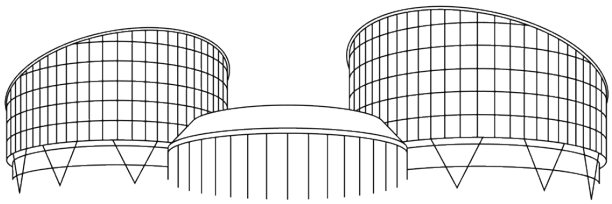

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF MACKAY & BBC SCOTLAND v. THE UNITED KINGDOM

(Application no. 10734/05)

JUDGMENT

STRASBOURG

7 December 2010

FINAL

07/03/2011

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

In the case of Mackay & BBC Scotland v. the United Kingdom**,**

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

Lech Garlicki, *President,*
Nicolas Bratza,
Ljiljana Mijović,
David Thór Björgvinsson,
Ledi Bianku,
Mihai Poalelungi,
Vincent Anthony de Gaetano, *judges,*

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 16 November 2010,

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

PROCEDURE

1. The case originated in an application (no. 10734/05) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a British national, Mr A. Mackay, and the British Broadcasting Corporation in Scotland (BBC Scotland) ("the applicants") on 23 March 2005. Mr Mackay was born in 1954 and lives in Glasgow. When the application was lodged he was working for BBC Scotland as a journalist; he has since retired.

2. The applicants were represented by Mr A. Bonnington, solicitor-advocate, and subsequently by Ms R. M. M. McInnes, a solicitor for BBC Scotland, assisted by Mr M. S. Jones Q.C., counsel. The United Kingdom Government ("the Government") were represented by their Agent, Ms H. Upton of the Foreign and Commonwealth Office.

3. The applicants alleged they were unable to challenge a court order prohibiting reporting of a criminal trial in violation of Articles 6, 10 and 13 of the Convention.

4. On 26 February 2008 the President of the Chamber to which the case had been allocated decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. On 13 September 2004 two men went on trial in the High Court of Justiciary sitting at Glasgow on charges of importing and supplying controlled drugs. The proceedings were filmed and relayed through a closed-circuit television system to a remote viewing room in the court building. On 23 September 2004, it was discovered that police officers and prosecution staff had been watching the proceedings in the remote viewing room with the risk that defence conversations might have been overheard. When this was brought to the attention of the trial judge on 28 September 2004, he took the decision to desert the trial diet *simpliciter* since he believed that no fair trial could continue before him. This decision had the effect of bringing the prosecution case to an end resulting in the acquittal of the accused. The desertion *simpliciter* meant that the accused could not be reindicted.

6. The same day, the trial judge heard argument from counsel for BBC Scotland before making an interim order under section 4(2) of the Contempt of Court Act 1981 preventing the publication of any report of the proceedings. That order was to become final on 30 September 2004 unless any interested party applied to the court for its recall (quashing) or variation. On 29 September 2004, BBC Scotland appeared before the trial judge and made representations in respect of the order. The trial judge varied the interim order to the effect that publication of any report of the proceedings was prohibited until the completion of any appeal and any further trial. The varied order was to become final on 1 October 2004 unless there was another application to recall or further vary it.

7. The Crown appealed against the decision of the trial judge to desert the trial diet *simpliciter*. The appeal was scheduled to be heard by the High Court of Justiciary (sitting as an appeal court in Edinburgh) on 15 February 2005.

8. In advance of the hearing, BBC Scotland sent a number of letters to the Clerk of the High Court of Justiciary, seeking an opportunity to address the court should an application to prevent publication of any report of the appeal proceedings be made. On 5 February 2005, counsel for BBC Scotland was told verbally by court officials that no opportunity would be made available for it to make representations in court. A further fax asking for a hearing was sent by BBC Scotland the same day. No response was received.

9. On the morning of 15 February 2005, the High Court of Justiciary, on the unopposed motion of the Crown, made a section 4(2) order prohibiting the publication of a report of any part of the appeal hearing until completion

of the appeal. The applicants, in their observations to this Court, maintain that their representative attended the High Court hearing that morning but was not heard. The order made by the High Court was to become final on 17 February 2005 unless an application was made to recall or vary it. The order was posted on the Scottish Courts Service website and circulated to the Scottish media.

10. On the afternoon of 15 February 2005, BBC Scotland sent another fax to the High Court stating that it wished to be heard on the order as soon as possible. BBC Scotland were then contacted and advised that a hearing would be fixed but not before 18 February 2005. The Government, in their observations to this Court, maintain that BBC Scotland did not challenge that decision. On 18 February, BBC Scotland sent another fax to the High Court advising that a telephone call to their offices would be sufficient to enable them to arrange representation before the High Court within twenty-four hours. The fax also conveyed BBC Scotland's understanding that, if the High Court dismissed the prosecution's appeal, then BBC Scotland would be heard by the court in respect of the section 4(2) order.

11. The Government maintain that BBC Scotland did not contest the decision not to hold a hearing before 18 February 2005 and, because no application had been made to recall or vary the interim order before 17 February 2005, the interim order became final on 17 February 2005. The applicants maintain that their fax of 15 February 2005 was intended to be an application to recall or vary the interim order; as such, the interim order did not become final on 17 February 2005.

12. The prosecution's appeal was determined on 24 March 2005. On the basis of further information provided by the prosecution as to who had been watching the trial proceedings in the remote viewing room, the Appeal Court recalled the order of the trial judge and substituted an order for desertion *pro loco et tempore*, which allowed for the re-indictment of one of the original accused.

On the same date, the Appeal Court deferred its consideration of BBC Scotland's application for the recall of the section 4(2) order made on 15 February 2005. On 21 June 2005, the Appeal Court recalled that order.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Section 4(2) orders

13. Section 4(2) of the Contempt of Court Act 1981 provides that where legal proceedings are held in public, in any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of

the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose.

14. Section 159 of the Criminal Justice Act 1988 provides that in England and Wales, where such an order is made, an aggrieved person may appeal such an order to the Court of Appeal. The section does not apply to Scotland. Instead, following the High Court of Justiciary's ruling in *Galbraith v. H.M. Advocate* 2001 S.L.T. 465, where the question was considered *obiter dicta*, it appears that the practice of Scottish courts will be to make interim orders for forty-eight hours, to give notice of the interim order to the legal representatives of media organisations and give them the opportunity to address the court on the terms of the interim order. A full copy of any section 4(2) order is intimated to press and media contacts who are listed with the Scottish Courts Service. The names of cases where section 4(2) orders are in place are available from the Scottish Courts Service website.

B. The *nobile officium*

15. The concept of *nobile officium* in Scots law is an extraordinary equitable power vested in, *inter alia*, the High Court of Justiciary. It was described by the High Court in *Anderson v. HMA* 1974 SLT 239 as:

> "...a remedy for any extraordinary or unforeseen occurrence in the course of criminal business in any part of the country...In short, the principle is, that wherever the interposition of some authority is necessary to the administration of justice, and there exists no other judicature by whom it can competently be exercised, or which has been in use to exercise it, the Court of Justiciary is empowered and bound to exercise its powers [of *nobile officium*], on the application of the proper party, for the furtherance of justice"

The procedure is used where there is no other remedy provided for by law. A petition to the *nobile officium* was brought in *BBC Petitioners* 2002 JC 27 in order to seek the recall of a section 4(2) order made by a trial judge in criminal proceedings. The High Court found that, in the circumstances of the case, the order was not justified and recalled it. Having considered the relevant authorities of this Court on Article 10 of the Convention, it also gave guidance to the Scottish courts as to the proper approach to making such orders.

THE LAW

16. The applicants complained under Article 6 of the Convention that their right of access to court was violated by the refusal to hold a hearing at which they could challenge the order made by the High Court of Justiciary on 15 February 2005. They further complained under Article 10 of the

Convention that this was an unjustified interference with their right to impart information as guaranteed by that Article. Finally, under Article 13 of the Convention, they complained that there was no effective remedy to challenge the making of an order under section 4(2) of the Contempt of Court Act 1983.

Article 6 of the Convention, where relevant, provides:

> "1. In the determination of his civil rights and obligations or 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."

Article 10 provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Article 13 provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

I. ADMISSIBILITY OF THE APPLICATION

17. The Government contested the admissibility of the application on a number of grounds under Articles 34 and 35 § 1 of the Convention. Article 34 provides:

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. ... "

Article 35 § 1 provides:

> "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

A. BBC Scotland's victim status

18. In their initial observations, the Government objected that the BBC was a public broadcasting corporation established by Royal Charter and therefore BBC Scotland could not be a victim for the purposes of Article 34 of the Convention. However, in their final observations the Government informed the Court that, for the sole purpose of the present application, they conceded that BBC Scotland could be categorised as a victim and withdrew their initial observations on this point.

Relying on the Court's judgment in *Österreichischer Rundfunk v. Austria*, no. 35841/02, 7 December 2006, the applicants considered that the second applicant was a victim for the purposes of Article 34.

19. Having noted the parties' positions and having regard to its established case-law (see, for example, *Radio France and Others v. France* (dec.), no. 53984/00, ECHR 2003-X (extracts)) the Court will proceed on the basis that BBC Scotland can be considered to be a victim within the meaning of Article 34 of the Convention.

B. Incompatibility *ratione materiae* of the complaint made under Article 6 of the Convention

20. The Government also objected to the admissibility of the applicants' first complaint, that their right of access to court guaranteed by Article 6 of the Convention was violated by the refusal to hold a hearing at which they could challenge the section 4(2) order made by the High Court of Justiciary on 15 February 2005. The Government relied on the Commission's decision in *G. Hodgson, D. Woolf Productions Ltd. and National Union of Journalists v. the United Kingdom* and *Channel Four Television Co. Ltd. v. the United Kingdom*, nos. 11553/85 and 11658/85, 9 March 1987, Decisions and Reports (DR) 51, p. 136, and argued that there was no "civil right" to report public court proceedings.

21. The applicants replied that it was not their case that there was a civil right to report public court proceedings or that a section 4(2) order contravened a right guaranteed by Article 6 § 1 of the Convention. Instead, their complaint was that, in the present case, the section 4(2) order interfered with their right to impart information because it imposed an obligation to refrain from publishing information connected to the appeal hearing. Furthermore, in the determination of their civil rights and obligations they were entitled to a fair and public hearing, which had not been afforded to them.

22. The Court recognises that the applicants have not sought directly to challenge the Commission's decision in *Hodgson and others*. Instead, they appear to argue that the High Court's section 4(2) order imposed a civil obligation on them to refrain from reporting on the appeal proceedings and thus that they had a right to a hearing at which they could challenge the imposition of that obligation. However, in the Court's view, this is, in effect, an indirect challenge to the Commission's decision in *Hodgson and others*. The applicants have simply sought to re-cast the issue as one of obligations rather than rights. If, consistently with the decision in *Hodgson and others*, the right to report matters stated in open court is not a civil right, then an interference with that right cannot create a civil obligation within the meaning of Article 6. The mere fact of an interference by a State authority with the right to impart a certain kind of information cannot create a civil obligation where there is no corresponding civil right to impart that information. Consequently, the Court finds the applicants' submission to be, in effect, an invitation to depart from the Commission's decision in *Hodgson and others*. It is well-established in the Court's case-law that, in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases (see *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 74, ECHR 2002-VI). The Court cannot find any good reason to depart from the Commission's decision in *Hodgson and others*. Indeed the wording of Article 6 § 1, which expressly allows for the exclusion of the public and press from court proceedings on certain, limited grounds, would appear to preclude any applicant from asserting a right to report court proceedings, still less from asserting that such a right were civil in nature: a general reporting restriction must be regarded as the exercise of a public authority prerogative and can in no way be regarded as decisive for the private rights and obligations of any one media outlet. The Court therefore confirms the Commission's finding in that case that the right to report matters stated in open court, cannot be described as a right which is “civil” in nature for purposes of Article 6 § 1. The applicants' complaint under Article 6 § 1 must, therefore, be rejected as incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 of the Convention.

C. Domestic remedies

23. The Government submitted that the applicants had failed to exhaust domestic remedies. They had failed to intimate their intention to challenge the interim order made on 15 February 2005. It was also apparent that they were content that a hearing would not be fixed before 18 February 2005, whereas it would have been open to them to seek an earlier hearing. Furthermore, when the order became final on 17 February, there was an

effective remedy in the form of a petition to the *nobile officium*. The applicants were well aware of that remedy, having used it effectively in the past: see *BBC Petitioners* at paragraph 15 above. In any event, they were afforded the opportunity to make representations on 24 March 2005 once the appeal had been determined.

24. The applicants disputed these submissions. BBC Scotland intended its faxed letter of 15 February to be an application to recall or vary the interim order and the High Court had understood the faxed letter in that way. The order could only have become final if there were no objection to it. Therefore, the effect of the faxed letter of 15 February was to prevent the order becoming final. The present case was different from *BBC Petitioners*. In that case, BBC Scotland had applied for the recall of a section 4(2) order and, after a hearing, the application was refused. There was no remedy then available other than by petition to the *nobile officium*. In the present case, because the application made by the letter of 15 February was still pending, the High Court would have been compelled to reject any petition to the *nobile officium*.

25. The Court considers that the question of exhaustion of domestic remedies is so closely linked to the merits of the case, in particular the applicants' complaint under Article 13 of the Convention, that it is inappropriate to determine it at the present stage of the proceedings. The Court therefore decides to join this objection to the merits.

26. Furthermore, the Court considers, in the light of the parties' submissions, that the applicants' complaints under Articles 10 and 13 of the Convention raise serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. They must therefore be declared admissible.

II. ALLEGED VIOLATIONS OF ARTICLES 10 AND 13 OF THE CONVENTION

27. The Court begins its examination of the merits of these complaints by observing that, when considering whether there has been a violation of the right to an effective remedy in respect of a violation of a substantive right guaranteed by the Convention, its normal practice is to consider first whether there has been a violation of the substantive right relied upon and then to consider whether there has been a violation of Article 13.

However, having considered the parties' submissions in respect of Articles 10 and 13, the Court considers that the core issue in this case is not whether the domestic courts were justified in making the section 4(2) order and thus whether the interference which undoubtedly arose in respect of the applicants' right to impart information was justified under Article 10 § 2.

Instead, the Court considers that the core issue is whether there was a failure to guarantee the applicants an effective remedy by which they could challenge the section 4(2) order. The Court therefore considers that, exceptionally, it should depart from its normal practice and examine first whether there has been a violation of Article 13 read in conjunction with Article 10.

A. The parties' submissions on Article 13 read in conjunction with Article 10

28. The Government considered it irrelevant that section 159 of the Criminal Justice 1988 had been enacted in England and Wales but did not apply to Scotland. The need for section 159 in England and Wales had only arisen because, prior its enactment, section 29(3) of the Supreme Court Act 1981 had prevented the High Court and Court of Appeal from hearing appeals against section 4(2) orders. Section 29(3) of the Supreme Court Act did not apply to Scotland where the High Court of Justiciary had supervisory jurisdiction over criminal matters. By virtue of the *nobile officium* and the practice of the Scottish courts since *Galbraith* (see paragraph 14 above), the High Court was not prevented from hearing appeals against section 4(2) orders. Accordingly, there was no need for section 159 to apply to Scotland.

Moreover, the practice adopted since *Galbraith* provided the applicants with a practical and effective remedy for the purposes of Article 13; had they properly sought a hearing before the High Court they would have been able to make submissions to that court on why the section 4(2) order allegedly violated Article 10. When told that a hearing would not be held before 18 February 2005, the applicants could have sought an earlier hearing. A further remedy was provided by the *nobile officium* which, the Government reiterated, had previously been used by BBC Scotland. The *nobile officium* was a well-known and understood power. It was flexible in its operation and provided a practical and effective remedy.

29. The applicants argued that the practice of the Scottish courts since *Galbraith* was intended to provide the media with the opportunity to seek the recall or variation of section 4(2) orders. However, in the present case, they had been denied that opportunity for four months. Their representative had attended the High Court's hearing on 15 February 2005 but had not been heard. The same day the applicants had advised the High Court of their wish to be heard on the matter and had been told that no hearing would be held before 18 February 2005. As it happened, they were not given the opportunity to seek the recall or variation of the order until 21 June 2005. The applicants also reiterated that consideration of their application had been deferred on 24 March 2005, the date on which the appeal had been determined. By 21 June 2005, the story of how the appeal had arisen had

become stale news and stale news was no news at all. In these circumstances, the Government's assertion that the practice of the Scottish courts since *Galbraith* was an effective remedy was without foundation.

The same was true for a petition to the *nobile officium*. The High Court's jurisdiction under the *nobile officium* could only be exercised within strict limits. It was an unusual remedy and the High Court would have been unable to exercise its jurisdiction while it was still seized of the application made by the applicants on 15 February 2005.

Finally, in reply to the Government's argument that they should have sought an earlier hearing date, the applicants also argued that they had no statutory or common law right to be heard by the High Court. There was no evidence that, had they insisted on an earlier hearing, the High Court would have fixed one.

B. The Court's assessment

30. The principles applicable to Article 13 were set out by the Grand Chamber in *Kudła v. Poland* [GC], no. 30210/96, § 157, ECHR 2000-XI, as follows:

> "Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an 'arguable complaint' under the Convention and to grant appropriate relief ...
>
> The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be 'effective' in practice as well as in law (see, for example, *İlhan v. Turkey* [GC], no. 22277/93, § 97, ECHR 2000-VII).
>
> The 'effectiveness' of a 'remedy' within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the 'authority' referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (see, among many other authorities, the Silver and Others v. the United Kingdom judgment of 25 March 1983, Series A no. 61, p. 42, § 113, and the Chahal v. the United Kingdom judgment of 15 November 1996, *Reports* 1996-V, pp. 1869-70, § 145)."

31. In applying those principles to the present case, the Court begins by observing that section 159 of the Criminal Justice Act 1988 was enacted in England and Wales while the *Hodgson and others* application was pending before the Commission. The enactment of section 159 enabled the Commission to decide that a friendly settlement had been concluded in that case (see *G. Hodgson, D. Woolf Productions Ltd. and National Union of*

Journalists v. the United Kingdom and *Channel Four Television Co. Ltd. v. the United Kingdom*, nos. 11553/85 and 11658/85, Commission's report of 15 July 1987, unreported). It is not for this Court to second guess Parliament's decision not to extend section 159 to Scotland. Nevertheless, the Court notes that the Government have sought to defend the decision not to extend section 159 to Scotland by submitting that the practice of the Scottish courts since *Galbraith* and the existence of the *nobile officium* make it unnecessary to do so. Accordingly, the Court must consider whether these remedies, either separately or cumulatively, provide an effective remedy for the purposes of Article 13 read in conjunction with Article 10.

32. In doing so, the Court notes that there is some dispute between the parties as to why no hearing was held to consider the applicants' representations in respect of the section 4(2) order made by the High Court on 15 February 2005. However, it is not the task of this Court to determine whether the applicants' fax of the afternoon of 15 February constituted proper notification of their intention to contest the interim order made by the High Court. Moreover, it is not for the Court to determine whether, if the fax did constitute proper notification, this had the effect of preventing the interim order from becoming final on 17 February 2005. The Court does, nevertheless, note that the dispute between the parties as to these two issues has arisen due to the informal nature of the practice which has evolved in respect of challenges to section 4(2) orders since *Galbraith*.

It may well be that, in the majority of cases, this practice works well and that, when the media wish to challenge a particular section 4(2) order, a hearing is held to give the media the opportunity to make representations for the recall of the order in advance of the proceedings to which the order relates and which the media wish to report. The Court has no doubt that, at any such hearing, a Scottish court would give appropriate consideration to any submissions made on the basis of Article 10 of Convention and that it would apply the guidance set out in *Galbraith* as to when section 4(2) orders can be made in conformity with Article 10. Nevertheless, the fact remains that, under the present system, any Scottish court which makes a section 4(2) order is under no obligation to hear representations from the media and, even where it does hear such representations, there is no obligation upon it to do so within a reasonable period of time and in any event prior to the proceedings to which the section 4(2) order relates. Instead, the practice since *Galbraith* appears to depend entirely upon the media making informal contact with court officials to arrange an appropriate hearing. It further appears that the reply received by court officials is the only basis upon which the media will know if a hearing is to be held and when that hearing is to take place. This approach may have the advantage of flexibility but the potential shortcomings are self-evident. The Court has repeatedly stated that freedom of expression constitutes one of the essential foundations of a democratic society and that, in that context, the

safeguards guaranteed to the press are particularly important (see, as recent authority, *Financial Times Ltd and Others v. the United Kingdom*, no. 821/03, § 59, 15 December 2009). When proper consideration is given to what is at stake for the media when section 4(2) orders are imposed, it becomes apparent that current Scottish practice provides too slender a basis for the safeguards which are required in this context.

33. In the present case, a date was not fixed for the hearing of the representations of the applicants prior to the criminal appeal proceedings on 23 March 2005 which the applicants wished to report and their application to recall or vary the section 4(2) order was not in fact heard until 21 June 2005, some three months after those proceedings had been determined, by which time the impact of any report would have been seriously diminished (see, *mutatis mutandis*, *Bączkowski and Others v. Poland*, no. 1543/06, §§ 82-83, ECHR 2007-VI). In these circumstances, the Court finds that the ability of the applicants to apply for recall of the interim order of 15 February 2005 did not constitute an effective remedy for the purposes of Article 13 read in conjunction with Article 10 of the Convention.

34. The same considerations apply in respect of the Government's submission that, if the High Court's section 4(2) order of 15 February 2005 became final on 17 February 2005, it would thereafter have been open to the applicants to petition the *nobile officium*. The Court observes that it does not appear to be in dispute that, for a petition to the *nobile officium* to have been available to the applicants, the High Court's section 4(2) order would have needed to have become final on 17 February 2005. However, the very essence of the dispute between the parties is precisely whether the High Court's section 4(2) order became final or whether the applicant's fax of 15 February 2005 was a valid application for recall or variation which prevented the order from becoming final (see paragraphs 11 and 32 above). As it was, the applicants were informed that no hearing would be held before 18 February 2005 but were never told whether the order had become final or whether they had made a valid application for its recall or variation. Even assuming, therefore, that the Government are correct and the order became final on 17 February 2005, the Court considers that the applicants were entitled to conclude that, by their fax of 15 February 2005, they had made a valid application for recall or variation of the section 4(2) order and that the High Court of Justiciary remained seized of that application until the conclusion of the appeal. Thus, they were entitled to conclude that a petition to the *nobile officium* was not available to them at that stage. Accordingly, even assuming that such a petition could in other circumstances be regarded as an effective remedy for the purposes of Article 13 of the Convention, the Court finds that it was not such a remedy in the circumstances of the present case.

35. Given, therefore, the Court's conclusions that the practice of the Scottish courts since *Galbraith* and possibility of recourse to the *nobile*

officium were not effective remedies in the present case, it follows that there has been a violation of Article 13 read in conjunction with Article 10 of the Convention. The Court in consequence dismisses the Government's preliminary objection as to non-exhaustion of domestic remedies. The Court further finds that this conclusion makes it unnecessary to examine separately the applicants' substantive complaint under Article 10 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

36. 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."

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Joins to the merits* the Government's preliminary objection on the issue of exhaustion of domestic remedies in respect of Article 10 of the Convention;

2. *Declares* the complaints concerning Article 10 and 13 admissible and the remainder of the application inadmissible;

3. *Dismisses* the Government's preliminary objection on the issue of exhaustion of domestic remedies in respect of Article 10 of the Convention;

4. *Holds* that there has been a violation of Article 13 read in conjunction with Article 10 of the Convention;

5. *Holds* that there is no need to examine separately the complaint under Article 10 of the Convention.

Done in English, and notified in writing on 7 December 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early Registrar	Lech Garlicki President