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. 35557/03
by Thomas Victor O'CARROLL
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 15 March 2005 as a Chamber composed of:

Mr J. CASADEVALL, *President*,
Sir Nicolas BRATZA,
Mr G. BONELLO,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application lodged on 30 October 2003,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Thomas Victor O'Carroll, is a United Kingdom national, who was born in 1945 and lives in Shildon.

A. The circumstances of the case

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

The applicant was convicted at the Southwark Crown Court on 17 July 2002 of three counts of being knowingly concerned in evading the prohibition on the importation of indecent material contrary to Section 170(2)(b) of the Customs and Excise Management Act 1979. Each count related to a photograph in an album which had been part of a consignment from Qatar addressed to the applicant in the United Kingdom. The applicant had signed a form declaring that he was not bringing in prohibited material in that way. Each photograph was of a young naked child, engaging in normal outdoor activity such as playing on a beach. The questions put to the jury in respect of each count were:

> "Considering each count separately, has the prosecution made you sure that:
>
> 1. On 5 October 2001 the defendant knowingly brought into this country the photograph of the child that is the subject of the count?
>
> 2. The child is under 14 years of age?
>
> 3. The photograph is indecent?
>
> [A photograph is indecent if in your judgment in offends against recognised standards of propriety]
>
> 4. The defendant deliberately failed to disclose his possession of the photograph because he believed that it was or might be indecent?
>
> If the answers to all four questions are YES, the defendant is GUILTY. If the answer to any of the above questions is NO, the defendant is NOT GUILTY."

The applicant was sentenced to nine months' imprisonment on 9 August 2002. On 11 October 2002 a single judge granted leave to appeal against sentence as it was arguable that the sentence was too long. Leave to appeal against conviction was refused, the judge considering that the trial judge's direction to the jury had been entirely satisfactory, and that the offence was sufficiently precisely defined so as to comply with the Article 7 of the Convention. In this latter respect he referred to *Müller and Others v. Switzerland* (judgment of 24 May 1988, Series A no. 133) and the domestic decision of *R. v. Perrin* ([2002] EWCA Crim 747).

The applicant's appeal against sentence was allowed by the Court of Appeal on 26 November 2002. No alternative sentence was passed, although the applicant was still required to register as a sex offender under the Sex Offences Act 1997.

A renewed application for leave to appeal against conviction was dismissed by the Court of Appeal on 29 July 2003. The Court of Appeal noted that:

> "whereas counsel's advice and grounds of appeal are set out in fourteen paragraphs over five pages, those arguments put forward by the applicant himself extend to 94 paragraphs over 27 pages. He is a dedicated enthusiastic and well-researched apologist

for what he sees as innocent and non-exploitative pleasure in viewing photographs of juvenile nakedness. He raises many philosophical, social and artistic arguments about that which we regard as irrelevant to the two legal questions for us:

(1) Was the conduct of the trial and the summing up correct?

(2) Are the convictions safe?"

The Court of Appeal dealt with the various grounds of appeal as follows:

- The Court of Appeal did not accept that the concept of "indecent" material was too vague to allow a citizen to conduct himself in knowledge of what the law was. It recalled that the test of whether an article was indecent was an objective one, and that the quality of indecency was to be determined by looking at the article alleged to be indecent, and nothing else. To require absolute certainty in advance as to whether an article was or was not indecent would set an impossible task which could only be met in the rare case in which a second set of proceedings was brought in respect of specific material already found to have been indecent.

- As to the ground of appeal that the judge was alleged to have dealt wrongly with the "context" of the photographs in that he had suggested that that was relevant to whether the photographs were indecent, and that he misdirected the jury that visibility of genitalia was a relevant consideration in determining whether the material was indecent, the Court of Appeal referred to the questions which the judge had put to the jury, in which he had stated that a photograph was indecent if it offended "against recognized standards of propriety". As to context, the trial judge had said:

"... here what you should do is to ignore context. Forget about context. Just look at the photographs of these young children, ignoring any context, and ask yourselves the question: Are they decent or indecent? The real question is ...: Are we sure they are indecent?"

The Court of Appeal added that the extent of the display of genitalia was a factor which one could expect to be considered by the jury, and the judge's reference to it was not surprising.

- As to the ground of appeal that in using the four questions put to the jury, the judge had reduced the statutory requirement of "knowingly" being concerned in importation to a belief that the photograph was or may have been indecent, the Court of Appeal considered that the statutory requirement of "knowledge" was met by the fourth question.

- As to the ground of appeal that the applicant had been denied the right to silence because the judge had instructed the jury that they could draw adverse inferences from the fact that applicant had not given evidence, the Court of Appeal noted that the judge's direction under Section 35 of the Criminal Justice and Public Order Act 1994 had been absolutely orthodox.

The defence had asked the judge to rule in advance that if the applicant gave evidence he could not be cross-examined about a number of matters, in particular matters which would reveal his general attitude to the "philosophical, social and artistic arguments" referred to above, and which could colour the jury's determination of the fourth question. To this, the Court of Appeal replied that the judge was wise to refuse to make any such ruling, as if he had done so, he would have given *carte blanche* to the defence "to give the sort of proselytising combative assertions which we find in the grounds of appeal through the defendant's evidence"

B. Relevant domestic law

According to Section 170(2) of the Customs and Excise Management Act:

> "Without prejudice to any other provision of the Customs and Excise Acts 1979, if any person is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion –
>
> ...
>
> (b) of any prohibition or restriction for the time being in force with respect to the goods under or by virtue of any enactment;
>
> ...
>
> he shall be guilty of an offence under this section and may be arrested."

As the House of Lords found in the case of *R. v Forbes* ([2001] UKHL 40):

> "This provision extends to all cases involving the evasion or attempted evasion of a prohibition or restriction. It requires proof by the prosecutor of two things. First he must prove that the goods in question were the subject of a prohibition or restriction under or by virtue of any enactment which was in force at the time of the evasion or attempt at evasion. This is an essential element in any prosecution, but its proof in many cases is likely to be a formality. In the present case the fact that the video cassettes contained indecent photographs of children, which is prohibited indecent material, was agreed between the defendant and the prosecutor. The second thing which the prosecutor must prove is that the defendant was knowingly concerned in a fraudulent evasion or attempt at evasion of the prohibition or restriction."

A number of provisions create prohibitions on indecent photographs, including Section 1 of the Obscene Publications Act 1959 (obscene publications), Section 1 of the Protection of Children Act 1978 (indecent photographs of a child under the age of sixteen) and Section 42 of the Customs Consolidation Act 1876 (indecent photographs).

Section 35 of the Criminal Justice and Public Order Act 1994 provides, so far as relevant, as follows:

"(2) Where this subsection applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment, in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question.

(3) Where this subsection applies, the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question."

COMPLAINTS

The applicant complained under Article 7 of the Convention that domestic law is not sufficiently precise to enable an individual to know in advance whether his conduct is criminal.

He also complained under Article 6 that the trial was unfair for the same grounds as made in his appeal against conviction, that his appeal was refused in an ill-considered way, in particular that his grounds of appeal entitled "misdirection on standard of proof" and "infringement of right to silence" were not properly dealt with.

THE LAW

1. The applicant alleged a violation of Article 7 of the Convention, contending that domestic law is not sufficiently precise. Article 7 reads, so far as relevant, as follows:

"1. 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.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

The primary purpose of Article 7 is to prohibit retroactive criminal legislation and punishments. The provision also, and more generally, includes a requirement that an offence should be clearly described by law, which requirement is met "where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable"

(*Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260-A, § 52). When speaking of "law", Article 7 alludes to the same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability. In the present case, only that last aspect is in issue (see *Cantoni v. France*, judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1627, § 29).

The Court first notes that Section 170 of the Customs and Excise Act 1979 has been in force since 1 April 1979, and the incriminated acts took place on 5 October 2001. There is therefore no question of retroactivity.

The applicant's complaint, however, is that to leave the question of whether an item is or is not obscene to the jury in itself fails to comply with the "foreseeability" requirements of the Convention, because it is impossible to tell in advance whether an item will be considered as "indecent" or not.

The Court recalls that it is not possible to attain absolute rigidity in the framing of laws, particularly in fields in which the situation changes according to the prevailing views of society. The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague. Criminal law provisions on obscenity fall within this category (see *Müller and Others v. Switzerland*, judgment of 24 May 1988, Series A no. 133, § 29).

Further, a law that confers a discretion, such as the discretion conferred on a jury in determining whether matter is obscene, blasphemous or defamatory, is not in itself inconsistent with the requirements of the Convention, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference (see, for instance, *Tolstoy Miloslavsky v. the United Kingdom* judgment of 13 July 1995, Series A no. 316-B, pp. 71-72, § 37; § 31, *Wingrove v. the United Kingdom*, judgment of 25 November 1996, *Reports of Judgments and Decisions* 1996-V, § 40).

In the jury system as it applies to indecency cases in the United Kingdom, it is for the jury, as the arbiters of fact, to decide in the first place whether matter is indecent. Such a starting point is perfectly compatible with the principles set out above, and indeed the way in which the judge framed the explanation of what is indecent ("if in your judgment it offends against recognised standards of propriety") had the aim of ensuring that the "prevailing views of society" were taken into account. Moreover, the jury's discretion was not unlimited. If the applicant had wished to claim that the material was wholly innocent and that no reasonable jury, properly directed, could conclude that the material was indecent, it would have been open to

him to ask the judge so to rule, as a matter of law, or to include such a claim in his notice of appeal. He did not. The scope of the discretion allowed to the jury, and the manner of its exercise, were thus limited by the domestic law in a way which afforded the applicant adequate protection against arbitrary interference. The Court thus notes that the applicant is not suggesting that the Court should itself find that the photographs fell outside any reasonable definition of "indecent".

The Court concludes that the applicant's conviction was compatible with the requirements of Article 7 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, and must be rejected pursuant to Article 35 § 4.

2. The applicant also makes a number of complaints under Article 6. He repeats the complaints made in his grounds appeal against conviction, and complains generally about the way in which the Court of Appeal dealt with his application for leave to appeal against conviction. He also complains that that some of his grounds of appeal were not properly dealt with. Article 6 of the Convention provides, so far as relevant, as follows:

> "1. In the determination 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."

The Court recalls that, according to Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, *e.g.*, *Cekic and Others v. Croatia* (dec.), no. 15085/02, 9 October 2003). To the extent that the applicant alleges that domestic law was not properly applied, the Court is not competent to deal with the complaint.

As regards the way in which the Court of Appeal dealt with the applicant's case, the papers submitted to the Court do not disclose anything which supports the applicant's contention that the Court of Appeal's treatment of the applicant did not comply with Article 6. The Court notes that, far from limiting its consideration of the appeal to the grounds submitted by the applicant's representative, the Court of Appeal considered the applicant's own grounds and dealt with them so far as they revealed issues for determination.

As to the question of the application of Section 35 of the Criminal Justice and Public Order Act 1994, the Court recalls that the right to silence is not an absolute right. The "fact that a trial judge leaves a jury with the option of drawing an adverse inference from an accused's silence ... during his trial cannot of itself be considered incompatible with the requirements of a fair trial" (see the *Owen* decision referred to below). However, since the right to silence lies at the heart of the notion of a fair procedure under Article 6,

particular caution is needed before a domestic court may invoke an accused's silence against him. Thus it would be incompatible with the right to silence to base a conviction solely or mainly on the accused's silence or on a refusal to give evidence himself. Nevertheless, it is obvious that the right cannot and should not prevent the accused's silence, in situations which clearly call from an explanation from him, from being taken into account in assessing the persuasiveness of the evidence adduced by the prosecution (see *Owen v. the United Kingdom* (dec.) no. 37983/97, with further references to *John Murray v. the United Kingdom* (Reports of Judgments and Decisions 1996-I) and *Condron v. the United Kingdom* (judgment of 2 May 2000, no 35718/97, ECHR 2000-V)). In such circumstances Section 35 does no more than repeat a common-sense approach which the jury might in any event have adopted.

Whether the drawing of adverse inferences from an accused's silence is compatible with Article 6 depends on all the circumstances of the case (*ibid*).

Section 35 of the Criminal Justice and Public Order Act 1994 permits the drawing of adverse inferences from an accused's decision not to give evidence in the course of proceedings. The standard direction in such cases (set out in full in the Court's decision in *Owen v. the United Kingdom*) provides, in its final words "If, in your judgment, the only sensible reason for his decision not to give evidence is that he has no explanation or answer to give, or none that could have stood up to cross-examination, then it would be open to you to hold against him the failure to give evidence, that is, take it into account as some additional support of the prosecution's case. You are not bound to do so. It is for you to decide whether it is fair to do so".

In the present case, the applicant decided, on advice, that he would not give evidence in court after the trial judge had not accepted the applicant's suggestion that he was prepared to give evidence provided he could not be cross-examined about his views and attitudes. The Court of Appeal took the view that the judge's refusal to accept such a proposal was wise, as otherwise the applicant would have been able to make proselytising combative assertions without being cross-examined on them.

It is plain from the papers submitted that the prosecution put to the jury sufficient evidence – including the photographs alleged to be indecent – to form a *prima facie* case against the applicant. The trial judge made clear that the jury were to assess guilt or innocence on the basis of the evidence (for example, all the questions put to the jury were prefaced by the words "has the prosecution made you sure ..."), and any inference which the jury drew in the present case must have played a subordinate role in their decision-making.

The jury in the present case was not required to convict solely on the basis of an inference, and there is no appearance that any inference which

may have been drawn by the jury was incompatible with the fairness guarantees of Article 6 § 1 of the Convention.

It follows that this part of the application is also manifestly ill-founded within the meaning of Article 35§ 3 of the Convention, and that it must be rejected pursuant to Article 35 § 4.

For these reasons, the Court unanimously

Declares the application inadmissible.

Michael O'BOYLE
Registrar

Josep CASADEVALL
President