AS TO THE ADMISSIBILITY OF

Application No. 11553/85
by G. Hodgson, D. Woolf Productions Ltd. and
National Union of Journalists
against the United Kingdom

Application No. 11658/85
by Channel Four Television Co. Ltd.
against the United Kingdom

The European Commission of Human Rights sitting in private on 9 March 1987, the following members being present:

MM. C.A. NØRGAARD, President
F. ERMACORA
E. BUSUTTIL
G. JÖRUNDSSON
G. TENEKDIES
S. TRECHSEL
B. KIERNAN
A.S. GÖZÜBÜYÜK
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
G. BATLINER
J. CAMPINOS
Mrs. G.H. THUNE
Sir Basil HALL
M. F. MARTINEZ

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the applications introduced on 3 May 1985 by G. Hodgson, D. Woolf Productions Ltd., and the National Union of Journalists against the United Kingdom and on 25 July 1985 by Channel Four TV Company Ltd., against the United Kingdom and registered on 23 May and 26 July 1985 under file Nos. 11553/85, 11658/85.

Having regard to:

- the report provided for in Rule 40 of the Rules of Procedure of the Commission;

- the decision of the Commission on 2 December 1985 to join both applications;

Having deliberated;

Decides as follows:

THE FACTS

The first application is brought by the following applicants:

- Mr. G.M.T. Hodgson, a journalist and member of the National Union of Journalists, who is involved in court reporting;

- D. Woolf Productions Limited, a company which makes television programmes;

- National Union of Journalists, a trade union which represents the interests of British journalists.

The above applicants are represented by Ms. Marie Staunton, a legal officer of the National Council for Civil Liberties.

The second application is brought by Channel Four Television Co. Limited, which is a subsidiary of the Independent Broadcasting Authority - a statutory body operating under the provisions of the Broadcasting Act 1981.

It is represented by its Chief executive, Mr. Jeremy Isaacs.

In 1984 D. Woolf Productions Ltd. commenced preparations for a series of programmes entitled "Court Report" which was designed to provide extended news coverage of trials of major public importance. The first applicants, Mr. G.M.T. Hodgson, was engaged to edit the daily court transcript with the assistance of other members of the National Union of Journalists and to present the programme. A contract was entered into between D. Woolf Productions Limited and Channel Four Television whereby "Court Report" would cover the trial of R. v. Ponting, an official secrets' case which had attracted wide public interest and which was due to commence on 28 January 1985 at the Central Criminal Court, London (1). The programme "Court Report" was to be screened for 25 minutes on every evening of the trial.

Channel Four had taken legal advice concerning the proposed format and had been advised that there would be no objection to a transcript of court proceedings being read out on television provided that care was taken to present the programme as extended news coverage and to ensure that the reading was neutral and undramatic in tone.

In a press release published by Channel Four it was stated that each edition of "Court Report" would take the form of studio readings from a transcript which had been carefully checked for fairness and accuracy. There was to be no dramatic re-enactment of proceedings in the court-room or any attempt to reproduce the atmosphere of the trial. The readers would be seen to read from an edited transcript and in order to ensure that they did not impart characterisation or misleading dramatic emphasis to their lines, a number of experienced actors were engaged. In addition Channel Four retained a barrister throughout the proceedings to advise

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(1) Mr. Ponting was alleged to have leaked certain information to a Member of Parliament concerning the sinking of the 'Belgrano' during the Falklands dispute.

on the contents of each programme. D. Woolf Productions Limited were advised by counsel that there was nothing in the finally settled format of "Court Report" which could prejudice the trial of Mr. Ponting.

At the opening of Mr. Ponting's trial on 28 January 1985 Mr. Justice McCowan made an Order under Section 4(2) (1) of the Contempt of Court Act 1981 in the following terms:

> "That a report of any part of the proceedings in the form proposed by Channel Four in their nightly half-hour 'Court Report' be postponed until after the jury has given its verdict in this case or until further order."

The order was not opposed by counsel for the prosecution or by counsel for the defence, and the trial judge held with reference to

the case of R. v. Central Criminal Court, ex parte Crook and the National Union of Journalists (2) that "a judge in these circumstances must not hear applications by journalists or other lay persons who are not parties to the case". Accordingly he declined to hear counsel on behalf of Channel Four and D. Woolf Productions on the basis that they had no standing to make an application that the Court should reconsider its ruling.

Counsel for Mr. Ponting stated that he shared the judge's apprehension that: "a rehearsal of what counsel say or what witnesses say which may have a different emphasis or inclination from that given in court contains the risk of prejudice."

Mr. Justice McCowan considered that there was a danger that the trial of Mr. Ponting would be prejudiced by contemporaneous reports of the day's court proceedings. He explained his decision as follows.

"I have no reason to doubt that a sincere attempt will be made to present a balanced picture of the day's events. But, inevitably, if approximately five hours of court proceedings are edited down to something under half an hour, the more newsworthy and dramatic parts of the day's evidence are likely to be shown. That, of course, happens in news reports, be they on television, radio or in the newspapers. But the difference in what is proposed here is that actors will, as I understand it, be taking the parts of the Judge,

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(1) Section 4(2) of the 1981 Act reads as follows: "In any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose."

(2) Decision of the Divisional Court of 7 November 1984.

Counsel for the Prosecution and the Defence, the Defendant and the witnesses. I do not think that the absence of the panelled sets or costumes or of any attempt to impersonate the characters involved, or the fact that scripts will be read from makes a crucial difference. The important point is that actors are being used in a dramatic setting, and it is difficult to think why actors are being used unless it be to give dramatic effect to the words used. Let me make clear that I am in no way seeking to prohibit publication of any part of this trial heard in open court in the presence of the jury. Again, I could have no possible objection if the presentations planned by Channel 4 were given after the jury has returned its verdict. It would not matter that they gave those presentations during the trial if under our system the jury were locked up for the entirety of the trial and could by that means be kept from looking at television. As it is, until such times as I have repeated my summing up and they have retired to consider their verdict, members of the jury will be free to go home in the evenings and to look at television. It would be the most natural thing in the work if they chose to look at a programme which involved a dramatic reconstruction of the highlights of the day's proceedings. The danger is that they will recall the most important parts of the day's evidence, not as the witnesses said them but as the actors say them, not the demeanour of the witnesses but the demeanour of the actors. The actors

will very likely do it better, but the members of the jury have to decide the case on the evidence as they heard it from the witnesses in the witness box and not as they heard it from the actors on the television screen. I feel obliged therefore to take the necessary measures to stop action which could frustrate the administration of justice. The type of report proposed by Channel 4 could wrongly influence the decision of the jury. It could be to the prejudice of either side and not least that of the Defendant. It would be most unfortunate if in the course of the trial it were necessary to discharge the jury because of what they had seen on Channel 4. I am satisfied that an Order under Section 4; subsection 2 of the Contempt of Court Act 1981 is necessary for avoiding a substantial risk of prejudice to the administration of justice in these proceedings."

(pp. 11-16 of the trial transcript).

As a result of Mr. Justice McCowan's Order, Channel Four altered the format of the programme and replaced the actors with newsreaders of wide experience. The programme was thus presented as extended news coverage of the trial. The readers did not assume individual roles, and the words of the judge, counsel and the parties were apportioned among them. However, the transcript of the programme was edited in the manner originally proposed. The transmission of the programme took place as scheduled on each evening of the trial. The judge later stated that the programme was "perfectly fair" and that Channel Four had scrupulously obeyed his Order.

The applicants were advised by counsel that the judge's Order was unlawful, in that Section 4(2) does not give a trial judge any power to impose a selective or discriminatory ban or postponement of reporting. They considered that the judge may postpone all reports of all the proceedings, or all reports of any part thereof, but may not impose a ban on the one reporter, or on one manner of reporting. A particular manner of reporting may amount to contempt in British law if it seriously prejudices a trial, but this is to be decided subsequently under the ordinary provisions for contempt and cannot be pre-empted by a postponement order purportedly made pursuant to Section 4(2). The applicants were additionally advised that the refusal by the judge to hear any argument on their behalf amounted to a breach of natural justice. However they were informed that no remedy existed for these breaches of their civil rights. They were not parties to the trial so they could not appeal the decision, and Section 29 (3) of the Supreme Court Act 1981 (1) debarred them from seeking a High Court review of decisions made contrary to law or to natural justice. Had such a decision been taken by a Magistrate's Court or by a Tribunal, judicial review would be available. It is precluded only in relation to orders made in the course of trials on indictment.

The applicants state that they had no alternative but to comply with the judge's Order, and the programme format was abandoned. D. Woolf Productions claim that they were obliged to cancel the contracts of a number of persons at considerable expense, and to engage others so that a different programme could be presented.

Channel Four claim that alternative arrangements had to be made at short notice involving the cancellation of contracts and the engagement of other persons, the obtaining of additional legal advice and the alteration of programme schedules and press publicity.

COMPLAINTS AND SUBMISSIONS

The applicants complain that the order under Section 4(2) of the Contempt of Court Act 1981 gave rise to a breach of their rights under Arts. 6, 10 and 13 of the Convention. They submit that had they

been allowed to oppose the order, they could have corrected the mistaken factual basis upon which it was made. They could have presented overwhelming evidence (including a tape of the 'pilot' programme) to demonstrate that it would not have impeded justice or prejudiced the trial. Had they been able to appeal by way of judicial review, they could have argued that the order was unlawful and made without jurisdiction, and that the refusal to hear their representations was a breach of natural justice.

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(1) Section 29(3) is as follows:

"In relation to the jurisdiction of the Crown Court, other than its jurisdiction in matters relating to trial on indictment, the High Court shall have all such jurisdiction to make orders of mandamus, prohibition or certiorari as the High Court possesses in relation to the jurisdiction of an inferior court."

The programme "Court Report" was an exercise by the applicants of their right to impart information to the public about a trial held in open court. The prior restraint imposed upon them by order of the court was an interference with their right to impart information and is not justified by a pressing social need. Nor was it reasonably proportionate to the aim of protecting the fairness of the trial.

Furthermore the civil rights of the applicants to report matters stated in open court and to exercise their profession as journalists and makers of television programmes were infringed by the order which was made and confirmed after they had been refused a fair hearing in breach of Article 6 para. 1 of the Convention.

Finally the applicants have no remedy, effective or otherwise, against the above breach of their rights. The Contempt of Court Act 1981 provides no right to oppose or appeal an Order made under Section 4 (2). The applicants were not parties to the trial and so had no standing to make representations to the trial judge or to appeal to the Court of Appeal against the ruling. Moreover, Section 29 (3) of the Supreme Court Act 1981 precludes them from applying to the High Court for judicial review of such an Order, no matter how unlawful or unreasonable it may be.

PROCEEDINGS BEFORE THE COMMISSION

The first application was introduced on 3 May 1985 and registered on 23 May 1985. The second application was introduced on 25 July 1985 and registered on the following day.

The applications were first considered by the Commission on 2 December 1985 when it was decided, in accordance with Rule 29 of the Rules of Procedure, to join both of the applications and to communicate them to the respondent Government for observations on the admissibility and merits of the complaints under Articles 10 and 13 of the Convention. The observations of the respondent Government were received on 8 April 1986 and the applicants' observations in reply on 3 July 1986.

The Commission next examined the application on 3 December 1986 when it was decided to invite the parties to a joint oral hearing in Strasbourg concerning the applicants' complaints under Articles 10 and 13 of the Convention.

At the hearing which took place on 9 March 1987 the parties were represented as follows:

Respondent Government

Mr. J. Grainger - Agent, Foreign and Commonwealth Office
Mr. N. Bratza - Counsel
Mr. P. Rodney - Adviser, Lord Chancellor's Department

Applicants

Mr. Geoffrey Robertson - Counsel
Ms. Hilary Kitchin - Solicitor, National Council of Civil Liberties
Ms. Elizabeth Forgan - Deputy Controller of Programmes, Channel Four TV
Mr. Don Christopher - Legal Services, Channel Four TV

Mr. Godfrey Hodgson, one of the applicants, was also present during the hearing.

SUBMISSIONS OF THE PARTIES

Respondent Government

As to Fact

The Government point out that counsel for Mr. Ponting indicated, at the opening of the trial, that he shared the judge's apprehension that "a rehearsal of what counsel say or what witnesses say which may have a different emphasis or intonation from that given in court contains the risk of prejudice". When the programme was televised in its revised format defence counsel indicated that he was content that the programme had been properly presented within the terms of the Order.

Domestic law and practice

The Contempt of Court Act 1981 concerns only certain aspects of the law on contempt of court which covers a diversity of forms of conduct which may take place within or out of court including such matters as conduct liable to interfere with the course of justice, reprisals against witnesses or parties, disruption of court proceedings and disobedience to court orders. A common feature of these forms of conduct is that they impede or prevent the proper administration of justice. It is the purpose of the law on contempt of court to ensure that the course of justice is not deflected or interfered with.

Section 4(1) provides a defence by which a person is not guilty of contempt in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith.

Section 4(2) enables a court to order the publication of reports of proceedings to be postponed if prejudice to those proceedings or to other proceedings might be caused by their publication. The standard example of situations in which such a power might be used is where there is a "trial within a trial", e.g. a hearing in the absence of the jury on the admissibility of a defendant's alleged confession.

Sub-Section (2) only enables courts to order the postponement of the sort of publications which might constitute contempt of court. A risk of prejudice to the proceedings in quetion or to other proceedings must ultimately disappear and after those proceedings are completed reports of what happened previously may be published. A central purpose of the power in Section 4(2) is to avoid

influencing the jury by publication of matters which might prejudice their minds unfairily. Such prejudice would normaly work to the detriment of the defendant in criminal proceedings, for example, if his alleged confession statement had been ruled inadmissible but nevertheless a report was published detailing its existence.

Article 25 para. 1

The Government submit that the National Union of Journalists cannot claim to be victims within the meaning of Article 25 para. 1 since they were not directly affected by Mr. Justice McCowan's Order. Their only interest in appearing in these proceedings is to effect a change in the law.

Article 10

The Government point out that there were only two changes made in the proposed format in consequence of the judge's Order. Newsreaders rather than actors were used to read the transcript and the text was divided up between the newsreaders, thereby avoiding role-playing by the actors of the participants in the trial. The judge's Order did not, by its terms or in its effect, prevent the applicants from imparting substantially identical information in its revised programme which was broadcast on each night of the trial using the edited transcript originally proposed.

It is submitted that, in such circumstances, the Order did not constitute an interference with the applicants' right to impart information. The applicants were, at all times, free to report any part of the Ponting trial and to do so by selecting readings from a verbatim transcript of the trial.

In the alternative, it is submitted that the interference was justified under para. 2 of this provision.

First, the interference was prescribed by law, i.e. Section 4(2) of the 1981 Act. The Government submit that, on a natural construction of the words of Section 4(2), which refers to the publication of any report of proceedings, the Order was lawful. The Order did not apply to Channel Four simpliciter but applied equally to any other agency which would have presented a broadcast "in the form proposed by Channel Four". Moreover, the Court's discretionary powers under this Section are expressly defined since Section 4(2) restricts the making of an Order to cases where it appears to the court to be "necessary for avoiding a substantial risk of prejudice to the administration of justice". The judge's Order thus satisfies the test of "foreseeability" as developed by the Court in the Sunday Times case (Eur. Court H.R., judgment of 26 April 1979, Series A no. 30 para. 49).

Second, the protection of the administration of justice and the right to a fair trial are among the bulwarks of a democratic society and concern a "pressing social need". In the present case the judge was concerned that it was actors who would be taking the part of the judge, counsel for the prosecution and the defence, the defendant and the witnesses and that it would inevitably be the more newsworthy and dramatic parts of the day's evidencewhich would be recounted. The judge was aware that no attempt was to be made to impersonate the characters involved and that the programme was to consist of readings from the transcripts. However, he considered that there was a danger that a dramatic effect would be given to the words used and that the jury would:

"recall the most important parts of the day's evidence, not as the witnesses said them but as the actors said them, not the demeanour of the witnesses but the demeanour of the

actors. The actors would very likely do it better, but the members of the jury have to decide the case on the evidence as they heard it from the witnesses in the witness box and not as they heard it from the actors on the television screen." (pp. 14-15 of the trial transcript)

It is further submitted that the Order made was, in all respects, proportionate to the legitimate aim sought to be achieved. The Government accept that a complete ban on the programme proposed by Channel Four would not have been proportionate to the need to protect the trial. However, the Order did not purport to prevent any programme being televised which consisted of daily readings from the transcribed proceedings in the trial. In fact the Order resulted in minor changes in the format of the programme and went no further than was necessary to protect the fair administration of justice.

Finally, it is submitted that the jury in a criminal trial, as judges of fact, are part of the judiciary under the terms of Article 10. The jury are an essential feature of a criminal trial and must be considered as being involved in the machinery of justice. In this respect reference is made to para. 55 of the judgment of the Court in the Sunday Times Case (loc. cit). Accordingly, the restriction was justified as necessary to maintain the authority and impartiality of the judiciary in this sense.

Article 13

The Government submit that, insofar as the applicants seek to challenge the conformity of United Kingdom legislation (i.e. Section 4(2) of the 1981 Act) with the Convention, no issue arises under Article 13. (See, Eur. Court H.R., James and Others judgment of 21 February 1986, Series A no. 98, paras. 84-85).

It is contended, with reference to the Commission's opinion in the case of Rice and Boyle (Comm. Report 7.5.86) that the applicants do not have an arguable claim and cannot, therefore, claim an effective

remedy under Article 13. The Government recall, in this connection, their submissions that there was no interference with the applicants' rights to impart information or alternatively that the interference was justified under Article 10 para. 2 and that the complaint is thus manifestly ill-founded.

The applicants

As to Fact

The judge suppressed the programme "Court Report" by mistakenly assuming that the actors in the programme would be playing the roles of participants in the trial. Thus he referred to the "fact" that actors would take the "roles" of participants several times in the course of making his order. Had an opportunity been afforded to the applicants, it could have been explained to the judge that this interpretation of the programme was incorrect. Had the applicants been able to make submissions to the judge, they could have shown him a video cassette of a "pilot" programme. Counsel for the applicants had no opportunity whatsoever to request that the judge see this programme.

The re-edited programme which was broadcast was to some extent different in terms of the words which were used. For example, the caution engendered by the judge's order and the uncertainty over its scope caused the introduction of explanatory material. Had this not been necessary more of the trial transcript could have been read within the time available. More importantly, the information was imparted in a form which was much less comprehensible to television audiences. The constraints imposed by the judge's order meant that

the medium of television was not utilised to its full potential for imparting this kind of information.

Article 10

The order made by the trial judge was an act which interfered with the process of imparting information and the judge's refusal to clarify his order to explain what form of report would be acceptable was a further interference. Compliance with the order required additional extraneous material which reduced the time which could have been allocated to reading from the trial transcript. A more serious interference was the banning of a telelvision format which would have imparted the information more comprehensible and to a larger number of persons. The altered format interfered with the process of imparting information because it produced a less communicative television programme and one that was "anaesthetic" and "unwatchable" in view of some television critics. The point of the original programme, using actors that could be directed to read the transcript in a way which would best convey the meaning of the words, was substantially undermined by the court order.

The applicants contend that there is amply judicial authority that freedom of expression extends to the manner of presentation as well as the content of the information conveyed. They refer to the Barthold case (Eur. Court H.R., judgment of 25 March 1985 para. 42) where the Court recognised that it is not possible to dissociate the manner of presentation from the matter presented. Similarly, the

Inter-American Court of Human rights recognised the same principle in the Schmidt case when it held that "expression and dissemination of ideas and information are indivisible concepts" (Advisory Opinion of 13 November 1985, para. 31, 8 E.H.R.R. 165). Reference was also made to the decisions of the Indian Supreme Court in the cases of Sahel Papers v. Union of India (1962) 3 SCR 842 and Ramesh Thappar v. State of Madras (1950) SCR 594.

It is further submitted that the court Order was not prescribed by law. Section 4(2) sets out no guidelines for the circumstances in which such an order may be imposed. This uncertainty cannot be resolved by challenging the Order of the court. The Section thus lacks the clarity, certainty and predictability required of free speech infringements (Sunday Times Case, loc. cit., para. 49).

In addition, Section 4(2) has never been used to order postponement of a particular form of reporting rather than postponement of all reports. Had the applicants been given an opportunity they would have sought to argue that Section 4(2) confers no jurisdiction on a trial judge to make such an order. Furthermore, the order was selective and discriminatory in that other, less fair and accurate methods of reporting (such as short extracts in newspapers or summaries by journalists on other television channels) were not affected.

The applicants submit that the order did not correspond to any "pressing social need". The jurors in the Ponting case were not restrained from reading partial accounts or watching television news summaries or absorbing critical comments on Section 2 of the Official Secrets Act. The respondent Government did not explain how the reading on television of a verbatim transcript of evidence and argument that jurors had heard directly from the witnesses and counsel earlier on the same day was likely to influence their minds in a way which would create a real risk of prejudice. It must be recalled that the applicants were dnot proposing to express any opinions on the evidence.

Insofar as any concern about the proposed programme was

legitimate, the need to protect the administration of justice could have been met by directing the jury not to watch the programme or otherwise to ignore it in their deliberations. There is no reason to believe that they would be incapable of disregarding a direction to ignore a television programme. Similar Orders have frequently been made in the course of criminal trials. In addition it would have been a more reasonable course of action for the judge to have looked at the programme first before deciding whether there was a real risk of prejudice. The Order made by the judge was disproportionate to the aim of protecting the fair administration of justice and thus not necessary in a democratic society.

Article 13

The applicants were not seeking to challenge Section 4(2) of the 1981 Act on the basis that it was incompatible with the Convention. They sought to argue that the Order which interfered with their rights under domestic law was:

- made in ignorance of the true facts and upon mistaken assumptions about their intentions;

- made erroneously, because their programme would not have impeded the administration of justice;

- an order made without jurisdiction.

They submit that they have an "arguable" claim that their right to impart information to the general public about legal proceedings has been violated by a judicial application of Section 4(2) of the 1981 Act and that no avenue exists under domestic law for them to ventilate that claim and have it decided. Questions relating to contempt of court and jurisdiction were clearly "arguable" if an opportunity to present submissions had been afforded to the applicants.

Finally, they point out that they would have had a remedy if the Order under Section 4 (2) had been made in a civil court or in a Magistrates' Court. Such Orders are frequently quashed on the grounds that they have been made without justification or jurisdiction. The absence of an effective remedy either by way of being heard by the trial judge, by appealing against his decision or by judicial review only exists in respect of Orders made in the course of trials on indictment in the Crown Court.

THE LAW

The applicants complain of an interference with their right to impart information as a result of the trial judge's Order under Section 4 (2) of the Contempt of Court Act 1981. They invoke Articles 10 and 13 (Art. 10, 13) of the Convention.

The Government have first contended that the National Union of Journalists (NUJ) cannot claim to be a victim within the meaning of Article 25 para. 1 (Art. 25-1) of the Convention. The Commission must first examine this preliminary question.

1. As regards Article 25 para. 1 (Art. 25-1)

The Commission recalls that it is not empowered under the Convention to examine complaints in abstracto. In accordance with the terms of Article 25 para. 1 (Art. 25-1) it may only receive petitions " ... from any person, non-governmental organisation or group of individudals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention ...". The individual or non-governmental organisation concerned must

show that the measures complained of have been applied to his detriment (see, Eur. Court. H.R., Klass and Others judgment of 6 September 1978, Series A no. 28, para. 33).

In the present case the Order of the trial judge was directed to Channel Four and those involved in the production of the programme "Court Report". The Order was not directed to the NUJ which was not prevented, in any way, from imparting information in the exercise of its rights under Article 10 (Art. 10) of the Convention.

It is true that one of the members of the NUJ - the first applicant, Mr. Hodgson - was directly affected by the Order. However the Commission does not consider that this is sufficient to bring his trade union into the category of 'victim' in Article 25 para. 1 (Art. 25-1) of the Convention in the absence of a particular measure which directly affects the rights of the union itself.

The Commission does not, therefore, consider that the NUJ can be regarded as a 'victim' within the meaning of Article 25 para. 1 (Art. 25-1) of the Convention. Accordingly insofar as the application is brought by the NUJ the Commission rejects it as incompatible rationae personae with the provisions of the Convention within the meaning of Article 27 para. 2 of the Convention.

2. As regards Article 10 (Art. 10)

The remaining applicants complain under this provision that they were prevented by the Order from broadcasting the programme "Court Report" in the manner they had chosen. They submit that the Order constitutes an unjustified interference with their right to impart information under this provision. They point out that under the law of the United Kingdom they had no standing to make representations to the trial judge and that they could not appeal against his decision or seek judicial review of it.

The respondent Government contend that the Order did not constitute an interference with the applicants' right to impart information as the programme was actually broadcast on each night of the trial using the edited transcript originally proposed although in a different form. In the alternative, it is submitted that the interference was justified under Article 10 para. 2 (Art. 10-2) in order to maintain the authority and impartiality of the judiciary and, in particular, to ensure that Mr. Ponting received a fair trial.

Article 10 (Art. 10) reads as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibiities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The Commission recalls that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basis conditions for its progress and for each individual's

self-fulfilment. Of particular importance, in this context, is the freedom of the press to impart information and ideas and the right of the public to receive them (see, in this respect, Eur. Court H.R., Lingens judgment of 8 July 1986, Series A no. 103, para. 41).

The Commission further recalls the prominent place held in a democratic society by the right to a fair trial as guaranteed by Article 6 para. 1 (Art. 6-1) of the Convention as well as the importance attached

to the public reporting of trials as one of the means whereby confidence in the courts, superior and inferior, can be maintained. As the European Court of Human Rights has stated:

"By rendering the administration of justice visible, publicity contributes to the achievement of the aims of Article 6 para. 1 (Art. 6-1), namely a fair trial ..." (see Eur. Court H.R., Axen judgment of 8 December 1983, Series A no. 72, para. 25)".

Against the background of these principles the Commission must determine whether there was an interference with the applicants' rights in the present case and, if so, whether it was proportionate to the legitimate aim pursued and whether the reasons adduced by the respondent Government to justify it are relevant and sufficient (see Lingens judgment of 8 July 1986, loc. cit. para. 40).

The respondent Government first, submit that, in fact, there was no interference with the applicants' rights because they were able to impart all of the information originally proposed albeit in a different format.

The Commission considers that the effect of the Court order was to transform the television programme as initially devised by the applicants. It was no longer permissible for them to use actors to play the role of the participants in the trial and the transcript of the court proceedings had to be read by a newsreader. In the Commission's view such an interference with the manner of conveying information to the public, as opposed to the content of information constitutes an interference with freedom of expression under paragraph 1 of this provision. In reaching this view the Commission has attached particular importance to the role played by production and presentation techniques in the making of television programmes.

Nevertheless, in the present case, it must be recalled that the applicants were able to impart substantially the same information in the amended version of their programme. In such circumstances the interference is clearly of a less serious degree than, for example,d a total prohibition.

The applicants further contend that the interference was not prescribed by law as required by Article 10 para. 2 (Art. 10-2) because the trial judge had no jurisdiction, under Section 4 (2) of the 1981 Act, to make an Order which was selective in the sense that it was directed against one television programme and concerned with questions of format as opposed to substance. They also submit that Section 4 (2) lacks the clarity certainty and predictability required of restrictions on free speech.

The Commission does not accept this argument. Section 4(2) empowers a court, where it appears to be necessary for avoiding a substantial risk of prejudice, to the administration of justice, to order that "the publication of every report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose".

The Commission considers that this provision satisfies the criterion of foreseeability ennunciated by the Court in the Sunday Times case in that the power of the judge is formulated with

sufficient precision in terms of the mischief sought to be avoided (see Eur. Court H.R., judgment of 26 April 1979, Series A no. 30, para. 49). The mere fact that a legislative provision may give rise to problems of interpretation does not mean that it is so vague and imprecise as to lack the quality of 'law' in this sense (see, in this context, No. 9174/80, Comm. Report 11.10.83, D.R., 40, p. 42 paras. 93-94).

Moreover, it is clear from the wording of Section 4 (2) that it covers "any report of the proceedings" (emphasis added), thus enabling a judge make an order contrary to the applicants' submission, in respect of a particular report. When a court order is grounded on a statutory provision it must be regarded as 'lawful' until set aside by a decision of a superior court. It is not rendered unlawful when, as in the present case, there exists no appeal against it. The Commission therefore considers that the Court Order was presecibed by law as required by Article 10 para. 2 (Art. 10-2) of the Convention.

As to whether the measure pursued a legitimate aim and was necessary in a democratic society the Commission recalls that the adjective "necessary" in paragraph 2 implies the existence of a "pressing social need" and that the Contracting States have a certain margin of appreciation in assessing whether such a need exists (see, for example, Eur. Court H.R., Lingens judgment of 8 July 1986, loc. cit., para. 39).

It is clear from the reasons given by the trial judge for the Order that he considered it necessary to protect the proper administration of justice and, in particular, Mr. Ponting's right to a fair trial. The Commission considers that these aims correspond to the purpose of "maintaining the authority and impartiality of the judiciary" as set out in Article 10 para. 2 (Art. 10-2) of the Convention. As the Court has remarked in the Sunday Times case, this concept encompasses the proper functioning of the courts and machinery of justice as well as the rights of litigants (loc. cit., paras. 55-56). In this regard the Court stated as follows:

"... insofar as the law of contempt may serve to protect the rights of litigants, this purpose is already included in the phrase 'maintaining the authority and impartiality of the judiciary': the rights so protected are the rights of individuals in their capacity as litigants, that is as persons involved in the machinery of justice, and the authority of that machinery will not be maintained unless protection is afforded to all those involved in or having recourse to it. ..." (para. 56).

The Commission therefore considers that the Court Order pursued a legitimate aim under Article 10 para. 2 (Art. 10-2) of the Convention namely to maintain the authority and impartiality of the judiciary.

The applicants, however, maintain that the Order was not necessary in a democratic society since the judge could have instructed the jury not to watch the programme or he could have seen the programme first before taking his decision. They further contend that, in any event, there was no real risk of prejudice since the jury would be merely hearing a summary of evidence they had already heard delivered by actors who had been instructed to read their lines without

dramatic emphasis. Moreover the trial judge had based his opinion on a false assumption that the actors would play roles. Such a mistaken assumption could have been corrected if the applicants had been allowed to address the trial judge.

The Commission notes that the trial judge based his decision on the risk that members of the jury would be prejudiced by contemporaneous reports of the day's court proceedings. He was

concerned that in a programme which lasted thirty minutes there would be an inevitable tendency to highlight the most dramatic parts of a five-hour hearing. He considered it important that members of the jury should decide the case on the evidence as it was heard from the witness box and not from actors on a television programme. It is clear from his explanation that he did not consider the absence of any attempts to portray the characters involved as making a crucial difference since actors were being used in a "dramatic setting".

The Commission also observes that defence counsel for Mr. Ponting shared the fear that a rehearsal of the proceedings might have a different emphasis from that given in court and created a risk of prejudice.

The Commission is of the opinion that the need to ensure a fair trial and to protect members of a jury from exposure to prejudicial influences corresponds to a 'pressing social need'. Such an interpretation is reflected in the importance attached in a democratic society to the right to a fair trial. Furthermore, where a trial judge is confronted, in the opening of a highly publicised and controversial trial, with a potentially prejudicial media report, great weight must be attached to his on-the-spot assessment of the dangers of prejudicing the jury and thereby harming the fairness of the trial. Such a calculation, involving as it does the proper balance to be struck between the applicants' freedom of expression and the fair administration of justice, is a matter which falls within the Contracting States' margin of appreciation subject, of course, to supervision by the organs of the Convention.

It is true that there may have been other less objectionable courses open to the trial judge, short of prior restraint, such as instructing members of the jury not to watch the programme or watching it himself before taking his decision. However, the Commission considers that where there is a real risk of prejudice the appropriate response, in the circumstances, is one which must lie, in principle, with the person responsible for ensuring the fairness of the trial, namely, the trial judge.

The Commission finds that the evaluation of the risk of prejudice was reasonable in the circumstances. Thus, bearing in mind that the applicants were able to impart substantially the same information in a revised programme and that the order only purported to postpone the programme, the Commission concludes that the interference with the right to impart information can reasonably be considered necessary in a democratic society for maintaining the authority and impartiality of the judiciary. Accordingly the Commission rejects the applicants' complaints under this provision as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. As regards Article 6 (Art. 6)

The remaining applicants further complain under Article 6 para. 1 (Art. 6-1) of the Convention that they were denied a fair hearing of their "civil right" to report matters stated in open court.

The relevant part of Article 6 para. 1 (Art. 6-1) guarantees that

"1. In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time ..."

The Commission recalls that whether or not a right is to be regarded as a civil right within the meaning of this provision is to be determined by reference to the substantive content and effects of the right (see, Eur. Court H.R., König judgment of 28 June 1977, Series a no. 27, para. 89). In the present case the Commission does not

consider in the light of the above text that the right to report matters stated in open court, can be described as a right which is 'civil' in nature for purposes of this provision. This complaint must, therefore, be rejected as incompatible ratione materiae with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

4. As regards Article 13 (Art. 13)

Finally, the remaining applicants complain that they have no remedy whatsoever in respect of their claim that their rights under Article 10 (Art. 10) to impart information were infringed by the judge's Order. They point out that the 1981 Act grants them no right to oppose or appeal an Order made under Section 4 (2). Moreover, Section 29 (3) of the Supreme Court Act 1981 precludes them from applying to the High Court for judicial review of such an Order. They further submit that they were not seeking to challenge Section 4 (2) on the basis that it was incompatible with the Convention. They sought inter alia to argue that the judge's Order was made without jurisdiction and was based on mistaken assumptions about their intentions.

Finally, the applicants submit that their claim of a breach of their right to impart information under Article 10 para. 1 (Art. 10-1) is clearly an 'arguable' claim for the purposes of Article 13 (Art. 13).

The Government contend that, since it is clear that the applicants were not victims of any interference with their rights under Article 10 (Art. 10) or that their complaint under this heading was manifestly ill-founded, they do not have an 'arguable' claim. They cannot, therefore, claim an effective remedy under Article 13 (Art.13). Moreover Article 13 (Art. 13) does not guarantee an effective remedy in respect of a legislative provision such as Section 4 (2) of the 1981 Act.

Article 13 (Art. 13) states as follows:

"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 Commission considers, in the light of the parties submissions, that this part of the application raises complex issues of law and fact under the Convention, the determination of which should depend on an examination on the merits of the application.

It concludes, therefore, that this part of the application is admissible without prejudice to the merits.

For these reasons, the Commission

- DECLARES INADMISSIBLE the complaints made by the National Union of Journalists in Application No. 11553/85;

- DECLARES ADMISSIBLE the remaining applicants' complaints under Article 13 (Art. 13) of the Convention;

- DECLARES THE REMAINDER OF THE APPLICATIONS INADMISSIBLE

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)