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

CASE OF ROWE AND DAVIS v. THE UNITED KINGDOM

(Application no. 28901/95)

JUDGMENT

STRASBOURG

16 February 2000

In the case of Rowe and Davis 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. 11[1], and the relevant provisions of the Rules of Court[2], 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 on 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, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 28901/95) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under former Article 25 by two British nationals, Mr Raphael Rowe and Mr Michael Davis, on 20 December 1993.

1-2. *Note by the Registry*. 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 the provisions of Article 5 § 4 of Protocol No. 11 taken together with Rules 100 § 1 and 24 § 6 of the Rules of Court, a panel of the Grand Chamber decided on 31 March 1999 that the case would be examined by the Grand Chamber of the Court. The Grand Chamber included *ex officio* Sir Nicolas Bratza, the judge elected in respect of the United Kingdom (Article 27 § 2 of the Convention and Rule 24 § 4), Mr L. Wildhaber, the President of the Court, Mrs E. Palm, Vice-President of the Court, and Mr J.-P. Costa and Mr M. Fischbach, Vice-Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 §§ 3 and 5 (a)). The other members appointed to complete the Grand Chamber were Mr L. Ferrari Bravo, Mr L. Caflisch, Mr W. Fuhrmann, Mr K. Jungwiert, Mr B. Zupančič, Mrs N. Vajić, Mr J. Hedigan, Mrs W. Thomassen, Mrs M. Tsatsa-Nikolovska, Mr T. Panţîru, Mr E. Levits and Mr K. Traja (Rule 24 § 3).

Subsequently Sir Nicolas Bratza, who had taken part in the Commission's examination of the case, withdrew from sitting in the Grand Chamber (Rule 28). The United Kingdom Government ("the Government") accordingly 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 decision of the Grand Chamber, a hearing in this case and in the cases of Jasper v. the United Kingdom (application no. 27052/95) and Fitt v. the United Kingdom (application no. 29777/96) 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,
Deputy Legal Adviser, *Agent*,
Mr R. CRANSTON, Solicitor-General,
Mr J. EADIE, Barrister-at-Law, *Counsel*,
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, *Advisers*;

(b) *for the applicants*

Mr B. EMMERSON, Barrister-at-Law, *Counsel*,
Ms M. CUNNEEN, Solicitor (Liberty),
Ms P. KAUFMAN, Barrister-at-Law,
Mr S. YOUNG, Solicitor,
Mr A.B.R. MASTERS, Barrister-at-Law, *Advisers*.

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The offences

4. During the night of 15 to 16 December 1988, a series of offences occurred in Surrey, England.

The first, which may have occurred sometime after 1.30 a.m., involved an attack on two men in a parked car in a field near a public house in Fickleshall. Just after the conclusion of sexual activities between the two men (Mr Ely and Mr Hurburgh), two masked men appeared. One carried a knife, the other a gun. Ely was pulled out of the car and 10 pounds sterling (GBP) was taken from him. On orders, he lay face down on the ground while the man with the knife kept guard over him. Ely became aware of a third masked man. The robbers wanted to take the car which belonged to Hurburgh, who objected and was attacked. Ely was made to crawl over to where Hurburgh was lying tied up. He was also tied up and gagged. Petrol was spread around both of them. Ely saw a lit cigarette and passed out. When he recovered consciousness, Hurburgh's Austin Princess car had gone and Hurburgh was dead. The attackers had abandoned a stolen Spitfire car in which they had arrived on the scene in the entrance to a field, about 500 metres away.

5. This offence was followed, at about 3.40 a.m., by three masked robbers arriving at the Napier household in Oxted. They entered by a back window. Two of them went into Timothy Napier's room; one had a knife, the other a gun. Meanwhile, Richard Napier (the father) was awakened by the third robber armed with a revolver. He was taken into Timothy's room. Both were told they would be shot if they did not cooperate. They attacked the robbers and forced them downstairs. In the struggle, Timothy Napier's

arm was cut and an artery was severed. Richard Napier was forced back upstairs to the bedroom where his wife was waiting. A knife was pointed at her and she was told to remove her rings and jewellery or her fingers would be cut off. The other two robbers ransacked the room before all three fled taking Timothy's Toyota car. Timothy Napier was rushed to hospital. He was found to have a stab wound to his back that had punctured the pleural cavity and required the insertion of a chest drain. Hurburgh's car was found abandoned nearby.

6. At 5 a.m., at the home of Mrs Spicer in Fetcham, she and her partner (Mr Almond) awoke to find three masked men in their bedroom. They were asked for money, jewellery and car keys. They told the intruders where to find them. Spicer and Almond were bound and gagged and the house was ransacked. It was nearly an hour before the robbers left, taking a large amount of property and the couple's two cars, a Renault and a Cavalier. Timothy Napier's Toyota was found abandoned nearby.

B. The reward, investigation and arrests

7. There was considerable interest in the above events, including publication in the national media between 17 and 19 December 1988 of the offer of a reward of GBP 25,000 for information leading to the conviction of the offenders. On Sunday 18 December the police incident room received information that the persons responsible for the murder and other offences were living at 25 Lawrie Park Road, Sydenham, South London ("No. 25"). In addition, the caller said that a considerable quantity of property which had been stolen during the course of the robberies had been taken by other persons resident at No. 25 and stored at the flat of a female associate at 71 Queen Adelaide Court.

8. No. 25 was owned by Mr Smith, who occupied the ground floor and basement. The remainder of the house, consisting of the two upper floors, was divided into flats occupied by the applicants, Raphael Rowe and Michael Davis, amongst others. Randolph Johnson visited the house from time to time, most recently to help repair the wiring and various electrical appliances, and he was said to have been there on the night of 15 December 1988. Rowe, Davis and Johnson were black.

9. Three white men also lived at No. 25: Mark Jobbins, Norman Duncan and Shane Griffin ("the Jobbins Group"). They were then aged 29, 21 and 19 years respectively. Duncan and Griffin sniffed glue on a regular basis. All three had criminal records.

10. As a result of the information received by the police, search warrants were obtained for each of the two addresses and were executed simultaneously at 7.50 a.m. on 19 December 1988. In a search of No. 25 carried out sometime between 2.15 p.m. on 19 December and 5 a.m. on 20 December, the police found a brooch from the Spicer/Almond robbery in

Rowe's wastepaper basket. Other Spicer/Almond items were found in a storeroom and, also in the storeroom, were some porcelain figurines (not connected with these offences) which bore Davis's fingerprints. Blood stains on a jacket found in Rowe's bedroom were analysed and found to be of a blood group shared by 8% of the population, including the murder victim, Hurburgh. Rowe, Davis, Jobbins and Griffin were arrested on suspicion of aggravated burglary. Duncan was arrested on 21 December.

11. Kate Williamson, a 16-year-old school student and girlfriend of Rowe, produced to the police a number of items from the Spicer/Almond robbery, including two eternity rings, a yellow metal watch strap and a lady's watch. She told them that she visited Rowe quite regularly and was there during the night of 15 December 1988. She said that she did not know Jobbins, Duncan or Griffin except by sight.

12. Joanne Cassar informed the police that she had stayed with another resident of No. 25, Jason Cooper, for a period in 1988. She knew Davis, Rowe, Jobbins, Duncan and Griffin. She had been at No. 25 during the night of 15 December 1988 and had stayed in Cooper's room.

13. The other search warrant was executed at 71 Queen Adelaide Court. It resulted in the arrest of the tenant, Bernadette Roberts, who was the girlfriend of Jobbins, and the recovery of a large amount of stolen property.

14. Johnson was arrested on 6 January 1989 after an extensive car chase by several police officers. At the time, he was carrying a revolver. In his statement he agreed that he had been to No. 25 on several occasions and, on the night in question, was probably there until late. He denied involvement in the offences and said in police interviews that he might have spent the night with a girlfriend.

C. The trial

15. The trial of the two applicants and Johnson took place at the Central Criminal Court in February 1990.

16. The prosecution case was that the three men had been involved in each incident. It was argued that there was evidence to link the offences: the Austin Princess stolen from Hurburgh was found at the scene of the Napier robbery; the Toyota stolen from the Napiers was found abandoned close to the Spicer/Almond household; and the vehicles stolen from the latter couple were connected to the occupants of No. 25. In addition, the witnesses to each of the robberies had described a team of three robbers, at least one of whom was carrying a gun and a second one a knife, dressed in black and wearing balaclavas.

17. The prosecution relied substantially upon the evidence of the Jobbins Group. The latter admitted having jointly stolen the Spitfire which had been found abandoned near the scene of the first robbery and murder, and having driven the Renault and Cavalier stolen at the last robbery to a field in Sidcup

where they had set fire to them. They gave evidence, *inter alia*, that on the night of 15 to 16 December, Rowe had asked if he could use the Spitfire and that he, Davis and another black man had requested help in other ways, such as the loan of a balaclava and assistance in starting the Spitfire. The Jobbins Group also gave evidence relating to the events of the following morning (16 December), when Rowe had allegedly made a number of incriminating comments about his own involvement in the crimes and had requested them to dispose of the stolen Spicer/Almond cars and to store the stolen property elsewhere.

18. In addition, the prosecution relied on the evidence of Kate Williamson that Rowe had left her during the night of 15 to 16 December and had returned the following morning at 6.30 a.m.; that he gave her rings from the Napier robbery in order to have them valued; that he scratched his bedroom window with one of the diamond rings and that he told her about the stolen cars. The prosecution also relied on the evidence of Joanne Cassar, that she had been given a plant by Davis that, it was suggested, came from the boot of the car stolen from Almond. Finally, Martin Todd, an inmate at Her Majesty's Prison Brixton where Johnson had been held on remand, gave evidence of incriminating remarks allegedly made to him by Johnson.

19. All three of the accused denied any involvement in the offences. Their defence relied on the facts that Kate Williamson and others had given evidence that Rowe and Davis had been in their company at times during the night of 15 to 16 December which were inconsistent with a sighting of the Spitfire at a similar time close to the scene of the Hurburgh murder and that the victims of the offences, including Ely, the Napiers and Spicer, had described their attackers as white. On behalf of Johnson it was argued that there was no evidence of his involvement in the preparatory acts or subsequent disposals.

20. The defence submitted that many of the witnesses for the prosecution were unreliable. Thus, Ely's evidence included a number of inconsistencies, as did the testimony and statements of the Jobbins Group. It was argued that if anyone from No. 25 had been responsible for the crimes, it was the Jobbins Group, and that Jobbins, Duncan and Griffin had given a deliberately false account to the police in order to implicate the accused and thus exonerate themselves. Joanne Cassar may have been an accomplice because she knew Duncan and Griffin, and Kate Williamson's evidence may have been motivated by jealousy of Rowe's relationship with another girlfriend and was in any event inconsistent with a letter which she had sent to Rowe whilst he was in prison. The defence sought to impugn Todd's evidence on the grounds that he may have lied in order to obtain parole. In addition, the defence referred to the substantial reward which had been offered as a factor which may have motivated prosecution witnesses to give evidence.

21. Davis gave evidence, consistent with his statement to the police, that he had played no part in the offences and had had nothing to do with the Spitfire. He claimed to have spent the evening of 15 December at home, and agreed with Kate Williamson's account of going out and not returning until about 12.30 a.m. Rowe's evidence was also consistent with his statement to the police. He denied having played any part in the offences and said that after returning to No. 25 at 12.30 a.m., he had then slept with Kate Williamson throughout the night. Johnson did not give evidence.

22. On 26 February 1990 the jury returned unanimous verdicts convicting the applicants and Johnson of murder, assault occasioning grievous bodily harm, and three counts of robbery. They were each sentenced to concurrent terms of life, fifteen years' and twelve years' imprisonment.

D. The proceedings before the Court of Appeal

23. The applicants and Johnson appealed on the grounds, *inter alia*, that their convictions were unsafe and unsatisfactory because of weaknesses and inconsistencies in the evidence against them.

1. The disclosure procedure

24. On 20 October 1992, at the first hearing before the Court of Appeal, counsel for the prosecution handed to the court a document which was not shown to defence counsel. He sought the Court of Appeal's ruling on a matter of disclosure (see paragraphs 34-35 below), and informed the court that the matter was sensitive to a degree which would require the court to hear him either *ex parte* or, if *inter partes*, only on an undertaking by defence counsel not to disclose what took place to their solicitors or clients. Both defence counsel indicated that they could not conscientiously give such an undertaking and withdrew from the hearing, which proceeded *ex parte*.

25. On 14 and 15 January 1993 the issue of disclosure was re-canvassed before a differently constituted Court of Appeal (although the Lord Chief Justice, Lord Taylor, participated in both hearings), because defence counsel had reconsidered their position and had concluded that they had been incorrect in withdrawing voluntarily as they had done at the first hearing. It was argued by the defence that (i) defence counsel should have been permitted to hear the application by the Crown without giving an undertaking and (ii) counsel for the Crown should, at the least, have been obliged to disclose the category of material in question so that defence counsel could then have made submissions as to whether or not disclosure of material in that category should be ordered. The Court of Appeal, in its judgment, remarked that the procedure to be followed when the prosecution was in possession of material which it believed should not be disclosed to

the defence had been changed by the judgment in *R. v. Ward* (see paragraph 37 below) in that it was now for the court, and not the prosecution, to decide whether disclosure should be made, and set out a series of procedural guidelines to be followed in such cases (see paragraphs 39-40 below). In conclusion, however, it refused to order disclosure.

26. On 22 June 1993, at the outset of the hearing of the substantive appeal before a differently constituted Court of Appeal, defence counsel invited the court to order the Crown to disclose the name of any person or persons to whom any reward money had been paid for information given to the police concerning the applicants, and sought access to the Police Complaints Authority Report concerning a complaint by Rowe. The prosecution showed the court documents relevant to the request for disclosure which were not shown to the defence. However, defence counsel were able to make submissions as to the factors weighing in favour of disclosure and the nature of the balancing exercise to be undertaken by the court. Having considered those submissions and having examined the relevant documents, the court refused to order disclosure.

2. The substantive appeal

27. On 29 July 1993 the Court of Appeal upheld the applicants' convictions and that of Johnson, concluding that there was no basis to say that there was even a lurking doubt about their safety.

E. Subsequent events

28. The applicants applied to the Court of Appeal for leave to appeal to the House of Lords, but this application was refused on 30 September 1993.

29. By a letter of 27 November 1994 the first applicant's solicitor, with reference to *R. v. Rasheed* (see paragraph 42 below), asked the Crown Prosecution Service for disclosure of any reward claim made prior to the trial by any witness and, in particular, by one of the Jobbins Group, Williamson or Cassar.

30. On 22 November 1995 the Crown Prosecution Service replied:

> "Regarding the question raised in paragraph (1) of your letter of 27th October 1994, you will know that the topic of rewards was raised by [defence counsel] at the outset of the appeal in this matter. This resulted in an *ex parte* application which was heard in camera. This application was upheld and referred to by Watkins LJ in his final judgment in these terms: 'We upheld the claim and refused to order disclosure of any kind for reasons we gave on 22nd June and which are recorded'."

31. In 1994 the applicants applied to the Home Office for a review of the safety of their convictions. In April 1997 the Criminal Cases Review Commission ("the CCRC") was set up under the Criminal Appeal Act 1995 and the applicants' case was transferred to it. In August 1997 the CCRC appointed an officer from Greater Manchester Police to investigate the

events surrounding the prosecution of the applicants and Johnson. The investigating officer's report was submitted in January 1999.

32. In its report of 7 April 1999 the CCRC found, *inter alia*, that Duncan was a long-standing police informant, who, on 18 December 1988 had approached a Sussex police officer and told him that the applicants were responsible for the crimes of 15 to 16 December 1988. As a result of his assistance to the police and the evidence which he gave at the applicants' trial, Duncan had received a reward of GBP 10,300, in addition to police protection between 18 and 22 December 1988 and immunity from prosecution in relation to his admitted participation as an accessory to the offences in question. It appeared from police records of the information supplied by Duncan that the latter had never identified Johnson as one of the offenders. These facts had not previously been disclosed to the defence on grounds of public interest immunity. The CCRC also found that "the police were not keen that the Jobbins Group should be prosecuted and there was a corresponding inertia on the part of the prosecuting authorities", and commented that "if the jury had been aware of this then the credibility of the Jobbins Group might have been assessed in a more critical manner". Moreover, Todd had retracted his statement concerning the incriminating comments allegedly made by Johnson.

The CCRC concluded that, in the light of this new evidence, there was a real possibility that Johnson was not involved in the offences of 15 to 16 December 1988. Whilst there was evidence linking the two applicants to the robberies, if the prosecution case against one of the three, Johnson, might no longer be sustainable, in the CCRC's view the Court of Appeal ought at the same time to have the opportunity to consider whether the case could still be sustained against Rowe and Davis. It therefore referred the convictions of the applicants and Johnson back to the Court of Appeal, since it considered that there was a real possibility that these convictions would not be upheld if such a reference were made (Criminal Appeal Act 1995, section 13).

33. At the time of the adoption of the present judgment the applicants' case is pending before the Court of Appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The prosecution's duty of disclosure

34. 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)

35. 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 Criminal Appeal Reports 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 ha[d] some bearing on the offence(s) charged and the surrounding circumstances of the case".

36. 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)*

37. Subsequent to the applicants' trial in 1990, but before the appeal proceedings in October 1992-July 1993, the Guidelines were superseded by the common law.

In *R. v. Ward* ([1993] 1 Weekly Law Reports 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)*

38. In *R. v. Trevor Douglas K.* ([1993] 97 Criminal Appeal Reports 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 ground 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)*

39. In *R. v. Davis, Johnson and Rowe* ([1993] 1 Weekly Law Reports 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.

40. 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)*

41. Following the applicants' appeal, the English courts further clarified the principles and procedures relating to the issue of disclosure.

In *R. v. Keane* ([1994] 1 Weekly Law Reports 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 (i) to be relevant or possibly relevant to an issue in the case; (ii) to raise or possibly raise a new issue the existence of which was not apparent from the evidence the prosecution proposed to use; or (iii) to 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)*

42. 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 justified overturning a conviction.

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

43. In *R. v. Winston Brown* ([1995] 1 Criminal Appeal Reports 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 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)*

44. In the case of *R. v. Turner* ([1995] 1 Weekly Law Reports 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

45. In 1996 a new statutory scheme covering disclosure by the prosecution came 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. "Special counsel"

46. Following the judgments of the European Court of Human Rights in Chahal v. the United Kingdom (15 November 1996, *Reports of Judgments and Decisions* 1996-V) and Tinnelly & Sons Ltd and Others and McElduff and Others 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.

47. 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 paragraphs (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 makes 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."

Rules 10 and 11, to which Rule 7 refers, provide:

"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) 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."

48. 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).

49. 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 a sexual offence.

PROCEEDINGS BEFORE THE COMMISSION

50. Mr Rowe and Mr Davis applied to the Commission on 20 December 1993. They alleged that their trial at first instance and the proceedings

before the Court of Appeal had breached their rights under Article 6 §§ 1 and 3 (b) and (d) of the Convention.

51. The Commission declared the application (no. 28901/95) admissible on 15 September 1997. In its report of 20 October 1998 (former Article 31 of the Convention), it expressed the unanimous opinion that there had been a violation of Article 6 § 1 taken in conjunction with Article 6 § 3 (b) and (d). The full text of the Commission's opinion is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

52. In their memorial and at the hearing, the applicants 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 taken in conjunction with Article 6 § 3 (b) and (d), and to award them just satisfaction under Article 41.

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

THE LAW

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

53. The applicants alleged that the proceedings before the Crown Court and the Court of Appeal, taken together, violated their 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:
>
> ...

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 judgment and decisions of the Court), but a copy of the Commission's report is obtainable from the Registry.

(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;

..."

54. The applicants submitted that any failure to disclose relevant evidence undermined the right to a fair trial, although they 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, the applicants contended that the procedure whereby the prosecution, without consulting the judge, decided not to disclose material evidence during the applicants' trial violated Article 6. This defect was not rectified by the *ex parte* procedure before the Court of Appeal, which afforded no safeguards against judicial bias or error and no opportunity to put arguments on behalf of the defence.

55. The applicants contended that it was necessary for the purposes of Article 6 to counterbalance the exclusion of the accused 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's claim to public interest immunity and act as an independent safeguard against the risk of judicial error or bias. They pointed to four examples of cases where a "special counsel" procedure had been introduced in the United Kingdom (see paragraphs 46-49 above). These examples, they 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 they reasoned that the onus was on the Government to show why it would not be possible to introduce such a procedure.

56. 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 applicants' case, provided the required level of protection. Thus, the Court of Appeal on two occasions, with the benefit of hindsight and a clear overview of the issues at trial, reviewed the material in question, weighed the interest of the accused in disclosure against the public interest in secrecy, and decided in favour of non-disclosure.

57. The Government submitted that the independent-counsel scheme proposed by the applicants 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 46 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.

58. The Commission expressed the view that the trial judge was in the best position to weigh the public interest in non-disclosure against the question of fairness to the defence, and that the review by the Court of Appeal of the undisclosed material could not remedy the absence of any such examination by the trial judge. In addition, the Commission noted that at no stage did any court dealing with the applicants' case have the benefit of hearing submissions on behalf of the defence by a specially appointed counsel.

59. 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, p. 34, § 33). In the circumstances of the case it finds it unnecessary to examine the applicants' allegations separately from the standpoint of paragraph 3 (b) and (d), since they amount to a complaint that the applicants did not receive a fair trial. It will therefore confine its examination to the question whether the proceedings in their entirety were fair (ibid., pp. 34-35, § 34).

60. 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, pp. 27-28, §§ 66-67). In addition Article 6 § 1 requires, as indeed does English law (see paragraph 34 above), that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused (see the Edwards judgment cited above, p. 35, § 36).

61. However, as the applicants recognised (see paragraph 54 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, p. 470, § 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, p. 712, § 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 Doorson judgment cited above, p. 471, § 72, and the Van Mechelen and Others judgment cited above, p. 712, § 54).

62. 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 Edwards judgment cited above, pp. 34-35, § 34). Instead, the European Court's task is to ascertain whether the decision-making procedure applied in each case complied, as far as possible, with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused.

63. During the applicants' trial at first instance the prosecution decided, without notifying the judge, to withhold certain relevant evidence on grounds of public interest. Such a procedure, whereby the prosecution itself attempts to assess the importance of concealed information to the defence and weigh this against the public interest in keeping the information secret, cannot comply with the above-mentioned requirements of Article 6 § 1. Indeed this principle is recognised by the English case-law from the Court of Appeal's judgment in *R. v. Ward* onwards (see paragraphs 37 et seq. above).

64. It is true that at the commencement of the applicants' appeal, prosecution counsel notified the defence that certain information had been withheld, without however revealing the nature of this material, and that on two separate occasions the Court of Appeal reviewed the undisclosed evidence and, in *ex parte* hearings with the benefit of submissions from the Crown but in the absence of the defence, decided in favour of non-disclosure.

65. However, the Court does not consider that this procedure before the appeal court was sufficient to remedy the unfairness caused at the trial by the absence of any scrutiny of the withheld information by the trial judge. Unlike the latter, who saw the witnesses give their testimony and was fully versed in all the evidence and issues in the case, the judges in the Court of Appeal were dependent for their understanding of the possible relevance of the undisclosed material on transcripts of the Crown Court hearings and on the account of the issues given to them by prosecuting counsel. In addition, the first-instance judge would have been in a position to monitor the need for disclosure throughout the trial, assessing the importance of the undisclosed evidence at a stage when new issues were emerging, when it might have been possible through cross-examination seriously to undermine the credibility of key witnesses and when the defence case was still open to take a number of different directions or emphases. In contrast, the Court of Appeal was obliged to carry out its appraisal *ex post facto* and may even, to a certain extent, have unconsciously been influenced by the jury's verdict of guilty into underestimating the significance of the undisclosed evidence.

66. In conclusion, therefore, the prosecution's failure to lay the evidence in question before the trial judge and to permit him to rule on the question of disclosure deprived the applicants of a fair trial. The facts of the present case set it apart from that of Edwards cited above, where the appeal proceedings were adequate to remedy the defects at first instance since by that stage 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 informed argument from the defence (op. cit., p. 35, §§ 36-37).

67. It follows that there has been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

68. Article 41 of the Convention provides:

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

A. Damage

69. The applicants claimed compensation for non-pecuniary damage to be awarded on a just and equitable basis. The Government contended that a finding of a violation would in itself amount to just satisfaction.

70. The Court, agreeing with the Government, finds that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage which the applicants may have suffered.

B. Costs and expenses

71. The applicants claimed Liberty's costs and expenses of 28,065.15 pounds sterling (GBP) inclusive of value-added tax ("VAT") in respect of the present application and counsel's fees which totalled GBP 25,380 (including VAT) in respect of the three applications (the applicants', that of Mr Jasper (no. 27052/95) and that of Mr Fitt (no. 29777/96) – see paragraph 3 above). The Government contended that, in a number of areas, costs were not necessarily incurred and reasonable in amount.

72. Making an assessment on an equitable basis, the Court awards to the applicants in the present case the sum of GBP 25,000, together with any VAT which may be payable, but less the amounts already paid by way of legal aid by the Council of Europe.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

2. *Holds*

(a) that the respondent State is to pay the applicants, within three months, for costs and expenses, GBP 25,000 (twenty-five thousand pounds sterling), together with any value-added tax that may be chargeable, less FRF 15,233.40 (fifteen thousand two hundred and thirty-three French francs forty centimes) to be converted into pounds sterling at the rate applicable on the date of delivery of the present judgment;

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

3. *Dismisses* the remainder of the applicants' claims for just satisfaction.

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