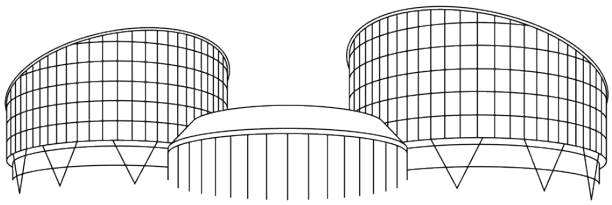

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

Application no. 31777/05
Fintan Paul O'FARRELL and others
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 5 February 2013 as a Chamber composed of:

Ineta Ziemele, *President,*
David Thór Björgvinsson,
Päivi Hirvelä,
George Nicolaou,
Paul Mahoney,
Krzysztof Wojtyczek,
Faris Vehabović, *judges,*

and Fatoş Aracı, *Deputy Section Registrar,*

Having regard to the above application lodged on 30 August 2005,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

The applicants, Mr. Fintan Paul O'Farrell, Mr. Declan Rafferty and Mr. Michael McDonald, are citizens of the Republic of Ireland who are currently in prison in the United Kingdom. They are represented before the Court by James Macguill of Macguill and Company Solicitors, a lawyer practicing in County Louth, Ireland. The United Kingdom Government ("the Government") were represented by their Agent, Ms Y. Ahmed of the Foreign and Commonwealth Office.

A. The circumstances of the case

1. The facts of the case, as presented by the parties, may be summarised as follows.

2. In 2000 the British Security Services became aware from an informant that the leader of the Real IRA (RIRA), Michael McKevitt, was seeking affiliation with another government. A covert operation was devised in order to lure Mr McKevitt into attending meetings with undercover security service agents in various European countries to discuss the supply of weapons and funds. Mr McKevitt was to be arrested when sufficient evidence had been obtained. A Security Services agent posing as an Iraqi Intelligence agent contacted Mr McKevitt and a meeting was organised. It was agreed that Mr McKevitt would not attend but would send others. The applicants subsequently attended this meeting.

3. In early 2001 the applicants met with British agents posing as Iraqi agents in a number of different European countries to discuss the purchase of weapons and the provision of funds. The last meeting took place on 7 July 2001 in Slovakia. At the conclusion of the meeting the applicants were arrested by Slovak police following the issue of an extradition warrant by a District Judge sitting at Bow Street Magistrates Court. Thereafter the applicants were remanded in custody and a request for their extradition was made by the United Kingdom for offences committed under the Terrorism Act 2000. The applicants were represented in the extradition proceedings by a Slovakian lawyer.

4. All three applicants were extradited to the United Kingdom on 30 August 2001 pursuant to an order of the Slovak Minister of Justice.

5. Following their extradition, the United Kingdom sought Slovakia's consent under Article 14 of the European Convention on Extradition 1957 to add the charge of conspiracy to cause explosions contrary to section 3 of the Explosives Substances Act 1883. Consent was granted in March 2002, shortly before the trial commenced.

6. Prior to arraignment, the applicants applied to have the criminal proceedings against them stayed on the ground of entrapment and on the ground of unlawful extradition. For its part, the prosecution made a preliminary application to withhold certain evidence on the ground of Public Interest Immunity ("PII"). In the course of the PII hearing, the applicants submitted that the trial judge should not sit *ex parte* to determine the prosecution's claim. However, the trial judge considered that so long as the procedural safeguards identified in *Jasper v. the United Kingdom* [GC], no. 27052/95, 16 February 2000 were followed, a tribunal which made a decision which had the effect of its acting as judge and jury would not offend Article 6 by an *ex parte* hearing.

7. On 19 April 2002 the prosecution's application was granted. The trial judge considered all of the material put before him and held that PII had

rightly been claimed in relation to the material because, if it were to be disclosed, it would affect national security and give rise to an immediate threat to life. More importantly, the trial judge was satisfied that the material neither undermined the case for the prosecution against any of the applicants nor supported any of the submissions made on behalf of the defendants.

8. On 30 April 2002 the defence's application for a stay of the prosecution was refused. The judgment followed an *inter partes* hearing at which evidence was adduced (including the record of conversations between the applicants and the undercover agents, details of the conduct of the undercover operation, and the emails from the infiltrated security agent which had led to the commencement of the operation) and the parties were afforded the opportunity to make submissions. Oral evidence was called from Witness E, a member of the Security Service, to explain the background to the operation. Witness E was cross-examined by counsel for the applicants. In refusing the application for a stay, the judge conducted a close analysis of the evidence and concluded that the applicants had

> "tapped into a rich vein of existing criminality. That activity stretched far beyond mere propensity and included the commission, or the potential commission, of offences of the kind alleged ... in the indictment".

9. Consequently, he found that the applicants had not been lured into committing a crime, and that the offences were not artificially created.

10. In rejecting the submission that the applicants had been illegally extradited, the judge further found that the matters complained of did not begin to reach the threshold required to show abuse of process. Moreover, while he accepted that there might have been failings in the Slovakian procedures, he found that there had been no connivance by the United Kingdom authorities.

11. The applicants were indicted and pleaded guilty to offences of conspiracy to cause explosions and to various other offences under the Terrorism Act 2000. Each applicant was sentenced to a total sentence of thirty years' imprisonment.

12. The applicants applied for leave to appeal against conviction and sentence. One of the grounds of appeal related to the conduct of the PII application by the trial judge. The applicants claimed that Special Counsel should be appointed so that the Court of Appeal could conduct a review of the material which had been withheld at trial. The applications for leave were referred to the full court, which in turn referred to the Court of Appeal the question of whether or not it was appropriate for the Court of Appeal (Criminal Division), on an appeal which raised issues about the PII exercise performed at the trial, initially to deal with the matter by reference to a summary of the PII material prepared by the prosecution. The application was adjourned pending judgment of the House of Lords in *R. v. H.; R. v. C.* [2004] UKHL 3, which was handed down on 5 February 2004.

13. At a hearing on 14 October 2004 the Court of Appeal considered the recent national case-law and identified the following principles guiding the conduct of appeals raising issues as to the trial judge's conduct of a PII hearing:

> "1. The approach should be the same whether the *ex parte* PII hearing before the judge was or was not on notice. The principles in relation to the appointment of Special Counsel, or the need for the judge to recuse himself or herself are the same in both cases.
>
> 2. The Court of Appeal (Criminal Division) will have to review *ex parte* with the prosecution present all the material which was before the trial judge. A prosecution summary will not usually suffice, but is always desirable and, in a complex case, essential.
>
> 3. It is necessary for that review to be carried out by the same constitution which is to hear the appeal.
>
> 4. The review will have to take place sufficiently in advance of the substantive appeal hearing to permit, in those exceptional cases where this is necessary, Special Counsel to be appointed and suitably prepared.
>
> 5. In the majority of cases, where the Public Interest Immunity material can be read in an hour or two, this should present no listing difficulty and the Public Interest Immunity hearing can take place, as frequently happens now, in the first week of a constitution sitting with the appeal being heard in the third week.
>
> 6. In the majority of cases, where the PII material is unusually voluminous, special listing arrangements will have to be made over a longer time scale."

14. On 14 January 2005 the Court of Appeal considered the application for leave to appeal in relation to the judge's decision to refuse the application for a stay on the ground of entrapment. In the course of the hearing, during an exchange with counsel for the applicants, Lord Justice Hooper made the following observations:

> "[T]he first point ... – one of the points that you ask us to do when looking at the material, which was disclosed to the trial judge: was there any material which was not disclosed, which would have assisted these applicants?"
>
> "We have borne that test in mind. We have gone through the material and I have to tell you the answer is no."
>
> "The next question is whether or not there was material before the judge which would have positively damaged the applicants' case [on entrapment], and the answer to that is no. We have looked at [the undisclosed material] and thought about it very carefully. In a sentence, it is possibly academic in this case, because ... there is no evidence of entrapment which would entitle a court, either [the trial judge] or ourselves, to conclude that there was entrapment. But we have done the test."

> "What potentially prejudicial material? There is complete absence of any evidence to support entrapment ... there is no evidence then of entrapment, one way or another. There is nothing to support entrapment."

15. In its judgment delivered at the end of the appeal hearing, the Court of Appeal reiterated that it had examined the undisclosed material which had been seen by the trial judge and had concluded that there was no material which undermined the prosecution case or assisted the defence case on entrapment; and that there was no material which would have damaged the defence case on entrapment. In particular, the court stated:

> "The Court has been asked by [counsel for the applicants] to look at the material which was available to the trial judge, to see whether or not there was any material in there which could assist the defendants to advance the defence of entrapment. ...
>
> We have looked at the material, and we are all quite satisfied that there is no material which comes within the category of material that ought to have been disclosed.
>
> It is secondly submitted that the trial judge may have received information adverse to applicants on the issue of entrapment and thus ought to have recused himself.
>
> We have looked at the material and we see no material which comes into that category. We do add this additionally: looking at the ruling and in the light of our examination of material, it seems to us that it is completely unarguable and was unarguable that there was any entrapment here at all, in so far as these three applicants are concerned."

16. As a consequence the Court of Appeal refused leave to appeal in relation to the entrapment issue.

17. The applicants also applied for leave to appeal on the ground that the extradition proceedings in Slovakia had been unfair as they had not been provided with a copy of the extradition request and that the extradition request had wrongly implied that the alleged offences had been committed within the United Kingdom.

18. On 13 July 2005 the Court of Appeal refused the application for permission to appeal. The court noted that there was some doubt as to whether the Slovak Code of Criminal Procedure required a copy of the extradition request to be provided. In any case, the extradition request had been read in full to the applicants in the presence of their lawyer. With regard to the second complaint, the Court of Appeal held that even if there had been a failure to make it clear that the offences were committed outside the United Kingdom, it was quite obvious from the date of the offences and from the account of what happened in Slovakia that events outside the United Kingdom had played a significant part in the offences for which extradition was being sought.

19. The applicants subsequently brought a claim against Slovakia alleging breaches of Article 5 §§ 1 and 4 of the Convention both taken alone and in conjunction with Article 13 of the Convention. They raised various

complaints concerning the deprivation of their liberty with a view to extradition, including the failure to provide their lawyer with a copy of the extradition request. The Court considered it necessary to give notice of the application to the respondent Government. However, the application was struck out on 11 October 2005 after the applicants' Slovak representative repeatedly failed to respond to correspondence from the Court.

B. Relevant domestic law and practice

1. Entrapment under English law

20. The fact that a defendant would not have committed an offence were it not for the activity of an undercover police officer or an informer acting on police instructions does not provide a substantive defence to a criminal charge under English law. The judge is, however, empowered to order a stay of a prosecution where it appears that entrapment has occurred, as the House of Lords affirmed in *R. v. Looseley; Attorney-General's Reference (no. 3 of 2000)* ([2001] UKHL 53), a judgment which followed and approved earlier case-law, including case-law which applied at the time of the applicants' trials (for example, the judgment of the House of Lords in *R. v. Latif* [1996] 1 Weekly Law Reports 104).

21. In *Looseley*, Lord Nicholls of Birkenhead explained (§ 1):

> "My Lords, every court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law. By recourse to this principle courts ensure that executive agents of the State do not misuse the coercive, law-enforcement functions of the courts and thereby oppress citizens of the State. Entrapment ... is an instance where such misuse may occur. It is simply not acceptable that the State through its agents should lure its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so. That would be entrapment. That would be a misuse of State power, and an abuse of the process of the courts. The unattractive consequences, frightening and sinister in extreme cases, which State conduct of this nature could have are obvious. The role of the courts is to stand between the State and its citizens and make sure this does not happen."

22. In addition, the court has a discretion, under section 78 of the Police and Criminal Evidence Act 1984, to exclude evidence obtained by an undercover police officer where, *inter alia*, the defendant would not have committed the offence without police incitement (see *R. v. Smurthwaite; R. v. Gill* (1994) 98 Criminal Appeal Reports 437, judgment of the Court of Appeal; and *Looseley*, cited above). Of the two remedies, the grant of a stay, rather than the exclusion of evidence, is the more appropriate remedy because a prosecution founded on entrapment is an abuse of the court's process and should not have been brought in the first place.

23. In *Looseley*, the House of Lords agreed that it was not possible to set out a comprehensive definition of unacceptable police conduct or

"State-created crime". In each case it was for the judge, having regard to all the circumstances, to decide whether the conduct of the police or other law-enforcement agency was so seriously improper as to bring the administration of justice into question. Factors to be taken into account included the nature of the offence, the reason for the particular police operation, the possibility of using other methods of detection and the nature and extent of police participation in the crime; the greater the inducement offered by the police, and the more forceful and persistent the police overtures, the more readily a court might conclude that the police had overstepped the boundary, since their conduct might well have brought about the commission of a crime by a person who would normally avoid crime of that kind. The police should act in good faith to uncover evidence of criminal acts which they reasonably suspected the accused was about to commit or was already engaged in committing, and the police operation should be properly supervised. The defendant's criminal record was unlikely to be relevant unless it could be linked to other factors grounding reasonable suspicion that he or she had been engaged in the criminal activity in question prior to the involvement of the police (*per* Lord Nicholls, §§ 26-29; Lord Hoffmann, §§ 50-71).

2. Disclosure of evidence by the prosecution

24. At common law, the prosecution has a duty to disclose any material which has or might have some bearing on the offence charged. This duty extends to any earlier written or oral statement of a prosecution witness which is inconsistent with evidence given by that witness at the trial and statements of any witnesses potentially favourable to the defence.

25. In December 1981 the Attorney-General issued guidelines, which did not have force of law, concerning exceptions to the common-law duty to disclose to the defence evidence of potential assistance to it ((1982) 74 Criminal Appeal Reports 302 – "the Guidelines")). According to the Guidelines, the duty to disclose was subject to a discretionary power for prosecuting counsel to withhold relevant evidence if it fell within one of the categories set out in paragraph 6. One of these categories (6(iv)) was "sensitive" material which, because of its sensitivity, it would not be in the public interest to disclose. "Sensitive material" was defined as follows:

> "... (a) it deals with matters of national security; or it is by, or discloses the identity of, a member of the Security Services who would be of no further use to those services once his identity became known; (b) it is by, or discloses the identity of, an informant and there are reasons for fearing that the disclosure of his identity would put him or his family in danger; (c) it is by, or discloses the identity of, a witness who might be in danger of assault or intimidation if his identity became known; (d) it contains details which, if they became known, might facilitate the commission of other offences or alert someone not in custody that he is a suspect; or it discloses some unusual form of surveillance or method of detecting crime; (e) it is supplied only on condition that the contents will not be disclosed, at least until a subpoena has been

served upon the supplier – e.g. a bank official; (f) it relates to other offences by, or serious allegations against, someone who is not an accused, or discloses previous convictions or other matters prejudicial to him; (g) it contains details of private delicacy to the maker and/or might create risk of domestic strife."

26. In *R. v. Ward* ([1993] 1 Weekly Law Reports 619), the Court of Appeal stressed that the court and not the prosecution was to decide whether or not relevant evidence should be retained on grounds of public interest immunity. It explained that "a judge is balancing on the one hand the desirability of preserving the public interest in the absence of disclosure against, on the other hand, the interests of justice. Where the interests of justice arise in a criminal case touching and concerning liberty or conceivably on occasion life, the weight to be attached to the interests of justice is plainly very great indeed".

27. In *R. v. Davis, Johnson and Rowe* ([1993] 1 Weekly Law Reports 613), the Court of Appeal held that it was not necessary in every case for the prosecution to give notice to the defence when it wished to claim public interest immunity, and outlined three different procedures to be adopted. The first procedure, which had generally to be followed, was for the prosecution to give notice to the defence that they were applying for a ruling by the court and indicate to the defence at least the category of the material which they held. The defence would then have the opportunity to make representations to the court. Secondly, however, where the disclosure of the category of the material in question would in effect reveal that which the prosecution contended should not be revealed, the prosecution should still notify the defence that an application to the court was to be made, but the category of the material need not be disclosed and the application should be *ex parte*. The third procedure would apply in an exceptional case where to reveal even the fact that an *ex parte* application was to be made would in effect be to reveal the nature of the evidence in question. In such cases the prosecution should apply to the court *ex parte* without notice to the defence.

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

fairness to the defendant". For this reason it was important for the same judge who heard any disclosure application also to conduct the trial.

29. In *R. v. Keane* ([1994] 1 Weekly Law Reports 746) the Lord Chief Justice, giving the judgment of the court, held that the prosecution should put before the judge only those documents which it regarded as material but wished to withhold on grounds of public interest immunity. "Material" evidence was defined as evidence which could be seen, "on a sensible appraisal by the prosecution: (1) to be relevant or possibly relevant to an issue in the case; (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence which the prosecution proposes to use; (3) to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2)".

30. Once the judge was seized of the material, he or she had to perform the balancing exercise between the public interest in non-disclosure and the importance of the documents to the issues of interest, or likely to be of interest, to the accused. If the disputed material might prove the defendant's innocence or avoid a miscarriage of justice, the balance came down firmly in favour of disclosing it. Where, on the other hand, the material in question would not be of assistance to the accused, but would in fact assist the prosecution, the balance was likely to be in favour of non-disclosure.

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

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

32. The requirements of disclosure have since been set out in a statutory scheme. Under the Criminal Procedure and Investigations Act 1996 (CIPA), which came into force in England and Wales immediately upon gaining Royal Assent on 4 July 1996, the prosecution must make "primary disclosure" of all previously undisclosed evidence which, in the prosecutor's view, might undermine the case for the prosecution. The defendant must then give a defence statement to the prosecution and the court, setting out in general terms the nature of the defence and the matters on which the defence takes issue with the prosecution. The prosecution

must then make a "secondary disclosure" of all previously undisclosed material "which might reasonably be expected to assist the accused's defence as disclosed by the defence statement". Disclosure by the prosecution may be subject to challenge by the accused and review by the trial court.

3. "Special Counsel"

33. Following the judgments of the European Court of Human Rights in *Chahal v. the United Kingdom* (15 November 1996, *Reports of Judgments and Decisions* 1996-V) and *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom* (10 July 1998, *Reports* 1998-IV), the United Kingdom introduced legislation making provision for the appointment of a "special counsel" in certain cases involving national security. The provisions are contained in the Special Immigration Appeals Commission Act 1997 ("the 1997 Act") and the Northern Ireland Act 1998 ("the 1998 Act"). Under this legislation, where it is necessary on national security grounds for the relevant tribunal to sit in camera, in the absence of the affected individual and his or her legal representatives, the Attorney-General may appoint a special counsel to represent the interests of the individual in the proceedings. The legislation provides that the special counsel is not however "responsible to the person whose interest he is appointed to represent", thus ensuring that the special counsel is both entitled and obliged to keep confidential any information which cannot be disclosed. The relevant rules giving effect to the 1997 and 1998 Acts are set out in the Court's judgment in *Jasper v. the United Kingdom* ([GC], no. 27052/95, § 36, 16 February 2000).

34. In December 1999 the Government commissioned a comprehensive review of the criminal justice system, under the chairmanship of a senior Court of Appeal judge, Sir Robin Auld. The report, published in September 2001 after extensive consultation and entitled "The Review of the Criminal Courts in England and Wales" ("the Auld Report"), recommended, *inter alia*, the introduction of a "special counsel" scheme in cases where the prosecution wished to seek, *ex parte*, non-disclosure on grounds of public interest immunity. The recommendation was explained in the Auld Report as follows (footnotes omitted):

> "193. The scheme [developed by the common law since *R. v. Ward* and reflected in the Criminal Procedure and Investigations Act 1996: see above] is an improvement on what went before and has been generally welcomed on that account. But there is widespread concern in the legal professions about lack of representation of the defendant's interest in the [*ex parte*] forms of application, and anecdotal and reported instances of resultant unfairness to the defence. ... A suggestion, argued on behalf of applicants in Strasbourg and widely supported in the Review, is that the exclusion of the defendant from the procedure should be counterbalanced by the introduction of a 'special independent counsel'. He would represent the interest of the defendant at first instance and, where necessary, on appeal on a number of issues: first, as to the

relevance of the undisclosed material if and to the extent that it has not already been resolved in favour of disclosure but for a public interest immunity claim; second, on the strength of the claim to public interest immunity; third, on how helpful the material might be to the defence; and fourth, generally to safeguard against the risk of judicial error or bias.

194. In my view, there is much to be said for such a proposal, regardless of the vulnerability or otherwise of the present procedures to Article 6. Tim Owen QC, in a paper prepared for the Review, has argued powerfully in favour of it. It would restore some adversarial testing of the issues presently absent in the determination of these often critical and finely balanced applications. It should not be generally necessary for special counsel to be present throughout the trial. Mostly the matter should be capable of resolution by the court before trial and, if any question about it arises during trial, he could be asked to return. If, because of the great number of public interest immunity issues now being taken in the courts, the instruction of special counsel for each would be costly, it simply indicates, as Owen has commented, the scale of the problem and is not an argument against securing a fair solution.

195. The role would be similar to that of an *amicus curiae* brought in to give independent assistance to a court, albeit mostly on appeal. In rape cases, where an unrepresented defendant seeks to cross-examine a complainant, the court must inform him that he may not do so, and should he refuse to instruct counsel, the court will appoint and instruct one. After the decisions of the European Court of Human Rights in *Chahal* and *Tinnelly*, the government introduced such a procedure in immigration cases involving national security. Although such cases are extremely rare, it is sufficient that the principle of a 'third' or 'special' counsel being instructed on behalf of a defendant has been conceded in a number of areas.

196. The introduction of a system of special independent counsel could, as Owen has also noted, in part fill a lacuna in the law as to public interest immunity hearings in the absence of a defendant appellant in the Court of Appeal, to which the 1996 Act and supporting Rules do not apply. Where there has been a breach of Article 6 because a trial judge did not conduct a public interest immunity hearing due to the emergence of the material only after conviction, the European Court of Human Rights has held that the breach cannot be cured by a hearing before the Court of Appeal in the absence of the appellant. The Court's reasons for so holding were that the appeals court is confined to examining the effect of non-disclosure on the trial *ex post facto* and could possibly be unconsciously influenced by the jury's verdict into underestimating the significance of the undisclosed material.

197. However, even the introduction of special counsel to such hearings would not solve the root problem to which I have referred of police failure, whether out of incompetence or dishonesty, to indicate to the prosecutor the existence of critical information. Unless, as I have recommended, the police significantly improve their performance in that basic exercise, there will be no solid foundation for whatever following safeguards are introduced into the system.

I recommend the introduction of a scheme for instruction by the court of special independent counsel to represent the interests of the defendant in those cases at first instance and on appeal where the court now considers prosecution applications in the absence of the defence in respect of the non-disclosure of sensitive material."

35. In *R. v. H.; R. v. C.* [2004] UKHL 3, decided on 5 February 2004 after the Chamber judgment in *Edwards and Lewis v. the United Kingdom* [GC], nos. 39647/98 and 40461/98, ECHR 2004-X, the Judicial Committee of the House of Lords held, *inter alia*:

> "The years since the decision in *R. v. Davis* and the enactment of the CIPA [the Criminal Procedure and Investigations Act 1996] have witnessed the introduction in some areas of the law of a novel procedure designed to protect the interests of a party against whom an adverse order may be made and who cannot (either personally or through his legal representative), for security reasons, be fully informed of all the material relied on against him. The procedure is to appoint a person, usually called a 'special advocate', who may not disclose to the subject of the proceedings the secret material disclosed to him, and is not in the ordinary sense professionally responsible to that party but who, subject to those constraints, is charged to represent that party's interests. ...
>
> There is as yet little express sanction in domestic legislation or domestic legal authority for the appointment of a special advocate or special counsel to represent, as an advocate in PII [public interest immunity from disclosure] matters, a defendant in an ordinary criminal trial ... But novelty is not of itself an objection, and cases will arise in which the appointment of an approved advocate as special counsel is necessary, in the interests of justice, to secure protection of a criminal defendant's right to a fair trial. Such an appointment does however raise ethical problems, since a lawyer who cannot take full instructions from his client, nor report to his client, who is not responsible to his client and whose relationship with the client lacks the quality of confidence inherent in any ordinary lawyer-client relationship, is acting in a way hitherto unknown to the legal profession. While not insuperable, these problems should not be ignored, since neither the defendant nor the public will be fully aware of what is being done. The appointment is also likely to cause practical problems: of delay, while the special counsel familiarises himself with the detail of what is likely to be a complex case; of expense, since the introduction of an additional, high-quality advocate must add significantly to the cost of the case; and of continuing review, since it will not be easy for a special counsel to assist the court in its continuing duty to review disclosure, unless the special counsel is present throughout or is instructed from time to time when need arises. Defendants facing serious charges frequently have little inclination to cooperate in a process likely to culminate in their conviction, and any new procedure can offer opportunities capable of exploitation to obstruct and delay. None of these problems should deter the court from appointing special counsel where the interests of justice are shown to require it. But the need must be shown. Such an appointment will always be exceptional, never automatic; a course of last and never first resort. It should not be ordered unless and until the trial judge is satisfied that no other course will adequately meet the overriding requirement of fairness to the defendant. ..."

4. Appeal against conviction following a plea of guilty

36. Under English law, the fact that a plea of guilty has been entered does not preclude an appeal against the resultant conviction. In *Chalkley & Anor, R* v [1997] EWCA Crim 3416 (19 December 1997) the Court of Appeal noted that it was entitled to quash as unsafe a conviction based on a

plea of guilty where the plea was mistaken or without intention to admit the truth of the offence charged, either because it was "founded upon" a material irregularity or an erroneous ruling on a point of law.

THE LAW

A. Alleged violation of Article 6 § 1 of the Convention

37. The applicants complained that the rejection of their preliminary application to stay the trial as an abuse of process after the trial judge had seen material withheld from them violated their rights under Article 6 § 1 of the Convention. They further complained that they were entrapped into committing offences by United Kingdom Security Services in violation of Article 6 § 1 of the Convention. Article 6 § 1 reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

38. The Government contested that argument.

1. The parties' submissions

39. The applicants argued that the procedure adopted by the trial judge and the Court of Appeal was incompatible with Article 6 of the Convention.

40. In particular, they relied on *Jasper v. the United Kingdom* (cited above), in which the Court held that it was compatible for a trial judge to conduct an *ex parte* public interest immunity hearing when considering the disclosure of evidence to the defence because, if the material was withheld, it could play no part in the jury's deliberations and could not be relied on by either party. In the present case, however, the relevant issue was that of entrapment and the decisive issue of fact – that is, whether the case should be stayed for an abuse of process on account of entrapment – was one for the trial judge and not the jury. Consequently, the central issue was determined by a tribunal which had seen material the defence had not had an opportunity to address.

41. Following *Edwards and Lewis v. the United Kingdom* (cited above), the applicants contended that it had been impossible for them to establish, on the relevant evidence, whether the involvement of *agents provocateurs* in the offences they committed rendered the proceedings against them unfair. In the applicants' submission, Article 6 did not permit a court to determine an application for a stay on grounds which included entrapment without the defence being informed of the case against it or being permitted to make any informed representations.

42. The applicants further relied on the above-cited *McKeown v. the United Kingdom* case in which the Court found no violation of Article 6 where, pursuant to the Northern Irish procedural rules, the finder of fact was a different judge from the one who dealt with disclosure.

43. Finally, the applicants submitted that the material seen by the judge must have been prejudicial as its disclosure was deemed to affect national security and it neither undermined the prosecution's case nor supported the applicants' submissions. If such material had to be withheld from the applicants and considered by the judge, they submitted that they should have been represented by Special Counsel to ameliorate some of the disadvantage which they suffered.

44. The Government, for their part, maintained that the complaints were manifestly ill-founded because the applicants had been provided by the prosecution with all the relevant evidence concerning the allegation of entrapment; the trial judge had given a detailed and reasoned judgment based solely on material presented to him in open court; and the Court of Appeal had upheld the procedure adopted by the trial judge after having reviewed the undisclosed material in a procedure approved by the Court in *Edwards and Lewis v. the United Kingdom* (cited above).

45. In particular, the Government submitted that the facts of the present case were materially different from the facts of *Edwards and Lewis* because the material shown to the judge did not assist the applicants' case on entrapment and it did not prejudice their case: instead, it provided no evidence in relation to entrapment "one way or the other"; and the trial judge, in rejecting the application to stay the indictment, did not rely on or take into account the undisclosed material.

46. The Government further submitted that the procedure adopted by the trial judge was fair, respected the requirement to provide adversarial proceedings and did not involve any finding of fact based in whole or in part on undisclosed evidence. Rather, the applicants were provided by the prosecution with all the relevant evidence concerning the allegation of entrapment; during the application the prosecution called a witness who gave oral evidence concerning the commencement, course and nature of the operation; counsel representing the applicants had been afforded the opportunity to advance submissions as to the facts and the law; the judge gave a reasoned and detailed judgment, based exclusively on the material which had been presented to him in open court; it was readily apparent why the judge reached the conclusion that he did and, contrary to the position in *Edwards and Lewis*, it would not have been impossible for a court on review to determine whether or not the applicants were victims of entrapment; and finally, the procedure adopted by the trial judge was reviewed and upheld by the Court of Appeal.

47. Finally, the Government submitted that the Court's judgment in *McKeown v. the United Kingdom* (no. 6684/05, 11 January 2011) did not

support the applicants' case. *McKeown* was concerned with disclosure in criminal proceedings in Northern Ireland. As such, it was addressing a different complaint from that raised by the applicants in the present case, and the decision did not shed any light on the issues now under consideration.

2. The Court's assessment

(a) The applicants' first complaint

48. 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. In addition, Article 6 § 1 requires that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused (*Rowe and Davis v. the United Kingdom* [GC], no. 28901/95, § 69, ECHR 2000-II).

49. The entitlement to disclosure of relevant evidence is not, however, 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. 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. Nonetheless, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1. Furthermore, 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 (*Rowe and Davis v. the United Kingdom*, § 61).

50. 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. In any event, in many cases, including the present, where the evidence in question has never been revealed, it would not be possible for the Court to attempt to weigh the public interest in non-disclosure against that of the accused in having sight of the material. It must therefore scrutinise the decision-making procedure to ensure that, as far as possible, the procedure complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused (*Rowe and Davis v. the United Kingdom*, § 61).

51. In *Jasper,* the Court examined the procedure set out by the Court of Appeal in *Davis, Johnson and Rowe*, whereby evidence which is too sensitive to be safely revealed to the defence is examined *ex parte* by the trial judge. The Court found that the fact that it was the trial judge, with full knowledge of the issues in the trial, who carried out the balancing exercise between the public interest in maintaining the confidentiality of the evidence and the need of the defendant to have it revealed, was sufficient to comply with Article 6 § 1. It was satisfied that the defence were kept informed and permitted to make submissions and participate in the decision-making process as far as was possible without disclosing to them the material which the prosecution sought to keep secret on public interest grounds (see *Jasper*, §§ 55-56).

52. Under the English system of trial by jury, it is the jury which decides upon the guilt or innocence of the accused. The Court considered it relevant, in finding no violation in *Jasper*, that the material which was withheld from the defence and which was found by the trial judge to be subject to public interest immunity formed no part of the prosecution case whatsoever, and was never put to the jury (see *Jasper*, § 55).

53. In *Edwards and Lewis*, however, the undisclosed evidence related, or may have related, to an issue of fact decided by the trial judge. Each applicant complained that he had been entrapped into committing the offence by one or more undercover police officers or informers and asked the trial judge to consider whether prosecution evidence should be excluded for that reason. In order to conclude whether or not the accused had indeed been the victim of improper incitement by the police, it was necessary for the trial judge to examine a number of factors, including the reason for the police operation, the nature and extent of police participation in the crime and the nature of any inducement or pressure applied by the police. In those circumstances, the Court did not consider that the procedure employed to determine the issues of disclosure of evidence and entrapment complied with the requirements to provide adversarial proceedings and equality of arms or incorporated adequate safeguards to protect the interests of the accused.

54. It is true that, as in *Edwards and Lewis*, the trial judge in the present case was required to rule on a preliminary issue of whether or not a stay of prosecution should be granted on the ground of entrapment; and that, while the judge reached his decision on this preliminary issue after an *inter partes* hearing in which the defence was provided by the prosecution with relevant evidence concerning the allegation of entrapment, he did so after having already seen prosecution material that had been withheld from the defence. However, there is a crucial difference between the present case and *Edwards and Lewis*: after examining the undisclosed material in its entirety, the Court of Appeal concluded – in no uncertain terms – not simply that this material did not support the prosecution, assist the defence or, unlike the

undisclosed material in *Edwards and Lewis*, possibly prejudice the defence on the issue of entrapment, but, more generally, that there was in fact a complete absence of any evidence going to entrapment. In the words of the Court of Appeal, the undisclosed material contained "no evidence ... of entrapment, one way or the other".

55. The Court accepts that this final point, as well as the narrower point picked up by the Court of Appeal that the undisclosed evidence did not include any material prejudicial to the defence, might not have been apparent from the trial judge's rulings. However, as the Court has held in a number of previous cases, proceedings before a criminal appeal court may be capable of remedying deficiencies in proceedings at first instance in relation to procedural issues such as those raised by the present applicants in their application for leave to appeal.

56. In this regard, the Court recalls that in *Rowe and Davis* it found a violation of Article 6 § 1 on the basis that evidence which could have been used to undermine the credibility of a key prosecution witness was withheld by the prosecution from both the defence and the trial judge at first instance, its non-disclosure on grounds of public interest immunity subsequently being ordered by the Court of Appeal following an *ex parte* hearing. The Court did not consider that this procedure before the appeal court was sufficient to remedy the unfairness caused at the trial by the absence of any scrutiny of the withheld information by the trial judge. Unlike the latter, who saw the witnesses give their testimony and was fully versed in all the evidence and issues in the case, the judges in the Court of Appeal were dependent for their understanding of the possible relevance of the undisclosed material on transcripts of the Crown Court hearings and on the account of the issues given to them by prosecuting counsel. In addition, the trial judge would have been in a position to monitor the need for disclosure throughout the trial, whereas the Court of Appeal judges made their determination *ex post facto*.

57. Equally, in *Atlan v. the United Kingdom*, no. 36533/97, 19 June 2001, the prosecution had repeatedly denied during the first-instance trial that they had any evidence in their possession concerning the man whom the applicants accused of having been an informer who had falsely implicated them. Shortly before the hearing of the appeal the prosecution informed the defence that contrary to their earlier statements there was some undisclosed material. The Court of Appeal, following an *ex parte hearing*, ruled that this evidence could remain undisclosed on grounds of public interest immunity. The Court found a violation of Article 6 § 1 on the grounds that, as it had held in *Rowe and Davis*, the trial judge had been better placed than the appeal court judges to decide whether or not the non-disclosure of material evidence would be prejudicial to the defence, and might, moreover, have chosen a different form of words for his summing up to the jury had he seen the evidence in question.

58. On the other hand, in *Edwards v. the United Kingdom*, 16 December 1992, Series A no. 247-B and *I.J.L. and Others v. the United Kingdom*, nos. 29522/95, 30056/96 and 30574/96, ECHR 2000-IX the Court found no violation of Article 6 because, although the prosecution did not disclose material evidence at the trial, there was full disclosure to the defence before the appeal hearing and the Court of Appeal considered the impact of the new material on the safety of the conviction and did so in the light of detailed argument from the appellants' lawyers.

59. The same conclusion was reached in *Botmeh and Alami v. the United Kingdom*, no. 15187/03, 7 June 2007, where undisclosed material in the hands of the United Kingdom Security Service had not been made available to the prosecution or trial judge. The undisclosed material had been first considered by the Court of Appeal in an *ex parte* hearing, a summary of the material had then been disclosed to the appellants well in advance of the appeal hearing and the appellants had been able to make submissions on the basis of it. The Court of Appeal had also been able to observe that there was nothing of significance before it that had not been placed before the trial judge (§ 43) and had been able to consider the impact of the new material on the safety of the appellants' convictions (§ 44). It concluded that no injustice had been done to the appellants by not having access to the undisclosed material at trial, since the material added nothing of significance to what had been disclosed at trial.

60. The alleged deficiency in the present case differs from those relied on by the applicants in the cases cited above, in that the material in question was not withheld from the trial judge. On the contrary, the present applicants are complaining about the disclosure to the trial judge of material that was withheld from the defence. However, as the case-law makes clear, the principal question for the Court to address in cases such as the present one will be whether, taking the proceedings as a whole, any unfairness can be held to have been done to the applicants by not having had access to the undisclosed material at trial (*Botmeh and Alami,* §§ 43 and 44).

61. In this regard, the Court of Appeal noted that, in rejecting the application to stay the indictment, the trial judge had not relied on or taken into account the undisclosed material. Consequently, the Court of Appeal concluded that the decision to withhold the material in question did not result in any unfairness to the applicants.

62. More importantly, having regard to the circumstances of the present case as outlined above (see paragraphs 1 – 19 above), the Court is satisfied that any alleged unfairness that might have been caused to the applicants by reason of the less explicit explanation given by the trial judge as regards the relevance of the material covered by the grant of PII was remedied by the subsequent procedure before the Court of Appeal, which examined all of the undisclosed material and spelt out that it did not contain any evidence in relation to entrapment "one way or the other".

63. In light of the foregoing, the Court finds that the applicants' first complaint under Article 6 § 1 is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and therefore inadmissible pursuant to Article 35 § 4.

(b) The second complaint

64. Although the admissibility of evidence is primarily a matter for regulation by national law, the requirements of a fair criminal trial under Article 6 entail that the public interest in the fight against crime cannot justify the use of evidence obtained as a result of police incitement (see *Teixeira de Castro v. Portugal*, 9 June 1998, §§ 34-36, *Reports of Judgments and Decisions* 1998-IV).

65. In arriving at this conclusion in *Teixeira de Castro v. Portugal*, the Court laid stress on a number of features of the case, particularly the fact that the intervention of the two officers had not been part of a judicially supervised operation and the fact that the national authorities had had no good reason to suspect the applicant of prior involvement in drug trafficking: he had no criminal record and there was nothing to suggest that he had a predisposition to become involved in drug dealing until he was approached by the police (ibid., p.1463, §§ 37-38).

66. In terms of the quality of legal protection available under the national law, the Court notes that significant safeguards are afforded to the accused in the United Kingdom in relation to entrapment. In particular, the definition of entrapment, characterised by the House of Lords as "State-created crime" in the case of *Looseley* (see paragraphs 20 – 21 above), can be said to be consistent with the Court's own case-law.

67. As to the particular circumstances of the present case, the trial judge considered the question of entrapment (see paragraphs 8 – 10 above) and, in light of the relevant evidence adduced at the *inter partes* hearing, concluded that rather than inciting the applicants to commit an offence, the Security Services had

> "tapped into a rich vein of existing criminality. That activity stretched far beyond mere propensity and included the commission, or the potential commission, of offences of the kind alleged ... in the indictment".

68. The trial judge therefore held – solely on the basis of the evidence submitted in open court – that the applicants had not been the victims of entrapment. In refusing leave to appeal, the Court of Appeal, after examining the undisclosed material which had been seen by the trial judge, stated that there was a "complete absence [in it] of any evidence to support entrapment" and that "it ... was completely unarguable that there was any entrapment here at all, in so far as these three applicants [were] concerned" (see paragraphs 14 – 15 above).

69. Moreover, the Court has examined the treatment by the domestic courts of the evidence – both disclosed and undisclosed – and concluded

that there was no unfairness to the applicants (see paragraphs 48 – 63 above). In particular, the Court has found that the contested procedure for withholding prosecution material from the defence on public-interest grounds did not give rise to unfairness contrary to Article 6 § 1 in relation to the ruling by the national courts on the issue of the alleged entrapment. This being so and in the absence of any other convincing arguments advanced by the applicants, the Court finds no reason to put in doubt the soundness of the domestic courts' conclusions, which were based on a thorough assessment of the relevant facts in accordance with the requirements of the domestic case-law.

70. Accordingly, the Court finds that the applicants' second complaint under Article 6 § 1 is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and therefore inadmissible pursuant to Article 35 § 4.

B. Alleged violation of Article 5 § 4 of the Convention

71. The applicants further complained that their detention in Slovakia pending extradition violated their rights under Article 5 § 4 of the Convention.

72. Article 5 § 4 of the Convention provides as follows:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

73. The Court is not persuaded that this complaint engages the responsibility of the respondent State. Although the United Kingdom requested the applicants' extradition, the decisions to extradite them and to detain them pending extradition were made by the Slovak Minister of Justice and the Slovak Regional Court. In this regard, it is noted that the present case can readily be distinguished from that of *Stephens v. Malta (no. 1)*, no. 11956/07, 21 April 2009 as the applicants have not alleged that there was a failure to comply with United Kingdom law in issuing the request for extradition. However, even if the Court were to have found that the responsibility of the United Kingdom was engaged, it would have been able to rely on the fact that in its decision of 13 July 2005 the Court of Appeal concluded that there had been no unfairness to the applicant as the extradition request had been read to them in full in the presence of their lawyer and that it was obvious from the date of the offences and from the account of what had happened in Slovakia that events outside the United Kingdom had played a significant part in the offences for which extradition was sought.

74. Consequently, the Court finds that this complaint is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and therefore inadmissible pursuant to Article 35 § 4.

For these reasons, the Court unanimously

Declares the application inadmissible.

Fatoş Aracı	Ineta Ziemele
Deputy Registrar	President