

AS TO THE ADMISSIBILITY OF

Applications Nos. 21858/93 and 21905/93
by T. K. and H. A. K.
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 29 November 1995, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
M.P. PELLONPÄÄ
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the applications introduced respectively on 25 March and 12 May 1993 by T. K. and H. A. K. against Austria and registered respectively on 17 and 24 May 1993 under files Nos. 21858/93 and 21905/93;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;
- the observations submitted by the respondent Government on 19 June 1995 and the observations in reply submitted by the applicants on 11 July 1995;

Having deliberated;

Decides as follows:

THE FACTS

The applicants, Austrian nationals, are spouses. The applicant in application No. 21858/93 ("the first applicant"), born in 1932, is a housewife. The applicant in application No. 21905/93 ("the second applicant"), born in 1906, is a businessman. Before the Commission they are represented by Dr. Peter Lambert, a lawyer practising in Vienna.

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

The particular circumstances of the case

On 19 June 1992 a bank was robbed in the vicinity of the applicants' residence in Vienna. Some 10 to 15 minutes later a bomb

attack was committed against the X. family. The police considered that both offences had been committed by the same individual.

On 20 June 1992 the duty judge (Journalrichter) of the Vienna Regional Court (Landesgericht für Strafsachen) gave permission, at the request of the Public Prosecutor (Staatsanwalt), for a three weeks period of surveillance of the telephone the second applicant was the subscriber to. The decision was based on the suspicion that the applicants' son had committed the aforesaid offences, and as he was fugitive, it was considered most likely that he would contact his parents.

The surveillance was carried out from 20 June to 11 July 1992. On the latter date, when the surveillance ended, an internal police report recommended that the second applicant should not yet be notified about the surveillance for "crimino-tactical" reasons as the police thought that the applicants were concealing their son's whereabouts.

On 28 September 1992 the second applicant received a letter from the Vienna Regional Court dated 22 September 1992 informing him about the surveillance of his telephone. The second applicant appealed against the surveillance of his telephone to the Vienna Court of Appeal (Oberlandesgericht). He complained in particular that the surveillance was unlawful as there was no strong suspicion against his son and as it was not probable that the surveillance would facilitate the arrest of his son.

On 5 November 1992 the Vienna Court of Appeal rejected the second applicant's appeal on the ground that there had been a strong suspicion of his son. However, in a separate letter of the same date to the President of the Regional Court, the Court of Appeal noted that this surveillance had not been approved by the Judges' Chamber (Ratskammer) without delay as the Code of Criminal Procedure (Strafprozessordnung) provided for, but only two months later.

On 23 April 1993 the Vienna Court of Appeal declared inadmissible a similar complaint by the first applicant on the ground that she was not the subscriber to the telephone at issue and therefore lacked standing under Austrian law to introduce such a complaint.

On 8 May 1993 the applicants' son returned from Thailand to Austria, and on 9 December 1993 the criminal proceedings against him were stayed.

On 3 March 1995 (i.e. after the applications had been communicated to the respondent Government pursuant to Rule 48 para. 2 (b) of the Commission's Rules of Procedure) the Attorney General's Office (Generalprokuratur) lodged a plea of nullity for preservation of the law (Nichtigkeitkeitsbeschwerde zur Wahrung des Gesetzes) with the Supreme Court (Oberster Gerichtshof) as regards the surveillance of the telephone to which the second applicant was the subscriber.

On 4 April 1995 the Supreme Court found that Sections 149a para. 2 and 149b para. 2 of the Code of Criminal Procedure as then in force had been violated in that the investigating judge had failed to apply for with for the approval of the surveillance by the Judges' Chamber and informed the subscriber of the surveillance belatedly.

The Supreme Court held, inter alia:

[Original]

"Soferne Aufnahmen oder schriftliche Aufzeichnungen der

überwachten Ferngespräche noch vorhanden sind, wird im Hinblick auf die Beendigung des Strafverfahrens gegen [den Sohn der Beschwerdeführer] durch Einstellung ... gemäß § 149c Abs 1 letzter Halbsatz, Abs 5 und Abs 7 StPO vorzugehen sein."

[Translation]

"So far as there are still tape recordings or written transcripts of the telephone conversations under surveillance, and bearing in mind that the proceedings against [the applicants' son] have been stayed, Section 149c paras. 1 (last half-sentence), 5 and 7 of the Code of Criminal Procedure will have to be applied."

The applicants submit that in the oral grounds of the judgment the Vice-President of the Supreme Court held that there had been no violation of Article 8 of the Convention in the second applicant's case.

The Government state that no tape recordings of the surveillance now exist, and that the Vienna Regional Court was requested to ensure that any transcripts of the taped telephone calls be destroyed in compliance with the Supreme Court's decision.

Relevant domestic law

The surveillance of telephone calls in Austria was at the relevant period governed by Sections 149a and 149b of the Code of Criminal Procedure. The relevant provisions stipulate as follows:

[Translation]

Section 149a

"(1) Surveillance of telephone communications including the recording of their contents is only permissible when it can be expected that it can contribute to elucidation of a deliberate criminal act punishable with more than one year's imprisonment and when

1. the subscriber is under strong suspicion of having committed the offence himself, or
2. there are reasons to assume that a person under strong suspicion of the offence is staying with the subscriber or that such a person will enter into contact with the subscriber by means of that telephone ...

(2) The Judges' Chamber has power to order surveillance of telephone communications. If delay would be prejudicial the order can also be issued by the investigating judge who however has to apply for the approval of the Judges' Chamber forthwith. If approval is refused the investigating judge has to revoke his order immediately and to have the records destroyed." ...

Section 149b

"(1) As soon as the prerequisites for further surveillance have fallen away the Judges' Chamber shall order immediate cessation of the surveillance. When the criminal proceedings are suspended, the investigating judge shall make this order at the same time as suspending the proceedings.

(2) After the surveillance has ended the investigating judge shall notify the subscriber as well as the suspect (accused) of the surveillance. At the same time the subscriber has to be

given an opportunity to consult the records ...

(3) If the subscriber considers himself adversely affected by the fact that the Judges' Chamber ordered, approved or maintained the surveillance, he has the right to lodge a complaint with the second instance court (Section 114) within fourteen days from service of the investigating judge's notification." ...

By virtue of the Criminal Procedure Amendment Act 1993 (Strafprozessänderungsgesetz) the provisions governing the surveillance of telephone communications have been amended.

Thus, under Section 149a para. 2 (b) of the Code of Criminal Procedure surveillance of telephone communications is permissible, *inter alia*, when there are reasons to assume that a person under strong suspicion of the offence will establish contact with the telephone to be put under surveillance (and not only with the subscriber, as under the earlier law).

Section 149b para. 4 of the Code now provides expressly for the possibility to delay informing the subscriber and the accused of the surveillance after its termination for as long as such informing would compromise the investigation.

The newly added Section 149c of the Code of Criminal Procedure, so far as relevant, reads as follows:

[Translation]

"(1) The surveillance of telephone conversations and the recording of their contents shall be carried out by the investigating judge or by the police agency authorised by him in agreement with the telecommunications authority. The investigating judge or the police agency shall examine the tape recordings and transcribe those parts that are relevant for the investigation and that may be used as evidence (para. 3). These written records shall be included in the file while the recordings shall be kept in the custody of the court and deleted after the termination of the proceedings. ...

(5) Persons involved in telephone conversations have the right to inspect the written records to the extent that they relate to the phone calls placed by them. The investigating judge shall inform such persons, where their identity is known or can be established without particular procedural difficulties, of their right under this paragraph as well as under paragraph 7. ...

(7) Those parts of the written recordings that cannot be relevant for criminal proceedings or may not be used as evidence shall be destroyed at the request of the public prosecutor or the accused or *ex officio*. Persons involved in telephone calls are also entitled to lodge such request inasmuch as their conversations are concerned."

COMPLAINTS

The applicants complain that their right to respect for their private and family life under Article 8 of the Convention was violated by the surveillance of their telephone conversations. They claim in particular that the surveillance was unlawful for the following reasons:

a) there was no strong suspicion against their son as required by domestic law;

b) it was not approved by the Judges' Chamber of the Regional Court "forthwith" as required by domestic law, but only two months later;

c) the cessation of the surveillance was not ordered by the Judges' Chamber as required by Section 149b para. 1 of the Code of Criminal Procedure as then in force;

d) the applicants were only informed about the surveillance belatedly and the reasons given were not provided for by domestic law; and

e) the surveillance of the first applicant's telephone conversations was not governed by domestic law.

The applicants further complain that the surveillance was not necessary within the meaning of Article 8 para. 2 of the Convention as it was unlikely that both crimes had been committed by the same person.

Finally, the first applicant complains that as under Austrian law only the subscriber can complain of the surveillance she did not have an effective remedy before a national authority as required by Article 13 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

Application No. 21858/93 was introduced on 25 March 1993 and Application No. 21905/93 on 12 May 1993. They were registered on 17 and 24 May 1993 respectively.

On 30 November 1994 the Commission decided to join the applications and to communicate them to the respondent Government pursuant to Rule 48 para. 2 (b) of the Rules of Procedure.

The Government's written observations of 14 June 1995 were submitted on 19 June 1995, after an extension of the time-limit fixed for that purpose. The applicants replied on 11 July 1995.

THE LAW

The applicants allege a violation of Article 8 (Art. 8) of the Convention which provides as follows:

"1. Everyone has the right to respect for his private and family life, his home 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 and morals, or for the protection of rights and freedoms of others."

The first applicant also complains that she did not have an effective remedy before a national authority. She alleges a violation of Article 13 (Art. 13) of the Convention which provides as follows:

"Everyone whose rights and freedoms as set forth in this 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 Government contend, inter alia, that the applicants can under no circumstances claim to be victims as regards the interference with their telephone conversations since by virtue of the Supreme Court's decision of 4 April 1995 the alleged violations have been acknowledged and remedied on the domestic level.

This is contested by the applicants. They submit that the Supreme Court not only failed to rule expressly that there had been a violation of Article 8 (Art. 8) of the Convention, but in the oral grounds of the judgment its Vice-President expressed himself to the contrary. They consider that the alleged violations have not been remedied since the Supreme Court did not expressly order to destroy the written recordings of their telephone conversations.

In addition, the first applicant contends that there were no proceedings for the protection of the law instituted in her respect.

The Commission observes that since the applications were communicated to the respondent Government, the matter has been remitted to the Supreme Court, which on 4 April 1995 found that the surveillance of the second applicant's telephone had been unlawful. The Supreme Court in effect ordered destruction of any remaining taped and written records of the conversations involving both applicants pursuant to Section 149c paras. 1 and 7 of the Code of Criminal Procedure.

The applicants were thereby granted redress, and in the Commission's view it is irrelevant that there were no separate proceedings instituted in respect of the first applicant. The alleged oral statement by the Vice-President of the Supreme Court and the fact that the judgment contains no formal finding of a violation of Article 8 (Art. 8) of the Convention cannot change this position, either.

The Commission further notes that the relevant domestic law has been amended so that there is now express provision for delaying information as to telephone surveillance, and a third party will also be informed that his or her conversations have been subjected to surveillance and will have certain rights of inspection and destruction of the records.

In the Commission's view, these facts taken together constitute appropriate redress for the alleged violations of Articles 8 and 13 (Art. 8, 13) of the Convention. In these circumstances, the applicants can no longer claim to be victims of the alleged violations of the Convention.

It follows that the applications are manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATIONS INADMISSIBLE.

Secretary to the First Chamber

President of the First Chamber

(M.F. BUQUICCHIO)

(C.L. ROZAKIS)