THIRD SECTION

**CASE OF M v. THE NETHERLANDS**

*(Application no. 2156/10)*

JUDGMENT

STRASBOURG

25 July 2017

FINAL

25/10/2017

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*

In the case of M v. the Netherlands,

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

 Helena Jäderblom, *President,* Branko Lubarda, Luis López Guerra, Helen Keller, Pere Pastor Vilanova, Alena Poláčková, *judges,* Egbert Myjer,ad hoc *judge,*and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 4 July 2017,

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

PROCEDURE

1.  The case originated in an application (no. 2156/10) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Netherlands national, Mr M (“the applicant”), on 7 January 2010. The President of the Section acceded to the applicant’s request not to have his name disclosed (Rule 47 § 4 of the Rules of Court).

2.  The applicant was represented by Mr A.W. Eikelboom and Mr M. Pestman, both lawyers practising in Amsterdam. The Netherlands Government (“the Government”) were represented by their Agent and Deputy Agent, Mr R.A.A. Böcker and Ms K. Adhin, of the Ministry of Foreign Affairs.

3.  The applicant alleged, in particular, that the criminal proceedings against him had violated Article 6 §§ 1 and 3 (b), (c) and (d) of the Convention in that the AIVD (*Algemene Inlichtingen- en Veiligheidsdienst*, General Intelligence and Security Service) had exercised decisive control over the evidence, restricting his and the domestic courts’ access to information contained in documents and controlling its use, making it impossible for him to instruct his defence counsel as he would have needed to, and preventing him from offering witness evidence effectively.

4.  On 2 December 2014 the applicant’s aforementioned complaints were communicated to the Government and the remainder of the application was declared inadmissible.

5.  Judge Johannes Silvis, the judge elected in respect of the Kingdom of the Netherlands, withdrew from sitting on the case (Rule 28 of the Rules of Court). On 21 May 2015 the President of the Section accordingly appointed Mr Egbert Myjer to sit as *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29 § 1 of the Rules of Court).

THE FACTS

I.  THE CIRCUMSTANCES OF THE CASE

6.  The applicant was born in 1970 and lives in Houten.

A.  Introduction

7.  The applicant was employed by the AIVD as an audio editor and interpreter. In this capacity he had access to classified information (*gerubriceerde informatie*), which he was under a duty not to divulge to persons not authorised to have knowledge of it.

8.  The suspicion arose that the applicant had forwarded copies of classified documents to persons outside the service, including in some cases persons who were under covert investigation by the AIVD in connection with possible terrorist activity.

9.  On 30 September 2004 the applicant was arrested. He was charged with divulging State secret information to persons not authorised to take cognisance of it and taken into detention on remand (*voorlopige hechtenis*).

10.   The AIVD advised the applicant in writing that he was still under an obligation of secrecy. Consequently it would be constitutive of a further criminal offence if he were to discuss matters covered by his duty of secrecy with anyone including his counsel.

11.  The applicant’s counsel were also warned that they might be prosecuted should they divulge any State secret information to third parties.

B.  Proceedings before the Regional Court

12.  The trial opened before the Rotterdam Regional Court (*rechtbank*) on 10 January 2005. It was adjourned several times.

13.  The applicant’s counsel protested against the restrictions affecting communication between themselves and the applicant, which in their submission undermined the effectiveness of the defence. They also asked for certain documents to be added to complete the file: these included the internal AIVD report that was the basis of the prosecution, which was absent from the file altogether, and the documents which had supposedly been leaked, which had been added to the case file in redacted form with parts blacked out. They further repeated a request, made earlier in writing, for the applicant to be released unconditionally from his duty of secrecy in order to conduct his defence (*vrijwaring*).

14.  The public prosecutor (*officier van justitie*) announced that some but not all of the documents requested by the defence would be added to the file but refused to release the applicant from his duty of secrecy unconditionally.

15.  On 24 January 2005 the Regional Court gave a decision remitting the case to the investigating judge, to whom it would fall to carry out investigations in such a way as to mitigate, and compensate as far as possible, the handicaps under which the defence laboured.

16.  On 4 March 2005 the head of the AIVD informed the applicant in writing that communication of matters covered by his duty of secrecy was permitted, subject to the following conditions:

1. He would be allowed to discuss such matters only with his counsel, Ms Böhler and Mr Pestman;
2. He was not allowed to reveal the identity of any AIVD staff or human sources;
3. He could discuss only “that which [was] contained in the case file”;
4. This exemption covered only information that was strictly necessary for the defence;
5. This exemption was valid only until the final judgment in the domestic proceedings was given.

The letter continues:

“In order to preclude any misapprehension I stress that this release from the duty of secrecy does not apply to the suspect’s counsel. In the event that counsel wish to make use of information obtained from the suspect with a view to the defence of M, this must be done in consultation with the investigating judge. The investigating judge will then determine whether the (answers to the) questions are of any relevance to the criminal proceedings (*strafvorderlijk van belang*). If this is the case, the AIVD will then indicate to what extent State secrets are at stake in this context.”

17.  On 1 April 2005 the Head of the AIVD wrote to the investigating judge in the following terms:

“... I consider it of great importance that the suspect (*verdachte*) should be able to defend himself adequately against the matters of which he is suspected. This entails that he will have to consult his counsel for that purpose. To that end I have granted the suspect conditional release from his duty of secrecy. These conditions are necessary and serve the interest of national security. There exists a certain tension within these frameworks, i.e. a (more far-reaching) release (as requested) of the duty of secrecy and the interests of national security. After all, the AIVD can only carry out its statutory duty within a certain measure of secrecy. Three criteria are of importance in this respect, namely that the AIVD should be able to maintain the secrecy of its current levels of intelligence, its sources and its working methods. These are critical thresholds that can be seen as the practical implementation of the so-called ‘jeopardise’ criterion in the case-law of the European Court of Human Rights.

...

... Two additional conditions apply:

1.  the release from his duty of secrecy granted [the applicant] shall apply solely to communication between the suspect, his lawyers Böhler and Pestman, Public Prosecutor Z. and the court, and

2.  shall take place within the confines of the offices of the Investigating Judge or in the presence of the trial court in a closed hearing.

...

The parties to the proceedings are to submit their questions and other requests to you [i.e. the investigating judge]. You then check whether the questions and requests are of any procedural significance (*strafvorderlijk belang*) in these proceedings, as you have indicated to me with regard to the three subjects mentioned by counsel. In the affirmative, you offer me the opportunity to consider whether the *text* of the questions in itself can harm national security.

In the (probably most likely) event that the questions in themselves cannot harm national security, the answer can be provided in the accustomed way, i.e. by means of an official AIVD report ...

In addition, and if the parties to the proceedings consider it necessary, more specific answers can be given by means of, for example, the hearing of witnesses. Perhaps unnecessarily I would observe that section 86(2) of the 2002 Intelligence and Security Services Act (*Wet op de inlichtingen- en veiligheidsdiensten*) applies.

In the event that the line of questioning (*vraagstelling*) in itself is capable of endangering national security, it is my responsibility, pursuant to section 15 of the 2002 Intelligence and Security Services Act, to ensure the secrecy of the information that should remain so and accordingly the classification of that information. I therefore propose that you do not place this information, after I have classified it, in the case file and to request the Regional Court to deal with those questions at a closed hearing. I am of the opinion that the above procedural proposal serves the interests of all parties to the proceedings, taking into account the interests involved in national security.

...

The second condition, which is that the suspect should not be allowed to disclose the identities of AIVD members or human sources, appears clear enough to me. All information that, whether or not in combination with other information, may lead to the identities of AIVD members or human sources becoming known, falls within the scope of the second condition for release [from the duty of secrecy].

...

As regards the third and fourth conditions, I am of the view that these too are sufficiently clear: [the applicant] is released from his duty of secrecy vis-à-vis his counsel Dr B. Böhler and Mr M. Pestman in so far as consultation between the suspect and his counsel [Dr] Böhler and Mr Pestman relates to the crimes with which he is charged. In the event that counsel wish to discuss documents with the suspect which they may wish to add to the case file, the third and fourth conditions should be interpreted to mean that the documents must be relevant and directly necessary for the defence in this case and may possibly be added to the case file. [These requirements of] relevance and direct necessity also apply to the preparation of requests and defences.

As to the latter condition: if and when such a procedure becomes a real possibility I will consider, if asked, whether release from the duty of secrecy, conditional or not, is possible.

...

Fourthly, you have asked me to react to the witnesses requested by counsel. I presume that you mean the AIVD members. I am of the opinion that this is above all a matter of criminal procedure, the public prosecutor indicating in her letter that the questions counsel would like to ask relate primarily to the working methods of the AIVD, the spreading of the leaked information and the internal investigation into this. I can agree with the position taken by the public prosecutor that these questions can most probably be answered by me or my deputy during a witness hearing. Whether and to what extent national security permits the questions to be answered will have to be seen for each question. This will require me first to have the questions intended to be asked at my disposal, so that the Ministers of Justice and of Internal Affairs and Kingdom Relations can decide together and in due time on the application of section 86(2) of the 2002 Intelligence and Security Services Act.

As to the possible questioning of AIVD members as witnesses, I would ask you to make it possible, in pursuance of Article 187c of the Code of Criminal Procedure, for special access to be granted to an additional AIVD member. This person can consider the interests of national security for each specific question during the interrogation. This will also permit the defence to put ‘sub-questions’, questions arising from the questions previously submitted in writing. The hearing of witnesses will thus, in my opinion, considerably speed up the pace of the proceedings – at least as far as the hearing of witnesses is concerned – since the (additional) AIVD member present will in many cases be able to decide almost immediately whether the said sub-questions can be answered. This acceleration of the proceedings, in my opinion, benefits all parties to the proceedings. I am prepared to advise the Ministers of Justice and of Internal Affairs and Kingdom Relations, on the basis of section 86(2) of the 2002 Intelligence and Security Services Act, to consider this in any exemption decision.

...”

18.  On 15 April 2005 the Regional Court gave a decision in which, following the public prosecutor, it refused to make the exemption unconditional. It expressed the view that it would serve no useful purpose to allow the applicant to disclose the identities of AIVD staff members and informants to his counsel. The interests of the applicant were sufficiently protected inasmuch as the exemption covered information strictly necessary for his defence. The Regional Court ordered the investigating judge to hear thirteen witnesses referred to by name and seven witnesses referred to by a code name or number. It refused to order the hearing of fifteen other witnesses referred to by a number and one named witness immediately, leaving that decision to be taken by the investigating judge after a particular witness, an AIVD staff member called B., had been heard. As to the partially blacked-out documents, the Regional Court noted that it too was thereby prevented from considering whether they held secret information within the meaning of Articles 98 and 98a of the Criminal Code (*Wetboek van Strafrecht*, see below); even so, the prosecution interest in maintaining secrecy prevailed.

19.  The named witness B. was heard on 23 May 2005 and 6 June 2005. It appears that he refused to answer certain questions because of his duty of secrecy.

20.  It appears that on 9 June 2005 the investigating judge decided to refuse to hear the sixteen witnesses requested by the defence for lack of available time (*agendatechnische redenen*).

21.  On 17 June 2005 the investigating judge decided that the unnamed witnesses permitted to be questioned would be heard at a secret location, under heavy disguise and with the use of voice distorting equipment. A representative of the AIVD and legal counsel of the State would attend in addition to the prosecution and the defence.

22.  The defence lodged an objection against the investigating judge’s decision of 17 June 2005 with the Regional Court, stating also that they would not cooperate in any witness hearing held at a secret location. They also asked for the named witnesses already heard to be relieved of their duty of secrecy and to be heard anew.

23.  The Regional Court held a hearing *in camera* on 5 July 2005. The defence outlined its provisional strategy, which was to aim for an acquittal by identifying potential sources of the leaks other than the applicant and by demonstrating that the documents leaked did not contain State secrets properly so-called. They also wished to establish the applicant’s attitude to his work for the AIVD. This strategy required the applicant’s former direct colleagues to be questioned and uncensored copies of the documents in question to be made available to the defence and the court.

24.  On 8 July 2005 the Regional Court gave an order for two further named witnesses to be heard but dismissed the defence’s objection for the remainder.

25.  On 14 July 2005 the defence challenged two judges of the trial chamber who had also taken part in the decision of 8 July 2005, arguing on various grounds that positions taken in the latter decision prejudged the outcome of the trial.

26.  The following day, 15 July 2005, the challenge was dismissed and the trial hearing was resumed. The defence asked for documents to be added to the file, including all those found in the applicant’s desk. The Regional Court remitted the case to the investigating judge for the hearing of the witnesses authorised to be heard, in so far as they had not already been heard, and requested the prosecutor to add documents to the file including a description – to be prepared by the AIVD – of the documents found in the applicant’s desk.

27.  Witnesses were heard on various dates. In so far as they were unnamed AIVD staff members, they were identified by a number; they were heavily disguised and they were placed in a box that left only their upper body visible; and their voices were distorted. The applicant states that it was impossible to discern their body language and facial expressions. He further states that an AIVD official was present, who could – and did – prevent named and unnamed witnesses from answering a proportion of the questions put by the defence, and that this was permitted by the investigating judge.

28.  The trial hearing was resumed on 30 August 2005. Finding no indication that the AIVD information had been leaked by someone else, the Regional Court yet again refused to hear the named witness and the fifteen unnamed witnesses. As to AIVD staff members who refused to disclose certain information based on their duty of secrecy, it stated that the final decision whether to allow this lay with the trial court itself but found that it could not set precise limits as the prosecution wanted.

29.  The trial hearing was resumed on 6 and 7 October 2005. The applicant made no statement.

30.  On 30 November 2005 the trial hearing resumed. The prosecution and the defence made their closing statements.

31.  The Regional Court gave judgment on 14 December 2005. It convicted the applicant and sentenced him to four years and six months’ imprisonment.

C.  Proceedings before the Court of Appeal

32.  The applicant lodged an appeal with the Court of Appeal (*gerechtshof*) of The Hague.

33.  The appeal hearing opened on 28 September 2006. Among other things, the applicant’s counsel objected to the refusal, in the proceedings at first instance, to allow the defence an unconditional exemption that would allow the applicant and his counsel to communicate unimpeded; to the hearing of unnamed witnesses under heavy disguise, in a closed box that partially hid them from view and with the use of voice distortion, even though they were the applicant’s former direct colleagues; to the withholding of evidence by the witnesses, based on their duty of secrecy as AIVD staff members; and to the withholding of documentary evidence requested by the defence. The prosecuting Advocate General (*advocaat‑generaal*) conveyed an offer by the AIVD to allow an independent expert to see uncensored AIVD documents and report on their content; the expert proposed had previously been a member of a committee appointed to investigate the internal functioning of the AIVD itself. The defence protested that this expert lacked independence precisely for that reason.

34.  The Court of Appeal delivered an interlocutory judgment on 12 October 2006. Its reasoning included the following:

“The duty of secrecy arising from the 2002 Intelligence and Security Services Act Serviced Act is subject only to the exceptions set out in that Act. The implication is that only the possibility offered by section 86(1) of that Act offers a solution for the applicant’s present predicament.

The interests of State security, which the 2002 Intelligence and Security Services Act and Article 98 and following of the Criminal Code seek to protect, stand in the way of a complete release from the duty of secrecy as the defence would wish and a complete exemption from prosecution for disclosing State secrets to be granted by the Public Prosecution Service. It is obvious that the said duty of secrecy constitutes a restriction of – normally entirely – free and confidential consultation between the suspect and his counsel and that – if it remained in force in its entirety – it would prevent a fair trial. In the present case, the suspect has been granted conditional release from that duty by the AIVD, based on the latter section of the 2002 Intelligence and Security Service Act, as have his two counsel. The conditions accompanying that release, all of which concern interests of State security in relation to interests of the defence in the present criminal proceedings, appear to the Court of Appeal neither unreasonable within the framework of the interests of State security nor unworkable within the framework of the interests of the defence.

...

Finally, it is the case that if the suspect and the defence, if they consider that the space left to them by the said release is not sufficient to conduct a defence meeting the requirements of the Convention and they consider, in their assessment, that he/they have to transgress his/their duty of secrecy further than the conditions governing the release allow, they can plead justification (*rechtvaardigingsgrond*), namely the interest of a proper defence within the meaning of Article 6 of the Convention. The Advocate General gave the assurance at the hearing of 28 September 2006 that no prosecution would be brought if a violation of the duty of secrecy by the suspect – and as the Court of Appeal presumes, his counsel as well – was justified by invoking Article 6 of the Convention.”

and

“The Court of Appeal assumes that the defence request [for access to the internal AIVD investigation materials] comprises all investigations undertaken by the AIVD after it had become known that a third party, i.e. S., possessed [a copy of a classified AIVD document]. It does not appear from the file that these internal investigations were set out in any report. The case file contains criminal complaints (*aangiftes*) based on those investigations.

It must be noted in the first place that the defence request does not concern documents in the possession of the Public Prosecution Service within the meaning of Article 30 of the Code of Criminal Procedure; none of the participants in the proceedings is aware of the content of the internal investigations, save for what has been stated by witnesses in this respect, and what is set out in the said criminal complaints. There is therefore no violation of the principle of ‘equality of arms’[[1]](#footnote-1).

Quite apart from the question whether the AIVD, given its duty and responsibility ..., would be willing to submit its report or any written documents concerning its internal investigation to the public prosecution service to be added to the file, the question needs to be considered whether these documents, which do not emanate from any investigatory body, can in reason be relevant to the defence.

The defence has not, in the present case, suggested, let alone shown, that the materials compiled by the AIVD within the framework of its internal investigation have been obtained unlawfully or are unreliable, but only that the documents and information provided by that service have been accepted uncritically (*voor zoete koek aangenomen*) first by the National Police Internal Investigations Department (*Rijksrecherche*) and then by the Public Prosecution Service and cannot be checked.

The Court of Appeal takes the provisional view – without wishing to prejudge its final decision [on the question whether the trial was fair] – that the said materials can be assessed based on the statements of the witnesses questioned, albeit, as far as AIVD members are concerned, subject to some restrictions owing to their duty of secrecy.”

It noted the “particular tension between fundamentally opposed interests”, namely the applicant’s interest as a defendant in a criminal trial and the State interest in maintaining the secrecy of AIVD information, but rejected the protests put forward on the applicant’s behalf. The judgment took note of a promise made by the Advocate General not to prosecute for a violation of the duty of secrecy if that violation was justified by reliance on Article 6 of the Convention (*gerechtvaardigd is door een beroep op artikel 6 EVRM*). It asked the prosecution to submit certain official reports but not the uncensored AIVD documents requested by the defence.

35.  The appeal hearing was resumed on 12 February 2007. The applicant announced that he might, in his own defence, have to reveal State secret information. This prompted the Court of Appeal to exclude the public from the interrogation of the applicant, despite the latter’s protests.

36.  In the course of questioning by his counsel the applicant mentioned the names of particular AIVD staff members; these are not recorded in the official record of the hearing. The Advocate General protested against the mentioning of these names in so far as they were not already to be found in the case file, which in his view was not justified by Article 6 of the Convention, and announced his intention to prosecute if the applicant should “transgress those limits” (*mocht hij die grenzen overschrijden*). The applicant’s counsel replied that the defence needed these names in order to decide whether to call the persons concerned as defence witnesses and pointed out that the public had been excluded. After the president decided that the Advocate General should be entitled to state a view on the acceptability of questions put to the applicant by his counsel, the applicant stated that he would for the remainder of the hearing comply with his duty of secrecy. Thereupon the hearing was reopened to the public.

37.  On 14 February 2007 the applicant’s counsel Mr Pestman sent the Advocate General a letter by fax, to which was appended a list of questions he and Ms Böhler would have wished to ask the applicant in support of the case for the defence. These questions concerned AIVD working methods and procedures and AIVD members. One question asked the applicant to identify individual AIVD members on a handwritten anonymised organigram by name. Other questions asked the applicant to state the names of AIVD members other than himself who would have had access to the documents found to have been leaked.

.  The hearing continued on 15 February 2007. The Advocate General announced his intention to prosecute the applicant should he answer questions naming AIVD sources, providing an insight into AIVD working methods or relating to the blacked-out parts of the redacted documents. Responding to protests by the defence, the Court of Appeal referred to its interlocutory judgment of 12 October 2006 (see paragraph 34 above), in which it had stated that if the applicant considered a breach of his duty of secrecy in the interest of his defence he would, if prosecuted, be able to pray the right under Article 6 of the Convention to defend himself in justification. The decision to prosecute, however, belonged to the Public Prosecution Service alone to the exclusion of the courts.

39.  The Court of Appeal gave judgment on 1 March 2007. It quashed the judgment of the Regional Court on the technical ground that the Regional Court’s judgment could not be simply endorsed, convicted the applicant and sentenced him to four years’ imprisonment.

40.  The evidence relied on was the following:

1. Statement by the applicant at the hearing of the Court of Appeal (12 February 2007), to the effect that:
	1. He worked for the AIVD and accordingly had the documents mentioned in the charges at his disposal;
	2. Knew some of the targets personally;
	3. Had written down names and addresses found in his address book himself;
	4. Had one of the documents (a phone tap report) in his home as well as in his office at work;
	5. He knew the name of another target.
2. National Police Internal Investigations Department report of 29 September 2004, criminal complaint lodged on behalf of the AIVD by its acting head, to the effect that it has emerged that one of the targets (O.) turns out to be aware that he is an object of investigations. In particular, O. turns out to possess a copy of a document to that effect. The document has been circulated to “tens of persons” within the AIVD. The applicant is mentioned by name.
3. National Police Internal Investigations Department report of 5 October 2004, statement by the AIVD’s acting head to the effect that a secret AIVD document (copy of a telephone interception report) has been found during a search of the applicant’s home. The name of the person who printed it out would normally have been stated on the document but appears to have been removed.
4. National Police Internal Investigations Department report of 5 October 2004, statement by an AIVD official to the effect that a document shown him by police officers is secret and that one of the persons to whom it had been given was the applicant.
5. National Police Internal Investigations Department report of 28 October 2004, statement by an AIVD official relating to investigations undertaken by the AIVD itself on a copy of the hard disk of the applicant’s home computer. This is stated to have revealed information compromising the applicant. In particular, the applicant is reported to have informed a target about AIVD investigations.
6. National Police Internal Investigations Department report of 4 November 2004, statement by an AIVD official to the effect that a fax seized from a target was a transcript of an intercepted phone call prepared by the applicant. The content of the document reveals specific methods used by the AIVD in terrorism-related investigations. The document is identical to a document found in the applicant’s office desk, which bears the applicant’s ID.
7. National Police Internal Investigations Department report of 31 January 2005, statement by an AIVD official to the effect that the leaked information is State secret, sensitive, and relates to ongoing AIVD operations for gathering information on terrorist groups.
8. National Police Internal Investigations Department report of 30 September 2004, from which it appears that the applicant was arrested that day and was found in the possession of an address book.
9. National Police Internal Investigations Department report of 4 October 2004, mentioning that objects (envelopes, diaries, a phone tap report, written notes, floppy discs, compact discs and computers) were seized in the applicant’s home. No further details given.
10. National Police Internal Investigations Department report of 4 October 2004, list of goods seized in the home of a target.
11. National Police Internal Investigations Department report of 6 October 2004, relating the search of the applicant’s office and describing State secret documents found in his desk. One of these is identical to a document found in the possession of a target; another is identical to a document found in the applicant’s home (albeit that the applicant’s ID has been whited out). These documents are identified by the acting head of the AIVD as State secret.
12. A transcript of a page out of the applicant’s address book, bearing names in Arabic script identified by an AIVD expert as the names of targets.
13. A copy of a post-it note found in the applicant’s address book.
14. National Police Internal Investigations Department report of 8 October 2004 to the effect that two (unnamed) AIVD members have classified the list of goods seized in the applicant’s home (paragraph 9 above) as State secret.
15. National Police Internal Investigations Department report of 8 October 2004 identifying persons mentioned in the transcript of the phone tap.
16. National Police Internal Investigations Department report of 12 October 2004 identifying the transcript of the intercepted telephone conversation as identical to a document found in the applicant’s office desk.
17. National Police Internal Investigations Department report of 27 October 2004 to the effect that a document found in a search of the home of a target (C.) was identical to a classified document found in the applicant’s office desk.
18. National Police Internal Investigations Department report of 29 December 2004 relating the arrest of another target (O.), who was found to be in possession of classified AIVD documents. O. stated that these had been sent to a friend of his anonymously by post. A search of the applicant’s hard disk revealed an e-mail inquiring of a friend (S.B.) whether “the information sent to him by post had been of any use.”
19. National Police Internal Investigations Department report of 3 February 2005. A search of the dwelling shared by Mohammed B., who was later convicted of the murder of filmmaker Theo van Gogh, had led to the finding, among the personal effects of Mohammed B.’s flat-mate, of a transcript of a conversation that was part of an AIVD investigation.
20. National Police Internal Investigations Department report of 3 February 2005. The post-it note found in the applicant’s address book bore an address to which it appears that “the aforementioned document” was found to have been sent.
21. National Police Internal Investigations Department report of 18 March 2005. Description of documents found in the possession of the target C., whose house had been searched, and copies of some of which were found in the possession of the target O. All are classified documents already mentioned in other National Police Internal Investigations Department reports.
22. National Police Internal Investigations Department report of 21 January 2005. Interview of an AIVD official responsible for the security of the IT system. No name is given, the official identified only by a number (05/20040094). It emerges that the applicant had access to all the systems needed for his work as an audio analyst and had his own user ID and password.
23. National Police Internal Investigations Department report of 21 February 2005. Interview of witness 05/20040094 to the effect that the applicant, and he alone, prepared a transcript of a conversation later found in the possession of the target H.
24. National Police Internal Investigations Department report of 30 September 2004. Interview of the applicant from which it appears that the applicant has been employed by the AIVD since 2003, receives weekly reports about investigations in progress (which are classified), has signed a promise of secrecy and knows the targets O. and C. who are friends of his brother-in-law. He is aware that O. and C. are investigation targets.
25. National Police Internal Investigations Department report of 2 October 2004. Interview of the applicant, who recognises the transcript of the intercepted telephone conversation, which he admits is classified and should not have left AIVD premises, but which he must have taken home by mistake. The applicant also recognises a note bearing a name.
26. National Police Internal Investigations Department report of 6 October 2004. Interview of the applicant, who recognises the post-it note with the names of three targets (O., K. and H.) and admits that he knows he should not take names of targets home. The applicant also admits that there is no other possible explanation for finding the transcript of the intercepted telephone conversation in his office desk than that he himself put it there.
27. National Police Internal Investigations Department report of 7 October 2004. The applicant identifies two observation reports which are classified. One of them is stated to have been found in his office at work.
28. National Police Internal Investigations Department report of 26 October 2004. The applicant identifies the name of the target H. on the post-it note.
29. National Police Internal Investigations Department report of 8 November 2004. The applicant identifies private e-mail addresses used by him (in his private capacity of agent for a travel agency based in Morocco) and by his wife respectively.
30. National Police Internal Investigations Department report of 8 November 2004. The applicant admits that the transcript of the intercepted telephone conversation bears his user ID. The name H. on the post-it note corresponds to the person H. who is a target of an AIVD investigation; the applicant himself identified him as a target.
31. National Police Internal Investigations Department report of 27 October 2004. A DNA sample is taken from the applicant.
32. National Police Internal Investigations Department report of 9 November 2004. The DNA sample corresponds to DNA found on an envelope.
33. National Police Internal Investigations Department report of 8 November 2004. A further DNA match is found on an envelope.
34. National Police Internal Investigations Department report of 25 March 2005. It is more than one billion times more likely that the DNA match can be explained by the presence of the DNA of the applicant than by the presence of the DNA of strangers.
35. National Police Internal Investigations Department report of 1 October 2004. The target C. states that he received two envelopes containing documents from which it appeared that he and other Moroccan men were being watched.
36. National Police Internal Investigations Department report of 2 October 2004. The target C. relates how he received the two envelopes. The first had been sent to him at his home address. The second had been addressed to him, but sent to the home address of a second person, B1, and handed to him by a third, B2.
37. Official record by the investigating judge of 28 June 2005. Target C. recognises the documents sent to him.
38. National Police Internal Investigations Department report of 27 September 2004. Statement by the target O. O was aware that he was being watched, since his friend C. had received reports by post.
39. Official record by the investigating judge of 28 June 2005. The target O. admits that when arrested he had two sheets of paper in his pocket which he had received from a friend (A.B., the “third person” mentioned in document no. 36).
40. National Police Internal Investigations Department report of 30 September 2004. B1 states that the target C. had received letters mentioning “our names”. One had been sent to his address (the address of the target C.); the second had been sent to the address of B2. The letters had been AIVD documents from which it appeared that all three were being watched. B1 recognised the documents.
41. National Police Internal Investigations Department report of 2 October 2004. B2 recognises the envelope sent to C. from a photocopy.
42. National Police Internal Investigations Department report of 2 October 2004. B2 describes how the second letter, addressed to C. and O., was received at the address of B1. He had opened the letter, which mentioned him and O. He had left it with C. O. had received a copy as well.
43. Official record by the investigating judge of 28 June 2005. B2 recognises the second letter referred to under no. 42. He had taken the letter to C. and given a copy to O.
44. National Police Internal Investigations Department report of 18 January 2005. Statement by S.B. (see under no. 18 above) who admits to knowing the applicant and also that he had received the e-mail from the applicant. In April or May 2004 he had received a transcript of an intercepted conversation from the applicant.
45. Official record by the investigating judge of 21 June 2005. S.B. admits to having received the e-mail from the applicant. He admitted to having received a transcript by mail and recognised it from a photocopy.
46. National Police Internal Investigations Department report of 10 November 2004. Target H. recognises the telephone transcript, which was sent to him at his home address. He suggests that it was sent to him because the other targets still lived with their parents.
47. Official report of the Ministry of Internal Affairs and Kingdom Relations [which is the Ministry responsible for the AIVD], 15 March 2005, with a statement of the (by then) Head of the AIVD to the effect that it is now possible to accommodate the applicant’s defence by offering documents with fewer parts blacked out, but noting that the documents in issue come from a place that is out of bounds.
48. A copy of the Royal Decree designating the AIVD offices out of bounds.
49. The applicant’s letter of appointment as a member of the AIVD (17 October 2003).
50. Official report of the Ministry of Internal Affairs and Kingdom Relations, 10 February 2010, to the effect that the documents found in the possession of unauthorised third parties in the course of the criminal investigation against the applicant concern current AIVD counterterrorist operations and destroying their secrecy endangers national security.
51. Letter from the Head of the AIVD to the investigating judge, 17 June 2005, confirming that those documents concern AIVD counterterrorist operations and endanger the interests of the State by offering an insight into the AIVD’s state of intelligence, sources and operational methods.
52. Official report of the Ministry of Internal Affairs and Kingdom Relations, 28 December 2006, signed by the Head of the AIVD, stating that not blacking out the blacked-out parts of particular documents would harm the State by disclosing the AIVD’s state of intelligence, sources (including one human source) and operational methods, naming the foreign intelligence services with which the AIVD cooperates, and disclosing the nature of information exchanged with those foreign services; identifying targeted organisations and their members (referred to as “Arab nationalist extremists”).
53. Official record of verification by the National Public Prosecutor for Counter-terrorism, 29 December 2006. The prosecutor has personally examined the documents in issue in unredacted form and found the unredacted parts of the redacted documents identical to the corresponding parts of the unredacted documents.

Photocopies of the address book with the post-it note and the redacted AIVD documents were attached to the judgment.

41.  The Court of Appeal’s reasoning included the following:

“In considering whether the positions adopted by the service [i.e. the AIVD] and/or its members as regards the necessary secrecy and in answering the question to what extent restrictions on (among other things) the right to question witnesses can be justified, other issues than that of defining State secrets in a strict sense also play a part. That is apparent from the chapeau paragraph of section 85(1) of the 2002 Intelligence and Security Services Act, which imposes on AIVD officials a duty of secrecy ‘without prejudice to Articles 98-98c of the Criminal Code’. That obligation extends to ‘all information the confidential character of which he knows or ought reasonably to suspect’. Only a ministerial decision as referred to in section 86(2) of that Act can relieve the official of this duty of secrecy if he wishes to act as a witness. The legislature has thus placed the choice in the ‘conflict ... between the interests of State security, which may imperatively require certain sources or information to be kept secret, and the interest of establishing the material truth in, among other things, ... criminal procedure’ [reference to the statutory drafting history of an earlier Act, repealed by the 2002 Intelligence and Security Services Act, omitted] in the hands of the said Ministers.

...

The above leads the Court of Appeal to conclude as follows. In addition to State secrets within the meaning of Article 98 of the Criminal Code there are other matters that (in the view of the AIVD) fall under the duty of secrecy of section 85 of the 2002 Intelligence and Security Services Act. The Court of Appeal deduces, on the basis of what is laid down in section 86 of that Act, that that obligation (in principle) prevails over the duties of a witness in a criminal trial. The Court of Appeal’s examination of the question whether an AIVD staff member has rightly invoked his duty [of secrecy] is necessarily detached/marginal. Things are different where it concerns the question whether the right of the defence to question witnesses is materially impaired, it being relevant, in the opinion of the Court of Appeal, whether the statement of that particular witness is used in evidence.”

and

“The interests of State security, which the 2002 Intelligence and Security Services Act and Articles 98 and following of the Criminal Code are intended to protect, stand in the way of granting a complete exemption from the duty of secrecy as desired by the defence.

It is obvious that the said duty of secrecy constitutes, to some extent, a restriction on – normally entirely – unimpeded free and confidential discussion between the suspect and his counsel and that – had it been in force unmitigated – it would prevent a fair trial.

As the Court of Appeal held in its interlocutory judgment of 12 October 2006, the duty of secrecy is subject only to the exceptions set out in the 2002 Intelligence and Security Services Act.

This means that the situation in which the suspect finds himself in the present criminal case leaves only the avenue left by section 86(1) of the said Act.”

and

“The Advocate General has given the undertaking, at the Court of Appeal’s hearing of 2 September 2006, that [the applicant] shall not be prosecuted if a violation of the duty of secrecy by [the applicant] is justified by reliance on Article 6 of the Convention, with due regard to the demands of proportionality and subsidiarity inherent pertaining to a legal defence (*strafuitsluitingsgrond*).

The conditions attached to the exemption aforementioned, all of which concern the interest of State security in relation to the interests of the defence in the present criminal proceedings, do not appear unreasonable to the Court of Appeal within the framework of the interests of State security and in the Court of Appeal’s opinion have done no relevant harm to the interests of the defence.”

and

“The Court of Appeal can only answer the question whether the information in issue is to be considered ‘State secret’ or as information relating to State security by referring to the texts, as contained in the file, of [the documents concerned], to the extent that these documents have been added to the file in censored form as appendices to the AIVD’s official record of 15 March 2005, [an uncensored e-mail relevant to one of the charges] and the explanations to these documents given by the AIVD, especially as contained in the said official record of the head of the AIVD of 10 February 2005 and the official record of the acting head of the AIVD of 28 December 2006, which latter report has been verified by the National Public Prosecutor for Counter-terrorism (*Landelijke Officier van Justitie Terrorismebestrijding*) as appears from the latter’s official report of 29 December 2006.

The Court of Appeal considers itself sufficiently able to determine the nature and character of this information on the basis of these documents, considered in context. For that purpose it is not necessary, in the opinion of the Court of Appeal, to possess or have access to entirely uncensored versions of the information. In this connection, the Court of Appeal has sought, in giving its interlocutory judgment aimed at obtaining a further official report about the type and nature of the State security interest of the information contained in the censored texts portions, to gain optimum understanding of the nature and character of the information. Although the AIVD, in submitting its official record of 28 December 2006 (verified by the National Public Prosecutor for Counter-terrorism), has not entirely kept to the letter of the Court of Appeal’s order, the Court of Appeal has, based on the texts before it, considered in context with the AIVD’s explanations in its official records of 10 February 2005 and 28 December 2006, sufficiently gained the understanding referred to.”

D.  Proceedings before the Supreme Court

42.  The applicant lodged an appeal on points of law (*cassatie*) with the Supreme Court (*Hoge Raad*).

43.  The Supreme Court gave judgment on 7 July 2009 (ECLI:NL:HR:BG7232). It held that the length of the proceedings before it had been excessive and the applicant was entitled to compensation in the form of a reduction of sentence. It therefore quashed the judgment of the Court of Appeal for technical reasons in order to revise the sentence which it reduced by two months to three years and ten months. It held, however, that the appeal was unfounded. Its reasoning included the following:

“5.5.  There is no statutory provision for an exception to the duty of secrecy laid down in section 85 of the 2002 Intelligence and Security Services Act in the event that the official concerned is a suspect. Even then the official is bound by his duty of secrecy and he will not be permitted to divulge information in violation of that duty.

If, however, the trial judge takes the view, whether or not it be in response to a request or a legal argument (*verweer*) put forward by the defence, that the interest of the defence requires that information falling under the duty of secrecy is disclosed by the suspect, the court will have to weigh the conflicting interests in the case. The guiding principle (*richtsnoer*) in so doing is whether, if this information cannot be disclosed after all, there can still be a fair trial within the meaning of Article 6 of the Convention.

If the trial court reaches the finding that it is necessary, from the point of view of that Convention guarantee, to take cognisance of that secret information and the handicap for the defence [resulting from not being able to disclose it][[2]](#footnote-2) is not sufficiently compensated by the procedure followed, it will have to determine – for example, by hearing the appropriate AIVD official or officials on this point – whether the duty of secrecy is to be maintained intact in relation to that information. If that is the case, the conclusion will have to be that there cannot be any fair trial and the prosecution will have to be declared inadmissible (*zal de officier van justitie niet-ontvankelijk moeten worden verklaard in de vervolging*).

5.6.  In so far as the Court of Appeal has been inspired by a procedural framework other than outlined above, it has misinterpreted the law (*heeft het blijk gegeven van een onjuiste rechtsopvatting*). However, that need not lead to the quashing of the judgment [of the Court of Appeal] for the following reasons. ...”

The Supreme Court went on to find that the compensatory measures had been sufficient in the circumstances: the possibility had been offered to hear AIVD officials as witnesses without disclosing their identities, and the Court of Appeal had been sufficiently informed by the information contained in the case file – the uncensored parts of documents, the official explanatory documents submitted by the AIVD, and the checking of the AIVD position by the National Public Prosecutor for Counter-terrorism – to make a proper assessment as to whether the documents in issue were properly classified State secret.

II.  RELEVANT DOMESTIC LAW

A.  The Criminal Code

44.  Provisions of the Criminal Code relevant to the case before the Court are the following:

Article 98

“1.  Anyone who deliberately delivers or makes available knowledge (*inlichting*) which needs to be kept secret in the interest of the State or its allies, an object from which such information can be derived, or such information (*gegevens*) to a person or body not authorised to take cognisance of it, shall, if he knows or ought reasonably to be aware that it concerns such knowledge, such an object or such information, be sentenced to a term of imprisonment not exceeding six years or a fifth-category fine [i.e. up to 74,000 euros (EUR)]. ...”

Article 98c

“1.  The following shall be sentenced to a term of imprisonment not exceeding six years or a fifth-category fine:

i.  anyone who deliberately takes or keeps knowledge, an object or information as referred to in Article 98 without being duly authorised;

ii.  anyone who undertakes any action with intent to obtain knowledge, an object or information as referred to in Article 98 without being duly authorised; ...”

B.  The Code of Criminal Procedure

.  At the time of the events complained of, provisions of the Code of Criminal Procedure (*Wetboek van Strafvordering*) relevant to the case before the Court were the following:

Article 190

“1.  The investigating judge shall ask suspects, witnesses and experts to state their names and first names, age, profession and place of residence or abode; and the suspect to state his place of birth. If the suspect is known, the investigating judge shall ask witnesses and experts whether they are his relatives by blood or marriage, and in the affirmative, in what degree of kinship.

2.  The investigating judge may, either *ex officio* or on an application (*vordering*) of the public prosecutor or at the request of the suspect or the witness, determine that particular information as referred to in the first paragraph shall not be asked for if there is reason to suspect (*vermoeden*) that the witness will be inconvenienced in connection with the making of his statement or will be hindered in the exercise of his profession. The investigating judge shall take whatever measures are reasonably necessary to prevent the disclosure of this information.

3.  The investigating judge shall state the reasons for which the second paragraph has been applied in his official record. ...”

C.  The 2002 Intelligence and Security Services Act

.  Provisions of the 2002 Intelligence and Security Services Act relevant to the case before the Court are the following:

Section 6

“1.  There shall be a General Intelligence and Security Service [i.e. the AIVD].

2.  The [AIVD]’s tasks, in the interest of national security, are the following:

a.   to carry out investigations relative to organisations and persons who, by the aims which they pursue or their activities, give rise to serious suspicion (*het ernstige vermoeden*) that they constitute a danger to the continued existence of the democratic legal order or to the security or other weighty interests of the State;

b.  ...

c.  to promote measures (*het bevorderen van maatregelen*) for the protection of the interests mentioned in sub-paragraph a, including measures aimed at securing information which needs to be kept secret in the interest of national security and of those parts of Government service and private enterprise (*bedrijfsleven*) which in the judgment of the Ministers invested with responsibility in the matter are of vital importance for the maintenance of social life (*de instandhouding van het maatschappelijk leven*);

d.  to carry out investigations concerning other countries relative to subject-matter indicated by the Prime Minister, Minister of General Affairs (*Minister-President, Minister van Algemene Zaken* [the Prime Minister being both at the same time]), in agreement with other Ministers involved; ...”

Section 9

“1.  Officials of the [intelligence and security] services are not invested with powers of criminal investigation (*bezitten geen bevoegdheid tot het opsporen van strafbare feiten*). ...”

Section 12

“1.  The [intelligence and security] services are empowered (*bevoegd*) to process data taking into account the constraints (*eisen*) posed thereon by the present Act ...

2.  Data shall be processed only for a particular purpose and only in so far as is necessary for the proper implementation of this Act ...

3.  Data shall be processed in accordance with the law and properly and with due care.”

Section 15

“The heads of the [intelligence and security] services shall see to:

a.  the maintenance of the secrecy of data so designated (*daarvoor in aanmerking komende gegevens*);

b.  the maintenance of the secrecy of sources so designated from which data are obtained;

c.  the safety of the persons with whose co-operation data are collected.”

Section 16

“The heads of the [intelligence and security] services shall also see to:

a.  the making of the arrangements necessary to ensure the correctness and completeness of the data to be processed;

b.  the making of the arrangements of a technical and organisational nature necessary to secure the safety of the processing of data against loss or damage and against unauthorised processing;

c.  the appointment of persons who shall be authorised, to the exclusion of others, to carry out the tasks appointed in the framework of data processing.”

Section 85

“1.  Without prejudice to Articles 98-98c of the Criminal Code, everyone who is involved in the execution of this Act and thereby enters into the possession of information the confidential character of which he knows or ought reasonably to suspect (*en daarbij de beschikking krijgt over gegevens waarvan hij het vertrouwelijke karakter kent of redelijkerwijs moet vermoeden*) shall have a duty to keep it secret except in so far as a legal provision places him under an obligation to divulge it. ...”

Section 86

“1.  The duty of secrecy owed by an official involved in the execution of this Act shall not apply *vis-à-vis* the person to whom the official is directly or indirectly subordinate, nor to the extent that he has been exonerated from that duty by a superior.

2.  The official referred to in the first paragraph, if obliged pursuant to a legal provision to act as a witness or an expert, shall only make a statement about the matters covered by his duty of secrecy to the extent that the Minister concerned and the Minister of Justice together have exonerated him from that duty in writing. ...”

D.  The Protection of State Secrets Act

.  Provisions of the Protection of State Secrets Act (*Wet bescherming staatsgeheimen*) relevant to the case are the following:

Section 1

“Every place used by the State or a State company (*staatsbedrijf*) may be designated out of bounds by Us [i.e. the Monarch, effectively the Minister of the Interior and Kingdom Relations (*Minister van Binnenlandse Zaken en Koninkrijksrelaties*)] (*kan door Ons als verboden plaats worden aangewezen*) for the protection of information that needs to be kept secret in the interest of State security (*waarvan de geheimhouding door het belang van de veiligheid van de Staat wordt geboden*).”

.  Places designated out of bounds by Royal Decree (*koninklijk* *besluit)* pursuant to this provision include buildings used by the AIVD.

E.  The Information specific to State service (Security) Order

.  Provisions of the Information specific to State service (Security) Order (*Voorschrift informatiebeveiliging rijksdienst-bijzondere informatie*, also known domestically as “Vir-bi”) relevant to the case are the following:

Section 1

“In this Order:

‘State secret’ shall mean: specific knowledge which needs to be kept secret in the interest of the State or its allies;

‘Classify’ shall mean: to establish and indicate that particular information (*een gegeven*) constitute specific information and to determine and indicate the level of security to be assigned to this information.”

Section 5

“State secrets shall be classified as follows:

a.  State secret TOP SECRET (*Stg. ZEER GEHEIM*), if the interests of the State or its allies can be very seriously harmed should unauthorised persons take cognisance thereof;

b.  State secret SECRET (*Stg. GEHEIM*), if the interests of the State or its allies can be seriously harmed should unauthorised persons take cognisance thereof;

c.  State secret CONFIDENTIAL (*Stg. CONFIDENTIEEL*), if the interests of the State or its allies can be harmed should unauthorised persons take cognisance thereof.”

F.  Classification of the identity of AIVD staff members

.  It is reflected in the drafting history of the 2002 Intelligence and Security Services Act (Parliamentary Documents, Lower House of Parliament (*Kamerstukken II*) 1997-98, 25877, no. 3 (Explanatory Memorandum (*Memorie van Toelichting*), page 93) that the identity of AIVD staff may, depending on the circumstances, be State secret.

THE LAW

I.  ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

51.  The applicant complained that the criminal proceedings against him were unfair in that the AIVD had exercised decisive control over the evidence, restricting his and the domestic courts’ access to it and controlling its use, and preventing him from instructing his defence counsel effectively. He alleged violations of Article 6 §§ 1 and 3 (b), (c) and (d), which provide as follows:

“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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

...

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;

(c)  to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(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; ...”

.  The Government disputed this.

.  The applicant’s complaints concern the redacting of certain documents and the alleged withholding of others; the restrictions on the applicant’s right to give information and instructions to counsel; the refusal to allow the applicant to state the names of AIVD members to the Court of Appeal; the conditions under which certain AIVD members were heard as witnesses; and the refusal to call certain other AIVD members as defence witnesses.

A.  Admissibility

54.  The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B.  Merits

1.  General

55.  As the Court has held many times, the requirements of Article 6 § 3 are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1 (see, among many other authorities, *Sakhnovskiy v. Russia* [GC], no. 21272/03, § 94, 2 November 2010, and *Schatschaschwili v. Germany* [GC], no. 9154/10, § 100, ECHR 2015).

56.  The right to a fair trial under Article 6 § 1 is an unqualified right. However, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case. The Court’s primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings (see *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08, 50571/08, 50573/08 and 40351/09, § 250, ECHR 2016, with further references).

2.  The redacting of certain documents and the alleged withholding of others

57.  The Court will consider these issues under Article 6 §§ 1 and 3 (b).

58.  The Government stated that publication of the redacted information would have severely harmed the interests of the State in that it would have identified individuals and organisations under investigation, human sources and foreign intelligence and security services with whom the AIVD cooperated. In some cases the safety of AIVD staff would have been endangered. The restrictions to which the defence had been subject had therefore been strictly necessary.

59.  In each case, the domestic court had assessed whether it was necessary to deny disclosure. This they had done on the basis of the unredacted parts of the text, as contained in the case file; the explanations provided by the AIVD itself concerning the classification and the interest at stake for the State; and the verification by the National Public Prosecutor for Counterterrorism. The approach followed had met with the approval of the Supreme Court.

60.  As time passed, the question whether certain information still had to be blacked out had been reconsidered. Fresh versions of some documents had been added to the case file in their original form or with less of the text blacked out.

61.  Counterbalancing measures had been available. The applicant had been given the opportunity to assess the reliability of the AIVD’s internal investigation using the statements made by the witnesses who had been questioned. In addition, at various points in the proceedings the applicant had had the opportunity to challenge the withholding of evidence. The Government prayed in aid *Jasper v. the United Kingdom* [GC], no. 27052/95, 16 February 2000 and *Fitt v. the United Kingdom* [GC], no. 29777/96, ECHR 2000‑II.

62.  The applicant complained that certain documents relied on by the prosecution in the case against him were either provided to the defence in redacted form, with parts blacked out by the AIVD, or not provided to the defence at all.

63.  The applicant accepted that national security considerations might justify withholding information from the defence. Praying in aid *Edwards and Lewis v. the United Kingdom* [GC], nos. 39647/98 and 40461/98, ECHR 2004‑X, and *A. and Others v. the United Kingdom* [GC], no. 3455/05, ECHR 2009, he submitted that strict necessity for so doing should be shown; that the restrictions on access to the information should be the least intrusive possible; and that counterbalancing procedures should be in place.

64.  It was the applicant’s argument that the need to restrict defence access to any materials had not been demonstrated. There had been no independent verification: the domestic courts had made their assessment on the basis of the unredacted parts of each text, the explanation provided by the AIVD and the decision of the National Public Prosecutor for Counter-terrorism. Neither the AIVD nor the National Public Prosecutor for Counterterrorism was independent. Not even the courts themselves had been allowed access to the information denied the defence. This distinguished the applicant’s case from *Jasper* and *Fitt*, both cited above.

65.  It made no difference in this respect that as time went on certain documents were made available with fewer parts blacked out, since the parts that were later disclosed offered no relevant information in this regard.

66.  In *Fitt*, cited above, the Court held as follows (see also *Jasper*, cited above, §§ 51-53):

“44.  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 18 above), that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused (see *Edwards v. the United Kingdom*, 16 December 1992, § 36, Series A no. 247‑B).

45.  However, as the applicant recognised (...), 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).

46.  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). In any event, in many cases, such as the present one, 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.”

.  Turning to the facts of the case, the Court notes that the applicant sought disclosure of the report of the internal AIVD investigation and of the redacted parts of the AIVD documents contained in the case file.

.  As regards the internal AIVD investigation, the Court notes that the Court of Appeal did not find it established that any report actually existed (see paragraph 34 above). At all events, the Court is satisfied that no such document was in the hands of the prosecution either – let alone the Court of Appeal – and that accordingly it could not form part of the prosecution case (compare *Fitt*, § 48). In so far as the applicant wishes to imply that the investigation might have yielded information capable of disculpating him, the Court dismisses such a suggestion as entirely hypothetical.

.  As regards the documents made available to the Court of Appeal and the applicant in redacted form, the Court points out that the information blacked out could in itself be of no assistance to the defence. Since the applicant was charged with having supplied State secret information to persons not entitled to take cognisance of it, the only question in relation to these documents was whether or not they were State secret.

.  The evidence on which the applicant was convicted included AIVD statements attesting that the documents in issue were classified State secret and explaining the need to keep the information contained in the documents secret. The National Public Prosecutor for Counter-terrorism confirmed that the documents contained in the case file of the criminal proceedings were in fact copies of the documents they purported to represent (see paragraph 40, sub-paragraph 53 above), which the applicant does not dispute they were. Seen in this light, the Court is satisfied that the remaining legible information was sufficient for the defence and the Court of Appeal to make a reliable assessment of the nature of the information in the documents.

.  There has therefore not been a violation of Article 6 §§ 1 and 3 (b) as regards the redacting of certain documents and the alleged withholding of others.

3.  The restrictions on the applicant’s right to give information and instructions to counsel and the refusal to allow the applicant to state the names of AIVD members to the Court of Appeal

72.  The Court will consider both issues under Article 6 §§ 1 and 3 (c).

73.  The Government recognised the fundamental importance of free communication between a defendant and counsel, but considered that there had been no fundamental interference with this in the present case. The applicant had been discharged from his duty of secrecy for the purpose of communicating with his lawyers, albeit conditionally.

74.  The Government submitted that the right to restrictions might be imposed on an accused’s access to his lawyer for good cause. They relied on *Öcalan v. Turkey* [GC], no. 46221/99, § 133, ECHR 2005‑IV, and *Marcello Viola v. Italy*, no. 45106/04, § 61, ECHR 2006‑XI (extracts).

75.  The conditions had been necessary to serve the dual purpose of protecting the AIVD’s staff and human sources and to maintain the secrecy of classified information that was not relevant to the criminal case against the applicant. As an intelligence service, the AIVD could not function unless secrecy remained intact.

76.  The Government also pointed to the undertaking of the Advocate General to the Court of Appeal that the applicant would not be prosecuted if a breach of his duty of secrecy was justified by invoking Article 6 of the Convention.

77.  Finally, the Government argued, in the light of the statements actually made by the applicant at the hearing of 12 February 2007 (see paragraph 36 above) and the questions set out in Mr Pestman’s fax letter of 14 February 2007 (see paragraph 37 above), that there was little sign that the applicant had allowed himself to be deterred by the threat of prosecution as suggested in the applicant’s submissions to the Court.

78.  The applicant argued that the conditions put in place amounted to restrictions of the communication between his counsel and himself and had hindered his defence. In particular, he had been prevented from discussing with his counsel any potential exonerating evidence and any alternative scenarios in so far as the relevant information was not already contained in the case file. This had placed the prosecution and, through the prosecution, the AIVD in control of the defence.

79.  The applicant further argued that the AIVD had been allowed to define the scope of the evidence the defence had been allowed to proffer throughout the proceedings. He also stated that he had been threatened with prosecution even in the confidential setting of a hearing behind closed doors.

80.  The applicant relied on *S. v. Switzerland*, 28 November 1991, § 48, Series A no. 220, in which the Court had recognised that a lawyer should be able to confer with his client and receive confidential instructions from him without surveillance (which in that case consisted of police supervision of the lawyer’s visits and interception of correspondence between the lawyer and the client). He also prayed in aid *A. and Others v. the United Kingdom,* cited above, § 220, in which it was recognised that a detainee should be able to give effective instructions to the special advocate, arguing that the duty of secrecy imposed on him prevented him from instructing his counsel as he would have needed to.

81.  As to the refusal to allow the applicant to state the names of AIVD members to the Court of Appeal, the applicant argued that he was prohibited from divulging secret information to the courts in order *inter alia* to present credible alternative explanations to him being responsible for any criminal acts. The Government were of the opinion that the domestic courts had rightly ruled out any alternative scenarios in the light of the evidence weighing against the applicant.

82.  The Court reiterates that while Article 6 § 3 (c) confers on everyone charged with a criminal offence the right to “defend himself in person or through legal assistance ...”, it does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court’s task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial. In that connection it must be borne in mind that the Convention is intended to “guarantee not rights that are theoretical or illusory but rights that are practical and effective” and that assigning counsel does not in itself ensure the effectiveness of the assistance he or she may afford an accused (see, among other authorities, *Sakhnovskiy v. Russia,* cited above, § 95, with further references).

83.  The Court reiterates that the right to a fair trial as guaranteed by Article 6 § 1 of the Convention includes the right of the parties to the trial to submit any observations that they consider relevant to their case. This right can only be seen to be effective if the observations are actually “heard”, that is duly considered by the trial court. In other words, the effect of Article 6 is, among others, to place the “tribunal” under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant (see *Perez v. France* [GC], no. 47287/99, § 80, ECHR 2004‑I).

84.  The Court further observes that Article 6 § 1 makes allowances for considerations of national security in its second sentence in that it makes provision for “the press and public to be excluded from all of part of the trial”. It has no doubt that the trial of the applicant was one to which such considerations were relevant and that a genuine need to withhold State secret information from the press and the public existed.

85.  The Court has held that an accused’s right to communicate with his legal representative out of the hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6 § 3 (c) of the Convention. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness (*S. v. Switzerland*, cited above, § 48; *Öcalan v. Turkey* [GC], no. 46221/99, § 133, ECHR 2005‑IV).

86.  The Court has also held, in the context of Article 5 § 4, that an interference with the lawyer-client privilege and, thus, with a detainee’s right to defence, does not necessarily require actual interception or eavesdropping to have taken place (see, *mutatis mutandis*, *Castravet v. Moldova*, no. 23393/05, § 51, 13 March 2007).

87.  The Court has further held, in the context of Article 8 of the Convention, that it is clearly in the general interest that any person who wishes to consult a lawyer should be free to do so under conditions which favour full and uninhibited discussion. It is for this reason that the lawyer-client relationship is, in principle, privileged (*mutatis mutandis*, *Campbell v. the United Kingdom*, 25 March 1992, § 46, Series A no. 233).

88.  The Court has tolerated certain restrictions imposed on lawyer-client contacts in cases of terrorism and organised crime (see, in particular, *Erdem v. Germany*, no. 38321/97, § 65 et seq., ECHR 2001-VII (extracts), and *Khodorkovskiy and Lebedev* *v. Russia*, nos. 11082/06 and 13772/05, § 627, 25 July 2013). Nonetheless, the privilege that attaches to correspondence between prisoners and their lawyers constitutes a fundamental right of the individual and directly affects the rights of the defence. For that reason, the Court has held – again in the context of Article 8 of the Convention – , that the fundamental rule of respect for lawyer-client confidentiality may only be derogated from in exceptional cases and on condition that adequate and sufficient safeguards against abuse are in place (*mutatis mutandis*, *Erdem*, § 65).

89.  In *A. and Others v. the United Kingdom* the Court was called upon to consider measures designed to ensure fairness of proceedings for purposes of Article 5 § 4 of the Convention while withholding from the defence evidence relied on by the prosecution. The Court took as its starting point that during the period of the applicants’ detention the activities and aims of the al-Qaeda terrorist network had given rise to a “public emergency threatening the life of the nation.” It had therefore to be borne in mind that at the relevant time there was considered to be an urgent need to protect the population of the United Kingdom from terrorist attack and, although the United Kingdom had not derogated from Article 5 § 4 but only from Article 5 § 1, a strong public interest in obtaining information about al‑Qaeda and its associates and in maintaining the secrecy of the sources of such information (*loc. cit.*, § 216).

90.  A procedure whereby the prosecution itself attempts to assess the importance of concealed information for 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 (*Dowsett v. the United Kingdom*, no. 39482/98, § 44, ECHR 2003 VII). The Court has also held, in the context of Article 6 § 3 (b), that an accused is guaranteed adequate time and facilities for the preparation of his defence and therefore Article 6 § 3 (b) implies that the substantive defence activity may comprise everything that is “necessary” to prepare the main trial (*Mayzit v. Russia*, no. 63378/00, § 78, 20 January 2005).

91.  Turning to the present case, the Court notes the Government’s position that the conditions governing communication between the applicant and his counsel were a concession to the defence in the light of the applicant’s duty of secrecy. However, it takes the opposite view, namely that they constituted a restriction on the right of an accused to communicate with his or her legal counsel without hindrance.

92.  The present case differs from those cited above in several relevant respects. Firstly, the applicant was not denied access to prosecution evidence: he was ordered not to disclose to his counsel factual information to be used in his defence. In this the present case is distinguishable from *A. and Others*. Secondly, there was no interference whatsoever with the confidentiality between the defendant and his lawyer. This case therefore differs essentially from *S. v. Switzerland*, cited above, § 48; *Campbell v. the United Kin*gdom, cited above, § 48; and *Moiseyev v. Russia*, no. 62936/00, § 210, 9 October 2008, where surveillance of communication was in issue. Furthermore, no independent monitoring of the information passed between the applicant and his counsel took place: rather, the applicant was threatened with prosecution *post factum* if he gave his counsel secret information. In this the present case is unlike *Erdem*.

93.  These differences, however, are not decisive: what matters is that communication between the applicant and his counsel was not free and unrestricted as to its content, as the requirements of a fair trial normally require.

94.  The Court accepts that secrecy rules apply generally, and there is no reason of principle why they should not apply when the members of staff of the security service are prosecuted for criminal offences related to their employment. The question for the Court is how a ban on divulging secret information affects the suspect’s right to defence, both in connection with his communications with his lawyers and as regards the proceedings in courts.

95.  It is reflected in the two judgments of the Court of Appeal and the hearing of 12 and 15 February 2007 (see paragraphs 34-41 above) that the Advocate General gave an undertaking not to prosecute the applicant for breach of his duty of secrecy if such breach was justified by the rights of the defence, as guaranteed by Article 6 of the Convention. This laid upon the applicant the burden to decide, without the benefit of counsel’s advice, whether to disclose facts not already recorded in the case file and in so doing risk further prosecution, the Advocate General retaining full discretion in the matter.

96.  The Court considers that it cannot be expected of a defendant to serious criminal charges to be able, without professional advice, to weigh up the benefits of full disclosure of his case to his lawyer against the risk of prosecution for so doing,

97.  In those circumstances the Court finds that the fairness of the proceedings was irretrievably compromised by the interference with communication between the applicant and his counsel. There has accordingly been a violation of Article 6 §§ 1 and 3 (c) of the Convention in this respect.

98.  In view of this finding, the Court does not consider it necessary to consider separately whether the refusal to allow the applicant to state the names of AIVD members to the Court of Appeal also constituted a violation of the Convention.

4.  The conditions under which certain AIVD members were heard as witnesses and the refusal to call certain other AIVD members as defence witnesses

99.  The Court will consider these matters under Article 6 §§ 1 and 3 (d).

100.  The Government submitted that the witnesses examined by the investigating judge and identified only by a number were not “anonymous” witnesses within the meaning of, for example, *Van Mechelen and Others v. the Netherlands*, 23 April 1997, *Reports of Judgments and Decisions* 1997‑III. The applicant was aware of their names and positions; this was a fundamentally different situation from that in which the identity of the witness was unknown to the defence.

101.  The use of voice distortion and disguise to obscure identity had been intended to make the examination of the witnesses as interactive as possible. The restrictions imposed on the defence had therefore no real impact on the fairness of the proceedings.

102.  The incriminating witnesses had made extensive statements before the investigating judge and had only declined to answer certain questions in connection with the requirement of secrecy. The present case was therefore unlike that described in *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, ECHR 2011, in which an incriminating witness had remained silent in response to questions put by the defence.

103.  Good reasons existed for the measures adopted. At the time when the witnesses were examined, AIVD employees and/or human sources were still operationally active and their safety had to be considered.

104.  Although maintaining that the present case was not one to which the *Van Mechelen and Others* and *Al-Khawaja and Tahery* case-law applied, the Government argued that the applicant’s conviction was not based “solely or to a decisive extent” on the statements made by the witnesses identified only by a number. The statement of no more than one of the witnesses in question was used in evidence; the witness was the AIVD’s IT employee, was known to the applicant, and answered the many questions put by the defence. The other witnesses whose statements were used in evidence were heard under their own names. In addition, there was other evidence including traces of the applicant’s DNA identified on the seal of an envelope found at the home of one of the targets.

105.  The applicant submitted that his strategy was to demonstrate that other scenarios were conceivable to explain the leaking of AIVD documents imputed to him than the sole possibility that he was guilty. He argued that since the defence already laboured under heavy restrictions, witness evidence was one of the few means left to him to obtain the information needed for him to make out his case. For that reason alone his requests to call witnesses ought to have been given more favourable consideration.

106.  The applicant could not verify that the witnesses were persons whom he knew, since he had been unable to recognise them. Moreover, the defence had been unable to recognise their non-verbal expression.

107.  The necessity of this measure had not been demonstrated. To begin with, the witnesses were persons whom the applicant already knew – his former colleagues. Secondly, they had not been heard in public. Thirdly, his counsel were under a duty of secrecy. Fourthly, the prosecution had been permitted to speak to these witnesses without disguise.

108.  Throughout the witness hearings there had been an AIVD official present to veto questions from the defence. In particular, questions about AIVD working practices and security arrangements had been blocked. This had hampered the defence’s attempts to demonstrate the possibility that someone other than he might have leaked the AIVD documents in issue.

109.  There had been no necessity for such interference with the rights of the defence to question witnesses, since the needs of secrecy could have been met by holding a hearing *in camera*.

110.  The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court’s task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among many other authorities, *Van Mechelen and Others*, cited above, § 50).

111.  The Court observes that the present case is unlike *Van Mechelen and Others*, *Al-Khawaja and Tahery* or *Schatschaschwili* in that the defence was not denied the possibility to cross-examine prosecution witnesses with a view to testing the veracity of statements made by them earlier in the proceedings. Rather, it is the applicant’s case that he was denied access to information to which the AIVD members were privy that would have been capable of casting doubt on his guilt.

112.  It is, in itself, a perfectly legitimate defence strategy in criminal cases to create doubt as to the authorship of a crime by demonstrating that the crime could well have been committed by someone else. It does not, however, entitle the suspect to make specious demands for information in the hope that perchance an alternative explanation may present itself.

113.  The evidence on which the Court of Appeal grounded its conviction (see paragraph 40 above) – which comprised no fewer than 53 different items – included several linking the applicant directly to the leaked documents and to the unauthorised persons found in possession of them. In the circumstances, the Court cannot consider that the Court of Appeal acted unreasonably or arbitrarily either by not allowing him all the witnesses requested or in holding that the applicant’s defence was not materially impaired by the conditions under which those witnesses who were not refused him were questioned.

114.  There has accordingly not been a violation of Article 6 §§ 1 and 3 (d).

II.  APPLICATION OF ARTICLE 41 OF THE CONVENTION

115.  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

116.  The applicant asked the Court to order the Government to “remedy the violations of Article 6 which have occurred by overturning his conviction”, thus enabling him to claim compensation for pecuniary damage under domestic law. He also claimed 25,000 euros (EUR) in respect of non‑pecuniary damage.

117.  The Government pointed to the possibility for the applicant to seek revision (*herziening*) under domestic law in the event that the Court found a violation of the Convention. They asked the Court to hold that the finding of a violation constituted in itself sufficient just satisfaction in respect of non-pecuniary damage.

118.  The Court reiterates that it has no jurisdiction to quash convictions pronounced by national courts (see, among other authorities, *Albert and Le Compte v. Belgium* (Article 50), 24 October 1983, § 9, Series A no. 68; *Findlay v. the United Kingdom*, 25 February 1997, § 88, *Reports* 1997-I; and *Sannino v. Italy*, no. 30961/03, § 65, ECHR 2006‑VI). Moreover, the Court observes that where, as in the instant case, a person is convicted in domestic proceedings that have entailed breaches of the requirements of Article 6 of the Convention, a new trial or the reopening of the domestic proceedings at the request of the interested person represents an appropriate way to redress the violation (see, among other authorities, *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003; *Sejdovic v. Italy* [GC], no. 56581/00, § 126, ECHR 2006‑II; and *Cudak v. Lithuania* [GC], no. 15869/02, § 79, ECHR 2010). In this connection, it notes that Article 457 § 1 (b) of the Netherlands Code of Criminal Procedure provides for the possibility of revision by the Supreme Court of a conviction where it has been determined in a ruling of the Court that there has been a violation of the Convention or one of its Protocols, as the case may be, in proceedings that have led to the conviction, or a conviction of the same crime, if revision is necessary with a view to reparation within the meaning of Article 41 of the Convention.

119.  The Court considers that in the circumstances of the case the finding of a violation constitutes in itself sufficient just satisfaction in respect of non-pecuniary damage.

B.  Costs and expenses

120.  The applicant also claimed EUR 732 for the costs and expenses incurred before the Court, the sum which he had had to pay towards the cost of his representation in the proceedings before the Court under the domestic legal aid scheme. Value-added tax was not claimed.

121.  The Government declined to comment.

122.  The Court awards the sum claimed, i.e. EUR 732.

C.  Default interest

123.  The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

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

2.  *Holds* that there has been no violation of Article 6 §§ 1 and 3 (b) of the Convention as regards redacting of certain documents and the alleged withholding of others;

3.  *Holds* that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention as regards the restrictions on the applicant’s right to give information and instructions to counsel;

4.  *Holds* that it is not necessary to consider whether there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention as regards the limitation on revealing the names of AIVD members before the Court of Appeal;

5.  *Holds* that there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention as regards the conditions under which certain AIVD members were heard as witnesses and the refusal to call certain other AIVD members as defence witnesses;

6.  *Holds* that the above finding of a violation constitutes in itself sufficient just satisfaction in respect of any non-pecuniary damage sustained by the applicant;

7.  *Holds*

(a)  that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 732 (seven hundred and thirty-two euros) in respect of costs and expenses;

(b)  that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

8.  *Dismisses* the remainder of the applicant’s claim for just satisfaction.

Done in English, and notified in writing on 25 July 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

 Fatoş Aracı Helena Jäderblom
 Deputy Registrar President

1. In English in the original. [↑](#footnote-ref-1)
2. Emendation by the Court. [↑](#footnote-ref-2)