CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 43505/98
by Haroun Ali SALAMAN
against the United Kingdom

The European Court of Human Rights (First Section), sitting on 15 June 2000 as a Chamber composed of

Mrs E. Palm, *President*,
Mrs W. Thomassen,
Mr Gaukur Jörundsson,
Mr R. Türmen,
Mr C. Bîrsan,
Sir Nicolas Bratza,
Mr R. Maruste, *judges*,
and Mr M. O'Boyle, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 20 April 1998 and registered on 18 September 1998,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant is a British citizen born in 1956 and residing in Meopham, Kent, England.

A. The circumstances of the case

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

The applicant was appointed an executor and beneficiary under the will of the deceased B, a freemason, who died in November 1992. This professionally drawn will, dated 5 June 1991, left a large part of the estate to the applicant subject to a life interest in the residuary estate to B's brother, P. The applicant states that B told him that P was also a freemason. The Government have provided a letter from the United Grand Lodge of England stating that they had no trace of P as a member.

On 6 August 1991, B made a manuscript codicil endorsed on the back of a photocopy of the will by which he purported to revoke the will without making any other will in its place. It was purportedly witnessed by two persons present at the time. The applicant complained to the police about the codicil after B's death but the police did not find any evidence of criminal conduct.

P applied to the High Court for a declaration that the will had been validly revoked. The applicant states that he wished to produce in evidence tape recordings of a phone conversation between, amongst others, B and a friend. Although the tapes were not produced, a transcript of one tape appears in one of the police statements which was before the judge. Two of P's witnesses were freemasons. The evidence before the court made reference to B's involvement in freemasonry. In his application, the applicant alleged that P's counsel and solicitor were also freemasons. The Government have provided letters from both in which they stated that they were not, and never had been, freemasons.

On 12 December 1994, the deputy High Court judge, Mr Roger Kaye, declared that the will had been validly revoked by the codicil, ordered that letters of administration be granted to P and ordered the applicant to pay P's costs. The result of this order was that B died intestate and the entirety of his estate passed to P. The applicant had been legally represented until shortly before the trial when he dispensed with legal assistance and conducted his case in person before the judge.

P died on a date unspecified in 1995, leaving no surviving children or spouse.

The applicant appealed to the Court of Appeal, claiming *inter alia* that the evidence as to the attestation of the will was inconsistent, that the judge disallowed the admission of tapes in evidence, that P failed to disclose documents or did so at a late stage, that the judge did not explain why he made a costs order and that the judge erred in concluding that the codicil was validly executed, that B knew what he was signing and that he was not the victim of undue influence.

In its decision of 22 November 1995, the Court of Appeal (Lord Justice Rose, Lord Justice Millett and Lord Justice Thorpe) found that there were no flaws in the judge's essential findings or conclusion. Further it was noted that the applicant had not made any

formal application for the admission of the tapes in evidence but that in any event it appeared unlikely that this would have influenced the trial judge one way or the other. The Court of Appeal unanimously held that there was no substance to the appeal and made an order for costs against the applicant. On 18 December 1995, the Court of Appeal refused leave to the applicant to appeal to the House of Lords.

On 22 July 1997, the applicant petitioned the House of Lords for leave to appeal upon similar grounds. This was rejected by the House of Lords on 13 January 1998.

The applicant alleges that he subsequently learnt that the trial judge was a freemason, and received confirmation that one of the Court of Appeal judges Lord Justice Millett was also a freemason. At the time of the hearing the applicant states that there would have been no means of discovering this. A letter provided by the Government indicates that the applicant was aware of Lord Justice Millett's membership by 2 December 1996 at the latest.

In his letter dated 18 May 1999, Lord Millett (now a Law Lord in the House of Lords) did not recall being aware that either the deceased or plaintiff was a freemason but even if it was mentioned in the papers it would have made no impression on him. He pointed out that there were 1,000 lodges in the United Kingdom and over 300,000 masons, the overwhelming majority of whom were complete strangers. As masons, they shared common interests, as did those who played golf or collected stamps. They owed each other no special obligations that they did not owe to others. They acknowledged the claims of charity but beyond this the notion that masons were obligated to support each other or protect each other's property was a complete myth.

In his letter dated 24 May 1999, Roger Kaye Q.C. recalled that he was aware during the proceedings that B had been a freemason as it had received fleeting mention. He also recalled that there were references in the documents to one or two witnesses being freemasons. He was not aware that P was alleged to be a freemason. However, this aspect was never an issue of feature in the case. At no time did it appear to him to have such a bearing or connection with the case as to call for a declaration of interest.

B. Relevant domestic law and practice

Freemasonry in the United Kingdom

According to a Parliamentary Home Affairs Select Committee report (see below), freemasonry is a predominantly social organisation which plays a significant role in charitable activities, donating about £13 million per year to charitable causes. In their evidence to the Committee, the United Grand Lodge estimated their active lodge membership as 349,213.

Freemasons belong to a lodge, each lodge having on average 40 members. Lodge meetings typically consist of a social dinner and the acting out of a series of one-act plays by members. Members take an oath to abide by particular principles, including obedience to God and the law, the practice of morality and charity and basic principles of good citizenship. Members also take oaths of mutual support. In its written evidence to the Select Committee, the United Grand Lodge stated that a Freemason's duty as a citizen must always prevail over any obligation to other Freemasons.

Although in the past, freemasons adopted an attitude of secrecy, since 1984 there has been a change. Freemasonry now publishes leaflets, its rule book and year book. Nor is there any obligation on a freemason to keep his membership of the organisation secret.

Freemasonry and the judiciary

In a Memorandum from the Lord Chancellor's Department to the Home Affairs Committee entitled "Freemasonry in the Judiciary" dated December 1996 it was stated:

> "2.1. Judges ... are bound by the judicial oath which they take on appointment ...
> 2.2. In honouring this oath, a judge can be expected to have full regard to the law on disqualification on grounds of interest or bias. Recent authority on this area of the law can be found in the judgment of the House of Lords case of R v. Gough [1993] AC 646.
> 2.3. The law as elucidated in R v. Gough disqualifies a person automatically from taking a judicial decision if she or he has any pecuniary or proprietary interest in the outcome of the proceedings. Where a judge has an interest other than a pecuniary or proprietary one, the law disqualifies him or her from adjudicating in any cases where circumstances point to a "real danger"... of bias in relation to a party or an issue involved in the case, each case falling to be considered on it own facts.
> 2.4. If a judge finds that he is acquainted with, or has any other sort of relationship with, a person involved in a case or with the subject matter of the case, then the judge must consider whether the nature of the relationship would ... be such as to create a real danger of bias. This would apply to an acquaintance or relationship resulting from membership of the freemasons just as it would to any other sort of relationship. If the judge sitting decides that the relationship would be regarded as creating a real danger of bias, then the judge should disqualify himself from adjudicating on the matter ...
> 2.8. The judicial oath overrides any commitment which might be made as part of a person's membership of the freemasons, and the Lord Chancellor has no reason to believe that freemasons who take the judicial oath cannot be relied upon to honour it."

In March 1997, the Parliamentary Home Affairs Select Committee published a report entitled "Freemasonry in the Police and the Judiciary" which concluded, *inter alia*:

> "The Committee conclude that, when the oaths are read in context, there is nothing in them that would appear sinister; and nothing in the evidence we have heard that would show a conflict between the oath taken by a judge or policeman and that taken by a freemason.
>
> We do not believe that there is anything sinister about freemasonry, properly observed, and are confident that freemasonry itself does not encourage malpractice." (paragraph 32)
>
> "It is obvious that there is a great deal of unjustified paranoia about freemasonry and we have no wish to add to it ...We believe however that nothing so much undermines public confidence in public institutions as the knowledge that some public servants are members of a secret society one of whose aims is mutual self-advancement - or a column of mutual support to use the masonic phrase ... The solution is disclosure. We recommend that police officers, magistrates, judges and crown prosecutors should be required to register membership of any secret society and that the record should be

> available publicly. However, it is our firm belief that the better solution lies in the hands of freemasonry itself. By openness and disclosure, all suspicion would be removed and we would welcome the taking of such steps by the United Grand Lodge." (paragraph 56)

The Government responded to the Report by announcing on 17 February 1998 the setting up of a voluntary register. New recruits to the judiciary would be required to register their membership of the Freemasons. The Home Secretary stated that he would be requesting existing judges to join voluntary registers. The Government would address the need for legislation having regard to the extent of compliance with voluntary registers.

According to the Government's provisional figures, 96% of the professional judiciary have responded to the invitation to declare whether they were freemasons or not. Of those that responded, 5% declared themselves to be freemasons.

COMPLAINTS

The applicant complains that he did not receive a fair hearing in the determination of his civil rights by an impartial tribunal contrary to Article 6 § 1 of the Convention because:

a) B (the deceased), P, P's counsel and solicitor, the trial judge Mr Roger Kaye Q.C. and one of the Court of Appeal judges, Lord Justice Millett, were freemasons.

b) the trial judge failed to give reasons for the costs order against the applicant, the Court of Appeal failed to deal with his application for costs in their judgment and the House of Lords failed to grant leave to appeal; the trial judge allowed P's witnesses to sit in court throughout the hearing and did not deal adequately with the removal of some of the applicant's documents by P's solicitor; the trial judge was incompetent, was unreasonable in the way he assessed the evidence before him, did not deal properly with the application for certain tapes to be played and the Court of Appeal failed to deal adequately with this point.

THE LAW

The applicant complains that he did not receive a fair hearing by an impartial tribunal in the proceedings concerning B's will. He invokes Article 6 § 1 of the Convention which provides in its first sentence:

> "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."

<u>Concerning the allegations of lack of impartiality of the first instance and Court of Appeal judge</u>

The Government point out, firstly, that the applicant was aware of the fact that Lord Millett was a freemason by 2 December 1996 at the earliest. He did not raise the matter in his appeal to the House of Lords and has therefore failed to exhaust domestic remedies in this regard as required by Article 35 § 1 of the Convention. Even assuming that this was not an effective remedy, his complaint on this aspect would be out of time, as failing to comply with the six month time-limit under Article 35 § 1 of the Convention.

In any event, the Government dispute that the applicant's allegations of freemasonry links in the probate proceedings has been substantiated. They refer to the letters from P's counsel and solicitor refuting their alleged membership and also to the letter from the Grand United Lodge which shows that P was not recorded as being a member. In these circumstances, they argue that there is not only no evidence of subjective lack of impartiality on the part of the judges in his case but no appearance of an objective lack of impartiality as freemasonry was wholly peripheral to the case and could not be perceived as having any potential influence on professional judges, who were bound by their overriding judicial obligations whatever their social interests might be.

The applicant submits that while he was aware that Lord Millett was a freemason when he made submissions to the Select Committee in December 1996 this was not a matter he was sufficiently certain of to raise as a legal ground of appeal before the House of Lords. In any case, he argues that the membership of the first instance judge Mr Kaye Q.C. was of far more crucial significance in his case as it was that judge who made the findings of fact adverse to the applicant and he was not aware of that fact until after the House of Lords decision in the case.

The applicant submits that the letter from the Grand United Lodge is not conclusive of P's membership as P had lived abroad and could have joined an overseas lodge. Also the Lodge's records were not reliable, as he had been told by the deceased that P was a freemason. Furthermore, it was clear from the proceedings that two of P's witnesses were freemasons and he claims that a freemason judge should not hear evidence from freemason witnesses without declaring his interest. The freemason's oaths of loyalty and protection of family property meant that anyone looking at his case would have the gravest misgivings about the impartiality of the tribunals involved. He alleges that the recent history of miscarriages of justice in England shows abuses can exist even where superficially the cases may look in order. Both judges, Mr Kaye and Lord Millett, should in his opinion have declared their interests and stood down and their failure to do so deprived him of a fair hearing by an impartial tribunal. He also submits that the United Kingdom have failed to set up a proper system to stop freemason judges from hearing cases where freemasons were involved and refers to the secretive, pervasive nature of freemasonry which has a corrupting and abusive influence.

The Court observes that the applicant knew of Lord Millett's membership of the freemasons by 2 December 1996 and that he did not include it his grounds of appeal to the House of Lords. It is not persuaded by the applicant's argument that he was not sufficiently sure of this fact to raise it in legal proceedings. It finds that the applicant has in this regard failed to exhaust domestic remedies in this respect and that this aspect of his complaints must therefore be rejected pursuant to Article 37 §§ 1 and 4 of the Convention.

As regards the applicant's complaints that the first instance judge Mr Roger Kaye Q.C. was lacking in impartiality, the Court recalls that there are two aspects to the requirement of impartiality in Article 6 § 1. First, the tribunal must be subjectively impartial, that is, no member of the tribunal should hold any personal prejudice or bias. Personal impartiality is presumed unless there is evidence to the contrary. Secondly, the tribunal must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect (see, inter alia, the Fey v. Austria judgment of 24 February 1993, Series A no. 255, p. 12, § 28).

As to the subjective test, the Court notes that the applicant does not claim that the judge was in fact motivated by any improper personal considerations, submitting principally that there is an objective appearance of bias.

Under the objective test, it must be determined whether, quite apart from the judges' personal conduct, there are ascertainable facts which may raise doubts as to their impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to the proceedings (*ibid*., § 30). However, the view taken by the applicant with regard to the impartiality of a tribunal judge cannot be regarded as conclusive. What is decisive is whether his doubts can be objectively justified (see for example, the Remli v. France judgment of 23 April 1996, *Reports* 1996-II, p. 574, § 46).

In the present case, the Court notes that it is undisputed that the judge and the deceased whose will was being disputed in the proceedings were both freemasons. It also appears that two witnesses for the other party in the case were freemasons, and that this fact was mentioned in passing during the evidence. It is however less clear whether P, the opposing party, was himself a freemason. The only evidence for that proposition is the applicant's contention that the deceased told him so. The Court finds it unnecessary however to determine this issue, as whether or not P was a freemason, there is no evidence before the Court to indicate that the judge was aware that P was a freemason. Nor is it satisfied that there was any element in the case which rendered the judge's membership of freemasonry of relevance to the issues to be decided. In these circumstances therefore, there was no objective element present which would give rise to any appearance of the risk of bias. The Court does not consider that the mere fact the deceased was known to be a freemason or that witnesses were mentioned as being freemasons gave rise in itself to a conflict of interest which should have alerted the judge to a necessity to declare his own membership or to withdraw from the case.

The Court notes that the applicant disputes that the freemasonry can be considered a benign social influence and refers to popularly-held suspicions that freemasonry has a secretive, pervasive and corrupting aspect which he states is incompatible with judicial functions. However, having regard to the position taken by the Lord Chancellor's Department and the findings of the Home Affairs Select Committee which held hearings concerning the issues, the Court does not consider that it has been shown that membership of a judge per se in the freemasons in the United Kingdom raises doubts as to his impartiality where a witness or party in a case is also a freemason. There is no reason to doubt in particular that a judge would regard his oath on taking judicial office as taking precedence over any other social commitments or obligations. Whether or not a problem could arise, for example, due to a judge's personal acquaintance with a fellow freemason or due to the interests of a freemason institution being in issue in a case would depend on the circumstances of the case. There is no indication that the requirement under domestic law for a judge to withdraw where he has a pecuniary or proprietary interest in the outcome of the proceedings or where other factors point to a " 'real danger'… of bias in relation to a party or an issue involved in the case" does not meet the requirements of Article 6 § 1 of the Convention in respect of the impartiality of the tribunal determining civil rights and obligations.

Accordingly, the Court finds that the applicant was not deprived of a hearing before an impartial tribunal and that this complaint must be rejected as manifestly ill-founded pursuant to Article 35 §§ 4 and 4 of the Convention.

Concerning the remaining allegations

Insofar as the applicant raises complaints about the way in which the first instance and appellate courts handled his case, the Court finds, having examined the parties' submissions, that his complaints disclose no matters of substance. In particular, it observes that, though the tapes that the applicant wished to rely on were not heard in court, a transcript was before the judge. There is no indication that the costs procedure disclosed any arbitrary or unfair elements, having regard to the general rule in such proceedings that costs follow the event unless there are special reasons. Furthermore, insofar as the applicant complains of the decisions reached by the courts in his case, the Court emphasises that it is not its role to act as court of appeal from the findings of domestic courts, or to substitute its own opinion on the merits.

The Court concludes that the applicant's complaints in this respect disclose no appearance of a violation of Article 6 of the Convention in this case, and must accordingly be rejected as manifestly ill-founded as whole, pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Michael O'Boyle
Registrar

Elisabeth Palm
President