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. 15227/03
by Isidore Jack LYONS and Others
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 8 July 2003 as a Chamber composed of

Mr M. PELLONPÄÄ, *President*,
Sir Nicolas BRATZA,
Mrs V. STRÁŽNICKÁ,
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 April 2003,

Having deliberated, decides as follows:

THE FACTS

The applicants, Mr Isidore Jack Lyons, Mr Gerald Maurice Ronson and Mr Anthony Keith Parnes are United Kingdom nationals, who were born in 1916, 1939 and 1945 respectively. The first applicant lives in Switzerland. The second and third applicants live in London. The applicants are represented before the Court by Stephenson Harwood, Solicitors, London.

A. The circumstances of the case

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

In its judgment (*Merits*) of 19 September 2000 in the case of *IJL, GMR and AKP v. the United Kingdom* (nos. 29522/95, 30056/96 and 30574/96), the Court found that the respondent Government had breached the applicants' right to a fair hearing since a significant part of the prosecution case against them consisted of the transcripts of the interviews they gave to Department of Trade and Industry Inspectors ("the Inspectors") under statutory compulsion. These interviews were conducted during an investigation into the applicants' alleged dishonest conduct in the context of a share support operation in the course of a take-over bid in 1986. The statutory basis for requiring the applicants to reply to the Inspectors' questions was contained in section 434 of the Companies Act 1985.

The Court noted in its judgment that the transcripts of the applicants' interviews were read out to the jury by the prosecution over a three-day period and were used in a manner intended to incriminate the applicants. The Court concluded that, in the circumstances, there had been an infringement of the right not to incriminate oneself and thus a breach of Article 6 § 1 of the Convention (see §§ 82 and 83 of the judgment and point 1 of the operative provisions).

The Court rejected the applicants' claim for pecuniary loss on the ground that it could not speculate as to the question whether the outcome of their trial would have been any different had use not been made of the transcripts (§ 146 and point 6 of the operative provisions).

On 14 April 2000 an amendment was made to section 434 of the Companies Act 1985 via the enactment of the Youth Justice and Criminal Evidence Act 1999. The amended provisions came into force pursuant to SI No. 1039/1999. As a result of that amendment, the prosecution can no longer use in evidence as part of its case or in cross-examination answers obtained under compulsory powers.

Following the Court's judgment the applicants succeeded in having their cases referred back to the Court of Appeal by the Criminal Cases Review Commission ("CCRC") under section 9 of the Criminal Appeal Act 1995. The CCRC reasoned its reference decision as follows:

> "If [the applicants'] replies to the compulsory interviews had been excluded from evidence, the jury would have been presented with a substantially different case to consider. The use of those interviews by the Crown had been identified by the European Court of Human Rights as having given rise to unfairness in the trial. The developments which have taken place since [the applicants'] previous appeal suggest to the Commission that there is a real possibility that the Court might now regard the unfairness identified by the ECHR as a shortcoming of such gravity that doubt is cast on the safety of the conviction."

In the proceedings before the Court of Appeal the applicants contended that retrospective effect should be given to the Human Rights Act 1998 ("HRA") so as to allow them to base a challenge to the fairness of their trial on Convention grounds, notwithstanding that their trial took place many years before its coming into force (20 October 2000). The Court of Appeal considered that the applicants' argument was excluded in the light of the House of Lords decision in *R. v. Lambert* ([2001] 3 WLR 206). In that decision, which was later criticised but confirmed by the House of Lords in the case of *R. v. Kansal* ([2002] 2 AC 69), the House of Lords ruled that the HRA did not enable an applicant to rely, during the course of a hearing held after the date on which the Act came into force, on a breach of a Convention right which had occurred during a trial that had concluded before that date.

The applicants also contended that the Court of Appeal was required to recognise and give effect to the judgment of 19 September 2000 as a consequence of the United Kingdom's obligations under Article 46 of the Convention to abide by that judgment and to afford *restitutio in integrum* for the breach identified by the European Court of Human Rights. In concrete terms, that meant conducting a reconsideration of the safety of the applicants' conviction without reliance on the evidence which the European Court found to have been admitted in breach of Article 6 of the Convention. The applicants relied on, among other materials, Recommendation No. R(2000)2 of the Committee of Ministers on the re-examination or re-opening of certain cases at domestic level following judgments of the European Court of Human Rights.

In giving the judgment of the Court, the Vice-President, Lord Justice Rose, observed that during the course of argument, the court had indicated that:

> "... we concluded that the compelled answers should not have been admitted in evidence, or if we concluded that we were bound to give effect to the Strasbourg Court's decision that the trial was unfair by examining anew the safety of the convictions, we would not uphold the convictions on the basis that they are unsafe in any event."

Lord Justice Rose further stated:

> "In our judgment, the State's obligation under Article 46 to abide by the judgments of the ECtHR does not confer any right on these appellants. In any event, we doubt whether Article 46 requires the re-opening of convictions. This is not expressly or implicitly required by Article 46 and there is nothing in the Strasbourg jurisprudence to suggest that there is any such obligation. It is to be noted that the ECtHR made a declaration of violation in relation to each of these appellants. That declaration can be, and is regarded by the ECtHR as amounting to, sufficient just satisfaction. That court could have awarded damages but did not do so. It made an award of costs which the United Kingdom has paid in fulfilment of the judgment of the court. There is no suggestion in the ECtHR's judgments that that court regarded the remedy of declaration and costs as insufficient, irrespective of what might or might not occur domestically. This is so even though the English courts (whatever may have been the position in other countries) have not, before the HRA, re-opened convictions solely

because of a Strasbourg finding of unfairness. Assuming, at the highest from the appellants' point of view, that the Strasbourg findings entitle them to have their convictions re-opened by this court, that would simply mean, in view of the other evidence against them, that their convictions would be quashed and a retrial ordered. This is not a case in which, in relation to any appellant, the prosecution case was dependent solely on the compelled answers: there was and is substantial other evidence against each of them. It may be, given the lapse of time in this case and other considerations, that a retrial would not, as a matter of discretion, be ordered – indeed we so indicated during the hearing. That does not detract from the point that in principle in a case such as the present where what is complained of is the use of compelled evidence but there exists other evidence on the basis of which a jury might equally have convicted, restitutio in integrum would be achieved by the ordering of a retrial. Merely to quash a conviction would in such a situation put an appellant, at any rate so far as concerns jeopardy of a conviction, in a superior position to that in which he had been before his trial. Perhaps what this discussion demonstrates is that, in relation to convictions properly secured years ago, the concept of restoring as far as possible the situation existing before the breach is somewhat elusive, the more so when the challenge is to the use of some but not all of the material deployed at trial.

However, and determinatively, even if the failure to re-open the appellants' convictions might give rise to violation of Article 46, domestic law precludes reliance on any such violation in the circumstances of this case. The fact of violation could not have led to the exclusion of the answers at the trial, applying the approach available under domestic law at the time, because this would have amounted to partial repeal of legislation enacted by Parliament which authorised the use of the evidence (...). The same conclusion results from s6(2) of the HRA which preserves the lawfulness of the conduct of the prosecution and trial judge in relation to the admission of the DTI answers. Put another way, the will of Parliament as expressed in s434 trumps any international obligation."

On 21 December 2001 the Court of Appeal dismissed the applicants' appeals. The applicants sought leave to appeal.

On 11 February 2002 the Court of Appeal certified that the applicants' appeal raised a point of law of general importance, namely:

"Where the Court of Appeal (Criminal Division) is called upon to determine the safety of a criminal conviction following a finding by the European Court of Human Rights that the use made at trial before 2 October 2000 of evidence obtained under powers of statutory compulsion in section 434 of the Companies Act 1985 rendered the appellant's trial unfair and in breach of Article 6 of the European Convention on Human Rights

(a) is the Crown entitled to rely after 2 October 2000 upon the evidence the use of which was held to have rendered the trial unfair in order to support the safety of the conviction; and

(b) is the Court entitled to hold the conviction safe in reliance on such evidence;

notwithstanding the United Kingdom's obligation under Article 46 of the European Convention to abide by the judgment of the European Court, and the principle of judicial comity governing the recognition and enforcement of a judgment of an international tribunal which is final and binding as between the parties to the appeal?"

On 19 March 2002, the House of Lords granted leave to appeal.

In addition to the arguments deployed before the Court of Appeal, the applicants also relied on the relevant principles of international law in the matter of reparation for internationally wrongful acts.

The applicants' appeal was dismissed on 14 November 2002.

The House of Lords held that the Court of Appeal was entitled to hold the applicants' convictions as safe since the Court of Appeal was obliged to examine the question of safety according to the law as it stood at the time of the applicants' trial, and at that time section 434 of the Companies Act 1985 permitted the admission in evidence of statements which the applicants were obliged to give to the Inspectors. Parliament had since amended that Act to bring it into line with the European Court's judgment. However that amendment did not apply with retrospective effect. Accordingly, the House of Lords considered itself bound by the principle of parliamentary sovereignty to respect the legislative intention of Parliament as it stood at the date of the applicants' trial. The applicants had not had an unfair trial and there was no lack of safety in their conviction.

As to the effect of Article 46 of the Convention, and the obligation of the United Kingdom to make reparation for the breach of Article 6 in the form of *restitutio in integrum,* Lord Bingham stated:

> In the circumstances, I think it neither necessary nor desirable, despite the wealth of interesting material to which we were referred, to consider what full reparation or just satisfaction might require in a case such as the present in which (if the compelled evidence were excluded) the existing convictions could not be upheld as safe, in which there is material (irrespective of the compelled evidence) to support a case against the appellants, but in which the Court of Appeal has indicated (no doubt rightly, in view of the lapse of time, the serving or partial serving of prison sentences and the age and health of some of the appellants) that the interests of justice would not appear to require a retrial even if the appeals were allowed (see section 7(1) of the Criminal Appeal Act 1968). These are no doubt questions which the European Court or the Committee of Ministers, or both, may be called upon to address and I forbear to comment.

B. Relevant materials

Recommendation No. R (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights[1]

[1] Considering that the quasi-judicial functions of the Committee of Ministers under the former Article 32 of the Convention will cease in the near future, no mention of the Committee of Ministers' decisions is made. It is understood, however, that should certain cases still be under examination when the recommendation is adopted, the principles of this recommendation will also apply to such cases.

(Adopted by the Committee of Ministers
on 19 January 2000
at the 694th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to bring about a closer union between its members;

Having regard to the Convention for the protection of Human Rights and Fundamental Freedoms (hereinafter "the Convention");

Noting that under Article 46 of the Convention on Human Rights and Fundamental Freedoms ("the Convention") the Contracting Parties have accepted the obligation to abide by the final judgment of the European Court of Human Rights ("the Court") in any case to which they are parties and that the Committee of Ministers shall supervise its execution;

Bearing in mind that in certain circumstances the above-mentioned obligation may entail the adoption of measures, other than just satisfaction awarded by the Court in accordance with Article 41 of the Convention and/or general measures, which ensure that the injured party is put, as far as possible, in the same situation as he or she enjoyed prior to the violation of the Convention (*restitutio in integrum)*;

Noting that it is for the competent authorities of the respondent State to decide what measures are most appropriate to achieve *restitutio in integrum*, taking into account the means available under the national legal system;

Bearing in mind, however, that the practice of the Committee of Ministers in supervising the execution of the Court's judgments shows that in exceptional circumstances the re-examination of a case or a reopening of proceedings has proved the most efficient, if not the only, means of achieving *restitutio in integrum;*

I. Invites, in the light of these considerations the Contracting Parties to ensure that there exist at national level adequate possibilities to achieve, as far as possible, *restitutio in integrum*;

II. Encourages the Contracting Parties, in particular, to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention, especially where:

(i) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and

(ii) the judgment of the Court leads to the conclusion that

(a) the impugned domestic decision is on the merits contrary to the Convention, or

(b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of.

COMPLAINTS

The applicants complain under Article 6 § 1 of the Convention that by refusing to exclude from the review of safety the very evidence the use of which at trial the Court held to be in breach of Article 6 § 1, the domestic courts have committed a fresh breach of the same provision.
The applicants highlight in this connection Lord Justice Rose's statement in the Court of Appeal that their convictions could not be regarded as safe given the prominence accorded at their trial to their compelled interviews.

The applicants further complain under Article 13 of the Convention that they have been denied an effective remedy in respect of the original breach of Article 6 § 1. They maintain that the jurisdiction of the Court of Appeal to review the safety of a criminal conviction is confined to a consideration of the law in force at the time of the conviction.

THE LAW

The applicants rely on Articles 6 and 13 of the Convention, which provide, as relevant:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

"Everyone whose rights and freedoms as set forth in [the] 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."

The Court observes that, although the applicants have formulated their complaints under Articles 6 and 13 of the Convention, the circumstances of their case require it to have regard to Article 46 of the Convention, which states:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

It notes in this connection that the proceedings which the applicants seek to challenge under Articles 6 and 13 have their origin in earlier proceedings which led to their conviction. In respect of the latter proceedings, the Court found that the applicants did not receive a fair trial on account of the extensive use made by the prosecution at their trial of statements which they were compelled to make to the authorities. For that reason, the Court found that there had been a breach of Article 6 § 1.

The applicants subsequently succeeded in having their convictions referred back to the Court of Appeal in view of the Court's finding. However, it must be observed that the reference proceedings did not give rise to a determination of a new "criminal charge" against the applicants. In so far as it can be said that Article 6 is applicable to those proceedings, the point of departure must be the applicants' original trial and convictions. It follows that the reference proceedings are to be regarded as part of an on-going judicial process at the domestic level rooted in the unfairness of the proceedings in which the original criminal charges were determined against the applicants. On that account, the Court does not accept the applicants' argument that the reference proceedings gave rise to a new breach of Article 6 of the Convention. Its conclusion on this point is not affected by any suggestion in the statements of Lord Justice Rose in the Court of Appeal that the applicants' convictions could not be regarded as safe if the compelled evidence had to be discounted from the case against them.

For the Court, the applicants' argument that a new breach of Article 6 has been committed rests essentially on their view that by refusing to quash their convictions or to order a re-retrial, the domestic courts have failed to give effect to its finding that they did not receive a fair hearing.

However, it points out that the finding in that judgment was essentially declaratory (*Marckx v. Belgium* judgment of 13 June 1979, Series A no. 31, p. 25, § 38). It further recalls that by virtue of Article 46 of the Convention the High Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers (see, *mutatis mutandis*, *Papamichalopoulos and Others v. Greece (former Article 50)* judgment of 31 October 1995, Series A no. 330-B, pp. 58-59, § 34). It follows, inter alia, that a judgment in which the Court finds a breach of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic

legal order to put an end to the violation found by the Court and to redress so far as possible the effects (see *Pisano v. Italy* (*Striking Out*) [GC], no. 36732/97, § 43, ECHR 2002 -), *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII).

As regards the applicants' case, the Court has been informed, firstly, that section 434 of the Companies Act 1985 has been amended in order to ensure that the violation found by the Court would not be repeated in future cases and, secondly, that the Government have paid the sums awarded to the applicants in its Article 41 judgment by way of costs and expenses. As to other measures which might be taken to afford *restitutio in integrum*, the Court has further been informed that this is a matter of on-going discussion between the Committee of Ministers and the respondent Government. It reiterates that, subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see the *above-cited Scozzari and Giunta* judgment, § 249). For its part, the Court cannot assume any role in this dialogue. It notes in particular that the Convention does not give it jurisdiction to direct a State to open a new trial or to quash a conviction (see, *Saïdi v. France* judgment of 20 September 1993, Series A no. 261-C, p. 57, § 46; *Pelladoah v. the Netherlands* judgment of 20 September 1994, Series A no. 297-B, p. 36, § 44). It follows that it cannot find a State to be in breach of the Convention on account of its failure to take either of these courses of action when faced with the execution of one of its judgments.

This is not to say that measures taken by a respondent State in the post-judgment phase to afford redress to an applicant for the violation of violations found fall outside the jurisdiction of the Court. It may, for example, take account of what has been done at the national level in cases where it has reserved the issue of Article 41 (see *Schuler-Zgraggen v. Switzerland* (*former Article 50*) judgment of 31 January 1995, Series A no. 305-A; *Barberà, Messegué and Jabardo v. Spain* (*former Article 50*) judgment of 13 June 1994, Series A no. 285-C). Furthermore, it may entertain a complaint that a retrial at the domestic level by way of implementation of one of its judgments gives rise to a new breach of the Convention (see *Hertel v. Switzerand* (dec), no. 53440/99, 17.01.2002). However, neither of these considerations applies in the instant case.

The Court would observe that the above-mentioned considerations are not intended to detract from the importance of ensuring that domestic procedures are in place which allow a case to be re-visited in the light of a finding that Article 6 of the Convention has been violated. On the contrary, such procedures may be regarded as an important aspect of the execution of its judgments and their availability demonstrates a Contracting State's commitment to the Convention and to the Court's case-law (see, *mutatis*

mutandis, the above-cited *Barberà, Messegué and Jabardo v. Spain judgment,* § 15).

Having regard to the above considerations, the Court finds that the application is incompatible *ratione materiae* with the provisions of the Convention, within the meaning of Article 35 § 3, and therefore inadmissible in application of Article 35 § 4.

For these reasons, the Court unanimously

Declares the application inadmissible.

Michael O'BOYLE
Registrar

Matti PELLONPÄÄ
President