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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 18905/02
by John CARNDUFF
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 10 February 2004 as a Chamber composed of:

Mr M. PELLONPÄÄ, *President*,
Sir Nicolas BRATZA,
Mr J. CASADEVALL,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO, *judges*,
and Mrs F. ELENS-PASSOS, *Deputy Section Registrar*,

Having regard to the above application lodged on 30 April 2002,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr John Carnduff, is a United Kingdom national, who was born in 1943 and lives in Birmingham, England. He is represented before the Court by Mr Steven Jonas, a lawyer practising in Birmingham.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

The applicant is a registered police informer. He commenced an action seeking to recover payment for information that he supplied to the West Midlands police. His written pleading set out his case in the following terms:

> “1. In approximately 1984, it was agreed orally between (1) the [applicant] and (2) officers of the West Midlands Police Force ... that the [applicant] would provide information and assistance to the police to enable them to investigate suspected criminals and criminal offences, and/or to arrest and prosecute persons suspected of crime, and/or to prevent crime, and that in return for such information and assistance and in consideration thereof the [applicant] would be paid reasonable remuneration.
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> 2. It was an implied term of the agreement that the remuneration paid to the [applicant] as aforesaid would be reasonable, taking into account the seriousness of the criminal activity to which his information and assistance related; the financial rewards likely to accrue to criminals from the relevant criminal activity; the value to the police of his information and assistance; and the personal danger to which the [applicant] and his family would be exposed as a result of his providing information and assistance as aforesaid.
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> 3. On many occasions from about 1984 onwards the [applicant] provided information and assistance for reward to various officers of the West Midlands Police Force, including officers of the Regional Crime Squad and the West Midlands Drugs Squad, pursuant to the said agreement. The [applicant] was on many occasions paid reasonable remuneration in consideration of his information and assistance, determined in accordance with the principles which had been agreed as aforesaid.
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> 4. In or about 1996 the [applicant] became aware that one Zafar Ali Mirza and others [were] planning to supply heroin in large quantities in the U.K. The [applicant] offered, for reward, to provide information and assistance to officers of the West Midlands Police, to enable them to prevent the planned crime, to arrest and prosecute the criminals, and to seize the drugs. He had oral discussions with various officers, including Detective Constable Gary Sykes (who was one of the [applicant’s] "handlers"), and [Inspector Rock]. The [applicant’s] offer was accepted by [Inspector Rock], who [was] acting as a principal and/or as an agent for and on behalf of [the Chief Constable]. It was an implied term of the agreement that the [applicant] would be paid reasonable remuneration for his information and assistance, in accordance with the principles referred to in the above paragraphs.

> 5. The [applicant], pursuant to the said agreement, duly provided information and assistance to the police, and introduced an "undercover" police officer who pretended to be interested in buying heroin [from] Zafar Ali Mirza.
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> 6. As a result of the [applicant]'s information and assistance, which the police well knew he had provided pursuant to the said agreement, police officers were able to arrest and prosecute Zafar Ali Mirza and others involved in the illegal supply of heroin, and to seize a large quantity of heroin. The officers accepted the benefits accruing from the [applicant]'s services, knowing that his services were not intended to be gratuitous."

The defence filed on behalf of the police admitted that the applicant had provided information for payment on a number of occasions. It also admitted that the applicant had provided information relating to Mirza and his associates; that Mirza and some of his associates were prosecuted and convicted of drugs offences; and that 7 kilograms of heroin were seized in the course of police investigations. However, the remainder of the allegations set out at paragraphs 4 and 6 of the applicant's pleading were denied. There was a specific denial that any information or assistance provided by the applicant led to the arrests, prosecutions, or convictions of Mirza and/or others.

After the close of pleadings (in which the parties set out their factual cases in writing), but before any application in relation to disclosure (in which the parties set out the documentary evidence which is in their possession or control) had been heard, the defendants applied to strike out the applicant's claim under Civil Procedure Rules 3.4 and/or 24.2 on the primary bases that the alleged agreement was not legally enforceable and that to enforce any such agreement would be contrary to public policy.

1. *The proceedings at first instance*

The defendants' application was dismissed by the High Court on 6 September 2000. The judge referred to paragraph 151 of the judgment of the European Court of Human Rights in *Osman v. the United Kingdom* (judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII) to conclude that claims for blanket immunity could not be sustained and that the court had to balance all relevant public policy factors in coming to a decision. The judge stated as follows in relation to the argument raised on behalf of the police that the public policy factors in the case were so strong that it should not be allowed to proceed:

> "I have looked at all the factors in this case. It seems to me the strongest one against [the applicant] may be -- for the defendants properly to advance their defence, it may be necessary to say, "No, we did not get the information we relied on from [the applicant]. We were relying on other confidential information which we are simply not in a position to disclose because of the danger that could arise to those concerned." However, that is not asserted in the statement ... made in support of the application.

> Nevertheless it is clearly an important factor and I take into account the possibility that such evidence might have to be the subject of an application for public interest immunity. There was a discussion at the Bar as to how that could be undertaken. It was suggested that the procedure of the court would not be able to handle that. In fact I do not think that is correct. It seems to me that if the action proceeds it will be possible for an application to be made - as indeed it has been - for public interest immunity in relation to a number of the documents."

The judge concluded that, at the future public interest immunity hearing, a judge would have to exercise his discretion to consider whether any part of the documentary evidence requested by the applicant was necessary for the proper disposal of the action.

The judge stated that a further matter of public policy which needed to be considered was the difficulty of assessing the value of the information that the applicant had provided to the police. He referred to a previous domestic case (*Robinson v. the Commissioners of Customs & Excise*, Queen's Bench Division, 17 April 2000, which had been dismissed on a preliminary issue and had therefore never proceeded to a full trial) in which there had been unchallenged evidence as to the way in which informers were handled. He stated that such information had therefore already been disclosed in the courts and that he doubted whether anything particularly different would emerge if the action of the applicant were allowed to proceed. The judge then concluded as follows:

> "I have to balance the protection of the public, the protection of confidential information supplied to the police and all the other factors on the one hand and also [the applicant's] right to assert that there has been a breach of the contract which he alleges and his assertion that he should be paid a reasonable sum for the information which he gave.
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> In my judgment, balancing all the factors, I am firmly of the view that this application to strike out on the ground of public policy must fail. It seems to me that, so far as I can judge, there will not be a great deal of difficulty for a court in assessing the confidential information, nor will it involve the disclosure of a great deal of that information.
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> Accordingly, it seems to me that, on the facts of this particular case, it is one in which [the applicant] is entitled to proceed to the next stage in relation to his action, and I dismiss the application ..."

2. The appeal proceedings

On 11 May 2001, the defendants' appeal to the Court of Appeal was allowed, by a majority, on the grounds that to continue the action would be against the public interest. Both parties were represented by counsel at the appeal hearing.

(a) The judgment of Lord Justice Waller

In his dissenting opinion Lord Justice Waller agreed with the conclusion of the first instance judge. His Lordship pointed out, *inter alia*, that there was a risk that if the matter were to be tried fairly, at least when it came to assessing the value of any remuneration, the police would be under pressure to disclose highly sensitive information for which they would wish to claim public interest immunity; and that the court was not being asked to say that every case brought by an informer against the police for payment was an abuse of process because some difficulty might be encountered when dealing with such a claim as a result of issues of public interest immunity.

However, His Lordship proceeded to quote the following passage from the judgment of Lord Justice Potter in a previous Court of Appeal case, *Savage v. the Chief Constable of Hampshire* [1997] 1 Weekly Law Reports 1061, which had raised a similar issue to that in the applicant's case and in which the court had held that the informer was free to pursue his action:

> "... it is clear that the judge based his decision in large measure upon his anticipation of the likely outcome of the plaintiff's applications for discovery [disclosure] and interrogatories later in the action. The judge said he could think of nothing more damaging to the police effort than to make material of the sort which would be sought available from police files. He said:
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> > "This may be new law but I must grasp the nettle and rule upon it. A new type of action needs new principles of law or a greater application of old principles. I have not the slightest doubt that it would be very much contrary to the public interest to allow any part of such material into the public domain or into the possession of a police informer and then from him to the criminal fraternity."
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> Having concluded that discovery would be refused for that reason, he regarded it as an additional ground to strike out the action. There are two points to be made in that respect. First, the fact that difficulties may be encountered on discovery does not itself render an action vexatious or an abuse of process. Secondly, and particularly in a position where "new law" may have to be made, it seems to me quite wrong to consider issues of possible privilege in advance and in vacuo rather than on the basis of the particular facts and consequent claims for privilege which are asserted in the light of the issues as crystallised at the discovery stage. I, too, would allow the appeal."

Lord Justice Waller stated that he agreed with the approach taken in *Savage*. He acknowledged the obvious difficulties that there might be in relation to the disclosure of highly sensitive material if the case were allowed to proceed. However, he was of the opinion that the correct approach was for the court to establish first, either summarily or as a preliminary issue, whether the alleged contract was capable of forming a legally binding agreement. He continued:

> "If the [applicant] succeeds at that stage, then what will have been demonstrated is that despite all the difficulties, the police will have made a binding agreement intended to be enforced in a court of law. The court should then see whether there is machinery

> available to enable the questions that will arise thereafter to be tried fairly. I believe that machinery should and would if necessary be found, because it would not seem to me to be right in such circumstances that the police should simply be released from a binding contract that on this assumption they have made with their eyes open."

(b) The judgments of the majority

For the majority, Lord Justice Laws stated that, in considering whether to strike out the claim, the court had to determine whether the disputed issues disclosed on the pleadings could be tried without injury to the public interest. He emphasised that the claim should not be struck out unless the injury to which he had referred outweighed the public interest in doing justice between the parties by holding a trial of the action.

Lord Justice Laws referred to the issues that arose on the pleadings, *inter alia*, the fact that the applicant would seek to prove that the information provided by him to the police was instrumental in bringing Mirza and others to justice; and to invite the court to assess the degree of utility of his information, and to put a value upon it, as part of his case on quantum. He further referred to the denial in the defence, *inter alia*, of the majority of issues set out at paragraphs 4 and 6 of the applicant's pleading and the specific denial that any information or assistance provided by the applicant had led to the arrests, prosecutions, or convictions of Mirza and/or others. Lord Justice Laws continued as follows:

> "33. It seems to me that these matters cannot be litigated consistently with the public interest; and if that is so there is a plain jurisdiction to strike out the claim as embarrassing or abusive, under CPR 3.4. See what is involved. If the disputes which they generate were to be resolved fairly by reference to the relevant evidence - and there is no other legitimate judicial means of proceeding - the court would be required to examine in detail the operational methods of the police as they related to the particular investigation in question; to look into the detailed circumstances of the claimant's discussions with police officers; to conduct a close perusal of such information as the claimant provided, to assess its quality; to compare that information with other relevant information in the hands of the police, very possibly including material coming from or relating to other informers, and so also to assess and contrast the degree of trust reposed by the police in one informer rather than another; and to make judgments about the information's usefulness, and not only the use in fact made of it (and thus, notionally at least, to put itself in the shoes of a competent police force so as to decide what such a force would or should have done). Some of these exercises would, by the standards and practices of ordinary litigation, require the assistance of expert evidence.
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> 34. In short, the very business of trying this claim would transfer the difficult and delicate business of tracking and catching serious professional criminals (**'... Zafar Ali Mirza and others planning to supply heroin in large quantities in the UK'**: amended Statement of Claim, paragraph 4) from the specialist and confidential context of police operations to the glare of the public arena of a court of justice.
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> 35. I recognise at once that it is impossible at this stage to predict precisely the degree to which the issues I have outlined would have to be gone into. Some might

> figure larger than others. Some might not arise at all - if, for instance, the police made admissions (contrary to their present stance) as to the utility of the claimant's information. If I considered that there was any sensible possibility that the action might be tried without offence to the public interest, I would readily agree with the conclusion arrived at by my Lord Waller LJ (paragraph 26 of his judgment) that the court should not now strike out the case but should ascertain in due course, through the usual interlocutory procedures, whether there is machinery available to enable the questions falling for trial to be adjudicated fairly.
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> 36. But in my judgment there is no such sensible possibility. The pleaded contest arising from the issues joined in the amended statement of claim and the amended defence cannot be resolved without adjudication of some or other or all of the issues to which I have referred; it is upon these issues that the contest wholly depends. And once any such issue were raised, it is to my mind inevitable that the court's duty would be to hold that the public interest in withholding the evidence about it outweighed the countervailing public interest in having the claim litigated on the available relevant evidence. In reality such a position could only be avoided if the police made comprehensive admissions which absolved the court from the duty to enter into any of these issues. But a case which can only be justly tried if one side holds up its hands cannot, in truth, be justly tried at all.
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> 37. But that is not all. In my judgment the very bringing of such a claim as this makes injustice, at least if the claim is disputed in good faith (and we are surely entitled to assume that that is the position here). If it is allowed to proceed at all, an expectation is generated that somehow or other a means may be found to try it consistently with the public interest; the parties are bound to attempt to configure their competing cases so as to get in evidence in the face of the obvious public interest difficulties; at once the very process of litigation, supposed to be even-handed, is gravely distorted. The basis on which either party's case is pleaded (assuming no more than a modest sophistication on the lawyers' part) is subject to pressures which should be irrelevant, and there will be pressures to compromise of a kind which ought not to be brought to bear. All this, in my judgment, tends to compromise the business of doing justice."

Lord Justice Laws then quoted the same passage from the case of *Savage v. the Chief Constable of Hampshire* that had been cited by Lord Justice Waller (see above). He continued as follows:

> "39. This very passage, however, demonstrates that it cannot have been their Lordships' view in *Savage* that the case could not be tried without injury to the public interest, which is my view of the present case.
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> 40. I repeat: I base my decision solely on the particular content of the pleadings in this action. I do not say there can never be a claim in contract by an informer against a police force to recover agreed remuneration for the delivery of information. But the present claim cannot and should not be litigated.
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> 41. I would allow the appeal and strike out the action."

Lord Justice Parker stated that he was in full agreement with the judgment of Lord Justice Laws. He, too, allowed the appeal to strike out the action of the applicant. He expressed his reasoning, in relevant part, as follows:

“47. In cases where reliance is placed on considerations of public policy, various competing interests and considerations may have to be taken into account before a judgment can be made as to where the overall public interest lies. The instant case is such a case, in my judgment. Thus, there is a fundamental public interest in ensuring that justice is done and is seen to be done. Further, and more specifically, there is a public interest in the enforcement of contractual obligations. Equally, however, it is in the public interest that the effectiveness of the law enforcement agencies in investigating and preventing crime should not be adversely affected by an obligation to make public information or material of a sensitive or confidential nature.

48. In the instant case Mr Paul (for the [applicant]) accepts that a situation may arise at some point in the future where it can be seen that the further prosecution of the action would require the police to make disclosure of material, contrary to the public interest; and that if and when that point is reached the action should proceed no further. However, he submits that that point may never in fact be reached, and that a court on a strike out application should not assume that it will.

49. In my judgment, Mr Paul was right to recognise an overriding public interest in not requiring the police to disclose information or material for the purposes of a civil trial where such disclosure would be contrary to the public interest. It seems to me to follow that if a fair trial of the issues in the case would necessarily involve the disclosure by the authorities of information or material which is sensitive or confidential and the disclosure of which is not in the public interest, and if that in turn means that it would be contrary to the public interest that the trial should take place, then the case should not be allowed to proceed. As soon as it becomes apparent that that is the position, then in my judgment it is open to the court, in the exercise of its inherent jurisdiction, to strike the action out.

50. In the instant case it is in my judgment inevitable on the face of the Statement of Claim that a fair trial of the issues there raised will necessarily involve the disclosure of information and material by the police, the disclosure of which is not in the public interest. Thus, paragraph 2 of the Statement of Claim pleads that it was an implied term of the alleged agreement that in determining the amount to be paid to the claimant the following factors should be taken into account:

‘..... the seriousness of the criminal activity to which his information and assistance related; the financial rewards likely to accrue to criminals from the relevant criminal activity; the value to the police of his information and assistance; and the personal danger to which the Plaintiff and his family would be exposed as a result of his providing information and assistance as aforesaid.’

51. In my judgment in taking account of the second and third of those factors (and possibly also the first) the court’s investigation will inevitably cover sensitive areas which should, in the public interest, remain confidential to the police. In such circumstances, it would in my judgment be contrary to the public interest that a trial of the action should take place.

52. Nor can I accept Mr Paul’s submission that matters should be allowed to proceed at least to the stage of a preliminary issue (as they were allowed to do in *Savage*), in order to see whether the claimant can establish the agreement which he pleads. In my judgment where (as here) it is apparent on the face of the Statement of Claim that the resolution of the pleaded issues will necessarily involve disclosure contrary to the public interest, it would be pointless to allow the action to proceed to

the hearing of a preliminary issue since the effect of doing so would (if I am right) merely delay the moment at which the action comes to a premature end.

53. In *Savage*, the pleaded agreement was in significantly different terms to that which is pleaded in the instant case. In *Savage* the agreement as pleaded provided that payment would be calculated on the basis of 10 per cent of the value of any property recovered, less any insurance reward, but if payment could not be calculated in that way then a reasonable sum would be payable. It was possible, therefore, that payment could be calculated on a basis which would not involve disclosure of any sensitive or confidential material. That, however, is not the position in the instant case, given the terms of paragraph 2 of the Statement of Claim (quoted above)."

The Court of Appeal refused the applicant permission to appeal to the House of Lords. On 7 November 2001 the House of Lords itself refused the applicant permission to appeal.

B. Relevant domestic law and practice

Rule 3.4 of the Civil Procedure Rules provides, in relevant part, as follows:

"(2) The court may strike out a statement of case if it appears to the court -

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

(c) that there has been a failure to comply with a rule, practice direction or court order."

Rule 24.2 of the Civil Procedure Rules provides, in relevant part, as follows:

"The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if -

(a) it considers that -

(i) that claimant has no real prospect of succeeding on the claim or issue; or

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial."

COMPLAINTS

The applicant complained under Article 6 of the Convention that he had been denied the right to have his civil rights determined as there had not been any substantive determination of his claim for damages for breach of contract. He averred that the issue of public interest had been used as a procedural bar by the police to prevent a proper examination of the merits of his claim.

The applicant further complained under Article 13 of the Convention that he had been denied an effective remedy as a result of his action having been struck out.

The applicant averred that the procedure that should have been followed, which would have complied with Articles 6 and 13, was that set out by Lord Justice Waller in his dissenting judgment in the Court of Appeal.

THE LAW

1. The applicant complained under Article 6 of the Convention that his claim had not been examined on the merits as a result of a procedural application which had resulted in the striking out of his action on public interest grounds. Article 6 reads, in relevant part:

> "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."

A. General principles

The Court recalls that it has had previous occasion to hold that the procedural guarantees laid down in Article 6 of the Convention concerning fairness, publicity and expeditiousness would be meaningless if there were no protection of the pre-condition for the enjoyment of those guarantees, namely, access to a court, which is established as an inherent aspect of the safeguards enshrined in Article 6. The right to institute proceedings before a court in civil matters constitutes one aspect of the right of access to court.

However, this right is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be

compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Ashingdane v. the United Kingdom*, judgment of 28 May 1985, Series A no. 93, p. 24, § 57; *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 44, ECHR 2001 - VIII).

There is no reason to consider the striking-out procedure as *per se* offending the principle of access to a court. In such a procedure, the claimant is able to submit to the court the arguments supporting his or her claims on the law and the court will rule on those issues at the conclusion of the adversarial procedure (see the above-cited *Z. and Others v. the United Kingdom* judgment, at § 97).

The Court further recalls that it is not its function to substitute its own assessment of the facts and evidence for that of the national courts or to act as a fourth instance appeal (see, among many other examples, *Edwards v. the United Kingdom*, judgment of 16 December 1992, Series A no. 247-B, § 34).

B. Application of the general principles to the facts

In applying the above principles to the facts of the present case, the Court recalls that the Court of Appeal struck out the claim of the applicant as it was of the opinion that his action could not be tried without injury to the public interest, in particular the public interest in maintaining the confidentiality of the methods used by the police when investigating serious criminal behaviour.

The Court recalls that it has held, even in the very different context of the disclosure of evidence by the prosecution to the defendant during the course of criminal proceedings, that it may be necessary to withhold certain evidence from the defence so as to safeguard an important public interest. The need to keep secret police methods of investigation of crime has been explicitly recognised to be one such important public interest (see *Rowe and Davies v. the United Kingdom* [GC], no. 28901/95, § 61, ECHR 2000-II; *Jasper v. the United Kingdom* [GC], no. 27052/95, § 52, 16 February 2000; *Fitt v. the United Kingdom* [GC], no. 29777/96, § 45, ECHR 2000-II).

The Court further recalls that it has held that the public interest in ensuring the efficiency and effectiveness of the police in the battle against crime constitutes a legitimate aim, in Convention terms, in the context of the striking out of civil proceedings (see the above-cited *Osman v. the United Kingdom* judgment at §§ 149-150).

On the facts of the present case, the Court finds the protection of the public interest in preserving the confidentiality of police operations – thereby maintaining the effectiveness of the police service and hence the

prevention of disorder or crime – to be a legitimate basis for restricting the right of the applicant to proceed with civil proceedings.

However, the question remains as to whether the stage in the proceedings at which the action was struck out – after the close of pleadings but before any application in relation to disclosure had been heard (and therefore without any specific judicial examination of the actual evidence upon which the parties would have wished to rely) – restricted the applicant's right of access to court to such an extent that its very essence was impaired and/or whether it was a proportionate response to the legitimate aim pursued. The Court notes in this context that the applicant averred that the approach of Lord Justice Waller should have been followed – namely that the action should have been allowed to proceed so that a court could consider first whether the alleged contract was capable of forming a legally binding agreement and, if so, whether there was machinery available to that court to enable the issues to be tried fairly thereafter.

The Court observes that the applicant was able to issue civil proceedings in relation to his claim for breach of contract. The claim was only struck out on public interest grounds following a contested hearing in front of the Court of Appeal at which the applicant was legally represented and was able to put forward full oral argument. Furthermore, the judgments of the majority made clear that they were basing their decision solely on the particular content of the pleadings in the case. Indeed, Lord Justice Laws expressly stated that he was not deciding that there could never be a claim in contract by an informer against the police to recover agreed remuneration for the delivery of information. As such, the decision of the Court of Appeal did not confer a blanket or automatic immunity to the police in all cases of this type, unlike the situation that was before this Court in the above-cited *Osman v. the United Kingdom* judgment (see §§ 150-152).

The Court further observes that the decision to strike out the case was taken by independent judges upon careful examination of the issues involved. The present case is therefore not one in which the applicant's right of access to a court was "displaced by the *ipse dixit* of the executive" (cf *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom*, judgment of 10 July 1998, *Reports* 1998-IV, § 77, and, in general, §§ 73-79).

Moreover, the judgments of the majority specifically carried out a balance between the competing public interests. They explicitly recognised that there was a public interest in ensuring that contractual obligations were enforced and in doing justice between the parties by holding a trial of the action. They weighed those factors against the public interest in maintaining the effectiveness of law enforcement agencies in investigating and preventing crime.

Furthermore, careful consideration was given to the specific issues that arose as a result of the manner in which both parties had pleaded their cases.

In reaching his conclusion that, to resolve the pleaded issues fairly, a court would be required to examine extensively the operational methods of the police in relation to the particular investigation in question, Lord Justice Laws listed in detail, at paragraph 33 of his judgment (see above), the various factors which in his opinion would require examination by a court, to a greater or lesser degree, were the action allowed to proceed. Lord Justice Parker also focused specifically upon the manner in which the applicant had pleaded paragraph 2 of his pleading. He considered that the matters which required determination as a result would inevitably require the investigation of a court to cover sensitive areas which should, in the public interest, remain confidential to the police.

In addition, the Court observes that Lord Justice Laws came to his conclusion after specific reference to that passage of the above-cited domestic case of *Savage* in which it had been stated that it had been quite wrong, on the facts of that case, "to consider issues of possible privilege in advance and in vacuo rather than on the basis of the particular facts and consequent claims for privilege which are asserted in the light of the issues as crystallised at the discovery [disclosure] stage". By reference to the contents of the pleadings, Lord Justice Laws concluded that the action of the applicant was different from that of *Savage*. Significantly, Lord Justice Laws expressly stated that if he had been of the view that there was any sensible possibility that the action could be tried without offence to the public interest he would readily have agreed with the conclusion of Lord Justice Waller that the action should not be struck out at that stage, but that the court should ascertain in due course, through the usual interlocutory procedures, whether there was machinery available to enable the issues to be tried fairly. However, it was only when he concluded that there was "no such sensible possibility" that Lord Justice Laws determined that the action should be struck out at that stage. Similarly, Lord Justice Parker expressly stated that, as it was to him apparent on the face of the applicant's pleading that a resolution of the issues would necessarily involve disclosure contrary to the public interest, it would be pointless to allow the action to proceed since the effect of doing so would merely delay the moment at which the action came to a premature end.

In all the above circumstances, it is not for this Court to challenge the actual conclusion of the domestic court that the applicant's action could not be tried without injury to the public interest. To do so would be tantamount to this Court acting as a court of "fourth instance", which is not its role (see the above-cited *Edwards* judgment, § 34).

The Court considers that, in the light of all of the factors set out above, including the careful consideration given to the issues that arose in the case and the reasons given for stopping the action at that particular stage, the decision of the Court of Appeal was proportionate and within the margin of

appreciation afforded to the Contracting States to regulate the right of access to court.

The Court consequently finds the complaint of the applicant under Article 6 of the Convention to be manifestly ill-founded within the meaning of Article 35 § 3. It must therefore be rejected pursuant to Article 35 § 4 of the Convention.

2. The applicant complained under Article 13 of the Convention that the striking out of his action had denied him an effective remedy in relation to his action for breach of contract. Article 13 reads, in relevant part:

> "Everyone whose rights and freedoms as set forth in this 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."

The Court recalls that Article 13 applies only where an individual has an "arguable claim" to be the victim of a violation of a Convention right (see *Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, Series A no. 131, § 52). The Court has found above that the applicant's complaint under Article 6 is manifestly ill-founded. For similar reasons, the applicant did not have an "arguable claim" and Article 13 is therefore inapplicable to his case. Furthermore, and in any event, Article 6 § 1 is the *lex specialis* in relation to the applicant's complaint about the restriction upon his right of access to court. Article 13 is inapplicable to his case for this reason as well.

It follows that this part of the application is also manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4.

For these reasons, the Court unanimously

Declares the application inadmissible.

Françoise ELENS-PASSOS
Deputy Registrar

Matti PELLONPÄÄ
President