

APPLICATION No. 8403/78

by Guy JESPERS

against

BELGIUM

- I. Report of the European Commission of Human Rights  
adopted on 14 December 1981 (Article 31 of the Convention) ..... page 1
  
- II. Resolution DH (82) 3 of the Committee of Ministers  
adopted on 29 September 1982 (Article 32 of the Convention) ..... page 49

This publication contains the report of the European Commission of Human Rights drawn up in accordance with Article 31 of the Convention for the Protection of Human Rights and Fundamental Freedoms, relating to the application (No. 8403/73) lodged with the Commission by Mr Guy Jaspers against Belgium.

This report was transmitted to the Committee of Ministers on 4 March 1982.

As the case was not referred to the European Court of Human Rights, it was for the Committee of Ministers to decide, under the provisions of Article 32, paragraph 1, of the Convention "whether there has been a violation of the Convention".

The decision of the Committee of Ministers was taken by Resolution DH (82) 3 of 29 September 1982, the text of which is reproduced at page 49 of the present publication.

The Committee of Ministers also authorised publication of the Commission's report on this case.

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I. INTRODUCTION

1. The following is an outline of the case as presented by the parties to the European Commission of Human Rights and a description of proceedings.

a. Summary of the facts and of the applicant's complaints

2. The applicant, a Belgian national born in 1934, is represented before the Commission by Mr Houtekier, a barrister at the Belgian Court of Cassation, assisted by MM J Vanderveeren, a barrister practising in Brussels, R Verstringhe, a barrister practising in Ghent, and J Van Londersele, a barrister practising in Ninove.

3. At the time of his arrest, on 27 February 1977, the applicant was an examining judge in the court at Ghent. On 28 January 1978, following a two-month hearing, the applicant was sentenced by the East Flanders Assize Court to twenty years' hard labour for the attempted murder of his wife, two cases of aggravated theft involving a total of 14.5 million Belgian francs, forgery, slanderous accusations and the carrying of firearms. The jury did not find him guilty on a charge of murdering his wife, who was found drowned in her bath.

4. The applicant appealed, but his appeal was dismissed by the Court of Cassation on 25 April 1978.

5. On 27 June 1980 the applicant was provisionally released for health reasons (suspension of imprisonment without legal effect on the enforcement of the sentence).

6. The applicant, who has constantly protested his innocence, maintains that he was convicted without any conclusive evidence having been adduced and that he is the victim of a miscarriage of justice resulting from violations of the Convention for the Protection of Human Rights and Fundamental Freedoms.

7. Before the Commission he alleged that his trial had been the result of a plot hatched in certain judicial circles and that it had been preceded by a conditioning of public opinion calculated to influence the jury called upon to try him. He also complained that several reports drawn up by the police during the trial either had not been made available to the defence for inspection at all or had been made available late. He further alleged that a "special folder" containing certain documents and letters sent by third parties direct to the Public Prosecutor's Office had not been included in the case file. Lastly, he complained that he had been the victim of discriminatory treatment in prison. He invoked Articles 5 (1), 6 (1), (2) (3) (b) and (d), 14 and 13 of the Convention.



12. Having declared the application admissible, the Commission, in accordance with Article 28 (b) of the Convention, placed itself at the disposal of the parties with a view to securing a friendly settlement of the matter. In view of the attitude adopted by the parties, the Commission finds that there is no basis for such a settlement.

c. The present report

13. The present report has been drawn up by the Commission in accordance with Article 31 of the Convention, after deliberations and votes in plenary session, the following members being present:

MM. C A NØRGAARD, President  
G SPERDUTI, First Vice-President  
J A FROWEIN, Second Vice-President  
J E S FAWCETT  
L KELLBERG  
B DAVER  
G JÖRUNDSSON  
G TENEKIDES  
S TRECHSEL  
B KIERNAN  
M MELCHIOR  
J A CARRILLO.

14. In accordance with Article 31 (1) of the Convention, since no friendly settlement has been reached, the purpose of the present report is accordingly:

1. to establish the facts; and
2. to state an opinion as to whether the facts found disclose a breach by the respondent Government of its obligations under the Convention.

The following items are appended to this report: a schedule setting out the history of the proceedings before the Commission (Appendix I), a copy of the lists, supplied by the respondent Government, of the police reports drawn up during the trial before the Assize Court (Appendix II), and the text of the decision on the admissibility of the application (Appendix III).

15. The present report was adopted by the Commission on 14 December 1981 and will be transmitted to the Committee of Ministers in accordance with Article 31 (2) of the Convention.

The full text of the parties' written and oral submissions and the documents submitted to the Commission are in the Commission's archives and can be made available to the Committee of Ministers on request.

II. ESTABLISHMENT OF THE FACTS

A. The origin of the charges against the applicant and the course of the proceedings

16. On 19 December 1975 the applicant's wife had a narrow escape when her car caught fire following an explosion, which an expert attributed, at the time, to a technical fault in the ignition system.

On the night of 26-27 June 1976 Mrs Jaspers was found dead in her bath. Following medical reports, the Public Prosecutor's Office considered, at the time, that there was nothing in the file to suggest that death was not due to natural causes.

Furthermore, on 1 February and between 10 and 18 February 1977 Mr and Mrs V-L, with whom the applicant was acquainted, were victims of several thefts.

17. On 26 February 1977, following statements made by a certain De C during preliminary investigations against him for theft from Mr and Mrs V-L, implicating the applicant in those thefts and suggesting that he had first attempted to murder and then murdered his wife, the examining judge in Ghent issued a warrant (mandat d'amener) to compel the applicant's attendance. On 27 February the applicant was arrested and was charged, amongst other things, with the attempted murder and murder of his wife and with complicity in the aforementioned thefts. The applicant was detained in Ghent prison.

The preliminary enquiries were carried out by a judge of the Court of Appeal in Ghent, in pursuance of section 480 of the Code of Criminal Procedure, relating to proceedings against members of the judiciary.

18. The applicant and De C, the main co-accused, were questioned on numerous occasions, together with a number of other persons involved in one or other of the offences. During the investigation De C stated that the applicant had paid him to contrive the explosion in his wife's car. He further alleged that he had been present at the applicant's home on the evening of Mrs Jaspers' death and that she had been submerged in the bath by her husband after being drugged. He also accused the applicant of actively participating in the thefts from Mr and Mrs V-L. The applicant contested these statements and explained that he had paid De C two million Belgian francs to finance the production of medical apparatus.

19. The examining judge ordered a further inspection by experts of the motor-car destroyed in 1975. The experts came to the conclusion that there must have been an explosive device in the car. The judge also had Mrs Jaspers' body exhumed and many tests carried out. In an expert report submitted on 14 April 1977 Professors A and T stated that it was impossible to determine the cause of death by an examination of the body eight and a half months afterwards. No trace of poisoning was discernible. A toxicological report drawn up on 15 April 1977 confirmed that there was no trace of poison, but that the tissues contained traces of tranquillisers. After an inspection of the locus, Professor T concluded, on 2 May 1977, that it was impossible to rule out either murder or an accident.

20. The preliminary investigations were completed early in June 1977. On 23 June 1977 the Indictments Chamber of the Court of Appeal in Ghent referred the case to the East Flanders Assize Court, which sits in Ghent.

21. The trial began on 28 November 1977 and ended on 28 January 1978. The applicant was sentenced to twenty years' hard labour for attempted murder, theft, forgery, slanderous accusations and the carrying of firearms. The applicant appealed to the Court of Cassation on 4 February 1978 and his appeal was dismissed on 25 April in the same year.

B. The "special folder" held by the Public Prosecutor's Office

22. On 24 August 1977 the Public Prosecutor at the Court of Appeal in Ghent sent four letters written by prisoners in Ghent Prison concerning the Jaspers case to the district police brigade commander, Major V D. One of these letters, dated 21 August 1977, bore the words: "File in the special Jaspers folder kept in Mr V H's (Prosecution representative at the Court of Appeal) office and hand him the folder along with this letter". In the letter the prisoner, B, requested an interview with the head of the Public Prosecutor's Department about a conversation he had had with De C, from which it had emerged that the applicant was innocent of the charges of murder and attempted murder.

23. The head of the Public Prosecutor's Department instructed Major V D to give the authors of the letters a hearing. Those hearings are recorded in reports Nos. 2856 and 2857 drawn up by the police on 5 September 1977. Report No. 2857 includes the following statement by prisoner B (translation):

"I thus found out that De C had made an untrue statement regarding the murder of (Mrs Jaspers). According to De C he had not been at Jaspers' home on the evening of the murder, although he says he stated the contrary during the investigation. I said I thought that was unjust, to which De C replied that he had said it to put pressure on Jaspers regarding the latter's statement about the theft from the aged V-L couple. He said that, if Mr Jaspers changed his statement about the theft, he would withdraw his statement incriminating Jaspers in the murder of (Mrs Jaspers).

In addition, he told me that as far as the attempted murder of (Mrs Jaspers) was concerned, it was indeed he who had put the explosive device in Jaspers' car. De C said that Jaspers knew nothing about it and that he (De C) had done it to put Mr Jaspers at his mercy".

At his hearing on 15 September 1977 (police report no. 2858), De C said:

"I have never here, in the prison, told a different version of the story from the one I gave during the investigation.

So it's absurd to claim that I said I wasn't at Jaspers' house on the evening (Mrs Jaspers) was murdered.

Furthermore, I have never said anything like:

'If Jaspers changes his statement about the theft from Mr and Mrs V-L, I'll change my statement about the murder of (Mrs Jaspers)'".

The prisoners' letters and the reports were included in the prosecution file when the trial opened before the Assize Court.

24. When inspecting these documents, the applicant's counsel noticed the annotation in the margin of B's letter of 21 August 1977, mentioning the existence of a "special folder" at the Public Prosecutor's Office. They immediately submitted the following conclusions (translation):

"The defence requests the President of the Court to use his discretionary powers to order that all documents relating to the Jaspers and De C case and, more particularly, those contained in the prison records of De C and V R (another accused) should be included in the file ....;

These items might be necessary for establishing the truth;

Furthermore, documents transmitted to the defence by the Public Prosecutor's Department reveal that there is a special folder on this case in the Public Prosecutor's Office;

The defence requests that this folder also be included in the file".

25. By decision of 29 November 1977 the Assize Court ordered that "all the documents - especially the correspondence - and objects seized by the prison authorities ... from the cells of the accused or their person ..." should be included in the file. It added that no information available to the Court suggested that there were "any other documents material to the case which had not been included in the file".

In execution of that decision, certain items were added to the file, eg a magnetic-tape found in a pocket tape-recorder belonging to one of the applicant's co-accused.

C. The police reports made available to the defence after the applicant's conviction

26. On 22 December 1977 Gendarmerie Lieutenant V D drew up ex officio a report (no. 3834) stating that a certain D B, a former fellow-prisoner of the applicant and of De C in Ghent prison, had contacted one of the jurors in Jespers case in a bar.

Following this report, the Crown Prosecutor in Ghent instructed the police to question De B. According to the report of the hearing (no. 2835 of 26 December 1977), De B said, among other things (translation):

"De C told me on several occasions that he had played a nasty trick on Mr Jespers and that the latter had nothing to do with the offences with which he was charged. He even asked me to pass on a message to Mr Jespers to the effect that all Jespers had to do was to say he had put De C in touch with Mrs V-L, and that De C would then change everything regarding the accusations of murder and attempted murder".

27. On 29 December 1977 the same De B sent a letter to the President of the Assize Court, repeating the substance of certain of the statements recorded in report no. 2835 and, in particular, those relating to an alleged deal between De C and the applicant. This letter was added to the file on 5 January 1978 (see below).

28. In addition, on 28 December 1977, a police officer guarding the prisoners at the Ghent court house drew up report no. 87/D recording De C's remarks to the applicant during a break in the hearing in the afternoon of 22 December. De C is reported to have said (translation:

"Guy, if you admit to the deal about the theft, I'll withdraw immediately my statement about the murder and attempted murder. I can even tell all the lies you want".

A few moments later, De C added:

"Even if you just admit that it was you who put me in touch with Mrs V-L, that would be enough. That's the only thing that matters to me, I don't care about the rest. If you'd said that earlier, I'd never have implicated you".

According to the same report, one of the applicant's counsel told the applicant at the end of the morning hearing on 23 December 1977 (translation):

"I ought to find out the names of the police officers who were on duty and heard that".

29. When called as a witness on 5 January 1978, Gendarmerie Lieutenant V D revealed that certain documents existed which were essential to the investigation and that those documents could still be produced. The defence immediately requested that they should be added to the file.

The Public Prosecutor's Office then produced a report by Lieutenant V D dated 18 December 1977, containing further statements by a witness named V P, who had testified before the Court on 14 December 1977 regarding the theft from Mr and Mrs V-L. At the same time, the letter of 29 December from De B to the President of the Court (cf para 27 above) was also added to the file.

30. Having learned, after the end of the trial, that reports recording De C's proposals to the applicant had been drawn up during the hearing, one of the applicant's counsel wrote on two occasions (6 and 22 February 1978) to the Crown Prosecutor at Ghent requesting access to, and if possible copies of, the reports drawn up by the police during the hearing before the Assize Court, "as such items were essential to enable him to continue to defend his client's interests" and possibly to file an appeal to the Court of Cassation or an application for review.

31. The Crown Prosecutor replied on 27 February 1978 that the request had been satisfied, since the applicant's counsel had been able to inspect and obtain copies of three files, including a file on De B. (regarding subornation of jurors). This file contained, among other things, reports nos. 3834 and 2835 drawn up by the police on 22 and 26 December 1977 (cf para 26 above). The Commission has not been able to establish from the material at its disposal the exact date on which these files were handed over, but both parties agree that it was after the applicant's conviction.

32. However, not having received the police report on proposals made by De C to the applicant during the trial, counsel for the applicant wrote another letter to the Crown Prosecutor on 14 March 1978. On 23 March 1978 the Crown Prosecutor authorised him to inspect and take copies of report no. 87/D regarding these facts (cf para 28 above).

D. The appeal to the Court of Cassation

33. In support of his appeal of 4 February 1978 to the Court of Cassation, the applicant filed a memorial on 6 April 1978. Basing his argument on Article 6 (1) of the Convention in particular, he maintained that the rights of the defence had been disregarded through the Assize Court's refusal to order the Public Prosecutor's Office to include in the file the correspondence kept in a special folder, and through the failure, despite several requests, to include in the file the reports drawn up after the case had been referred for trial. In support of the last-mentioned ground of appeal he referred to report no. 87/D, which contained statements exonerating him and had been handed over to the defence after the trial.

34. On 25 April 1978 the Court of Cassation dismissed the appeal. It found, firstly, that the Assize Court had replied, on 29 November 1977 to the applicant's submissions by stating, in a conclusive decision on a question of fact, that there were no "other documents" material to the case, meaning thereby, in particular, the correspondence in the Prosecution's special folder mentioned in the applicant's submissions. The Court of Cassation further found that the applicant could have applied to the trial court to have report no. 87/D added to the file or, if he did not know of the existence of the said report, he could have asked for the police officers who had heard the conversation recorded in the report to be identified and called as witnesses. In fact, report no. 87/D shows that the remarks addressed by De C to the applicant were known to his counsel, because on the same day one of them expressed the desire to know the names of the policemen who had heard them. The Court held that the mere fact of having handed over a copy of the report to the defence after the trial did not constitute a violation of Article 6 (1) of the Convention.

III. SUBMISSIONS OF THE PARTIES

A. Late communication, for inspection, of the reports drawn up by the police during the trial

1. The applicant

35. The applicant states that five of the twenty reports drawn up during the trial at the Assize Court were not included in the file, and that this eliminates the excuse of human error. He produces three reports (nos. 87/D, 3834 and 2835) which were not included in the file during the trial before the Assize Court and considers that the prosecution cannot have overlooked these three reports whose dates follow closely on one another (22, 26 and 28 December 1977) and which, furthermore, all cast doubt on the statements made at the trial by De C, the applicant's co-accused. The prosecution did not produce these three reports during the hearing, but it did produce others. The applicant cannot believe that the prosecution can produce certain documents during a trial, know it is under an obligation to produce others and omit to do so. It was therefore a deliberate act, an implicit refusal to produce those documents.

36. He suspects that the number of reports drawn up and not included in the file is greater than admitted by the Government. He claims there are two grounds for this assertion: firstly, a letter of 2 October 1980 from a former police officer responsible for guarding the accused at the Assize Court trial, stating that he had had several reports drawn up and transmitted regarding conversations, arguments, incidents and deals between the accused and that he did not rule out the possibility that reports were handed direct to the prosecution; secondly, the fact that on several occasions reports were said to have been handed direct to the prosecution representative without following the hierarchical channels or being registered. He also mentions a report concerning the testimony of a witness V P, drawn up during the trial and not mentioned in the list supplied by the government at the Commission's request.

37. The irregularities concerning the registration of reports, the special procedure followed by the Public Prosecutor at the Court of Appeal and the police for the transmission of reports, and the disappearance of, or failure to permit access to a number of reports show that the Public Prosecutor's Department assumed a discretionary and unverifiable right over the production of reports and the constitution of the file. If the police had not informed the defence that the reports existed, the defence would not have known about them. The failure to make these documents available for inspection constituted a violation of the rights of the defence.

38. The applicant submits that the first duty of a Prosecution Officer is to be impartial and objective and to provide the court with all the facts relevant to the case to be tried. The position of the Public Prosecutor's Department cannot be likened to that of an advocate. Advocates defend the interests of individuals whereas the Public Prosecutor's Department defends

the general interest and has the function of bringing out the truth, not of obtaining a conviction. The Public Prosecutor's Department had a duty to include the reports in the file automatically. In the present case, although the Public Prosecutor's Department had an obligation to include in the file documents both unfavourable and favourable to the accused, it had kept certain evidence in a special file.

39. Its failure to produce the documents in dispute prevented the applicant from defending himself fully. The communication of report no. 87/D would have enabled the defence to have arranged a confrontation between De C and the police officers. Without that report the defence had no documentary evidence of the statements made by De C, who could retract his statements as he had done before.

40. The applicant disputes the reasons given by the Government to explain the failure to communicate the reports. Firstly, he claims that it is untrue that all the facts recorded in the reports omitted from the file were known to the applicant. Secondly, he submits that it is not up to the Public Prosecutor's Department to pre-judge whether or not a report is in order, eg the second report of 25 January 1978 mentioned by the Government. Once a report has been drawn up, it should be included in the file, unless the Assize Court decides otherwise. Lastly, the oral nature of the procedure cannot justify the failure to produce the documents, since the jury is put in possession of the case file when it retires to deliberate.

The applicant considers that the question is not whether or not production of the documents in dispute would have altered his conviction in any way, but whether or not the Public Prosecutor's Department violated the rights of the defence as guaranteed by the Convention.

## 2. The Government

41. The Government admit that report no. 87/D drawn up by the police on 28 December 1977 was made available to the defence after the applicant was convicted. They plead human error, but maintain that the error did not have any prejudicial consequences for the applicant, who was given a fair trial.

Report no. 87/D of 28 December 1977 shows that De C's remarks to the applicant were known to counsel for the defence, since, the same day, one of them expressed the desire to know the names of the police officers who had heard them. As soon as the hearing was resumed, the applicant and his counsel could thus have requested the President to ask De C to confirm the remarks he had just made and to ask the police officers to confirm that those remarks had actually been made. They did not do so. The important thing was that both parties knew what De C had proposed and that those proposals were recorded in a report.

42. In the memorial in support of his appeal to the Court of Cassation the applicant pointed out that the decision of 28 January 1978 had been taken in violation of the rights of the defence in that "important

documents, such as report no. 87/D drawn up on 28 December 1977 by the Ghent police and containing statements exonerating the applicant, were not sent to his counsel until after the hearing". The Court of Cassation rejected this plea.

The Government submit that examination of the record of the court hearing on 5 January 1978 makes it possible to establish that the applicant did not ask for report no. 87/D to be included in the file and that the Public Prosecutor's Office and the Court were concerned to ensure that Article 6 of the Convention on Human Rights was complied with.

43. As regards report no. 3834 of 22 December 1977 and report no. 2835 of 26 December 1977 concerning the suspicion that De B had suborned jurors, the Government submit that the first of these reports concerned De B and not the applicant and that the substance of De B's statements in Jespers' favour in the second report was repeated in a letter of 29 December 1977 from De B to the President of the Assize Court and added to the file at the hearing of 5 January 1978.

44. At the Commission's request, the Government mention other reports which, for good reasons, were not included in the file:

- a. Report no. A/28323 of 12 December 1977 and another unnumbered report dated 17 December 1977 were irrelevant to the trial as they concerned information that persons unknown had threatened V P and other persons called as witnesses in the Jespers case. These reports were included in one of the files made available to the defence in February 1978.
- b. Police report no. 1092/M of 19 December 1977 has not been traced and it has not been possible to establish its content. The Government assert that it concerned a transfer of prisoners.
- c. In the Government's opinion, report no. 86/D of 26 December 1977 concerning an enquiry carried out in connection with the reconstruction of the explosion of Mrs Jespers' car and report no. 88/D of 29 December 1977 giving details of the thefts from Mr and Mrs V-L did not provide any new or previously unknown facts, but merely confirmed statements made before the Assize Court.
- d. Report no. 531 of 19 January 1978 and report no. 872 of 27 January 1978, the one concerning the discovery of a small spring from a pen on De C's person and the other concerning the calling in of a doctor to treat De C, were irrelevant to the defence.

- e. In the Government's view, two reports dated 25 January 1978 concerning incidents during the hearing were irrelevant to the defence. The first of these, no. 118/D K1192, concerns the authorisation given by the Public Prosecutor's Office to counsel for De C to talk privately with their client for a few moments. The second records an exchange of notes between De C and his counsel and a letter including the words: "If J confesses to the deal, the undersigned, De C, will tell the truth about what happened in Fleurusstraat". As far as the second report is concerned, the Public Prosecutor's Office rightly did not wish to make use of indiscretions.

45. To sum up, the Government submit that none of the documents not included in the file was relevant to the applicant's defence, since the defence knew all the facts recorded in those documents.

The Government explain that proceedings at the Belgian Assize Court are exclusively oral and that the jury may take into consideration only testimony given at the hearing, not documents in the file.

Lastly they assert that there never was a "special procedure" for the transmission of documents between the Ghent police and the Head of the Public Prosecutor's Department, who merely instructed the Crown Prosecutor to keep him informed of all incidents and all reports he received regarding the Jespers case.

B. Failure to communicate the "special folder"

1. The applicant

46. The applicant accepts the need for an administrative file for internal correspondence but objects to the fact that it may contain reports not made available to the defence and letters from third parties concerning the trial, especially if such documents tend to exonerate the accused. He points out that, in this particular case, if the special folder had been merely an administrative folder in the strict sense, in which the Public Prosecutor's Office filled its internal correspondence with the judicial authorities, experts and administrative authorities, he would not have asked for it to be produced. Furthermore, the applicant stresses that the Head of the Public Prosecutor's Department had written the words "special folder" and not "administrative folder" or "internal folder" on the letter of 29 December 1977. When written by the Head of the Public Prosecutor's Department "special folder" was not synonymous with "administrative folder".

The applicant asserts that at the Assize Court he had specifically requested "the inclusion of the correspondence of the Public Prosecutor's Office in the file". His request was not acceded to, with the result that the rights of the defence were violated.

47. Although, generally speaking, the applicant accepts the Government's views on the Prosecution's independence of the judicial authority and the consequence thereof as regards the communication of documents, he does not accept that, in a trial before the Assize Court, that independence could restrict the discretionary and almost unlimited powers of the President. Those powers, which are conferred on him under Sections 268 and 269 of the Code of Criminal Procedure (1), are real powers of investigation and a necessary consequence of the oral nature of the proceedings. In the applicant's view, the President of the Assize Court has the right to have included in the file any document necessary to the establishment of the truth. It is therefore within the President's powers to order reports and even confidential documents from the special folder to be produced.

## 2. The Government

48. The Government confirm that for every case every Public Prosecutor's Office opens a section folder, also known as an "administrative file", "special folder" or "internal folder", which is used for filing internal post, eg between the Public Prosecutor's Office and the Crown Prosecutor or the Minister of Justice, administrative documents, letters from counsel, press articles, anonymous letters, etc. These documents, which are not procedural papers, are of no importance for the establishment of the truth. The keeping of such files is not a secret practice and the Government mention, in this connection, a series of circulars from Prosecution representatives regarding internal files of this kind.

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(1) Section 268: "The President has discretionary powers to take any step which he considers necessary for the purpose of establishing the truth; and the law charges him in his honour and conscience to do everything he can to help establish it".

Section 269: "In the light of any new information supplied by the accused or by witnesses at the hearing, the President may, during the trial, summon - even by means of warrant to compel attendance (mandat d'amener) - and hear any person or have brought to him any new documents he considers likely to clarify the fact at issue.

Witnesses thus summoned shall not take an oath and their statements shall be considered as information only".

In the Jespers case the "administrative file", which was contained in twelve boxes, included press cuttings, copies of documents from the investigation, procedural documents, documents relating to the execution of the judgment and correspondence between judicial authorities and with counsel.

49. It is incorrect to state, as the applicant does, that the Assize Court dismissed the request for the production of the special folder. Its decision of 29 November 1977 contains, firstly, the applicant's submissions alleging that there was a special file on the case in the Public Prosecutor's Office and asking for it to be produced. Then, after stating that it was necessary for the establishment of the truth, to include in the file the documents seized by the prison authorities from the cells of the accused, the Assize Court decided that none of the items in its possession suggested that there were other documents relevant to the case which had not been included in the file. Furthermore, the Court of Cassation, which had no competence to order that the correspondence of the Public Prosecutor's Office be produced found that the Assize Court has thus answered the applicant's submissions without violating the rights of the defence.

50. The Government adds that in spite of the wide discretionary powers conferred on him under Sections 268 and 269 of the Code of Criminal Procedure, the President of the Assize Court cannot order the production of any one document, any more than the whole or part of the administrative file. This restriction is due to the separation of powers and to the independence of the Public Prosecutor's Department, to which the President of the Assize Court cannot issue instructions. To give an example: on 27 August 1976 the Brussels Court of Appeal quashed a decision of the correctional court ordering the Public Prosecutor's Department to include a decision of the Conseil d'Etat in the file and to open a further inquiry.

51. It cannot be maintained that if a trial is to be fair the Public Prosecutor's Department must open all its files. That Department must, it is true, make available to the Court all the documents necessary to the defence, but that does not mean that the special folder or administrative file must be made available. The judge could not be required to inspect the files of the Public Prosecutor's Department, for then he would have to inform the defence of their content, since documents known to the judge must also be known to the defence. The equality of arms would cease to exist if the defence could inspect the special file of the Public Prosecutor's Department, while the latter cannot and has no wish to inspect the personal files of the defence.

The decision of the Assize Court not to order the Public Prosecutor's Department, in the present case, to produce the administrative file was in accordance with the principle of the independence of the Public Prosecutor's Department and did not infringe the right of the accused to a fair trial.

IV. OPINION OF THE COMMISSION

52. The Commission takes the view that the only provisions of the Convention cited by the applicant which are relevant to an examination of the complaints declared admissible are Article 6 (1) and Article 6 (3) (b).

The questions on which the Commission is required to express an opinion may be summarised as follows:

- a. Did the keeping by the Public Prosecutor's Department of a "special folder" or "administrative file" whose content was not, or not fully, disclosed to the defence before the end of the trial violate the applicant's rights under Article 6 (1) and/or Article 6 (3) (b) of the Convention?
- b. Did the fact that the Public Prosecutor's Office did not include in the case file before the end of the trial certain reports drawn up by the police during the trial on facts relating to the accusations against the applicant violate his rights under the same provisions?

53. Article 6 (1) of the Convention reads as follows:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".

Article 6 (3) (b) of the Convention reads as follows:

"Everyone charged with a criminal offence has the following minimum rights:

.....

- b. to have adequate time and facilities for the preparation of his defence".

54. The relationship between paragraphs 1 and 3 of Article 6 of the Convention is that of the general to the particular. As the Commission has long previously pointed out, Article 6 does not define the notion of a fair trial in criminal cases. Paragraph 3 of that Article lists certain specific rights which constitute essential elements of that general notion. The term "minimum" clearly shows that the list of rights in paragraph 3 is not exhaustive and that a trial could well not fulfil the general conditions of a fair trial even if the minimum rights guaranteed by paragraph 3 were respected (Application no. 343/57, Nielsen v Denmark, Report of the Commission, para 52). The European Court of Human Rights expressed a similar opinion in its judgments on the Deweer and Artico cases (decision of 27 February 1980, para 56 and decision of 13 May 1980, para 32 respectively).

The Commission will therefore examine the applicant's complaints firstly from the point of view of the specific provision of paragraph 3 (b), as sub-paragraphs (a), (c), (d) and (e) do not appear to it to be relevant to the instant case. If necessary, it will then examine those complaints in the light of Article 6 (1) should they, in any respect, fall outside the scope of Article 6 (3) (b).

A. On Article 6 (3) (b) of the Convention

55. Article 6 (3) (b) states that everyone charged with a criminal offence has the right to have adequate time and facilities for the preparation of his defence. In the present application the problem is one of "facilities", not of "time".

As regards the interpretation of the term "facilities", the Commission notes firstly that in any criminal proceedings brought by a state authority, the prosecution has at its disposal, to back the accusation, facilities deriving from its powers of investigation supported by judicial and police machinery with considerable technical resources and means of coercion. It is, in order to establish equality, as far as possible, between the prosecution and the defence that national legislation in most countries entrusts the preliminary investigation to a member of the judiciary or, if it entrusts the investigation to the Public Prosecutor's Department, instructs the latter to gather evidence in favour of the accused as well as evidence against him. It is also, and above all, to establish that same equality that the "rights of the defence", of which Article 6 (3) of the Convention gives a non-exhaustive list, have been instituted. The Commission has already had occasion to point out that the so-called "equality of arms" principle could be based not only on Article 6 (1) but also on Article 6 (3), especially sub-paragraph (b) (Applications nos. 524/59 and 617/59; Ofner and Hopfinger, Report of the Commission, para 46; Applications nos. 596/59 and 789/60, Pataki and Dunshirn against Austria, Report of the Commission, para 36).

56. In particular, the Commission takes the view that the "facilities" which everyone charged with a criminal offence should enjoy include the opportunity to acquaint himself, for the purposes of preparing his defence, with the results of investigations carried out throughout the proceedings. Furthermore, the Commission has already recognised that although a right of access to the prosecution file is not expressly guaranteed by the Convention, such a right can be inferred from Article 6 (3) (b) (see, by implication: Application no. 1816/63, Yearbook 7, p 205, 211; Application no. 7412/76, Haase against the Federal Republic of Germany, Report of the Commission, paras 115-117, D R 11, p 78, 108). It matters little, moreover, by whom and when the investigations are ordered or under whose authority they are carried out. In view of the diversity of legal systems existing in the states parties to the Convention the Commission cannot restrict the scope of the term "facilities" to acts carried out during certain specified phases of the proceedings, eg the preliminary investigation. Close scrutiny of the position of the Public Prosecutor's Department and of any obligations of impartiality imposed on it by national law would therefore be superfluous in the instant case. Any investigations it causes to be carried out in connection with criminal proceedings and the findings thereof consequently form part of the "facilities" within the meaning of Article 6 (3) (b) of the Convention.

57. In the above-mentioned provision, the word "facilities" (French "facilités") is qualified by the adjective "adequate" (French "nécessaire"). Despite the slight difference in meaning between the adjective in the French text and the one in the English text it is clear that the facilities which must be granted to the accused are restricted to those which assist or may assist him in the preparation of his defence.

58. In short, Article 6 (3) (b) recognises the right of the accused to have at his disposal, for the purposes of exonerating himself or of obtaining a reduction in his sentence, all relevant elements that have been or could be collected by the competent authorities. The Commission considers that, if the element in question is a document, access to that document is a necessary "facility" ("facilité nécessaire") if, as in the present case, it concerns acts of which the defendant is accused, the credibility of testimony, etc.

1. The "special folder" kept by the Public Prosecutor's Office

59. The parties do not dispute that, in a criminal case, the Public Prosecutor's Department can legitimately keep a file containing personal notes and internal correspondence. The respondent Government has explained that the file in question, variously called the "administrative file", "special folder" or "internal folder", contains correspondence between the Head of the Public Prosecutor's Department and the Crown Prosecutor or the Minister of Justice, administrative documents, letters from counsel, anonymous letters, etc. The Commission has noted that numerous circulars to that effect, issued by the Department, are to be found in Belgian public prosecutors' offices. The first of these circulars is said to date from 1817.

The Commission stresses that if the "special folder" contains relevant items which could enable the accused to exonerate himself or have his sentence reduced, failure to make those items available to the defence for inspection would constitute a refusal of facilities necessary for the preparation of the defence and, therefore, a violation of the right guaranteed in Article 6 (3) (b).

60. In the present case, the applicant can certainly not be expected to specify from amongst the documents in the special folder concerning his case those which were relevant and should have been made available to him for inspection since the very cause of his complaint is that he never had access to that special folder. All the defence noticed was that a letter dated 21 August 1977 - one of four written by prisoners to the Public Prosecutor's Department - bore a note to the effect that it should be filed in the special folder and, together with the other three and the police reports drawn up as a result of them, was included in the prosecution file at the start of the trial before the Assize Court.

61. Furthermore, the Commission cannot ignore the fact that the Assize Court asserted, in its decision of 29 November 1977, that it had no evidence to suggest that there were other documents material to the case which had not been included in the file. The Court of Cassation subsequently considered itself bound by that finding (decision of 25 April 1978).

62. Lastly, the Commission points out that more than two years after the end of the trial and after having been allowed to inspect three other files finally produced by the Public Prosecutor's Department concerning third parties, neither the applicant nor his counsel were able to give the Commission the slightest evidence that the "special folder" held by the Ghent Public Prosecutor's Department, and not inspected by them, included a document whose content might have been necessary for the preparation of the defence. In the absence of any conclusive evidence, the Commission cannot presume that a State Party to the Convention did not honour an undertaking given under that Convention. It follows that as far as this complaint is concerned there is no evidence of any violation of the rights guaranteed under Article 6 (3) (b).

2. Police reports nos. 3834 and 2835

63. These reports, the first of which was drawn up spontaneously and the second on the instructions of the Crown Prosecutor in Ghent, concerned the behaviour of a certain De B, one of the applicant's former fellow-prisoners. The reports were included in the file relating to the penal proceedings brought against De B on a charge of subornation of jurors. That file and others were made available to the applicant's counsel for inspection on his request after the end of the Jespers case.

Only the second of these reports (no. 2835), which recorded De B's remarks regarding a deal between the applicant and De C about their respective confessions, contained elements which Jespers' counsel might have wished to make use of.

64. The variations in the various statements by De C, the applicant's co-accused, and his attempts to make a deal with the applicant were admittedly well known to the defence, but the latter would have needed the testimony of third parties in order to convince the Assize Court of them, since De C was likely merely to deny them if he alone was called upon to give evidence.

The Commission points out, however, that on 29 December 1977, ie three days after making a statement to the police, De B wrote a long letter to the President of the Assize Court repeating, among other things, the statements he had made to the police, but with many more details than had been given in report no. 2835. That letter was included in the file on 5 January 1978 and thereafter the defence inspected or could have inspected it. It was therefore open to the defence to ask the Court to call De B to give evidence, and this incidentally would very probably have revealed the existence of report no. 2835. But counsel for the applicant did nothing until the close of the trial.

In the Commission's opinion, the applicant cannot, therefore, claim that the production of report no. 2835 for inspection during the trial would have constituted a facility necessary for the preparation of his defence, within the meaning of Article 6 (3) (b) of the Convention.

3. Police report no. 87/D

65. This report was drawn up spontaneously by the officer who, during a break in the hearing, overheard a conversation between De C and the applicant regarding the deal which has just been mentioned.

Here again, the defence might have wished to use a document like this, drawn up by a policeman who had taken an official oath, to try and have De C confirm before the Court, if the need arose, the remarks he had addressed to the applicant.

66. The defence probably did not know at the time of the trial that the police had made a report on the conversation overheard by the officer. But it emerges from the report itself - and this point was not contested by the applicant - that the defence knew that the conversation had been heard but did not know the name of the police officer.

While one can understand to some extent why reports nos. 3834 and 3835, which principally concerned the proceedings instituted against De B, were not included in the Jespers file, the same cannot be said of report no. 87/D, and the Commission considers it surprising that this document, which directly and exclusively concerned two of the accused, was not immediately included in the file but was made available for inspection much later following several requests by counsel for the applicant.

67. Nevertheless, in the opinion of the Commission, it should not have been particularly difficult for the defence to identify - directly or through the President of the Assize Court - the police officer who had heard the conversation between the two accused and his written or oral testimony could then have been obtained if the defence had thought it necessary, yet the defence did nothing until the close of the trial.

The Commission therefore considers, here too, that the applicant cannot claim that the production of report no. 87/D for inspection during the trial would have constituted a facility necessary for the preparation of his defence, within the meaning of Article 6 (3) (b) of the Convention.

#### CONCLUSION

68. In view of the foregoing, the Commission expresses the opinion, by nine votes and three abstentions, that Article 6 (3) (b) of the Convention was not violated in the instant case.

#### B. On Article 6 (1) of the Convention

69. Apart altogether from the question of respect for the specific rights of the defence, the applicant asserted, on the basis of Article 6 (1), that he had not been given a fair trial because of the existence at the Public Prosecutor's Department of a special folder containing items not included in the case file and because of the failure to make available to the defence for inspection certain police reports drawn up at the time of the trial.

The Commission thinks the applicant means that the Prosecution had an advantage which destroyed "the equality of arms" to the detriment of the defendant, in that it had at its disposal documents which the defence had not inspected.

70. In its interpretation of Article 6 (3) (b) (see para 55 above) the Commission pointed out that that provision was designed, in particular, to help establish between the prosecuting authority and the defendant the equality necessary for a fair trial, and that consequently the principle of the "equality of arms" was grounded in it.

Having concluded that Article 6 (3) (b) was not violated in the instant case, the Commission must now confine itself to examining whether that equality might have been infringed to the detriment of the applicant otherwise than with respect to the above-mentioned provision.

71. Examination of the applicant's complaints, the arguments put forward and the documents produced has not, however, revealed any violation of the principle of equality. In particular, it has never been alleged that, during the proceedings, the Assize Court gave the Public Prosecutor's Department any advantage which it did not give to the defence.

In this regard, the Commission has already found in particular (see para 62 above) that the applicant has not been able to produce the slightest evidence to discredit the Assize Court's assertion, in connection with the "special folder", that there were no other documents material to the case which had not been included in the file.

Moreover, the Commission cannot consider the fact that the documents or reports mentioned by the applicant were not communicated to the defence as proof of bias against him on the part of the Assize Court.

#### CONCLUSION

72. In view of the foregoing, the Commission expresses the opinion, by nine votes and three abstentions, that Article 6 (1) of the Convention was not violated either in the instant case.

Deputy Secretary of the Commission

President of the Commission

(J RAYMOND)

(C A NØRGAARD)