

P.G. and J.H. v. the United Kingdom - 44787/98

Judgment 25.9.2001 [Section III]

Article 6

Criminal proceedings

Article 6-1

Fair hearing

Non-disclosure, on ground of public interest immunity, of material held by prosecution: *no violation*

Use in criminal trial of evidence obtained in violation of the Convention: *no violation*

Article 8

Article 8-1

Respect for private life

Installation of covert listening device on private property: *violation*

Use of covert listening device in police station: *violation*

Acquisition by police of information relating to use of private telephone: *no violation*

Facts: Acting on information that an armed robbery was planned by the first applicant and B., the responsible police officer submitted a report to the Chief Constable in support of an application for authorisation to instal a covert listening device in B.'s flat. On 4 March 1995, the Chief Constable, who was on annual leave, gave oral authorisation to proceed. He did not provide written confirmation, as required by Home Office guidelines; the Deputy Chief Constable gave "retrospective" written authorisation four days later, by which time the device had been installed. Conversations at the flat were monitored and recorded until the device was discovered on 15 March and the premises were abandoned. The police also obtained from the telephone operator itemised billing in relation to the telephone in the flat. Although no robbery took place, the applicants were arrested and later charged with conspiracy to rob. On legal advice, they declined to comment and refused to provide speech samples. The police then obtained authorisation, in accordance with the guidelines, to instal covert listening devices in the applicants' cells and to attach such devices to the officers who were to be present when the applicants were charged. Samples of the applicants' speech were recorded without their knowledge and sent to an expert for comparison with the voices recorded at the flat. The applicants challenged the admissibility of evidence derived from the use of the listening device in the flat. The prosecution invoked public interest immunity in respect of certain documents which it did not wish to disclose to the defence, including the report submitted to the Chief Constable. The police officer concerned declined to answer questions put to him in cross-examination, on the ground that it might reveal sensitive material, but with

the agreement of defence counsel the trial judge put these questions to the police officer in chambers, in the absence of the applicants and their lawyers. The answers were not disclosed and the judge rejected the challenge to the admissibility of the evidence derived from the devices in the flat. He also rejected a challenge to the admissibility of the evidence derived from the use of such devices at the police station. The applicants were subsequently convicted and sentenced to fifteen years' imprisonment. They were refused leave to appeal.

Law: Article 8 (listening device at B.'s flat) – It was not disputed that this surveillance constituted an interference with the right to respect for private life and the Government conceded that the interference was not "in accordance with the law". The guidelines were neither legally binding nor directly accessible to the public and, as there was no domestic law regulating the use of such devices at the time, the interference was not in accordance with the law.

Conclusion: violation (unanimously).

Article 8 (information about the use of B.'s telephone) – It was not disputed that the obtaining by the police of information relating to the use of the telephone in B.'s flat interfered with the private life or correspondence of the applicants, who had used the telephone. The parties agreed that the measure was based on statutory authority and the question was rather whether there were sufficient safeguards against arbitrariness. The information obtained concerned the telephone numbers called from B.'s flat but did not include any information about the content of the calls or who had made or received them, so that the data obtained and the use which could be made of it, were strictly limited. While it did not appear that there were any specific statutory provisions governing storage and destruction of the information, the Court was not persuaded that the lack of such detailed formal regulation raised any risk of arbitrariness or misuse. Nor was it apparent that there was any lack of foreseeability, disclosure to the police being permitted under the relevant statutory framework. The measure was therefore in accordance with the law. Furthermore, the information was obtained and used in the context of an investigation into a suspected conspiracy to commit armed robbery and no issues of proportionality had been identified. The measure was accordingly justified for the protection of public safety, the prevention of crime and the protection of the rights of others.

Conclusion: no violation (unanimously).

Article 8 (listening devices at the police station) – There are a number of elements relevant to the consideration of whether measures effected outside a person's home or private premises concern private life. Since there are occasions when people knowingly involved themselves in activities which were or might be recorded or reported in a public manner, reasonable expectation as to privacy may be a significant, though not necessarily conclusive factor. Private life considerations may arise once a systematic or permanent record of material from the public domain comes into existence. The Court was not persuaded that recordings taken for use as voice samples could be regarded as falling outside the scope of Article 8. The recording and analysis of the applicants' voices had to be regarded as concerning the processing of personal data. There had therefore been an interference with their right to respect for private life. While it may be permissible to rely on the implied powers of the police to note evidence and collect and store exhibits for steps taken in the course of an investigation, specific statutory or other express legal authority is required for more invasive measures. The principle that domestic law should provide protection against arbitrariness and abuse in the use of covert surveillance techniques applies equally to the use of devices on police premises. Since, at the relevant time, there was no statutory

system to regulate the use of such devices by the police on their own premises, the interference was not in accordance with the law.

Conclusion: violation (unanimously).

Article 6 § 1 (non-disclosure) – The entitlement to disclosure of relevant evidence is not an absolute right and in some cases it may be necessary to withhold certain evidence from the defence in order to preserve the fundamental rights of another individual or to safeguard an important public interest. However, any difficulties caused to the defence by a limitation on its rights have to be sufficiently counterbalanced by the procedures followed by the judicial authorities. It is not the role of the Court to decide whether or not non-disclosure is strictly necessary, since as a general rule it is for the national courts to assess evidence; rather, the Court's task is to ascertain whether the decision-making process has complied as far as possible with the requirements of adversarial proceedings and equality of arms and has incorporated adequate safeguards. In the present case, the defence was kept informed and was permitted to make submissions and participate in the decision-making process as far as possible without the material being revealed, and the questions which the defence wished to put were asked by the judge in chambers. The undisclosed material did not form part of the prosecution case and was never put to the jury. Moreover, the fact that the need for disclosure was at all times under assessment by the judge provided a further, important safeguard. Finally, although there was no review on appeal, the applicants did not include a ground of appeal on this issue, although it was open to them to do so, and the Court was not persuaded that there was any basis for holding that there should be an automatic review in such cases. In conclusion, the decision-making process complied, as far as possible, with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards.

Conclusion: no violation (unanimously).

Article 6 § 1 (use of evidence obtained by covert surveillance devices) – The installation of the listening devices and the recording of the applicants' conversations were not unlawful in the sense of being contrary to domestic criminal law: the "unlawfulness" related exclusively to the absence of statutory authority for the interference with the right to respect for private life and correspondence. The material was not the only evidence against the applicants, who had ample opportunity to challenge both the authenticity and the use of the recordings. Although their arguments were unsuccessful, it was clear that the domestic courts would have had discretion to exclude the evidence had they been of the view that its admission would have given rise to substantive unfairness. There was no unfairness in leaving it to the jury, on the basis of a thorough summing-up by the judge, to decide where the weight of the evidence lay. Finally, voice samples may be regarded as akin to other specimens used in forensic analysis, to which the privilege of self-incrimination does not apply. In the circumstances, the use of the recorded material did not conflict with the requirements of fairness.

Conclusion: no violation (six votes to one).

Article 13 – The domestic courts were not capable of providing a remedy, since it was not open to them to deal with the substance of the Convention complaint that the interference with the right to respect for private life was not "in accordance with the law", and still less was it open to them to grant appropriate relief. With regard to a complaint to the Police Complaints Authority, although the Authority can require a complaint to be submitted to it for consideration, the extent to which it oversees the decision-making process undertaken by the Chief

Constable is unclear. In any event, the Secretary of State plays an important role in appointing, remunerating and, in certain circumstances, dismissing members of the Authority, which must also have regard to any guidance which he gives in respect of the withdrawal or preferring of disciplinary or criminal charges. Consequently, the system of investigation of complaints does not meet the requisite standards of independence.

Conclusion: violation (unanimously).

Article 41 – The Court awarded each of the applicants £1,000 (GBP) in respect of non-pecuniary damage. It also made awards in respect of costs and expenses.

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