KHAN v. THE UNITED KINGDOM - 35394/97 [2000] ECHR 195 (12 May 2000)

THIRD SECTION

CASE OF KHAN v. THE UNITED KINGDOM

(Application no. 35394/97)

JUDGMENT

STRASBOURG

12 May 2000

FINAL

04/10/2000

In the case of Khan v. the United Kingdom,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr J.-P. COSTA, *President*,

Mr W. FUHRMANN,

Mr L. LOUCAIDES,

Mr P. KURIS,

Sir Nicolas BRATZA,

Mrs H.S. GREVE,

Mr K. TRAJA, *judges*,

and Mrs S. DOLLé, *Section Registrar*,

Having deliberated in private on 26 October 1999 and 4 May 2000,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 35394/97) against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights

and Fundamental Freedoms ("the Convention") by Mr Sultan Khan ("the applicant"), a United Kingdom national, on 1 January 1997.

2. On 3 December 1997 the Commission (First Chamber) decided to give notice of the application to the United Kingdom Government ("the Government") and invited them to submit observations on its admissibility and merits.

3. The Government submitted their observations on 2 March 1998. The applicant replied on 30 September 1998, after an extension of the time-limit fixed for that purpose. On 16 October 1998 the Government made comments on the applicant's observations in reply.

4. Following the entry into force of Protocol No. 11 to the Convention on 1 November 1998, and in accordance with the provisions of Article 5 § 2 thereof, the case was examined by the Court.

5. In accordance with Rule 52 § 1 of the Rules of Court, the President of the Court, Mr L. Wildhaber, assigned the case to the Third Section.

6. On 24 April 1999 the Court declared the application admissible[1] and decided to invite the parties to a hearing on the merits.

7. On 7 July 1999 the President granted leave to the non-governmental organisations Justice and Liberty to submit joint written comments in connection with the case (Article 36 § 2 of the Convention and Rule 61 § 3).

8. The hearing took place in public in the Human Rights Building, Strasbourg, on 26 October 1999.

There appeared before the Court:

(a) *for the Government*

Mr C. WHOMERSLEY, Foreign and Commonwealth Office, *Agent*,

Lord WILLIAMS OF MOSTYN QC, *Attorney-General*,

Mr J. CROW, *Counsel*,

Ms R. COLLINS-RICE,

Ms K. JONES, *Advisers*;

(b) *for the applicant*

Mr B. EMMERSON,

Mr K. STARMER, *Counsel*,

Mr J. DICKINSON, of the Sheffield Bar, *Solicitor*.

The Court heard addresses by Mr Emmerson and Lord Williams.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. On 17 September 1992 the applicant arrived at Manchester Airport on a flight from Pakistan. On the same flight was his cousin, N. Both men were stopped and searched by customs officials. N. was found to be in possession of heroin with a street value of almost 100,000 pounds sterling. He was interviewed and then arrested and charged. No drugs were found on the applicant. He too was interviewed, but made no admissions. He was released without charge. On 26 January 1993 the applicant visited a friend, B., in Sheffield. B. was under investigation for dealing in heroin. On 12 January 1993 the installation of a listening device on B.'s premises had been authorised by the Chief Constable of South Yorkshire on the grounds that the conventional methods of surveillance were unlikely to provide proof that he was dealing in drugs. It was not expected or foreseen that the applicant would visit the premises. Neither B. nor the applicant was aware of the aural surveillance equipment which had been installed by the police.

10. By means of that device the police obtained a tape recording of a conversation, in the course of which the applicant admitted that he had been a party to the importation of drugs by N. on 17 September 1992. The applicant was arrested on 11 February 1993. Again he made no admissions when interviewed, but subsequently he and N. were jointly charged with offences under the Customs and Excise Management Act 1979 and the Misuse of Drugs Act 1991 and committed for trial.

11. The trial took place in December 1993. The applicant pleaded “not guilty”. The applicant admitted that he had been present at the Sheffield address and that his voice was one of those recorded on the tape. It was admitted on behalf of the Crown that the attachment of the listening device had involved a civil trespass and had occasioned some damage to the property. Thereupon, the trial judge conducted a hearing on the *voir dire* (submissions on a point of law in the absence of the jury) as to the admissibility in evidence of the conversation recorded on the tape. The Crown accepted that without it there was no case against the applicant.

12. The trial judge ruled that the evidence was admissible. Following an amendment to the indictment, the applicant was re-arraigned and pleaded guilty to being knowingly concerned in the fraudulent evasion of the prohibition on the importation of heroin. On 14 March 1994 the applicant was sentenced to three years' imprisonment.

13. The applicant appealed to the Court of Appeal on the ground that the evidence ought to have been held to be inadmissible. On 27 May 1994 the Court of Appeal dismissed the applicant's appeal against conviction but also certified, as a point of law of general public importance, the question whether evidence of tape-recorded conversations, obtained by a listening device attached by the police to a private house without the knowledge of the owners or occupiers, was admissible in a criminal trial against the defendant.

14. On 4 October 1994 the Appeal Committee of the House of Lords granted the applicant leave to appeal from the decision of the Court of Appeal dismissing his appeal against conviction. On 2 July 1996 the House of Lords dismissed the applicant's appeal. The House

of Lords noted that the question before it gave rise to two separate issues, the first being whether evidence of the taped conversations was admissible at all and the second whether, if admissible, it should nonetheless have been excluded by the trial judge in the exercise of his discretion at common law or under the powers conferred by section 78 of the Police and Criminal Evidence Act 1984 ("PACE"). As to the former issue, the House of Lords held that there was no right to privacy in English law and that, even if there were such a right, the common-law rule that relevant evidence which was obtained improperly or even unlawfully remained admissible applied to evidence obtained by the use of surveillance devices which invaded a person's privacy. As to the latter issue, it was held that the fact that evidence had been obtained in circumstances which amounted to a breach of the provisions of Article 8 of the Convention was relevant to, but not determinative of, the judge's discretion to admit or exclude such evidence under section 78 of PACE. The judge's discretion had to be exercised according to whether the admission of the evidence would render the trial unfair, and the use at a criminal trial of material obtained in breach of the right to privacy enshrined in Article 8 did not mean that the trial would be unfair. On the facts, the trial judge had been entitled to hold that the circumstances in which the relevant evidence was obtained, even if they constituted a breach of Article 8, were not such as to require the exclusion of the evidence. Lord Nolan, giving the opinion of the majority of the House, added:

"The sole cause of this case coming to your Lordship's House is the lack of a statutory system regulating the use of surveillance devices by the police. The absence of such a system seems astonishing, the more so in view of the statutory framework which has governed the use of such devices by the Security Service since 1989, and the interception of communications by the police as well as by other agencies since 1985. I would refrain from other comment because counsel for the respondent was able to inform us, on instructions, that the government proposes to introduce legislation covering the matter in the next session of Parliament."

15. The applicant was discharged from prison on 11 August 1994. His release was on licence until 12 May 1995.

II. RELEVANT DOMESTIC LAW

A. The Home Office Guidelines

16. Guidelines on the use of equipment in police surveillance operations (the Home Office Guidelines of 1984) provide that only chief constables or assistant chief constables are entitled to give authority for the use of such devices. The Guidelines are available in the library of the House of Commons and are disclosed by the Home Office on application.

17. In each case, the authorising officer should satisfy himself that the following criteria are met: (a) the investigation concerns serious crime; (b) normal methods of investigation must have been tried and failed, or must from the nature of things, be unlikely to succeed if tried; (c) there must be good reason to think that the use of the equipment would be likely to lead to an arrest and a conviction, or where appropriate, to the prevention of acts of terrorism; (d) the use of equipment must be operationally feasible. The authorising officer should also satisfy himself that the degree of intrusion into the privacy of those affected by the surveillance is commensurate with the seriousness of the offence.

18. The Guidelines also state that there may be circumstances in which material so obtained could appropriately be used in evidence at subsequent court proceedings.

B. The Police Complaints Authority

19. The Police Complaints Authority was created by section 89 of PACE. It is an independent body empowered to receive complaints as to the conduct of police officers. It has powers to refer charges of criminal offences to the Director of Public Prosecutions and itself to bring disciplinary charges.

C. The Police and Criminal Evidence Act 1984

20. Section 78(1) of PACE provides as follows:

"In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

D. The Police Act 1997

21. The 1997 Act provides a statutory basis for the authorisation of police surveillance operations involving interference with property or wireless telegraphy. The relevant sections relating to the authorisation of surveillance operations, including the procedures to be adopted in the authorisation process, entered into force on 22 February 1999.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

22. The applicant alleges a violation of Article 8 of the Convention which provides, so far as relevant, as follows:

"1. Everyone has the right to respect for his private ... life, ... 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."

23. The applicant refers to the opinion of the European Commission of Human Rights in the case of Govell v. the United Kingdom (application no. 27237/95, Commission's report of 14 January 1998), in which the Commission found that no existing statutory system governed the use of covert listening devices and that the Home Office Guidelines were neither legally binding nor accessible. Consequently, there had been a breach of Article 8 of the Convention because the tape recording in that case could not be considered to be "in accordance with the law" as required by Article 8 § 2 of the Convention. He claims that the position is the same in

the present case, where a covert listening device was used to overhear a private conversation he had had with B.

24. The Government, whose observations on Article 8 were submitted before the Commission adopted its above-mentioned report in the Govell case, do not dispute that the surveillance of the applicant amounted to an interference with his right to respect for private life guaranteed by Article 8 § 1 of the Convention, but contend that such interference was not in breach of the Article since it was in accordance with the law and necessary in a democratic society for the prevention of crime.

They recognise that foreseeability is a component of the concept of "in accordance with the law", but submit that foreseeability cannot be the same in the context of covert police surveillance as it is where the object of the relevant law is to place restrictions on the conduct of individuals. They argue that a law which confers a discretion as to whether or not to undertake covert surveillance activities does not breach the requirement of foreseeability provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity. They submit that the Home Office Guidelines were public and accessible, even though they did not have statutory force, and provided constraints within which surveillance was limited to the investigation of serious crime.

Furthermore, the measures taken were proportionate to the criminal investigation in question. The Government refer to the judgment of the Court of Appeal, which expressly considered Article 8 of the Convention with reference to the applicant's case. Finally, the Government contend that the existence of the Police Complaints Authority demonstrates that there were adequate procedural safeguards against arbitrary interference and the abuse of powers.

25. The Court notes that it is not disputed that the surveillance carried out by the police in the present case amounted to an interference with the applicant's rights under Article 8 § 1 of the Convention. The principal issue is whether this interference was justified under Article 8 § 2, notably whether it was "in accordance with the law" and "necessary in a democratic society", for one of the purposes enumerated in that paragraph.

26. The Court recalls, with the Commission in the Govell case (see paragraphs 61 and 62 of the report cited above), that the phrase "in accordance with the law" not only requires compliance with domestic law but also relates to the quality of that law, requiring it to be compatible with the rule of law (see the Halford v. the United Kingdom judgment of 25 June 1997, *Reports of Judgments and Decisions* 1997-III, p. 1017, § 49). In the context of covert surveillance by public authorities, in this instance the police, domestic law must provide protection against arbitrary interference with an individual's right under Article 8. Moreover, the law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which public authorities are entitled to resort to such covert measures (see the Malone v. the United Kingdom judgment of 2 August 1984, Series A no. 82, p. 32, § 67).

27. At the time of the events in the present case, there existed no statutory system to regulate the use of covert listening devices, although the Police Act 1997 now provides such a statutory framework. The Home Office Guidelines at the relevant time were neither legally binding nor were they directly publicly accessible. The Court also notes that Lord Nolan in the House of Lords commented that under English law there is, in general, nothing unlawful

about a breach of privacy. There was, therefore, no domestic law regulating the use of covert listening devices at the relevant time.

28. It follows that the interference in the present case cannot be considered to be "in accordance with the law", as required by Article 8 § 2 of the Convention. Accordingly, there has been a violation of Article 8. In the light of this conclusion, the Court is not required to determine whether the interference was "necessary in a democratic society" for one of the aims enumerated in paragraph 2 of Article 8.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

29. The applicant also alleges a breach of Article 6 § 1 of the Convention, on the ground that the use as the sole evidence in his case of the material which had been obtained in breach of Article 8 of the Convention was not compatible with the "fair hearing" requirements of Article 6. Article 6 § 1 of the Convention provides, so far as relevant, as follows:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ..."

30. The applicant does not submit that Article 6 requires an automatic rule of exclusion of evidence obtained in consequence of a breach of Article 8, but argues that where evidence has been obtained in breach of a Convention right, three requirements must be fulfilled by the domestic courts:

– there must be an effective procedure during the trial by which the applicant can challenge the admissibility of evidence;

– the trial court should have regard to the nature of the violation; and

– the conviction should not be based solely on evidence obtained in consequence of a breach of a Convention right.

The applicant argues that the procedure under section 78 of PACE is not capable of affording a ground for the exclusion of evidence, given that the House of Lords' judgment indicates that a breach of Article 8 was not capable of affording a ground for the exclusion of evidence under that section. He submits that the absence of an effective procedure, by which he could challenge the use of evidence obtained in breach of Article 8, is in breach of Article 6 of the Convention.

31. The applicant further submits that the nature of the breach amounted to a fundamental violation of the Convention as there was a complete absence of a statutory scheme regulating the use of secret aural surveillance devices by the police. Finally, the applicant contends that it is contrary to the rule of law to permit a criminal conviction to be based solely on evidence obtained by illegal acts of law-enforcement agents. He maintains that he can still claim to be the victim of a violation of the right to a fair hearing even though he was in fact guilty and pleaded guilty to the offence with which he had been charged. In the present circumstances, if the evidence had been excluded as inadmissible by the trial court, the prosecution would have discontinued the proceedings. The applicant submits that the Court's role is not to determine whether or not there was a miscarriage of justice but whether or not the applicant, innocent or guilty, received a fair trial.

32. The Government note that the present case closely resembles the case of Schenk v. Switzerland (judgment of 12 July 1988, Series A no. 140), and submit that the applicant had the opportunity (which he took) to challenge the use of the tape recording in evidence at the *voir dire*. They note that, having carefully considered the applicant's arguments that the police lacked the power to use a listening device and that there was a civil trespass, a breach of Article 8 of the Convention and a breach of the Guidelines, the trial judge nevertheless considered that such arguments did not afford grounds for excluding the evidence under section 78 of PACE and he therefore admitted the tape recording as evidence. The applicant further had the opportunity of challenging the judge's ruling in the Court of Appeal and the House of Lords. The House of Lords expressly considered whether the applicant had a fair trial by analogy with Article 6 of the Convention but found that there was no breach of such right even if the obtaining of the evidence constituted a breach of Article 8 of the Convention.

33. The Government recognise that, in contrast to the position in the Schenk case, the tape recording was the only evidence against the applicant. However, in the Government's submission, where there is strong evidence to prove the involvement of a person in a serious crime, then there is a strong public interest in admitting it in criminal proceedings, even if it is the only evidence against the accused, provided that, as here, the accused has the opportunity of challenging the evidence and opposing its use, and that full consideration is given by the trial court to the fairness of admitting the evidence. Finally, the Government submit that the applicant's admission of guilt during the trial is relevant to the consideration of the fairness of the trial under Article 6.

34. The Court reiterates that its duty, according to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law (see the Schenk judgment cited above, p. 29, §§ 45-46, and, for a more recent example in a different context, the Teixeira de Castro v. Portugal judgment of 9 June 1998, *Reports* 1998-IV, p. 1462, § 34). It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the "unlawfulness" in question and, where violation of another Convention right is concerned, the nature of the violation found.

35. The Court recalls that in the Schenk case cited above the applicant complained, *inter alia*, that the recording of his conversation with P. in breach of Swiss law and its use as evidence at his trial contravened Article 6 § 1 of the Convention. The Court noted in its judgment that it was not disputed that the recording in issue had been obtained unlawfully as a matter of Swiss law and that this had been expressly recognised by the Swiss courts. The Court observed that it could not "exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible" (ibid., p. 29, § 46), and that it had only to ascertain whether the applicant's trial as a whole was fair. In concluding that the use of the disputed recording in evidence did not deprive the applicant of a fair trial, the Court noted, first, that the rights of the defence had not been disregarded: the applicant had been given the opportunity, which he took, of challenging the authenticity of the

recording and opposing its use, as well as the opportunity of examining P. and summoning the police inspector responsible for instigating the making of the recording. The Court further "attache[d] weight to the fact that the recording of the telephone conversation was not the only evidence on which the conviction was based" (ibid., pp. 29-30, § 48).

36. The Court notes at the outset that, in contrast to the position examined in the Schenk case, the fixing of the listening device and the recording of the applicant's conversation were not unlawful in the sense of being contrary to domestic criminal law. In particular, as Lord Nolan observed, under English law there is in general nothing unlawful about a breach of privacy. Moreover, as was further noted, there was no suggestion that, in fixing the device, the police had operated otherwise than in accordance with the Home Office Guidelines. In addition, as the House of Lords found, the admissions made by the applicant during the conversation with B. were made voluntarily, there being no entrapment and the applicant being under no inducement to make such admissions. The "unlawfulness" of which complaint is made in the present case relates exclusively to the fact that there was no statutory authority for the interference with the applicant's right to respect for private life and that, accordingly, such interference was not "in accordance with the law", as that phrase has been interpreted in Article 8 § 2 of the Convention.

37. The Court next notes that the contested material in the present case was in effect the only evidence against the applicant and that the applicant's plea of guilty was tendered only on the basis of the judge's ruling that the evidence should be admitted. However, the relevance of the existence of evidence other than the contested matter depends on the circumstances of the case. In the present circumstances, where the tape recording was acknowledged to be very strong evidence, and where there was no risk of it being unreliable, the need for supporting evidence is correspondingly weaker. It is true that, in the case of Schenk, weight was attached by the Court to the fact that the tape recording at issue in that case was not the only evidence against the applicant. However, the Court notes in this regard that the recording in the Schenk case, although not the only evidence, was described by the Criminal Cassation Division of the Vaud Cantonal Court as having "a perhaps decisive influence, or at the least a not inconsiderable one, on the outcome of the criminal proceedings" (ibid., pp. 19-22, § 28). Moreover, this element was not the determining factor in the Court's conclusion.

38. The central question in the present case is whether the proceedings as a whole were fair. With specific reference to the admission of the contested tape recording, the Court notes that, as in the Schenk case, the applicant had ample opportunity to challenge both the authenticity and the use of the recording. He did not challenge its authenticity, but challenged its use at the *voir dire* and again before the Court of Appeal and the House of Lords. The Court notes that at each level of jurisdiction the domestic courts assessed the effect of admission of the evidence on the fairness of the trial by reference to section 78 of PACE, and the courts discussed, amongst other matters, the non-statutory basis for the surveillance. The fact that the applicant was at each step unsuccessful makes no difference (ibid., p. 29, § 47).

39. The Court would add that it is clear that, had the domestic courts been of the view that the admission of the evidence would have given rise to substantive unfairness, they would have had a discretion to exclude it under section 78 of PACE.

40. In these circumstances, the Court finds that the use at the applicant's trial of the secretly taped material did not conflict with the requirements of fairness guaranteed by Article 6 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

41. The applicant also alleges a breach of Article 13 of the Convention on the ground that the courts should have taken into account that the evidence had been obtained in breach of the Convention. Article 13 provides as follows:

"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."

42. The applicant submits that, according to domestic law, a breach of Article 8 does not satisfy the requirements for exclusion under section 78 of PACE, even if the evidence so obtained is the only evidence in the case. Section 78 is therefore not capable of affording a remedy which is practical and effective, as required by Article 13.

In connection with the Government's claim that the Police Complaints Authority provides a second remedy, the applicant again refers to the findings of the European Commission of Human Rights in the Govell case (see paragraphs 68-70 of the report cited above) and submits that, given the Commission's finding of a breach of Article 13 in those circumstances, the Court must also find a breach of the Article in the present case.

43. The Government submit that remedies were available to satisfy the requirements of Article 13. They submit that the courts had a discretion under section 78 of PACE to take into account the fact that evidence had been obtained in circumstances which involved an arguable breach of Article 8 of the Convention.

Further, they claim that it was open to the applicant to complain to the Police Complaints Authority in respect of the allegations of police misconduct and that the High Court had jurisdiction over that Authority should the Authority act in breach of its procedures or irrationally.

44. The Court recalls that Article 13 guarantees the availability of a remedy at national level to enforce the substance of Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. Thus, its effect is to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, without, however, requiring incorporation of the Convention (see *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 135, ECHR 1999-VI). In the present case, the Article 13 claim must be taken to be an allegation that the applicant did not have an effective remedy in respect of his claims under Article 8 of the Convention. The Court would note at the outset that the courts in the criminal proceedings were not capable of providing a remedy because, although they could consider questions of the fairness of admitting the evidence in the criminal proceedings, it was not open to them to deal with the substance of the Convention complaint that the interference with the applicant's right to respect for his private life was not "in accordance with the law"; still less was it open to them to grant appropriate relief in connection with the complaint.

45. As regards the various other avenues open to the applicant in respect of the Article 8 complaint, the Court observes, again with the Commission in the Govell case, that complaints only have to be referred to the Police Complaints Authority in circumstances where they

contain allegations that the relevant conduct resulted in death or serious injury or where the complaint is of a type specified by the Secretary of State. In other circumstances the Chief Constable of the area will decide whether or not he is the appropriate authority to decide the case. If he concludes that he is the correct authority, then the standard procedure is to appoint a member of his own force to carry out the investigation. Although the Police Complaints Authority can require a complaint to be submitted to it for consideration under section 87 of PACE, the extent to which the Police Complaints Authority oversees the decision-making process undertaken by the Chief Constable in determining if he is the appropriate authority is unclear (see paragraph 68 of the Commission's report in the Govell case cited above).

46. The Court also notes the important role played by the Secretary of State in appointing, remunerating and, in certain circumstances, dismissing members of the Police Complaints Authority. In particular, the Court observes that under section 105(4) of the Act the Police Complaints Authority is to have regard to any guidance given to it by the Secretary of State with respect to the withdrawal or preferring of disciplinary charges and criminal proceedings (ibid., § 69).

47. Accordingly, the Court finds that the system of investigation of complaints does not meet the requisite standards of independence needed to constitute sufficient protection against the abuse of authority and thus provide an effective remedy within the meaning of Article 13. There has therefore been a violation of Article 13 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

48. The applicant made no claim for pecuniary or non-pecuniary loss. The Government considered that if a breach of the Convention were found, the judgment in itself constituted sufficient just satisfaction.

49. The Court is of the view that the finding of a violation constitutes in itself sufficient just satisfaction for any damage which the applicant may have suffered.

B. Costs and expenses

50. The applicant claimed a total of 14,694.95 pounds sterling (GBP) including value-added tax ("VAT"), consisting of GBP 10,810 for counsel's fees, and GBP 3,884.95 for solicitor's costs and expenses. The Government noted that the applicant in effect made two complaints, one under Articles 8 and 13, and one under Article 6. They submitted that, if the applicant were successful in part only of his claims, any amount awarded should be reduced accordingly. They considered that counsel's fees were in any event excessive, contending that a total, VAT-inclusive figure of GBP 7,391 would be more appropriate.

51. The Court, deciding on an equitable basis, awards the applicant the sum of GBP 11,500, together with any VAT which may be payable, but less the amounts already paid in legal aid by the Council of Europe.

C. Default interest

According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7.5% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 8 of the Convention;

2. *Holds* by six votes to one that there has not been a violation of Article 6 of the Convention;

3. *Holds* unanimously that there has been a violation of Article 13 of the Convention;

4. *Holds* by six votes to one

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final, for costs and expenses, GBP 11,500 (eleven thousand five hundred pounds sterling), together with any value-added tax that may be chargeable, less FRF 11,090.30 (eleven thousand and ninety French francs thirty centimes) to be converted into pounds sterling at the rate applicable on the date of delivery of the present judgment;

(b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;

5. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 12 May 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLé J.-P. COSTA

Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly concurring, partly dissenting opinion of Mr Loucaides is annexed to this judgment.

J.-P.C.

S.D.

PARTLY CONCURRING, PARTLY DISSENTING OPINION OF JUDGE LOUCAIDES

I agree with the majority that there have been violations of Articles 8 and 13 of the Convention in this case for the reasons set out in the judgment. However, I disagree with the finding of the majority that there has not also been a violation of Article 6.

This is the first case which comes before the Court where the only evidence against an accused in a criminal case which also led to his conviction was evidence secured in a manner contrary to the provisions of Article 8 of the Convention.

The Court has already found unanimously that the collection of the evidence against the applicant, through the use of a covert listening device, amounted to a violation of his right to respect for his private life because it was not regulated by any domestic law. However, the majority found that the admission of the evidence in question and the conviction of the applicant on the basis of that evidence did not conflict with the requirements of fairness guaranteed by Article 6 § 1 of the Convention, even though it was the only evidence against the applicant.

I cannot accept that a trial can be "fair", as required by Article 6, if a person's guilt for any offence is established through evidence obtained in breach of the human rights guaranteed by the Convention. It is my opinion that the term "fairness", when examined in the context of the European Convention on Human Rights, implies observance of the rule of law and for that matter it presupposes respect of the human rights set out in the Convention. I do not think one can speak of a "fair" trial if it is conducted in breach of the law. It is true that the Convention is not part of the domestic legal system of the United Kingdom, but for the purposes of the question in issue, it should be treated as such, in view of its ratification by that country and the ensuing obligation to enforce its provisions through its State organs. In other words, in assessing whether a trial was "fair" I can see no reason to make allowances for a State which ratified the Convention but has failed to incorporate it into its system.

It is correct that the evidence obtained in this case through the installation of a listening device on the applicant's premises was not contrary to any specific law in the United Kingdom. It was, however, taken contrary to the Convention. The United Kingdom authorities have an obligation under Article 1 of the European Convention on Human Rights to "secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention". I believe that this casts an obligation on the United Kingdom courts not to admit or rely on evidence in judicial proceedings which was obtained contrary to the Convention. This

applies *a fortiori* in cases where such evidence is the only evidence against an accused person in a criminal case like the present one.

Moreover, if it is accepted that the admission of evidence obtained in breach of the Convention against an accused person is not necessarily a breach of the required fairness under Article 6, then the effective protection of the rights under the Convention will be frustrated. This is well illustrated by cases like the present one, where evidence was secured by the police in a manner incompatible with the requirements of Article 8 of the Convention, and yet it was admitted in evidence against the accused and led to his conviction. If violating Article 8 can be accepted as "fair" then I cannot see how the police can be effectively deterred from repeating their impermissible conduct. And, I must repeat here, I cannot accept that a trial and a conviction resulting from such conduct can be considered as just or fair.

The exclusion of evidence obtained contrary to the protected right to privacy should be considered as an essential corollary of the right, if such right is to be of any value. It should be recalled here that the Court has on many occasions stressed "that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and

effective". The exclusion of such evidence, in my view, becomes even more imperative in cases like the present one, where no alternative effective remedy exists against the breach of the relevant right.

The basic argument against such an exclusionary rule is the pursuit of the truth and the public interest values in effective criminal law enforcement which entail the admission of reliable and trustworthy evidence, for otherwise these values may suffer and guilty defendants may escape the sanctions of the law. Breaking the law, in order to enforce it, is a contradiction in terms and an absurd proposition. In any event the argument has no place in the context of the issues in this case because evidence amounting to an interference with the right to privacy can be admitted in court proceedings and can lead to a conviction for a crime, if the securing of such evidence satisfies the requirements of the second paragraph of Article 8, including the one at issue in the present case, that is, that it was obtained "in accordance with the law".

The majority, in reaching their conclusion, took into account the fact that "had the domestic courts been of the view that the admission of the evidence would have given rise to substantive unfairness, they would have had a discretion to exclude it under section 78 of PACE" (see paragraph 39 of the judgment). I cannot see the relevance to our question of the approach of the domestic courts as regards the question of fairness of admitting the evidence in issue, given that under English law the concept of "fairness" as regards the relevant test of admissibility of evidence was never incompatible with illegality. According to the relevant English law of evidence, unfairness has been narrowly defined as arising only when prejudice to the

accused from the admission of improperly obtained evidence outweighed its probative value. What is more, according to English law, there is nothing unlawful about a breach of privacy like the one which occurred in the present case.

In the light of all of the above I find that the use at the applicant's trial of the secretly taped material, and his conviction on the basis thereof, conflict with the requirements of fairness guaranteed by Article 6 § 1 of the Convention.