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

THIRD SECTION

CASE OF VAN VONDEL v. THE NETHERLANDS

(Application no. 38258/03)

JUDGMENT

STRASBOURG

25 October 2007

FINAL

25/01/2008

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of van Vondel v. the Netherlands,

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

Mr B.M. ZUPANČIČ, *President*,
Mr C. BÎRSAN,
Mr L. LOUCAIDES,
Mrs E. FURA-SANDSTRÖM,
Mr E. MYJER,
Mr DAVID THÓR BJÖRGVINSSON,
Mrs I. BERRO-LEFÈVRE, *judges*,

and Mr S. NAISMITH, *Deputy Section Registrar*,

Having deliberated in private on 4 October 2007,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 38258/03) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Dutch national, Mr Joost van Vondel (“the applicant”), on 28 November 2003.

2. The applicant was represented by Mr G. Spong, a lawyer practising in Amsterdam. The Dutch Government (“the Government”) were represented by their Agent, Mr R.A.A. Böcker, of the Ministry for Foreign Affairs.

3. The applicant alleged a violation of his right to privacy as guaranteed by Article 8 of the Convention in that (telephone) conversations he had held with another person, Mr R., had been recorded by the latter with devices made available by the National Police Internal Investigation Department (*rijksrecherche*).

4. On 23 March 2006 the Court declared the application partly inadmissible and decided to communicate the complaint concerning the recording of the applicant's conversations with Mr R. to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1954 and lives in Leeds.

6. Between 1 January 1989 and 1 August 1994, he worked as a police officer and, in this capacity, acted as a "runner"[1] for the Kennemerland Regional Criminal Intelligence Service (*Regionale Criminele Inlichtingendienst;* "RCID").

A. The parliamentary inquiry into criminal investigation methods

7. On 26 January 1994 the Minister of Justice (*Minister van Justitie*) and the Minister of the Interior (*Minister van Binnenlandse Zaken*) informed the Lower House of Parliament (*Tweede Kamer der Staten-Generaal*) of the disbandment in December 1993 of the North-Holland/Utrecht Interregional Criminal Investigation Team (*Interregionaal Recherche Team;* "IRT") on account of deployment of controversial criminal investigation methods in the fight against organised crime (for further details, see *Van Vondel v. the Netherlands* (dec.), no. 38258/03, ECHR 2006). This triggered off a parliamentary inquiry (*parlementaire enquête*) into criminal investigation methods used in the Netherlands and the control exercised over such methods.

8. On 6 December 1994 the parliamentary commission of inquiry on criminal investigation methods (*parlementaire enquêtecommissie opsporingsmethoden*; "PEC") was instituted. It was composed of nine Lower House parliamentarians.

9. The PEC conducted an extensive inquiry, which lasted for about one year. Between January and May 1995 documents were collected and examined and preliminary interviews with more than 300 persons were held. The PEC had subsequent informal, confidential "private conversations" (*besloten gesprekken*) with a total of 139 persons – of which verbatim records were drawn up – in order to broaden its understanding of the issues involved, to select the persons and experts to be heard in public, and to prepare these public hearings. On the basis of these documents, interviews and conversations, the PEC made a selection of persons whom it wished to hear. Those interviews and "private conversations", which were all held on a voluntary basis, were of a confidential nature and the PEC gave an undertaking that, unless consent was given by the person concerned, it would not use any direct citations.

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1. "Runners" are police officers who serve as coach and contact person for civilians acting as police informers or having infiltrated criminal organisations.

10. Between 6 September and 9 November 1995, the PEC held 93 public hearings during which 88 persons gave evidence, including the applicant who was heard twice. These public hearings were directly broadcast on national television. It did not hold any witness or expert hearings in camera.

11. The PEC presented its final report containing its findings and recommendations on 1 February 1996. It concluded that there was a crisis in the field of criminal investigation which comprised three main elements, namely the absence of adequate legal norms for investigating methods used in respect of organised crime, a criminal investigation system that was not functioning properly in that it involved too many separate organisations with little or no co-ordination of their activities, resulting in unclear decision-making as regards competences and responsibilities, and problems with power structures in that the prosecution department did not always have or exercise sufficient authority over the police.

12. The PEC report has had a great impact on the organisation of criminal investigation in the Netherlands and has formed the basis of a number of changes to the Netherlands Code of Criminal Procedure, including the Preliminary Judicial Investigations (Review) Act (*Wet herziening gerechtelijk vooronderzoek*) and the Special Investigative Powers Act (*Wet bijzondere opsporingsbevoegdheden*) which entered into force on 1 February 2000, amending the legal rules on investigative powers and coercive measures in criminal investigations.

B. The fact-finding inquiry by the "Fort-team"

13. In April 1995, with the permission of the Minister of Justice and under the responsibility and direction of the public prosecution service (*Openbaar Ministerie*), a special team of the National Police Internal Investigation Department (*rijksrecherche*), the so-called "Fort-team", started a broad fact-finding inquiry into the manner in which the Kennemerland Regional Criminal Intelligence Service (*Regionale Criminele Inlichtingendienst*; "RCID") operated between 1990 and 1995, in particular its use of special investigation methods which were not dissimilar to those having been used by the disbanded North-Holland/Utrecht IRT.

14. The mission of the Fort-team was: "To carry out, as thoroughly as possible, a fact-finding inquiry into the activities, functioning and working methods of the Kennemerland RCID from 1990 to date. In so doing, particular attention must be paid to the use of special investigation methods. In addition, the responsibilities of both the police and the public prosecution service for the RCID and RCID operations must be mapped out. The inquiry is to result in a report containing findings and recommendations."

15. It was agreed with the Minister of Justice and the Minister of the Interior that the Chair and Vice-Chair of the PEC would be kept informed

from the outset of this inquiry of the findings of the Fort-team. It was to be a fact-finding exercise, primarily aimed at drawing lessons from facts found.

16. The functioning of the Kennemerland RCID during the period under investigation by the Fort-team had already been the subject of a number of previous inquiries by the Kennemerland regional police force as well as by the National Police Internal Investigation Department. The results of the previous inquiries were incorporated into those of the Fort-team inquiry, which covered a multitude of aspects related to the practical functioning of the Kennemerland RCID, including its involvement in a number of specific activities, such as a "fruit-juice channel" – a controlled-delivery channel involving the transport of narcotics concealed in fruit-juice concentrates.

17. In the course of its inquiry, 250 persons gave evidence, 40 of whom more than once. The persons heard included higher officials of the police and public prosecution department, police officers involved in criminal investigations, police informers and other civilians. The applicant and his former superior Mr L. also gave evidence to the Fort-team. All persons heard by the Fort-team were given an undertaking that their statements would not be used, without their consent, in any criminal investigation.

18. According to the final report issued by the Fort-team on 29 March 1996, it had had contacts – from the start of its inquiry – with Mr R., a Belgian fruit-juice producer who during the relevant period had acted as an informer for the Kennemerland RCID and who had been "run" by the applicant. Mr R. had contacted the National Criminal Intelligence Service (*Centrale Criminele Inlichtingendienst*; "CRI") in April 1995 and had declared that, since the end of 1991, he had been in contact with the applicant and subsequently with the latter's colleague Mr L. From the end of 1991 Mr R. had provided the applicant with information about the production of fruit-juice concentrates in Morocco and their transport to the Netherlands. After Mr R. had set up a fruit-juice factory in Belgium in 1992, he had met Mr L., whom he initially knew under a pseudonym. At the request of the applicant and Mr L., Mr R. had set up the fruit-juice factory Delta Rio in Ecuador. Although the applicant and Mr L. had invested millions of Netherlands guilders in both the Belgian and Delta Rio factories, they decided in September 1994 that the Delta Rio factory was to be closed down and sold. Mr R., who did not understand this decision, started to distrust the applicant and Mr L. and decided to inform the CRI about the matter. The CRI subsequently brought Mr R. into contact with the National Police Internal Investigation Department.

19. The final report of the Fort-team further states that, during its inquiry, the statements given by Mr R. had as far as possible been verified by the use of observations, audio devices and documents and that inquiries had been made as to whether and, if so, why the applicant and Mr L. had financially supported the factory in Belgium and had the Delta Rio factory in Ecuador set up.

20. Although reports by the National Police Internal Investigation Department are generally not public, the report of the Fort-team was rendered public given the attention this inquiry, against the background of the PEC inquiry, had attracted. Its main conclusions comprised, *inter alia*, the following elements:

- the Kennemerland RCID was to be characterised as a disorganised service, in which no direction was given and where no substantive control whatsoever was exercised;
- in the Kennemerland RCID, basic rules on the “running” of informers and infiltrators had been breached frequently and on a large scale;
- the police force command had seriously fallen short in the exercise of its responsibility over the RCID in that the commander, his deputy and the head of the criminal investigation division were not or hardly aware of the particulars of RCID activities;
- the scope of the CID work had for a long time been seriously underestimated by the Haarlem public prosecution department;
- between 1991 and 1995 the RCID chief L. and his (ex-)collaborator [the applicant] had, with a high degree of probability, spent over five million Netherlands guilders from an undocumented source, thus giving rise to the impression that the money had criminal origins;
- the spending of this money had not been subjected to any form of control;
- the RCID chief L. had consequently disregarded his duty to inform and give explanations to his superiors and the public prosecution department on essential points, and he had intentionally misinformed his superiors as well as the National Criminal Investigation Department;
- since at least 1991 the Kennemerland RCID had used the method of controlled drug deliveries;
- the relevant police commanders and public prosecutors had only controlled the application of this method by the Kennemerland RCID to a limited extent;
- Mr L. and the applicant had set up a CID operation in Ecuador wholly independently (without informing their superiors or the public prosecution department) and in this so-called “fruit-juice channel” all rules applicable to CID activities had been breached;
- the most plausible explanation for the “fruit-juice channel” was the wish to set up an infrastructure for controlled narcotics shipments and it had remained unclear what purpose this channel still served after the IRT had been disbanded and for what purposes major investments were still being made;
- the statements given by Mr L. and the applicant before the PEC about the funds invested in the “fruit-juice channel” were, on important points, in contradiction with the findings made in the inquiry of the National Criminal Investigation Department;

- the conducting of CID operations abroad (Morocco, Ecuador, the United Kingdom, Belgium), without informing the foreign authorities, had violated the sovereignty of these countries, making it subservient to domestic investigation interests;

- it had not appeared that killings in the criminal world could be attributed to the Kennemerland RCID's practice of "running" informers or to the targeting of such informers;

- after the IRT's disbandment, on several occasions serious threats against Mr L. had formed the topic of conversation, but it had appeared after investigation that there was nothing concrete behind these threats; yet it was noteworthy that these threats coincided with moments when Mr L. was called to account explicitly for far-reaching CID activities;

- moreover, after having left the police force, the applicant had maintained contacts with at least four informers and had – in cooperation with former colleagues – transported drugs through police-controlled channels and accepted money of criminal origin; and

- no explanation had been found for a number of actions by Mr L. and the applicant and they themselves had never given a reasonable explanation; the question whether they had been active, within the limits of the rule of law, in fighting crime or, whether, intentionally or unintentionally, they had participated in that same criminal activity could not be answered.

C. The proceedings in which the applicant was involved

21. On 9 October 1995, immediately after Mr L.'s appearance, the applicant gave evidence under oath at a public hearing before the PEC.

22. On 30 October 1995, the PEC had a "private conversation" with Mr R., who was referred to in the verbatim record of this conversation as "Juice-man" ("*Sapman*"). On 2 November 1995, directly after Mr L.'s second appearance, the PEC also took evidence from the applicant in public for a second time.

23. Although, in the course of its inquiry, the Fort-team had requested the applicant to give a statement on a number of occasions, he did so only once, namely shortly before his second PEC hearing, and briefly in the context of the inquiry into the "fruit-juice channel", and refused further cooperation.

24. On 31 January 1996 the PEC transmitted to the chief public prosecutor of The Hague a formal record of perjury (*proces-verbaal van meineed*) in relation to the applicant and his former superior Mr L. concerning various parts of their statements before the PEC, in particular those parts concerning the question of payments to Mr R.

25. On an unspecified date, the applicant was ordered to appear before the Regional Court (*arrondissementsrechtbank*) of The Hague to stand trial on charges of repeated perjury before the PEC and of repeatedly, that is to

say, on different occasions between 25 April 1996 and 11 June 1996, having sought to intimidate Mr R. when the applicant knew or had serious reason to assume that a statement from him would be sought in the context of the PEC inquiry.

26. In its judgment of 8 April 1998, following hearings on 24 and 25 March 1998, the Regional Court convicted the applicant as charged and sentenced him to six months' imprisonment. Both the applicant and the prosecution lodged an appeal with the Court of Appeal (*gerechtshof*) of The Hague.

27. In a judgment of 5 March 2002, following nine hearings held between 14 November 2000 and 19 February 2002 and in the course of which Mr R. had given evidence to the Court of Appeal on 17 January 2001, the Court of Appeal quashed the judgment of 8 April 1998, convicted the applicant of repeated perjury before the PEC (in respect of three parts of the statements he had made at hearings before the PEC) and of repeatedly having sought to intimidate the (potential) witness Mr R. It acquitted the applicant of the remaining charges and sentenced him to three months' imprisonment, suspended pending a two-year probationary period.

28. The Court of Appeal rejected the applicant's argument that the evidence in his case had been unlawfully obtained. As regards the inquiry by the Fort-team, the Court of Appeal noted that the tasks of the National Police Internal Investigation Department included carrying out inquiries into the manner in which police officers used their statutory powers, and that, in accordance with section 19 § 3 of the 1993 Police Act (*Politiewet*) in conjunction with section 2 of the Order on the functions of special-duty police officers (*Taakbeschikking bijzondere ambtenaren van politie*) of 25 March 1994 (Official Gazette (*Staatscourant*) 1994, no. 64), the prosecutor-general (*Procureur-Generaal*) can instruct the National Police Internal Investigation Department to carry out an inquiry, which may concern acts of an individual police officer or the functioning of a particular police force unit. After an extensive analysis of the mission of the Fort-team and the manner in which its inquiry had evolved, the Court of Appeal found no reasons for holding that this inquiry should be regarded as a covert criminal investigation or that, in the course of this inquiry, the applicant should have been regarded as a criminal suspect in connection with the "fruit-juice channel".

29. The Court of Appeal also rejected the applicant's argument that the recording by Mr R. of his (telephone) conversations with the applicant with technical equipment made available by the National Police Internal Investigation Department had infringed his right to privacy under Article 8 of the Convention. It found it established that, in the course of nine hearing sessions between 2 June 1995 and 7 March 1996, Mr R. had made statements to the Fort-team about the "fruit-juice channel", that four face-to-face conversations (between April and August 1995) and four

telephone conversations (between July and August 1995) between the applicant and Mr R. had been recorded by Mr R., that he had done so on a voluntary basis and with the aid of devices provided by the Fort-team at Mr R.'s own request as he was initially disbelieved and as he also wished this for personal safety considerations, that one of the four recorded telephone conversations only consisted of a recording of what Mr R. had said, and that only in respect of one particular conversation had Mr R. received specific instructions as to what information should be obtained from the applicant, namely an admission of payments by him to Mr R.

30. The Court of Appeal held that, according to domestic case-law, the mere tape-recording of a (telephone) conversation without the permission (or knowledge) of the conversation partner did not, in itself, entail a violation of that conversation partner's right to respect for privacy; for that to be the case, additional circumstances were required. In the instant case, the additional circumstances were that a number of conversations had been recorded, including the applicant's contributions to those conversations. Furthermore, the (telephone) conversations had been conducted by the applicant as the former "runner" of a (former) police informer about matters having occurred during the period in which the applicant "ran" Mr R. as informer and the winding-up of that relationship. As these conversations – in any event on the part of the applicant – were of an exclusively professional nature and content, the Court of Appeal held that, in view of domestic case-law on this point, this allowed no other conclusion than that the applicant's private life did not come into play in respect of the recorded (telephone) conversations at issue. It further held that Mr R.'s recourse to a recording device – and Mr R. had been entirely free to decide whether or not to activate it as well as to make the recordings available to the Fort-team – had mainly been prompted by Mr R.'s need to substantiate his account of the "fruit-juice channel" in order to be believed. The Court of Appeal therefore considered that it could not be said that there had been interference on the part of the authorities in respect of the recording. It only accepted the existence of such interference in breach of Article 8 § 1 in respect of the one recorded conversation for which Mr R. had received explicit instructions, to the extent that this conversation related to matters falling within the applicant's sphere of privacy. It did not use that particular statement in evidence.

31. In the opinion of the Court of Appeal, these findings were not altered by the fact that the Fort-team, for its part, had an interest in recording the conversations for the purposes of verifying information relevant to its fact-finding inquiry, provided by Mr R., about the involvement in the "fruit-juice channel" of staff attached to the Kennemerland RCID, the unit forming the object of the Fort-team inquiry. The Court of Appeal found it relatively obvious that this verification, in view of the accounts of the inquiry in subsequent reports, had taken place in the form of tape-recordings

and the preparation of transcripts and, in this connection, recalled its finding that the inquiry was not to be regarded as a (covert) criminal investigation.

32. The applicant lodged an appeal in cassation with the Supreme Court (*Hoge Raad*) in which he raised a total of 15 grievances, including a complaint – in which he relied *inter alia* on Article 8 of the Convention – that the Court of Appeal had unjustly rejected his argument that his right to privacy had been violated on account of the recording of his (telephone) conversations with Mr R.

33. The applicant's appeal in cassation was rejected by the Supreme Court on 8 July 2003. It dismissed the alleged violation of the applicant's right to privacy, holding:

> "The complaint does not provide grounds for overturning the ruling of the Court of Appeal (*kan niet tot cassatie leiden*). Having regard to section 81 of the Judiciary (Organisation) Act (*Wet op de rechterlijke organisatie*), no further reasoning is called for, since the complaint does not give rise to a need for a determination of legal issues in the interest of legal unity or legal development."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant provisions of the Netherlands Constitution

34. Article 10 of the Constitution (*Grondwet*) of the Kingdom of the Netherlands provides as follows:

> "1. Everyone shall have the right to respect for his privacy, without prejudice to restrictions laid down by or pursuant to Act of Parliament.
>
> 2. Rules to protect privacy shall be laid down by Act of Parliament in connection with the recording and dissemination of personal data.
>
> 3. Rules concerning the rights of persons to be informed of data recorded concerning them and of the use that is made thereof, and to have such data corrected shall be laid down by Act of Parliament."

Article 13 of the Constitution reads:

> "1. The privacy of correspondence shall not be violated except in the cases laid down by Act of Parliament, by order of the courts.
>
> 2. The privacy of the telephone and telegraph shall not be violated except, in the cases laid down by Act of Parliament, by or with the authorisation of those designated for the purpose by Act of Parliament."

B. The Netherlands Criminal Code

According to the relevant provisions of the Netherlands Criminal Code (*Wetboek van Strafrecht*) as in force at the material time (section 139a-e), it is not a criminal offence when a conversation partner taps or records a (telephone) conversation with a technical device or when a conversation partner passes a recording of such a conversation on to another person. It is further not a criminal offence when a person makes available to another person a recording device, unless the former is aware or in all reasonableness should be aware that the device concerned contains unlawfully made recordings or unlawfully obtained and stored data.

C. The Parliamentary Inquiries Act

35. Pursuant to section 3 § 2 of the 1850 Parliamentary Inquiries Act (*Wet op de Parlementaire Enquête* – "the Act"), all persons residing in the Netherlands are obliged to comply with a summons to appear before a parliamentary commission of inquiry in order to be heard as a witness or expert. In case a person fails to comply with a summons to appear, the commission may issue an order for the person concerned to be brought before it (*bevel tot medebrenging*) within the meaning of section 13 of the Act. The commission may require such witnesses to take the oath or make a solemn affirmation that they will state the whole truth and nothing but the truth (section 8 §§ 1 and 2 of the Act).

36. Unlike the situation in criminal proceedings, persons heard by a parliamentary commission of inquiry do not have the right to remain silent. The only persons who enjoy the privilege of non-disclosure before a parliamentary commission of inquiry are those who – by virtue of their office, their profession or their position – are bound to secrecy, but only in relation to matters the knowledge of which has been entrusted to them in that capacity (section 19 of the Act) or in case disclosure of secret information would entail disproportionate damage to the exercise of the profession of the person concerned or to the interest of his or her company or the company for which he or she works or has worked (section 18 of the Act).

37. Section 24 of the Act provides that, with the exception of the situation referred to in section 25, statements given to a parliamentary commission of inquiry can never be used in evidence in judicial proceedings against the person having given such statements or against any third party. This reflects the principle that the purpose of a parliamentary inquiry is to find out the truth about facts and events having taken place in the past and not to determine personal liabilities under civil or criminal law.

38. Section 25 of the Act provides, *inter alia*, that perjury (*meineed*) on the part of a witness heard by a parliamentary commission of inquiry

attracts the penalties provided for in the Criminal Code for giving false testimony in civil proceedings. It further provides that the written record of the hearing concerned constitutes legal evidence.

D. The National Police Internal Investigation Department

Section 43 of the 1993 Police Act (*Politiewet*) provides:

> "1. For tasks determined by the Minister of Justice, after consultation with the Minister of Internal Affairs, the Procurator General shall have at his disposal special-duty police officers (*bijzondere ambtenaren van politie*).
>
> 2. The special-duty police officers shall ... be appointed, promoted, suspended and dismissed by the Minister of Justice."

39. The main task of the National Police Internal Investigation Department is to investigate (purported) punishable behaviour of civil servants which affects the integrity of the administration of justice and/or that of the public administration. It exercises this task by conducting either a fact-finding inquiry or a criminal investigation, depending on the mission given. As a fact-finding inquiry is solely aimed at obtaining factual clarification, the National Police Internal Investigation Department cannot avail itself of any investigative powers (*opsporingsbevoegdheden*) or coercive measures (*dwangmiddelen*) in conducting such an inquiry. On the other hand, when conducting a criminal investigation, it can use such powers and measures and a criminal investigation may follow a fact-finding inquiry.

E. Rules governing surveillance and recording of telecommunications in criminal investigations

40. The rules, as in force at the material time, concerning the interception and recording of telecommunications by the investigation authorities in criminal proceedings are set out in the Court's judgment in the case of *M.M. v. the Netherlands*, (no. 39339/98, §§ 22-28, 8 April 2003) and in its decision on admissibility in the case of *Aalmoes and Others v. the Netherlands* (no. 16269/02, 25 November 2004).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

41. Relying on Article 8 of the Convention, the applicant complained of a violation of his right to privacy in that a number of his (telephone) conversation with Mr R. had been recorded by the latter with recording devices made available by the National Police Internal Investigation Department to Mr R. who had also been given suggestions by the National Police Internal Investigation Department about the substance of the conversations to be held with the applicant.

42. Article 8 of the Convention reads 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."

43. The Government contested that argument.

A. Admissibility

44. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

45. The applicant maintained that there had been a violation of his right to privacy as guaranteed by Article 8 of the Convention.

46. The Government submitted that the authorities did not themselves record the conversations concerned but that these were recorded by one of the parties to the conversations. In the Government's opinion, such cases give rise to State responsibility under the Convention only if the authorities "made a crucial contribution to the execution of the scheme" and, in the instant case and unlike the cases of *A. v. France* (judgment of 23 November 1993, Series A no. 277-B, p. 49, § 36) and *M.M. v. the Netherlands* (cited above, § 40), it could not be said that there was either a "crucial contribution" or a "scheme".

47. In the case at hand, Mr R. recorded various conversations with the applicant but Mr R. himself decided whether he would record a

conversation and, if so, whether he would hand the tape over to the National Police Internal Investigation Department. Mr R.'s acts were based on his wish to demonstrate his own credibility in respect of the statements given by him in the Fort-team fact-finding inquiry as well as for personal safety considerations. Against this background, the Government considered the provision of recording equipment as a perfectly responsible move on the part of the National Police Internal Investigation Department. As the recording of the conversations by Mr R. could not be equated with an investigative act by a private citizen, the Government submitted that there had been no interference with the applicant's rights under Article 8 § 1 of the Convention requiring justification under the second paragraph of this provision. The Government further added that, in their view, a strict interpretation of the *M.M. v. the Netherlands* judgment would mean that in future the authorities would be unnecessarily cautious in rendering assistance to members of the public.

48. The Court reiterates that the term "private life" must not be interpreted restrictively. In particular, respect for private life comprises the right to establish and develop relationships with other human beings; furthermore, there is no reason of principle to justify excluding activities of a professional or business nature from the notion of "private life". There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life" (see *Niemietz v. Germany*, judgment of 16 December 1992, Series A no. 251-B, pp. 33-34, § 29; *Halford v. the United Kingdom*, judgment of 25 June 1997, *Reports of Judgments and Decisions* 1997-III, p. 1015, § 42; and *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 56, ECHR 2001-IX).

49. The Court is of the opinion that the obtention by the National Police Internal Investigation Department – for the purposes of an officially commissioned fact-finding inquiry – of recordings of (telephone) conversations between the applicant and Mr R. that had been made by the latter with technical equipment made available for this purpose by the National Police Internal Investigation Department constituted an interference with the applicant's private life and/or correspondence (in the sense of telephone communications) which was imputable to a public authority. The Court would note that the recording of private (telephone) conversations by a conversation partner and the private use of such recordings does not *per se* offend against Article 8 if this is done with private means, but that by its very nature this is to be distinguished from the covert monitoring and recording of communications by a private person in the context of and for the benefit of an official inquiry – criminal or otherwise – and with the connivance and technical assistance of public investigation authorities. In that respect, the Court observes that in the present case, although the recordings of the applicant's conversations were made by Mr R. on a voluntary basis and for his own purposes, the

equipment was provided by the authorities, who on at least one occasion gave him specific instructions as to what information should be obtained from the applicant. In these circumstances, the Court considers that the authorities "made a crucial contribution to executing the scheme" and it is not persuaded that it was ultimately Mr R. who was in control of events. To hold otherwise would be tantamount to allowing investigating authorities to evade their responsibilities under the Convention by the use of private agents (see *M.M. v. the Netherlands*, cited above, § 40).

50. It must therefore be determined whether the interference in the present case was justified under Article 8 § 2, notably whether it was "in accordance with the law" and "necessary in a democratic society" for one or more of the purposes enumerated in that paragraph.

51. As to the question whether the interference was "in accordance with the law", the Court reiterates that this expression requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and be compatible with the rule of law (see, for instance, *Narinen v. Finland*, no. 45027/98, § 34, 1 June 2004).

52. The Court notes that the Government have not presented any arguments to the effect that the interference at issue was based on and in compliance with any statutory or other legal rule. It further notes that, as the investigation in the context of which the interference occurred was a fact-finding inquiry, the National Police Internal Investigation Department was not allowed to have recourse to any investigative powers such as, for instance, the covert recording of (telephone) conversations.

53. Although the Court understands the practical difficulties for an individual who is or who fears to be disbelieved by investigation authorities to substantiate an account given to such authorities and that – for that reason – such a person may need technical assistance from these authorities, it cannot accept that the provision of that kind of assistance by the authorities is not governed by rules aimed at providing legal guarantees against arbitrary acts. It is therefore of the opinion that, in respect of the interference complained of, the applicant was deprived of the minimum degree of protection to which he was entitled under the rule of law in a democratic society.

54. In the light of the foregoing, the Court finds that the interference in issue was not "in accordance with law". This finding suffices for the Court to hold that there has been a violation of Article 8 of the Convention. It is not therefore necessary to examine whether the interference in question pursued a "legitimate aim" or was "necessary in a democratic society" in pursuit thereof (see *Heglas v. the Czech Republic*, no. 5935/02, § 75, 1 March 2007).

55. There has accordingly been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

56. 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."

57. The applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award him any sum on that account.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the remainder of the application admissible;

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

3. *Holds* that there is no call to award the applicant any sum for just satisfaction.

Done in English, and notified in writing on 25 October 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley NAISMITH
Deputy Registrar

Boštjan M. ZUPANČIČ
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinion of Mr Myjer is annexed to this judgment.

B.M.Z.
S.H.N.

SEPARATE OPINION OF JUDGE MYJER

1. In the Observations of the Government, much reference is made to an annotation to the case of *M.M. v. the Netherlands* (judgment of 8 April 2003) which was published in the NJCM-bulletin (Netherlands Human Rights Law Review) 2003, p. 653-658:

'If the present judgment by the ECtHR stands, it would mean – by extension – that in future, if a criminal makes all manner of threats to a victim by telephone, the victim goes to the police, and the police (with the victim's) consent put a tap on his phone, the criminal would win his case in Strasbourg on the ground that his fundamental rights have been violated because his threatening calls had been recorded without a statutory basis; likewise, a kidnapper who rings the family of his victim to make the ransom demand could successfully claim to have been a victim of a violation of Article 8 ECtHR if the police record these telephone calls with the family's consent but without a basis in statute law. In my opinion, it is really going too far to require that recordings of this kind may only be made in accordance with statutory procedures. A perpetrator who phones a victim to prepare for his offence or actually to commit the offence should not be able to pose successfully as a victim on the grounds that the recording of incoming calls at the victim's end violated his right to the peaceful enjoyment of telephone communication. Or does the ECtHR truly mean to suggest that, in a case such as this one, the police should have sought permission under the rules of the Code of Criminal Procedure to place a normal tap on the telephone of none other than the victim, with all the extra infringements of her privacy that would entail? Or would the ECtHR perhaps prefer the lawyer's own telephone to have been tapped in accordance with all the rules, including all the safeguards against violations of his right to refuse to give evidence.'

Since it was I – in another capacity and before I was elected to this Court – who wrote the annotation with which the Government apparently agree and which was indeed very critical of the reasoning of the majority in that judgment, and since I voted in the *Van Vondel* case in favour of a violation of Article 8, I feel obliged to write this separate opinion.

2. Yes, as far as the judgment in the case of M.M. is concerned, I am still convinced that the reasoning of the majority in that case may lead to bizarre and unwanted consequences. In that particular case the police had helped a woman who had told the police that M.M., the defence counsel of her detained husband, had made sexual advances towards her. She feared that her word (the only available evidence) would be insufficient against that of M.M. The police then supplied her with a tape recorder linked to her telephone, so that she could record incoming telephone conversations with that lawyer in order to obtain evidence against him. The majority concluded that Article 8 had been violated. My objections are basically the same as those made in the dissenting opinion of former judge Elisabeth Palm, who was appointed by the Dutch Government to replace the former Dutch judge Wilhelmina Thomassen, who had withdrawn from the case. To me it was crucial that, unlike the *A. v. France* case (judgment of 23 November 1993) – where the police made a crucial contribution by making available for a short

time the office of the police superintendent, his telephone and his tape recorder and where an *outgoing* call was made to collect evidence – in the case of M.M. the woman only recorded *incoming* calls from M.M. Besides, she could decide herself if she wanted to hand these recordings over to the police or not. I am of the opinion that in these circumstances, from the point of view of the Convention, there was no relevant interference with M.M.'s privacy rights.

3. In the present case, however, there is no matter of someone just waiting until the 'suspect' might phone and make his self-incriminating remarks. Here, like in the case of *Heglas v. the Czech Republic* (judgment of 1 March 2007) and like in a lot of B-movies, a 'walking bug' went himself to the applicant and recorded the conversations. The very fact that the police provided the devices (and in respect of one conversation gave specific instructions as to what information should be obtained) constitutes a crucial contribution to an interference with the privacy rights of the applicant, as was laid down in the reasoning in paragraph 49. Since that interference was not 'in accordance with the law', there was also in my opinion a violation of Article 8.