



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

CASE OF JASPER v. THE UNITED KINGDOM

(Application no. 27052/95)

JUDGMENT

STRASBOURG

16 February 2000

[This judgment is subject to editorial revision before its reproduction in final form in the official reports of selected judgments and decisions of the Court.]

In the case of Jasper v. the United Kingdom,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”), as amended by Protocol No. 11¹, and the relevant provisions of the Rules of Court², as a Grand Chamber composed of the following judges:

MR L. WILDHABER, *President*,
Mrs E. PALM,
Mr L. FERRARI BRAVO,
Mr L. CAFLISCH,
Mr J.-P. COSTA,
Mr W. FUHRMANN,
Mr K. JUNGWIERT,
Mr M. FISCHBACH,
Mr B. ZUPANČIČ,
Mrs N. VAJIĆ,
Mr J. HEDIGAN,
Mrs W. THOMASSEN,
Mrs M. TSATSA-NIKOLOVSKA,
Mr T. PANȚÎRU,
Mr E. LEVITS,
Mr K. TRAJA,
Sir JOHN LAWS, *ad hoc judge*,

and also of Mrs M. DE BOER-BUQUICCHIO, *Deputy Registrar*,

Having deliberated in private on 20 October 1999 and 26 January 2000,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights (“the Commission”) on 12 March 1999. It originated in an application (27052/95) against the United Kingdom of Great Britain and Northern Ireland (“the Government”) lodged with the Commission under former Article 25 of the Convention by Mr Eric Jasper, a British national, on 26 September 1994. The applicant is represented by Ms Mary Cunneen of Liberty. The Government of the United Kingdom are represented by their Agent, Mr Martin Eaton, Deputy Legal Adviser at the Foreign and Commonwealth Office.

Notes by the Registry

1-2. Protocol No. 11 and the Rules of Court came into force on 1 November 1998.

The Commission's request referred to former Articles 44 and 48 and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (former Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 of the Convention.

2. In accordance with Article 5 § 4 of Protocol No. 11 to the Convention and Rules 100 § 1 and 24 § 6 of the Rules of Court, a panel of the Grand Chamber of the Court decided on 31 March 1991 that the case should be examined by the Grand Chamber.

On 1 April 1999 Mr L. Wildhaber, the President of the Court, acting under Rule 24 §§ 3-5 determined the composition of the Grand Chamber to include, *ex officio*, himself, and Mrs E. Palm, the Vice-President of the Court. The other members appointed to complete the Grand Chamber were Mr L. Ferrari Bravo, Mr L. Caflisch, Mr J.-P. Costa, Mr W. Fuhrmann, Mr K. Jungwiert, Mr M. Fischbach, Mr B. Zupančič, Mrs N. Vajić, Mr J. Hedigan, Mrs W. Thomassen, Mrs M. Tsatsa-Nikolovska, Mr T. Panțîru, Mr E. Levits and Mr K. Traja (Rule 24 § 3 and Rule 100 § 4).

Sir Nicolas Bratza, the judge elected in respect of the United Kingdom and who should have participated pursuant to Article 27 § 2 of the Convention, could not take part in the consideration of the case since he had participated in the proceedings before the Commission (Rule 28 § 3). The Government appointed Sir John Laws to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

3. In accordance with the President's decision, a hearing of the case, jointly with application nos. 28901/95, Rowe and Davis v. the United Kingdom, and 29777/96, Fitt v. the United Kingdom, took place in public in the Human Rights Building, Strasbourg, on 20 October 1999.

There appeared before the Court:

(a) *for the Government*

Mr M. EATON, Foreign and Commonwealth Office,	<i>Agent,</i>
Mr R. CRANSTON, Solicitor General,	
Mr J. EADIE, Barrister-at-law	<i>Counsel,</i>
Mr R. HEATON, Home Office,	
Ms G. HARRISON, Home Office	
Mr C. BURKE, Customs and Excise	
Ms F. RUSSELL, Crown Prosecution Service	
Mr A. CHAPMAN, Law Officer's Department,	<i>Advisers;</i>

(b) *for the applicant*

Mr B. EMMERSON, Barrister-at-law,	<i>Counsel,</i>
Ms M. CUNNEEN, Liberty,	

Ms P. KAUFMAN, Barrister-at-law,
Mr S. YOUNG, Barrister-at-law,
Mr A. MASTER, Solicitor,

Advisers.

The Court heard addresses by Mr Cranston and Mr Emmerson and also their replies to questions put by several of its members.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

1. The alleged offence

4. At the time of the introduction of the application, the applicant was serving a prison sentence. The background to his conviction is as follows.

On 30 June 1993 approximately three tonnes of cannabis resin was imported into the United Kingdom concealed in a consignment of frozen meat on a lorry travelling from Zeebrugge to Dover. There had been two previous importations of meat from the same consignor in May and early June 1993, both of which had been collected by a firm of hauliers called Davidsons. On this occasion, the meat was delivered to West Kent Cold Storage at Dunton Green, near Sevenoaks in Kent.

5. On 1 July 1993 Customs and Excise officers were keeping the applicant under observation. At approximately 6 a.m. he was followed from his home in Walthamstow, East London, to a lorry park at Beckton, where he collected an articulated lorry and refrigerated trailer which he had bought the previous month. He drove the lorry to West Kent Cold Storage, where he loaded the consignment of meat onto the lorry, and then drove on to a lock-up garage in Leytonstone, East London. He backed the trailer into the garage and drove away in his car. He made two brief visits to the garage during the morning, and then returned at approximately 1 p.m.

6. The applicant remained inside the garage for about five hours and was arrested just before 6 p.m. as he was leaving. The garage was searched. Six of the ten pallets of meat were still on the lorry in a frozen state, although the refrigerator motor was not operative. Four of the pallets, containing a

large quantity of cannabis resin, had been opened and left to defrost in the unrefrigerated garage. The applicant told Customs officers that he worked as a haulage contractor and had not known that the meat contained cannabis.

7. In addition, Customs officers found that the applicant's daughter had rented a safety deposit box on 19 March 1993, of which the applicant, using the name of "Eric Siggins" was an authorised signatory. Following the applicant's arrest on 5 August the box was searched and found to contain GBP 24,100 in cash and two passports bearing the applicant's photograph, the first in his true name and the second in the name of Eric Siggins. Also found in the box were two documents dated 30 June, the date of the applicant's arrest.

8. The applicant was charged with an offence of being knowingly concerned in the fraudulent evasion of the prohibition on the importation of cannabis, and remanded for trial in the Southwark Crown Court.

2. *The disclosure procedure at first instance*

9. On 14 January 1994, shortly before the commencement of the trial, the prosecution made an *ex parte* application to the trial judge to withhold material in its possession on the grounds of public interest immunity. The defence were notified that an application was to be made, but were not informed of the category of material which the prosecution sought to withhold. They were given the opportunity to outline the defence case to the trial judge, namely that the applicant had collected the consignment of meat pursuant to instructions received by telephone the previous night, and had not been aware that the meat contained cannabis, and to request the judge to order disclosure of any evidence relating to these alleged facts. The trial judge examined the material in question and ruled that it should not be disclosed. The defence were not informed of the reasons for the judge's decision.

10. On 18 January 1994 the defence served the following written request on the prosecution:

"9. The Crown are formally asked to indicate (a) in general whether there is unused material in connection with this case, apart from the subject-matter of the *ex parte* application to the Court on Friday 14 January 1994 ... which has not been disclosed and (b) in particular:

(i) whether any listening device or telephone intercept was used, and whether there exists any resulting recording, note, memorandum, or other record;

(ii) whether there exists any note, memorandum or other record of any interview with, or statement by any witness or potential witness in this case that has not already been disclosed;

(iii) whether there exists any evidence ... of any observations on the lorry ... or on the premises of West Kent Cold Storage, and if not, whether any such observations were in fact carried out;

(iv) whether there were any other observations carried out in connection with this enquiry that have not been disclosed;

(v) whether any enquiries were made to trace the vehicles and/or drivers used for the first two Davidson & Sons collections from West Kent Cold Store, and if so, with what result;

(vi) whether HM Customs and Excise acted in this enquiry on any 'information received' and if so, whether there exists any log, memorandum, or other record of any such information."

11. Prosecution counsel provided the answer to questions 9(iii) and (vi), informing the defence that there had been no such observations and no "information received" from an informant, but declined to answer the remainder of the questions. The defence therefore applied to the trial judge for an order that the prosecution should provide the information requested. The application was heard on 24 January 1994, when prosecution counsel submitted:

"I have refused and still refuse to answer the questions set out in ... paragraph 9 because I contend that I am not required to reveal to any person whether there has been any interception of communications under the [Interception of Communications] Act [see paragraphs 31-34 below]. If I answer the question at 9(a) or 9(b), I shall be answering that question which I am not required to answer. ... I am confident I have done what is required of me in respect of it. ...

I take the view that were there to be any matter falling under the Interception of Communications Act it should not be the subject of any *ex parte* application ... "

12. That position was upheld by the trial judge who, in his ruling of 24 January 1994, stated *inter alia*:

"I cannot invite [prosecution counsel] ... to go behind the stand that he is taking, at this stage, where he takes the view that even an *ex parte* application is unnecessary, which is the way he looks at it. ... I think we have taken the matter as far as we can in that particular aspect. One is bound, because I have no power [to order] otherwise, to accept the situation as the prosecutor tells it to be."

3. *The trial*

13. The applicant did not give evidence at his trial. The defence case was that he had no knowledge of the cannabis hidden in the consignment and was acting as an innocent haulier of the goods. He was attempting to

establish a haulage business (“Ejay Couriers”) and had bought vehicles and hired the lock-up garage for that purpose. It was submitted on his behalf that in collecting the meat he had been acting pursuant to instructions from another firm of hauliers, as was shown by a note, found in the applicant's possession at the time of his arrest, on Ejay Couriers headed paper of a telephone call made by Davidsons (see paragraph 1 above) at 7.30 p.m. on 30 June 1993.

14. On 31 January 1994 the applicant was convicted of the offence charged and on 21 March 1994 he was sentenced to ten years' imprisonment.

4. *The appeal*

15. The applicant appealed to the Court of Appeal, on the following grounds:

“It was clear that not all unused material had been disclosed. ... In open court it was stated on behalf of the defendant that the unused material was of potential importance to his defence that he had no knowledge that drugs were to be or were concealed in the load he carried, and that he had received his instructions for the collection by telephone, in the course of his business as a haulier, very shortly before 1 July 1993. ... Any information therefore that might have led to his being able to confirm either the source or content of those instructions, as well as to trace those who had involved him in a smuggling enterprise was of obvious importance.

The Crown had declined to answer the question whether any potentially relevant material, apart from the subject-matter of the *ex parte* application, had not been disclosed, on the grounds that to do so would reveal whether or not there had been a telephone intercept. It was plain from the course of the argument that the *ex parte* application had not dealt with any telephone intercept, since the Crown argued that this was the province solely of the prosecutor, and not that of the judge, a proposition based on *R. v. Preston* [see paragraph 34 below].

In these circumstances the defence were entitled to know at least the category of material with which that application did not deal. ... Furthermore, the Crown should have been called upon to justify, *ex parte* if necessary, the stance taken in relation to the other unused material. ...

Since there must have been a reason for watching the defendant, which was explained neither by the evidence adduced, nor by that served but excluded by agreement, and since it was said that there was no informant involved in the case, there is a strong likelihood that disclosable information, bearing directly upon the defendant's case, was in the possession of the prosecution.”

16. On 13 February 1995, prior to the hearing of the appeal, defence counsel applied to the Court of Appeal for an order that the defence should be given a transcript of the *ex parte* hearing of 14 January 1994, to enable

them to argue the non-disclosure as a ground of appeal. Defence counsel outlined the applicant's case, namely that the instructions for the collection of the load had been received by telephone very shortly before 1 July 1993, and submitted that any information that might be in the Crown's possession and which could, directly or indirectly, support the defence case, should have been disclosed.

17. The Court of Appeal, which had before it the transcript of the *ex parte* hearing of 14 January 1994 and the material which had been its subject-matter, declined to order the disclosure of either to the defence on the following grounds:

“The application is made, correctly, on the ground that if the matters which emerged during the *ex parte* hearing are relevant, or likely to have been relevant, to the defence of Mr Jasper, he should be permitted to have sight of the ruling and the transcript of the proceedings which took place on that occasion. We have read the record and it seems ... that the learned judge ... knew precisely the scope of the application and listened with the greatest possible care to the matters which were placed before him. He tested those matters, and he came to the conclusion that the ruling which he made was appropriate in all the circumstances. It is abundantly clear from the transcript that he throughout was very careful to ensure and to explore whether the material was relevant, or likely to be relevant to the defence which had been indicated to him. In these circumstances, it is impossible for this court to say that the learned judge erred in principle in adopting the course that he did, or that the prosecution erred in principle and we see no ground to set aside the order that the learned judge made on that occasion.”

18. On 28 March 1995 the Court of Appeal dismissed the applicant's appeal. The first ground of appeal, namely the non-disclosure of relevant evidence, was rejected in the following terms:

“The first [ground of appeal] ... related to matters to which the label 'unused material' is commonly given in these courts. It concerned the natural and proper desire of those instructed on behalf of the appellant to make sure, in so far as they could, that no documents or leads of any other sort existed which the Crown ought, as a matter of duty, to disclose to the defence if there was a real or a possible or more than a fanciful chance that disclosure of those documents or those leads might assist the defence. ...

There is no suggestion, nor any ground for a suggestion, that the Crown were in any way in dereliction of their duty of good faith in making disclosure of anything that ought properly to be disclosed.”

The court continued:

“This was a case of enormous strength so far as the prosecution were concerned. The appellant had been caught red handed with a huge amount of cannabis resin. He was exercising a proprietorial form of control over the packages. He was unloading them and opening them up. By opening them he was allowing what were ostensibly their sole contents to defreeze, with a risk (to put it no higher) of their becoming

valueless. He was not the consignee of the meat. [He] neither called nor gave evidence. That, of course, was his right, as the jury were ... directed, but it had the result that the jury were without any explanation whatsoever as to what, on his case, he was about. It is difficult, if not impossible, to see what other inference than that he was indeed guilty of the offence charged any reasonable jury could have reached. We dismiss this appeal.”

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The prosecution's duty of disclosure

19. At common law, the prosecution has a duty to disclose any earlier written or oral statement of a prosecution witness which is inconsistent with evidence given by that witness at the trial. The duty also extends to statements of any witnesses potentially favourable to the defence.

B. Limitations to the duty of disclosure on grounds of public interest

1. *The Attorney General's Guidelines (1981)*

20. In December 1981 the Attorney-General issued Guidelines, which did not have the force of law, concerning exceptions to the common law duty to disclose to the defence certain evidence of potential assistance to it ((1982) 74 Cr. App. R. 302 (“the Guidelines”)). The Guidelines attempted to codify the rules of disclosure and to define the prosecution's power to withhold “unused material”. Under paragraph 1, “unused material” was defined as:

“(i) All witness statements and documents which are not included in the committal bundle served on the defence; (ii) the statements of any witnesses who are to be called to give evidence at the committal and (if not in the bundle) any documents referred to therein; (iii) the unedited version(s) of any edited statements or composite statement included in the committal bundles.”

Under paragraph 2, any item falling within this definition was to be made available to the defence if “... it has some bearing on the offence(s) charged and the surrounding circumstances of the case”.

21. According to the Guidelines, the duty to disclose was subject to a discretionary power for prosecuting counsel to withhold relevant evidence if it fell within one of the categories set out in paragraph 6. One of these categories (6(iv)) was “sensitive” material which, because of its sensitivity,

it would not be in the public interest to disclose. “Sensitive material” was defined as follows:

“... (a) it deals with matters of national security; or it is by, or discloses the identity of, a member of the Security Services who would be of no further use to those services once his identity became known; (b) it is by, or discloses the identity of an informant and there are reasons for fearing that the disclosure of his identity would put him or his family in danger; (c) it is by, or discloses the identity of a witness who might be in danger of assault or intimidation if his identity became known; (d) it contains details which, if they became known, might facilitate the commission of other offences or alert someone not in custody that he is a suspect; or it discloses some unusual form of surveillance or method of detecting crime; (e) it is supplied only on condition that the contents will not be disclosed, at least until a subpoena has been served upon the supplier - e.g. a bank official; (f) it relates to other offences by, or serious allegations against, someone who is not an accused, or discloses previous convictions or other matters prejudicial to him; (g) it contains details of private delicacy to the maker and/or might create risk of domestic strife.”

According to paragraph 8, “in deciding whether or not statements containing sensitive material should be disclosed, a balance should be struck between the degree of sensitivity and the extent to which the information might assist the defence”. The decision as to whether or not the balance in a particular case required disclosure of sensitive material was one for the prosecution, although any doubt should be resolved in favour of disclosure. If either before or during the trial it became apparent that a duty to disclose had arisen, but that disclosure would not be in the public interest because of the sensitivity of the material, the prosecution would have to be abandoned.

2. *R. v Ward (1992)*

22. Since 1992 the Guidelines have been superseded by the common law, notably by a number of decisions of the Court of Appeal.

In *R. v. Ward* ([1993] vol. 1 Weekly Law Reports p. 619) the Court of Appeal dealt with the duties of the prosecution to disclose evidence to the defence and the proper procedure to be followed when the prosecution claimed public interest immunity. It stressed that the court and not the prosecution was to be the judge of where the proper balance lay in a particular case, because:

“... [When] the prosecution acted as judge in their own cause on the issue of public interest immunity in this case they committed a significant number of errors which affected the fairness of the proceedings. Policy considerations therefore powerfully

reinforce the view that it would be wrong to allow the prosecution to withhold material documents without giving any notice of that fact to the defence. If, in a wholly exceptional case, the prosecution are not prepared to have the issue of public interest immunity determined by a court, the result must inevitably be that the prosecution will have to be abandoned.”

The Court of Appeal described the balancing exercise to be performed by the judge as follows:

“... a judge is balancing on the one hand the desirability of preserving the public interest in the absence of disclosure against, on the other hand, the interests of justice. Where the interests of justice arise in a criminal case touching and concerning liberty or conceivably on occasion life, the weight to be attached to the interests of justice is plainly very great indeed”.

3. *R. v. Trevor Douglas K. (1993)*

23. In *R. v. Trevor Douglas K* (vol. 97 Criminal Appeal Reports p. 342), the Court of Appeal emphasised that in performing the balancing exercise referred to in *Ward*, the court must view the material itself:

“In our judgment the exclusion of the evidence without an opportunity of testing its relevance and importance amounted to a material irregularity. When public interest immunity is claimed for a document, it is for the court to rule whether the claim should be upheld or not. To do that involves a balancing exercise. The exercise can only be performed by the judge himself examining or viewing the evidence, so as to have the facts of what it contains in mind. Only then can he be in a position to balance the competing interests of public interest immunity and fairness to the party claiming disclosure.”

This judgment also clarified that where an accused appeals to the Court of Appeal on the grounds that material has been wrongly withheld, the Court of Appeal will itself view the material *ex parte*.

4. *R. v. Davis, Johnson and Rowe (1993)*

24. In *R. v. Davis, Johnson and Rowe* ([1993] vol. 1 Weekly Law Reports p. 613), the Court of Appeal held that it was not necessary in every case for the prosecution to give notice to the defence when it wished to claim public interest immunity, and outlined three different procedures to be adopted.

The first procedure, which had generally to be followed, was for the prosecution to give notice to the defence that they were applying for a ruling by the court and indicate to the defence at least the category of the material which they held.

The defence then had the opportunity to make representations to the court.

Secondly, however, where the disclosure of the category of the material in question would in effect reveal that which the prosecution contended should not be revealed, the prosecution should still notify the defence that an application to the court was to be made, but the category of the material need not be disclosed and the application should be *ex parte*.

The third procedure would apply in an exceptional case where to reveal even the fact that an *ex parte* application was to be made would in effect be to reveal the nature of the evidence in question. In such cases the prosecution should apply to the court *ex parte* without notice to the defence.

25. The Court of Appeal observed that although *ex parte* applications limited the rights of the defence, in some cases the only alternative would be to require the prosecution to choose between following an *inter partes* procedure or declining to prosecute, and in rare but serious cases the abandonment of a prosecution in order to protect sensitive evidence would be contrary to the public interest. It referred to the important role performed by the trial judge in monitoring the views of the prosecution as to the proper balance to be struck and remarked that even in cases in which the sensitivity of the information required an *ex parte* hearing, the defence had “as much protection as can be given without pre-empting the issue”. Finally, it emphasised that it was for the trial judge to continue to monitor the position as the trial progressed. Issues might emerge during the trial which affected the balance and required disclosure “in the interests of securing fairness to the defendant”. For this reason it was important for the same judge who heard any disclosure application also to conduct the trial.

5. *R. v. Keane (1994)*

26. In *R. v. Keane* ([1994] vol. 1 Weekly Law Reports p. 747) the Court of Appeal emphasised that, since the *ex parte* procedure outlined in *R. v. Davis, Johnson and Rowe* was “contrary to the general principle of open justice in criminal trials”, it should be used only in exceptional cases. It would be an abdication of the prosecution's duty if, out of an abundance of caution, it were simply “to dump all its unused material in the court's lap and leave it to the judge to sort through it regardless of its materiality to the issues present or potential”. Thus, the prosecution should put before the court only those documents which it regarded as material but wished to

withhold. “Material” evidence was that which could, on a sensible appraisal by the prosecution, be seen to (i) be relevant or possibly relevant to an issue in the case; (ii) raise or possibly raise a new issue the existence of which was not apparent from the evidence the prosecution proposed to use; or to (iii) hold out a real (as opposed to fanciful) prospect of providing a lead of evidence going to (i) or (ii). Exceptionally, in case of doubt about the materiality of the documents or evidence, the court might be asked to rule on the issue. In order to assist the prosecution in deciding whether evidence in its possession was “material”, and the judge in performing the balancing exercise, it was open to the defence to indicate any defence or issue which they proposed to raise.

6. *R. v. Rasheed (1994)*

27. In *R. v. Rasheed* (The Times, 20 May 1994), the Court of Appeal held that a failure by the prosecution to disclose the fact that a prosecution witness whose evidence was challenged had applied for or received a reward for giving information was a material irregularity which justifies overturning a conviction.

7. *R. v. Winston Brown (1994)*

28. In *R. v. Winston Brown* ([1994] Criminal Appeal Reports p. 191), the Court of Appeal reviewed the operation of the Guidelines. It stated:

“The Attorney General's objective was no doubt to improve the existing practice of disclosure by the Crown. That was a laudable objective. But the Attorney General was not trying to make law and it was certainly beyond his power to do so The Guidelines are merely a set of instructions to Crown Prosecution Service lawyers and prosecuting counsel Judged simply as a set of instructions to prosecutors, the Guidelines would be unobjectionable if they exactly matched the contours of the common law duty of non-disclosure But if the Guidelines, judged by the standards of today, reduce the common law duties of the Crown and thus abridge the common law rights of a defendant, they must be *pro tanto* unlawful

[T]oday, the Guidelines do not conform to the requirements of the law of disclosure in a number of critically important respects. First, the judgment in *Ward* established that it is for the court, not prosecuting counsel, to decide on disputed questions as to discloseable materials, and on any asserted legal ground to withhold production of relevant material For present purposes the point of supreme importance is that there is no hint in the Guidelines of the primacy of the court in deciding on issues of disclosure Secondly, the guidelines are not an exhaustive statement of the Crown's

common law duty of disclosure: *R. v. Ward* at 25 and 681D. To that extent too the Guidelines are out of date. Thirdly, the Guidelines were drafted before major developments in the field of public interest immunity. [I]n paragraph 6 the Guidelines are cast in the form of a prosecutor's discretion Much of what is listed as 'sensitive material' is no doubt covered by public interest immunity. But not everything so listed is covered by public interest immunity”

8. *R. v. Turner (1994)*

29. In the case of *R. v. Turner* ([1995] vol. 1 Weekly Law Reports p. 264), the Court of Appeal returned to the balancing exercise, stating *inter alia*:

“Since *R. v. Ward* ... there has been an increasing tendency for defendants to seek disclosure of informants' names and roles, alleging that those details are essential to the defence. Defences that the accused has been set up, and allegations of duress, which used at one time to be rare, have multiplied. We wish to alert judges to the need to scrutinise applications for disclosure of details about informants with very great care. They will need to be astute to see that assertions of a need to know such details, because they are essential to the running of the defence, are justified. If they are not so justified, then the judge will need to adopt a robust approach in declining to order disclosure. Clearly, there is a distinction between cases in which the circumstances raise no reasonable possibility that information about the informant will bear upon the issues and cases where it will. Again, there will be cases where the informant is an informant and no more; other cases where he may have participated in the events constituting, surrounding, or following the crime. Even when the informant has participated, the judge will need to consider whether his role so impinges on an issue of interest to the defence, present or potential, as to make disclosure necessary ...

It is sufficient for us to say that in this case we are satisfied that the information concerning the informant showed a participation in the events concerning this crime which, coupled with the way in which the defence was raised from the very first moment by the defendant when he said that he was being set up, gave rise to the need for the defence to be aware of the identity of the informant and his role in this matter. We, therefore, conclude that if one applies the principle which has been quoted from *R. v. Keane* ... to the facts of the present case, there could only be one answer to the question as to whether the details concerning this informer were so important to the issues of interest to the defence, present and potential, that the balance which the judge had to strike came down firmly in favour of disclosure.”

9. *The Criminal Procedure and Investigations Act 1996*

30. Subsequent to the applicant's trial, a new statutory scheme covering disclosure by the prosecution has come into force in England and Wales. Under the 1996 Act, the prosecution must make "primary disclosure" of all previously undisclosed evidence which, in the prosecutor's view, might undermine the case for the prosecution. The defendant must then give a defence statement to the prosecution and the court, setting out in general terms the nature of the defence and the matters on which the defence takes issue with the prosecution. The prosecution must then make a "secondary disclosure" of all previously undisclosed material "which might reasonably be expected to assist the accused's defence as disclosed by the defence statement". Disclosure by the prosecution may be subject to challenge by the accused and review by the trial court.

C. The Interception of Communications Act 1985

31. The Interception of Communications Act 1985 ("the 1985 Act") came into force on 10 April 1986 following the Court's judgment in *Malone v. the United Kingdom* (2 August 1984, Series A no. 82). Its objective, as outlined in the Home Office White Paper which preceded it, was to provide a clear statutory framework within which the interception of communications on public systems would be authorised and controlled in a manner commanding public confidence (*Interception of Communications in the United Kingdom* (February 1985) Her Majesty's Stationary Office, Cmnd. 9438).

32. By section 1 (1) of the 1985 Act, anyone who intentionally intercepts a communication in the course of its transmission by means of a public communications system is guilty of a criminal offence. Section 1 (2) and (3) provide four circumstances in which a person who intercepts communications in this way will not be guilty of the offence, for example, interception of a communication pursuant to a warrant lawfully issued by the Secretary of State under section 2 of the Act, where the Minister considers the interception necessary in the interests of national security, for the purpose of preventing or detecting serious crime, or in order to safeguard the economic well-being of the United Kingdom. The operation of the Act is overseen by a Tribunal and a Commissioner: see further the *Halford v. the United Kingdom* judgment of 25 June 1997 (*Reports* 1997-III, §§ 21-35).

33. Section 6 of the 1985 Act contains a series of provisions designed to secure that the retention and circulation of any intercepted material is “limited to the minimum ... necessary” to achieve the section 2 purpose for which it was obtained, including a provision requiring the destruction of any such material as soon as its retention “is no longer necessary” for that purpose. Section 9 provides that no evidence shall be adduced by any party, in any proceedings before a court or tribunal, which tends to suggest either that an offence under section 1 of the 1985 Act has been committed by a public servant or that a warrant has been issued to such a person under section 2 of the 1985 Act.

34. In *R. v. Preston* ([1994] vol. 2 Appeal Cases p. 130), the House of Lords decided that the fact that material intercepted pursuant to section 2 of the 1985 Act had been destroyed did not amount to a material irregularity in criminal proceedings. The basis for the House of Lords' decision was that the purpose for which such an interception might be permitted was narrowly defined in section 2 of the 1985 Act; in particular, the purpose of “preventing and detecting serious crime” did not extend to amassing evidence with a view to prosecuting offenders. One of the consequences of this construction was that, in a case of interception authorised for “preventing and detecting serious crime”, section 6 of the Act would normally require the destruction of intercepted material at a stage well before the prosecution's duty to disclose relevant material could arise in criminal proceedings. Accordingly, if the Act were to operate, as Parliament had intended, to restrict retention and dissemination of intercepted material to the minimum necessary to achieve the purpose of “preventing and detecting serious crime”, there was likely to be no intercepted material to disclose to the defence and its destruction could not be said to amount to a material irregularity.

D. “Special Counsel”

35. Following the judgments of the Court in *Chahal v. the United Kingdom* (15 November 1996, *Reports of Judgments and Decisions* 1996-V) and *Tinnelly v. the United Kingdom* (10 July 1998, *Reports* 1998-IV) the United Kingdom has introduced legislation making provision for the appointment of a “special counsel” in certain cases involving national security. The provisions are contained in the Special Immigration Appeals Commission Act 1997 (“the 1997 Act”), and the Northern Ireland Act 1998 (“the 1998 Act”). Under this legislation, where it is necessary on national security grounds for the relevant tribunal to sit *in camera*, in the absence of

the affected individual and his or her legal representatives, the Attorney General may appoint a special counsel to represent the interests of the individual in the proceedings. The legislation provides that the special counsel is not however “responsible to the person whose interest he is appointed to represent”, thus ensuring that the special counsel is both entitled and obliged to keep confidential any information which cannot be disclosed.

36. For example, in the immigration context, the relevant Rules under the 1997 Act are contained in the Special Immigration Appeals Act Commission (Procedure) Rules 1998 (Statutory Instrument no. 1998/1881). Rule 3 provides that in exercising its functions, the Commission shall secure that information is not disclosed contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest. Rule 7 relates to the special advocate established by section 6 of the 1997 Act. It provides, *inter alia*,

“7.(4) The function of the special advocate is to represent the interest of the appellant by -

- (a) making submissions to the Commission in any proceedings from which the appellant or his representative are excluded;
- (b) cross-examining witnesses at any such proceedings; and
- (c) making written submissions to the Commission.

(5) Except in accordance with paragraph (6) to (9) the special advocate may not communicate directly or indirectly with the appellant or his representative on any matter connected with proceedings before the Commission.

(6) The special advocate may communicate with the appellant and his representative at any time before the Secretary of State make the material available to him.

(7) At any time after the Secretary of State has made the material available under rule 10(3), the special advocate may seek directions from the Commission authorising him to seek information in connection with the proceedings from the appellant or his representative.

(8) The Commission shall notify the Secretary of State of a request for direction under paragraph (7) and the Secretary of State must, within a period specified by the Commission, give the Commission notice of any objection which he has to the request for information being made or to the form in which it is proposed to be made.

(9) Where the Secretary of State makes an objection under paragraph (8) rule 11 shall apply as appropriate. ...

10.(1) If the Secretary of State intends to oppose the appeal, he must, no later than 42 days after receiving a copy of the notice of appeal -

(a) provide the Commission with a summary of the facts relating to the decision being appealed and the reasons for the decision;

(b) inform the Commission of the grounds on which he opposes the appeal; and

(c) provide the Commission with a statement of the evidence which he relies upon in support of those grounds.

(2) Where the Secretary of State objects to material referred to in paragraph (1) above being disclosed to the appellant or his representative, he must also

(a) state the reasons for the objection; and

(b) if and to the extent it is possible to do so without disclosing information contrary to the public interest, provide a statement of that material in a form that can be shown to the appellant.

(3) Where he makes an objection under paragraph (2), the Secretary of State must make available to the special advocate, as soon as it is practicable to do so, the material which he has provided to the Commission under paragraphs (1) and (2).

11.(1) Proceedings under this rule shall take place in the absence of the appellant and his representative.

(2) The Commission shall decide whether to uphold the Secretary of State's objection.

(3) Before doing so it shall invite the special advocate to make written representations.

(4) After considering representations made under paragraph (3) the Commission may -

(a) invite the special advocate to make oral representations; or

(b) uphold the Secretary of State's objections without requiring further representations from the special advocate.

(5) Where the Commission is minded to overrule the Secretary of State's objection, or to require him to provide material in different form from that in which he has provided it under rule 10(2)(b), the Commission must invite the Secretary of State and the special advocate to make oral representations.

(6) Where -

(a) the Commission overrules the Secretary of State's objection or requires him to provide material in different form from that in which he has provided it under rule 10(2)(b), and

(b) the Secretary of State wishes to oppose the appeal, he shall not be required to disclose any material which was the subject of the unsuccessful objection if he chooses not to rely upon it in opposing the appeal.”

37. In the context of fair employment proceedings in Northern Ireland, the scheme under sections 90 to 92 of the 1998 Act and the relevant Rules is identical to the mechanism adopted under the 1997 Act (above).

38. In addition, the Government has recently placed before Parliament two Bills which make provision for the appointment of “special counsel” (operating under the same conditions) in other circumstances. The Electronic Communications Bill 1999 provides for the appointment of a “special representative” in proceedings before an Electronic Communications Tribunal to be established for the purpose of examining complaints relating to the interception and interpretation of electronic communications. In the context of criminal proceedings, the Youth Justice and Criminal Evidence Bill 1999 makes provision for the appointment by the court of a special counsel in any case in which a trial judge prohibits an unrepresented defendant from cross-examining in person the complainant in sexual offence.

PROCEEDINGS BEFORE THE COMMISSION

39. Mr Jasper applied to the Commission on 26 September 1994. He alleged that his trial at first instance and the proceedings before the Court of Appeal breached his rights under Article 6 §§ 1 and 3 (b) and (d) of the Convention.

40. The Commission declared the application admissible on 15 September 1997. In its report of 20 October 1998 (former Article 31 of the Convention), it expressed the opinion, by nineteen votes to eleven, that there had been no violation of Article 6 § 1 of the Convention in conjunction with Article 6 § 3(b) and (d). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment¹.

1. *Note by the Registrar.* For practical reasons this annex will appear only with the final printed version of the judgment (in the official reports of selected judgments and decisions of the Court), but a copy of the Commission's report is obtainable from the Registry.

FINAL SUBMISSIONS TO THE COURT

41. In his memorial and at the hearing, the applicant asked the Court to find that the proceedings before the Crown Court and Court of Appeal, taken together, violated Article 6 § 1 of the Convention in conjunction with Article 6 § 3(b) and (d), and to award him just satisfaction under Article 41.

The Government asked the Court to find that there had been no violation of the Convention in the applicant's case.

AS TO THE LAW

I. ARTICLE 6 §§ 1 AND 3(b) AND (d) OF THE CONVENTION

42. The applicant alleged that the proceedings before the Crown Court and the Court of Appeal, taken together, violated his rights under Article 6 §§ 1 and 3(b) and (d) of the Convention, which state as relevant:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...

3. Everyone charged with a criminal offence has the following minimum rights: ...

(b) to have adequate time and facilities for the preparation of his defence; ...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ...”

43. The applicant submitted that any failure to disclose relevant evidence undermined the right to a fair trial, although he agreed with the Government and the Commission that the right to full disclosure was not absolute and could, in pursuit of a legitimate aim such as the protection of national security or of vulnerable witnesses or sources of information, be subject to limitations. Any such restriction on the rights of the defence should, however, be strictly proportionate and counterbalanced by procedural safeguards adequate to compensate for the handicap imposed on the defence. Whilst accepting that in certain circumstances it might be necessary in the public interest to exclude the accused and his representatives from the disclosure procedure, he contended that the *ex parte* hearing before the judge (see paragraph 9 above) violated Article 6 because it afforded no safeguards against judicial bias or error and no opportunity to put arguments on behalf of the accused.

44. The applicant contended that it was necessary for the purposes of Article 6 to counterbalance the exclusion of the defence from the procedure by the introduction of an adversarial element, such as the appointment of an independent counsel who could advance argument on behalf of the defence as to the relevance of the undisclosed evidence, test the strength of the prosecution claim to public interest immunity and act as an independent safeguard against the risk of judicial error or bias. He pointed to four examples of cases where a special counsel procedure had been introduced in the United Kingdom (see paragraphs 35-38 above). These examples, he submitted, demonstrated that an alternative mechanism was available which would ensure that the rights of the defence were respected as far as possible in the course of a hearing to determine whether evidence should be withheld on public interest grounds, whilst safeguarding legitimate concerns about, for example, national security or the protection of witnesses and sources of information, and he reasoned that the onus was on the Government to show why it would not be possible to introduce such a procedure.

45. Finally, he alleged that his trial had been unfair because the product of a telephone intercept had been withheld from the defence without being placed before the trial judge.

46. The Government accepted that in cases where relevant or potentially relevant material was not disclosed to the defence on grounds of public interest, it was important to ensure the existence of sufficient safeguards to protect the rights of the accused. In their submission, English law in principle, and in practice in the applicant's case, provided the required level of protection. The procedure set out by the Court of Appeal in *R. v. Davis, Johnson and Rowe* (see paragraphs 24-25 above), which was followed at the applicant's trial, ensured that, as far as possible, the accused and his lawyers were given the maximum amount of information and the maximum opportunity to make submissions to the court, without jeopardising the confidentiality of evidence which it was necessary to withhold in the public interest.

47. The Government submitted that the independent counsel scheme proposed by the applicant was not necessary to ensure compliance with Article 6. They claimed that the position contrasted with that in immigration proceedings where the Secretary of State wished to deport an individual on grounds of national security prior to the introduction of the special counsel system (see the *Chahal* judgment cited in paragraph 35 above): in the present case the national judge was able fully to review and determine all issues relating to disclosure of evidence. Moreover, the proposed scheme

would give rise to significant difficulties in practice, for example, with regard to the duties which would be owed by the special counsel to the accused, the amount of information he or she would be at liberty to pass on to the accused and the defence lawyers and the quality of instructions he or she could expect to receive from the defence. Such difficulties would be particularly acute in cases involving more than one co-accused, where it would be necessary to appoint a special counsel in respect of each defendant to avoid the risk of conflict of interest, and in respect of long trials, with constantly evolving disclosure issues.

48. As for the issues relating to the Interception of Communications Act 1985 (see paragraphs 31-34 above), the Government pointed out that the Act was designed to ensure that the interception of communications was to be authorised only when strictly necessary in pursuit of a legitimate aim, and that the dissemination and retention of any intercepted material was limited to the minimum necessary for the purpose for which the interception was authorised (see paragraph 33 above). In this way, the Act sought both to achieve a proper balance between the individual's right to privacy under Article 8 of the Convention and the need to use secret surveillance, and to ensure that measures and methods of surveillance were kept secret. In consequence it was not possible to preserve, disclose and rely on intercepted material in criminal proceedings, but this restriction applied equally to prosecution and defence.

49. The Commission was satisfied that the criminal proceedings brought against the applicant were fair, since the trial judge, who decided on the question of disclosure of evidence, was aware of both the contents of the withheld evidence and the nature of the applicant's case, and was thus able to weigh the applicant's interest in disclosure against the public interest in concealment. It did not consider that the non-disclosure of intercepted material rendered the proceedings unfair, since it was not established that there was any such material, since the principle of equality of arms was respected because neither side could adduce interception evidence (see paragraph 33 above), and since the applicant could have given evidence as to the fact and content of the telephone calls which he alleged took place, but chose not to.

50. The Court recalls that the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial set out in paragraph 1 (see the *Edwards v. the United Kingdom* judgment of 16 December 1992, Series A no. 247-B, § 33). In the circumstances of the case it finds it unnecessary to examine the applicant's allegations separately from the standpoint of paragraph 3(b) and (d), since they amount to a complaint that the applicant

did not receive a fair trial. It will therefore confine its examination to the question whether the proceedings in their entirety were fair (*ibid.*, § 34).

51. It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (see the *Brandstetter v. Austria* judgment of 28 August 1991, Series A no. 211, §§ 66, 67). In addition Article 6 § 1 requires, as indeed does English law (see paragraph 19 above), that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused (see the above-mentioned *Edwards* judgment, § 36).

52. However, as the applicant recognised (see paragraph 43 above), the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused (see, for example, the *Doorson v. the Netherlands* judgment of 26 March 1996, *Reports of Judgments and Decisions* 1996-II, § 70). In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1 (see the *Van Mechelen and Others v. the Netherlands* judgment of 23 April 1997, *Reports* 1997-III, § 58). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (see the above-mentioned *Doorson* judgment, § 72 and the above-mentioned *Van Mechelen and Others* judgment, § 54).

53. In cases where evidence has been withheld from the defence on public interest grounds, it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them (see the above-mentioned *Edwards* judgment, § 34). In any event, in many cases, such as the present, where the evidence in question has never been revealed, it would not be possible for the Court to attempt to weigh the public interest in non-disclosure against that of the accused in having sight of the material. It must therefore scrutinise the decision-making procedure to ensure that, as far as possible, it complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused.

54. On 14 January 1994, shortly before the commencement of the applicant's trial, the prosecution made an *ex parte* application to the trial judge to withhold material in its possession on the grounds of public interest immunity. The defence were notified that an application was to be made, but were not told of the category of material which the prosecution sought to withhold. They were given the opportunity to outline the defence case to the trial judge, namely that the applicant had not known that the consignment of meat contained cannabis and had collected it pursuant to instructions received by telephone the previous night, and to request the judge to order disclosure of any evidence relating to these alleged facts. The trial judge examined the material in question and ruled that it should not be disclosed. The defence were not informed of the reasons for the judge's decision.

55. The Court is satisfied that the defence were kept informed and permitted to make submissions and participate in the above decision-making process as far as was possible without revealing to them the material which the prosecution sought to keep secret on public interest grounds. Whilst it is true that in a number of different contexts the United Kingdom has introduced, or is introducing, a "special counsel" (see paragraphs 35 and 36 above), the Court does not accept that such a procedure was necessary in the present case. The Court notes, in particular, that the material which was not disclosed in the present case formed no part of the prosecution case whatever, and was never put to the jury. This position must be contrasted with the circumstances addressed by the 1997 Act and the 1998 Act, where impugned decisions were based on material in the hands of the executive, material which was not seen by the supervising courts at all.

56. The fact that the need for disclosure was at all times under assessment by the trial judge provided a further, important, safeguard in that it was his duty to monitor throughout the trial the fairness or otherwise of the evidence being withheld. It has not been suggested that the judge was not independent and impartial within the meaning of Article 6 § 1. He was fully versed in all the evidence and issues in the case and in a position to monitor the relevance to the defence of the withheld information both before and during the trial. Moreover it can be assumed – not least because the Court of Appeal confirmed that the transcript of the *ex parte* hearing showed that he had been "very careful to ensure and to explore whether the material was relevant, or likely to be relevant to the defence which had been indicated to him" - that the judge applied the principles which had recently been clarified by the Court of Appeal, for example that in weighing the

public interest in concealment against the interest of the accused in disclosure, great weight should be attached to the interests of justice, and that the judge should continue to assess the need for disclosure throughout the progress of the trial (see the *Ward* and *Davis, Johnson and Rowe* judgments in paragraphs 22 and 24-25 above). The jurisprudence of the English Court of Appeal shows that the assessment which the trial judge must make fulfils the conditions which, according to the Court's case-law, are essential for ensuring a fair trial in instances of non-disclosure of prosecution material (see paragraphs 51 and 52 above). The domestic trial court in the present case thus applied standards which were in conformity with the relevant principles of a fair trial embodied in Article 6 § 1. Furthermore, during the appeal proceedings the Court of Appeal also considered whether or not the evidence should have been disclosed (see paragraphs 17-18 above), providing an additional level of protection for the applicant's rights.

57. In addition, the applicant alleged that his trial had been unfair because the product of a telephone intercept had been withheld from the defence without being placed before the trial judge. However, the Court notes that it is not established that any such material existed at the time of the trial. Moreover, since under section 9 of the 1985 Act both the prosecution and the defence were prohibited from adducing any evidence which might tend to suggest that calls had been intercepted by the State authorities, the principle of equality of arms was respected. It would, further, have been open to the applicant himself to testify, or to call evidence from other sources, as to the fact and contents of the instructions he allegedly received by telephone the day before his arrest.

58. In conclusion, therefore, the Court finds that, as far as possible, the decision-making procedure complied with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused. It follows that there has been no violation of Article 6 § 1 in the present case.

FOR THESE REASONS THE COURT

1. *Holds* by nine votes to eight that there has not been a violation of Article 6 § 1 of the Convention;

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 16 February 2000.

For the President

ELISABETH PALM
Vice-President

PAUL MAHONEY
Deputy Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following dissenting opinions are annexed to this judgment:

- (a) dissenting opinion of Mrs Palm, Mr Fischbach, Mrs Vajić, Mrs Thomassen, Mrs Tsatsa-Nikolovska and Mr Traja;
- (b) dissenting opinion of Mr M. Zupančič;
- (c) dissenting opinion of Mr Hedigan.

Initialled: E. P.

Initialled: P.J. M.

DISSENTING OPINION OF JUDGES PALM, FISCHBACH,
VAJIĆ, THOMASSEN, TSATSA-NIKOLOVSKA AND
TRAJA

We do not agree that there has been no violation of Article 6 § 1 in this case. We accept the majority's statement of the law as set out at paragraphs 51-53 of the judgment, but we do not accept the conclusions which the majority draw from that statement.

We note that, although the defence in this case were notified that an *ex parte* application was to be made by the prosecution for material to be withheld on grounds of public interest immunity, they were not informed of the category of material which the prosecution sought to withhold, they were not - by definition - involved in the *ex parte* proceedings, and they were not informed of the reasons for the judge's subsequent decision that the material should not be disclosed. This procedure cannot, in our view, be said to respect the principles of adversarial proceedings and equality of arms, given that the prosecuting authorities were provided with access to the judge and were able to participate in the decision-making process in the absence of any representative of the defence. We do not accept that the opportunity given to the defence to outline their case before the trial judge took his decision on disclosure can affect the position, as the defence were unaware of the nature of the matters they needed to address. It was purely a matter of chance whether they made any relevant points.

The fact that the judge monitored the need for disclosure throughout the trial (see paragraph 56 of the judgment) cannot remedy the unfairness created by the defence's absence from the *ex parte* proceedings. In our view, the requirements - set out in the Doorson and Van Mechelen judgments - that any difficulties caused to the defence by a limitation on defence rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities, are not met by the mere fact that it was a judge who decided that the evidence be withheld. In stating this, we do not suggest in any way that the judge in the present case was not independent and impartial within the meaning of Article 6 § 1 of the Convention, or that he was not fully versed in the evidence and issues in the case as mentioned in paragraph 56 of the judgment. Our concern is that, in order to be able to fulfil his functions as the judge in a fair trial, the judge should be informed by the opinions of both parties, not solely the prosecution.

The proceedings before the Court of Appeal were, in our view, inadequate to remedy these defects, since, as at first instance, there was no possibility of making informed submissions to the court on behalf of the accused. The facts of this case can therefore be distinguished from those of the Edwards judgment, where by the time of the appeal proceedings the defence had received most of the missing information and the Court of Appeal was able to consider the impact of the new material on the safety of the conviction in the light of detailed and pertinent argument from the defence (Edwards judgment, §§ 36-37).

We accept that there may be circumstances in which material need not be disclosed to the defence, but we find that the way in which the United Kingdom courts dealt with the sensitive material in the present case was not satisfactory. It is not for the Court to prescribe specific procedures for domestic courts to follow, but we note that, in the light of two Convention cases, a “special counsel” system has been introduced in the United Kingdom where it is necessary to withhold evidence from one of the parties to litigation, and that other examples are likely to be introduced (paragraphs 35-38 of the judgment). These examples do not exactly match the circumstances of the present case, but we have no doubt that the practical problems raised by the Government (see paragraph 47 of the judgment) can be resolved.

For example, we understand that in Northern Ireland, *ex parte* applications on public immunity grounds are made to a judge other than the trial judge. In such a system, no problems of participation of the “special counsel” at the trial would arise and the trial judge is not put in the uncomfortable position of having to see material and then having to discount it at a later stage of the proceedings.

Again without purporting to lay down specific procedures to be applied by domestic courts, we would refer to the system in the immigration context (see Rule 7 (7) of the Special Immigration Appeals Act Commission (Procedure) Rules 1998, set out at paragraph 36 of the judgment). Under these arrangements, a “special counsel” is permitted to have sight of the sensitive material, after which he or she is permitted further communication with the defence only with the leave of the court.

These examples show that legitimate concerns about confidentiality can be accommodated at the same time as according the individual a substantial measure of procedural justice.

We conclude, therefore, that the decision-making procedure in the present case did not sufficiently comply with the principles of adversarial proceedings and equality of arms, nor did it incorporate adequate safeguards to protect the interests of the accused. It follows that in our opinion there has been a violation of Article 6 § 1 in the present case.

DISSENTING OPINION OF JUDGE ZUPANČIČ

In my opinion this case is the tip of a much larger iceberg than imagined either by majority or by other dissenters. Non-disclosure, that is, secrecy concerning some aspects of prosecution's case, is of course a problem in itself. However, compared to the preponderantly inquisitorial Continental systems of criminal procedure in which the *ex officio* investigation used to be entirely secret, the partial non-disclosure in an adversarial system cannot be seen as a breach of a fundamental procedural standard. Still, for me this is not a minor technical consideration because it affects the whole philosophy of criminal procedure. I have written about that in an article entitled *The Crown and the Criminal: The Privilege against Self-Incrimination -- Towards the General Principles of Criminal Procedure*, Nottingham Law Journal, Vol. 5, pp. 32-119 (1996).

Here I should like to raise a preliminary issue which, to the best of my knowledge, has not been considered by the national courts. For the State to acquire the right to intrude on someone's privacy there must be probable cause, that is, a suspicion sufficiently fortified by specific, articulable and antecedent evidence to be called reasonable. Clearly, if the citizen is to have the right to be left alone by the Government any exception to this must be justified in advance of the intrusion itself. The *ex post facto* discovery of tons of cannabis cannot justify the previous breach of the fundamental human right to be left alone. Further, such antecedent evidence must not be tainted by violations of someone's constitutional and human rights. If it is, it (and all evidence which would not be obtained were it not for the breach) should be subject to exclusionary rule.

It is permissible to speculate in this case that there was telephone interception leading to arrest. The legitimacy of this intrusion into privacy has never been subject to adversarial scrutiny as regards the issue of privacy nor regarding the question whether it in fact crossed the threshold of probable cause. Unless it did, the question remains open as to the legitimacy of subsequent arrest and search leading to ultimate conviction.

The non-disclosure of these preliminary procedures of course precludes the proper examination of the basic probable cause safeguard.

Dissenting Opinion of Judge Hedigan

I regret that I cannot agree with the majority in this case. I agree with the dissenting opinion of Judges Palm, Fischbach, Vajić, Thomassen, Tsatsa-Nikolovska and Traja save only that I do not consider that as a general rule applications to withhold evidence need to be made to a Judge other than the trial Judge. In so far as their dissenting opinion might suggest this, I would disagree.

My point of departure is to be found in the judgment of the Court in *Van Mechelen and Others v. the Netherlands* 23/04/97 Reports 1997-III § 58 where it held; “having regard to the place that the right to a fair administration of justice holds in a democratic society, any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice then that measure should be applied.”

It follows that, if it can be shown that there is a viable alternative way of proceeding which is less restrictive of an applicant's right to a fair trial and to proceedings adversarial in character, it should be taken. In my opinion, where the applicant can establish on a *prima facie* basis that such an alternative way exists, the onus shifts to the respondent to show why it cannot use or adapt such a way.

In this case, the prosecution withheld relevant information from the defence. It was submitted on behalf of the applicant that any failure to disclose relevant evidence undermined the right to a fair trial. It was, however, conceded that the right to full disclosure was not absolute, and could, in pursuit of a legitimate aim such as protection of national security or of vulnerable witnesses or sources of information, be subject to limitations.

It was agreed by the applicants and the Government that any such restrictions must be counter balanced by sufficient safeguards to protect the rights of the accused. Under present U.K. law this is provided for by the requirement that it is the trial judge should decide whether the evidence in question be disclosed.

There are three ways in which this may occur:

a) An application by the prosecution on notice to the accused indicating at least the category of the material which they hold. The defence then have the opportunity to make representations to the Court.

b) Where disclosure of the category itself would 'let the cat out of the bag' the prosecution should notify the defence that an application to the

Court is to be made but the category would not be disclosed and the application would be *ex parte*.

c) The third procedure is where, to reveal even the fact that an *ex parte* application would be made, would be to reveal the nature of the evidence; in such cases the application should be made *ex parte* without notice to the defence.

The applicant to the Court argued that there was a need to introduce a counter-balancing adversarial element on the occasions when the defence would be excluded from an application. He showed that in two separate ways at present (and two others in the course of legislation) a “special counsel” procedure had been introduced by legislation in the United Kingdom. Special counsel’s function is to assist the court in circumstances where a party may not be allowed to participate for national security or other reasons. Special counsel is to represent the interests of the individual in the proceedings. The relevant legislation¹ provides that the special counsel is not however “responsible to the person whose interest he is appointed to represent”. This ensures that the special counsel is both entitled and obliged to keep confidential any information which cannot be disclosed. The Government argued that the present arrangements in principle and in practice adequately protected the rights of the accused. In essence, they relied on the impartiality of the judge and the honour and professional integrity of the prosecution. They also raised the significant practical difficulties involved in creating such a role as special counsel in a criminal case. The problems, the Government pleaded, involved questions as to the duties owed by special counsel to the accused, the amount of information he or she would be at liberty to pass on to the accused and the defence lawyers and the quality of instructions he or she could expect to receive from the defence. Difficulties would be most acute, they argued, where there were more than one accused and problems also would arise where there were long trials with constantly evolving disclosure issues.

The question to be decided is whether the problems raised by the Government are, in practical terms, insurmountable. To take them individually;

a) Special counsel in a criminal case; it is to be noted that in addition to the two special counsel procedures referred to above, the Government as pleaded in this case, have recently placed before Parliament two bills making provision for the appointment of special counsel in other circumstances. One of these is the Youth Justice and Criminal Evidence

¹ Special Immigration Appeals Commission Act 1997 and Northern Ireland Act 1998

Bill 1999 which makes provision for the appointment by the Court of a special counsel in any case in which a trial judge prohibits an unrepresented defendant from cross-examining in person the complainant in a sexual offence case. It is, therefore, contemplated by the Government that the special counsel procedure may be used in a criminal case albeit one somewhat different from the facts of this case. The duty owed by special counsel to the accused is one which in general terms ought to be capable of resolution by the relevant professional bodies. Such ethical problems are the everyday work of the professional ethics committees of the same. Whilst not easy to resolve, nothing in the Government's rather general objection suggests the problem is insurmountable.

b) The amount of information special counsel would be at liberty to pass on to the accused and the defence lawyers; this is a problem I should have thought was also capable of determination. Very little would undoubtedly be the rule. I have no doubt the defence would be more than happy to endure this restriction when balanced against the benefit of representation at the hearing on disclosure.

c) I am not sure what is meant by the Government's reservations regarding the quality of instructions special counsel might receive from the defence. This is surely a matter for the defence. It is difficult to see where problems would arise although, no doubt, every case would raise its own. Again no insurmountable ones have been identified by the Government.

d) I agree that difficulties would be most acute where there are more than one accused. There are, however, inherent difficulties in every such case. Since there are no insurmountable problems raised already, I fail to see why this generality on its own would be enough to rule out an otherwise viable procedure. Cases where there are more than one accused invariably throw up many difficult problems for the Bar, the Bench and the relevant prosecution service.

e) Long trials with constantly evolving disclosure issues are more an extended variation of the above. I should have thought that the same special counsel would inevitably be involved in dealing with continued or newly arising disclosure issues and I fail to see anything more than administrative inconvenience being the problem there. Administrative inconvenience can never be a ground for restricting rights guaranteed by the Convention.

For these reasons I cannot accept that the Government have demonstrated that there are in practical terms insurmountable difficulties in adapting an already existing system to criminal trials such as in this case. I,

therefore, take the view that because there is a less restrictive measure which is available and adaptable the Government is in violation of the applicant's right to a fair trial under Article 6 § 1 in failing to avail of the same.