme Court also found in favour of the Ministry of Justice.

In its judgment judge Hellesylt, joined by the other judges, stated inter alia:

(Translation)

"First I note that (the applicant) has tried in vain to obtain the court transcripts, if any, of the Trondheim City Court where the decision concerning telephone tapping should have been taken and he has also tried in vain to call certain other witnesses than those who were actually heard. As regards the court transcripts and the witness who is employed by the National Telecommunications Company the production of such evidence is prohibited according to Section 204 of the Code of Civil Procedure (tvistemålsloven) - the interest of national

security. The hearing of five other witnesses was rejected in accordance with Section 189 nos. 1, 2 and 3 of the Code of Civil Procedure since their statements either did not concern the case or concerned circumstances which were known or obviously had no value as evidence. ...

What makes this case special as it stands before the courts is the fact that the material which might be available in case (the applicant) has been the subject of telephone tapping by the Police Security Service, cannot be made known to the courts. Thus the courts cannot be informed whether or not (the applicant) actually has been the subject of telephone tapping. In case telephone tapping did take place the circumstances which were the cause of this are not revealed, such as the court decision. Nor is there information about what material or what considerations were otherwise the basis for the statement of the Control Committee that the case does not give rise to criticism of the Police Security Service.
...

On the basis of the Act of 1915 a Royal Decree of 19 August 1960 sets out regulations concerning postal, telegram and telephone control. According to Section 1, first paragraph a decision by a court is required for the police to effect telephone tapping. The decision concerning telephone tapping can only be taken when the interest of national security requires that such surveillance is carried out. The decision must indicate the basis for the surveillance, its object, its purpose and its duration.
...

As regards the subsequent court control the fact is, as already mentioned, that the material which could constitute the basis for an independent court control is withheld from the courts in accordance with Section 204 no. 1 of the Code of Civil Procedure. A real examination of the lawfulness of a possible telephone tapping is in these circumstances not possible. Even if no law expressly prevents or limits the courts' right to examine a case in connection with the control of the activities of the Security Service, there will only remain very little of the right to examine these matters. I add that the fact that the State in the interest of national security has the right to withhold information which constitutes the basis for a possible decision on telephone tapping, cannot lead to the conclusion that the court must find for a plaintiff as regards his allegations that the decision of surveillance is illegal unless the State proves the opposite.

The control mechanism in regard to the individual's legal security has accordingly been set up with regard to the special needs for secrecy, which is considered necessary for the Security Service to be able to function according to its purpose. I recall in this respect: the Act of 1915 and the supplementary regulations from 1960 have detailed and strict requirements as regards the situations in which telephone tapping can be carried out. Furthermore it is necessary to obtain a decision from the court before telephone tapping can take place. Here it will be considered whether the legal requirements are fulfilled and the decision must indicate the basis for the control, its object, its purpose and its duration. Thirdly one can complain to the Control Committee for Security and Intelligence Service which must in particular consider the individual's rights. The Committee must report every year to the Government about its activity. In reports to Parliament the Government inform Parliament about the activities of the Control Committee.

I add that similar systems are not unknown in other countries which could naturally be compared with Norway. I mention for example the system which is established in the Federal Republic of Germany and which the European Court of Human Rights found not to be in conflict with the Convention on Human Rights. I refer in this respect to the case of Klass and others which was decided on 6 September 1978.

(The applicant) could use and did use the possibility of complaining which is available. In a meeting with the Control Committee he submitted together with his lawyer his arguments as regards illegal telephone tapping. The Control Committee has, as appears from the Committee's answer to (the applicant), examined the case in accordance with its mandate and the right it has to obtain all available information. It has submitted a statement, not accompanied by reasons, as the Committee must do. After this I must conclude that (the applicant) has received the examination of his complaint which he may claim according to the rules in force. The courts have no basis upon which they can examine the case further."

B. Domestic law and practice

The legal basis for telephone tapping is Act No. 5 of 24 June 1915 relating to control of postal and telegraphic communications and telephone conversations. According to this Act the King in Council may issue regulations inter alia relating to control of telephone conversations when considered necessary in the interests of national security. Section 1 second paragraph of the Act contains an exhaustive list of the penal provisions which may in peacetime - subject to further conditions - give a legal basis for implementing telephone tapping. These provisions concern offences against the independence or security of the State, against the Constitution or the Head of State, against a public authority, against public order or peace, or offences which cause public danger.

In pursuance of the Act a Royal Decree of 19 August 1960 has been enacted which contains regulations concerning postal, telegram and telephone control. According to Section 1 first paragraph it is for the court to authorise telephone tapping by the police. Such a decision can be taken when there is reasoned suspicion that the person concerned will commit one of the offences listed in the Act, and only when interests of national security require that such surveillance be carried out. The decision must indicate the basis for the surveillance, its object, its purpose and its duration.

According to a Royal Decree of 25 November 1977, Section 2, the task of the Police Security Service is to prevent and counteract all offences insofar as they may involve a threat to national security. For this purpose the Police Security Service shall according to Section 4 obtain information about persons, groups and organisations which may be suspected of planning or committing such offences. However, membership in a legal political organisation or legal political activity cannot in itself form a basis for obtaining and recording information.

The Control Committee for Security and Intelligence Service was established by Royal Decree of 6 October 1972.

The Royal Decree contained the Committee's terms of reference and appointed its three members. The instructions of the Committee are now found in the Royal Decree of 22 January 1982. The substance of the Committee's terms of reference was the same when the Control Committee dealt with the applicant's complaint.

According to Section 2 of the instructions, the task of the Control Committee is exclusively that of exercising control, especially with regard to securing the legal safeguards for the individual. It

shall see to it that the activities of the Police Security Service and the Military Security Service are carried out in conformity with statutes and instructions (Section 3).

The Control Committee is composed of three members, of whom at least one member shall have qualifications equivalent to those of a Supreme Court Judge (Section 1). Since the establishment of the Committee the first two chairmen (in the periods of 1972-1984 and 1984-1988, respectively) were in fact Supreme Court judges, and the present chairman (since 1988) is a former President of the Norwegian Bar Association. The other two members have mostly been former parliamentarians. One member was a professor of law at the University of Oslo. Since 15 November 1989 the Committee has been enlarged to five members.

Under Section 4 of its instructions the Control Committee is obliged to examine any complaint submitted by an individual or organisation. It shall of its own motion take up any case or matter which it deems appropriate to deal with, particularly matters which have been the subject of public criticism.

The Committee may according to Section 3 inspect inter alia the Police Security Service's premises, archives, registers and technical installations which are of significance for the control. Such inspections may take place at the central or the local level of the Police Security Service, cf. Section 6 first paragraph. Moreover, the Committee may demand to be provided with all information necessary to carry out its controlling functions, and any member of the Police Security Service may be summoned for interrogation. In practice, the Control Committee has regularly exercised its powers in pursuance of these provisions.

After having examined a case instituted by a complainant, the Committee shall, according to Section 4 second paragraph, inform him as to the outcome of the proceedings in the form of a conclusion which does not state its reasons but which shall indicate that the complaint either does or does not give reason for criticism of the Police Security Service, as the case may be. When there is reason for criticism, a report concerning the matter that has given rise to the complaint shall at the same time be submitted to the Ministry of Justice.

The Control Committee may, according to Section 5 first paragraph, at any time submit special reports to the Minister of Justice as regards cases concerning the Police Security Service.

The Committee shall, according to Section 5, every year submit a report on its activities to the Government. The annual reports have in practice been published and included in the Government's reports to Parliament, which at regular intervals form the basis for Parliament's discussion of the activities of the Police Security Service. The Governmental reports to Parliament have also included reports from the Control Committee in pursuance of Section 4 of its instructions which have concluded that there was reason for criticism of the Police Security Service.

The fact that a complainant is not given the reasons for the Control Committee's conclusion is based on an established principle according to which the Police Security Service does not give information as to whether a person is or has been subject to surveillance measures. There are very few exceptions to this firmly established principle.

COMPLAINTS

The applicant has complained that the telephone tapping, which he alleges has taken place, is a violation of Article 8 of the Convention. He maintains that the authorities have offered no evidence to prove that the interference with his right to respect for private and family

life, his home and his correspondence was justified for any of the reasons set out in Article 8 para. 2 of the Convention.

Furthermore the applicant alleges a violation of Article 13 of the Convention in that the Supreme Court declared that the courts had no competence to look further into the matter than already done by the Control Committee. However, the Control Committee would represent no effective remedy as guaranteed by Article 13 of the Convention as this Committee offered no opportunity for him to know the facts or the legal basis for its examination.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 12 November 1987 and registered on 28 January 1988.

The Commission decided on 2 October 1989 to bring the application to the notice of the respondent Government and to invite them to submit written observations on the admissibility and merits of the application.

The Government submitted their observations on admissibility and merits on 8 December 1989 and the applicant's observations in reply were submitted on 23 February 1990.

THE LAW

1. The applicant has complained that his telephone has been tapped by the police without any justification. He invokes Article 8 (Art. 8) of the Convention which reads:

"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 Commission first notes that it has never been publicly established that the applicant's telephone was actually tapped. However, it is not necessary for the Commission to examine this specific question as the existence of laws and practices in Norway which permit and establish a system for effecting secret surveillance of his communications amounts in itself to an interference with the exercise of the applicant's rights under Article 8 (Art. 8) of the Convention, irrespective of any measure actually taken against him (cf. Eur. Court H.R., Klass and others judgment of 6 September 1978, Series A no. 28, p. 21, para. 41, and Malone judgment of 2 August 1984, Series A no. 82, p. 31, para. 64).

The issue of the present case is accordingly whether this interference was justified under the terms of Article 8 para. 2 (Art. 8-2), i.e. whether it was in accordance with the law, had a legitimate aim and was necessary in a democratic society for one or more of the aims enumerated in that paragraph.

As regards the question whether the interference was in accordance with the law the applicant has submitted that he could not be suspected of having contravened any of the relevant provisions of the Penal Code or other laws allowing the implementation of secret surveillance against him. Nor were national interests at stake. In addition the applicant maintains that the Norwegian legislation cannot be considered to be sufficiently clear.

The Government contend that any measure of secret surveillance fulfils the condition of being in accordance with the law since such measure follows from an Act which is adequately accessible and has been passed by Parliament. Furthermore they contend that the law is sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which, and the conditions on which, the public authorities are empowered to resort to secret surveillance.

As regards the above issue the Commission finds the measure of secret surveillance in Norway to be in accordance with the law within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention. The interference results from an Act passed by Parliament, i.e. Act No. 5 of 24 June 1915 relating to control of postal and telegraphic communications and of telephone conversations. Further regulations are contained in the Royal Decree of 19 August 1960 and are readily available to the public. In addition the Commission recalls that any individual measure of surveillance has to comply with the strict conditions and procedures laid down in the said legislation.

As regards the legitimate aim the Commission is satisfied that the aim of the above legislation is to safeguard national security and/or to prevent disorder or crime in pursuance of Article 8 para. 2 (Art. 8-2) of the Convention and it thus remains to consider whether the means provided for under this legislation for the achievement of these aims remain in all respects within the bounds of what is necessary in a democratic society.

In this regard the applicant has pointed out that although the decision to authorise surveillance measures must be taken by a court this cannot be considered as being a sufficient legal safeguard. It is the requesting authority alone which presents the facts upon which the decision should be taken and in such circumstances a control would be very limited. Furthermore the applicant submits that there is no duty to notify the person concerned, even after the surveillance has taken place. Such notification would enable a person subjected to an interference to take legal action in order to verify whether the measures are or were in accordance with national law and Article 8 (Art. 8) of the Convention. Such information would also give the public the opportunity of a democratic discussion and control of the political aspects. In view of these defects the Norwegian system of secret surveillances cannot, in the applicant's opinion, be accepted as being necessary in a democratic society.

The Government have submitted that the main point as regards a system of surveillance adopted by the national authorities is whether there exist adequate and effective guarantees against abuse. They maintain that the initial court control and the subsequent control by the Control Committee on the basis of the applicable legislation uphold a proper balance between the rights of the individual and those of the State. The Norwegian system of secret surveillance cannot therefore be considered to go beyond what is necessary in a democratic society within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention.

The Commission recalls that according to the case-law of the European Court of Human Rights the existence of some legislation granting powers of secret surveillance over mail and telecommunications must be accepted as being necessary in a democratic society and as to the conditions under which the system of surveillance is to be operated the domestic legislature enjoys a certain discretion (cf. notably Eur. Court H.R., Klass and others judgment, p. 23, paras. 48-49).

The Commission must be satisfied, however, that, whatever system of surveillance is adopted, there exist adequate and effective guarantees against abuse. In assessing this the Commission must examine the functioning of the system of secret surveillance established by Norway.

In this respect the Commission notes that in Norway secret telephone surveillance may only be ordered when this is considered to be necessary in the interest of national security. In time of peace it is a further condition that the person against whom the measure is directed is suspected of having committed an offence against the independence or security of the State, against the Constitution or the Head of State, against a public authority, against public order or peace, or an offence which causes public danger (cf. Section 1 of the Act No. 5 of 24 June 1915).

As regards the implementation of the measure the initial control is carried out by a court which decides whether the police should be allowed to proceed to telephone surveillance. The court examines whether all requirements have been fulfilled and its decision shall indicate the reasons, the object, the purpose and the duration of the surveillance (cf. the Royal Decree of 19 August 1960).

The Commission further recalls that the Government, after consultations with Parliament, have set up an independent Control Committee composed of three members to which complaints can be lodged, as indeed was done by the applicant. According to its instructions contained in the Royal Decree of 22 January 1982, which corresponds to the rules applicable in the present case, the Control Committee shall inform the complainant of the result of its examination in the form of a conclusion without any grounds, but indicating that the complaint either gives reason, or does not give reason for criticism of the Police Security Service. In doing this the Control Committee has at its disposal all available information concerning the concrete case. Moreover, the Control Committee shall report annually to the Government and may at any time inform the Government of specific cases. The Government also inform Parliament of the activities of the Control Committee.

When considering a system of secret telephone surveillance in relation to the Convention, the Commission finds that a balance must be sought between the individual's right to respect for his private life under Article 8 para. 1 (Art. 8-1) of the Convention and the necessity under paragraph 2 (Art. 8-2) to protect the democratic society as a whole. The very nature and logic of secret surveillance dictate that not only the surveillance itself but also the accompanying review must often be effected without the individual's knowledge. Furthermore the Commission notes that the individual is not informed, even once surveillance has ceased, but it does not find this to be incompatible with Article 8 (Art. 8) of the Convention provided that the system otherwise includes satisfactory guarantees against abuse.

As regards guarantees against abuse, the Commission recalls that Norwegian law requires that the interference by the executive authorities with an individual's rights in this regard must be authorised in advance by a court which determines the conditions for the measure, including its duration. Furthermore there is a control by the Control Committee which may request all information to be put before it in order to consider individual complaints. Finally the legislation in question contains various provisions designed to reduce the surveillance measures to an unavoidable minimum and to ensure that the surveillance is carried out in accordance with the law.

In these circumstances and having regard to its previous case-law in regard to similar legislation in other countries (see, in particular, Nos. 10439/83 etc., Dec. 10.5.85, D.R. 43 p. 34, No. 10628/83, Dec. 14.10.85, D.R. 44 p. 175 and No. 11811/85, Dec. 8.3.88, to be published in D.R.), the Commission finds that there are in the Norwegian system such adequate and effective guarantees against abuse as the European Court of Human Rights has found to be essential in any system of this kind (Klass and others judgment, p. 23,

para. 50). Consequently, there exists a proper balance between the different interests involved and the Norwegian legislature was justified to consider the interference resulting from its legislation with the exercise of the right guaranteed by Article 8 para. 1 (Art. 8-1) of the Convention as being necessary in a democratic society in the interest of national security and for the prevention of disorder or crime.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant has also alleged a breach of Article 13 (Art. 13) of the Convention which reads:

"Everyone whose rights and freedoms as set forth in this 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.

He maintains that the ordinary courts of law have no competence to examine a complaint concerning secret surveillance as shown by the judgment of the Supreme Court of 15 May 1987. Furthermore he considers that the Control Committee cannot be considered an effective remedy within the meaning of Article 13 (Art. 13) of the Convention.

The Commission finds that, in view of the particular subject-matter of the present case, the question of "effective remedies" constitutes an issue to be examined in relation to Article 8 (Art. 8) of the Convention in order to assess and evaluate the functioning of the system of secret surveillance established by Norway. Article 13 (Art. 13) requires a remedy in domestic law only in respect of a claim of a violation which can be regarded as "arguable" (cf. Eur. Court H.R., Boyle and Rice judgment of 27 April 1988, Series A no. 131, p. 23, para. 52). Having found above that the complaint under Article 8 (Art. 8) of the Convention is manifestly ill-founded, the Commission similarly considers that the applicant's claim of a violation of that Article cannot be regarded as "arguable" for the purpose of Article 13 (Art. 13) of the Convention (cf. Eur. Court H.R., Powell and Rayner judgment of 21 February 1990, Series A no. 172, para. 33). Consequently, Article 13 (Art. 13) of the Convention does not entitle the applicant to a remedy in domestic law in regard to his present complaint.

It follows that this part of the application is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)