AS TO THE ADMISSIBILITY OF

Application No. 24193/94
by Stephen and Zena PRESTON
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 2 July 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION
Mr. R. NICOLINI

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

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

Having regard to the application introduced on 3 May 1994 by Stephen and Zena PRESTON against the United Kingdom and registered on 25 May 1994 under file No. 24193/94;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 22 November 1995 and the observations in reply submitted by the applicants on 19 January 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicants are British citizens, born in 1955 and 1951, respectively and both are currently in prison in the United Kingdom. They are represented before the Commission by Mr. Keith Dolan, a solicitor practising in London.

The facts as submitted by the applicants may be summarised as follows.

A. Particular circumstances of the case

The applicants, who were married, separated in 1988. The first applicant moved to Morocco and then to Amsterdam. The second applicant, her son and daughter returned to England and lived together in a house at Waterfall Road.

An observation log was opened by the police in relation to the second applicant's address at Waterfall Road in February 1989. From March 1989 the second applicant's telephone at home was the subject of an interception under warrant of the Home Secretary pursuant to the Interception of Communications Act 1985 ("the 1985 Act"). On 22 April 1989 the second applicant's son was arrested and subsequently convicted in respect of cannabis dealings. On 3 August 1989 the first applicant was arrested after leaving the house at Waterfall Road with two bags containing £225,680. A subsequent search of the house in Waterfall Road revealed a bag containing approximately 10kg of cannabis resin. The second applicant was also arrested on 3 August 1989. The applicants, together with three others, were charged with, inter alia, conspiracy to import cannabis resin. The trial of the applicants took place between 1 November 1990 and 15 February 1991 before a judge and jury. Both applicants pleaded not guilty.

The case for the prosecution at the trial was later summarised by the House of Lords as follows: There were a number of monetary transactions between the applicants, the second applicant assisted the first applicant to procure a false passport and there were various meetings between the applicants and between the second applicant's children and the first applicant in Amsterdam. In addition, the prosecution relied on the frequency of telephone messages passing between, among others, the applicants on the telephones to which the applicants had access and, in particular, to a burst of telephonic activity prior to 28 July 1989. The prosecution did not seek to introduce evidence as to the contents of those telephone calls.

The prosecution case went on to refer to the fact that on 28 July 1989 the police were called to a van which had obviously been the subject of a hijacking in that large quantities of cannabis had been stolen from it. This event, according to the prosecution, was followed by more meetings (between the first applicant and the second applicant's daughter and between two other defendants in the proceedings), the hiring of vehicles and further telephone calls to and from the second applicant's telephone at Waterfall Road. When the applicants were arrested the money and cannabis resin (referred to above) were found with the first applicant and in the second applicant's home respectively. In addition, various papers were discovered at Waterfall Road which established connections between Waterfall Road and the bag containing the money. These papers also included, according to the prosecution, lists of drug dealers and lists of quantities of money and drugs. Following the applicants' arrest a police officer, according to the prosecution, took a number of telephone calls made to Waterfall Road and pretended to be a participant in a drug dealing conspiracy. While the detail of these calls remains in issue, the general nature of them appears to be undisputed. The first was from a man from Amsterdam who appeared to have a pressing need to know the whereabouts of the first applicant and the money the first applicant was said to owe to the telephone caller. The second was from the first applicant's girlfriend who said that she and the first applicant's son were being held hostage in Amsterdam for the return of money and cannabis to Holland. The third was from a man who spoke of the hijacking of cannabis.

From the evidence so presented, the prosecution asked the jury to find that the first applicant was guilty of exporting substantial quantities of cannabis from Amsterdam for some time and that at the end of July 1989 he had organised a particular deal which had gone wrong when a van containing the shipment was hijacked and the first applicant came to London to put matters right. As regards the second applicant, the prosecution's case concluded by asking the jury to find that the second applicant was the first applicant's chief organiser in the United Kingdom.

While the applicants did not deny that there was a conspiracy to import cannabis, they claimed that they had no part in it. The first

applicant maintained that while he was involved in the conspiracy after 30 July 1989, this was only because of threats made to his life and the lives of his girlfriend and child by Dutch distributors of cannabis who mistakenly thought that the first applicant had influence in drugs circles in the United Kingdom. His role after joining the conspirators after 30 July 1989 was to recover the money and drugs for those who had, at that stage, kidnapped his girlfriend and child. The second applicant claimed that the regular telephone contact with the first applicant was entirely innocent of any such conspiracy.

The question of the telephone calls came to a head during the trial when, on 26 November 1989, counsel for the first applicant was cross-examining two police officers involved in the surveillance of Waterfall Road and the arrest of the first applicant. The first officer indicated that he had been instructed that the first applicant could be armed and was expecting to be shot. The second officer indicated that there was a possibility that the first applicant was afraid for his life and that he knew from information that the first applicant was in the United Kingdom before 1 August 1989.

Counsel for the first applicant pursued, in the absence of the jury, the question of how the police officers came upon such information. On 27 November 1990 and pursuant to the application of counsel for the prosecution, the court sat in the absence of the applicants, their solicitors and the jury and counsel for the prosecution revealed that there was a warrant signed by the Secretary of State pursuant to the 1985 Act. Discussions then took place as to the possibility of disclosing any information derived from the interception of the telephone at Waterfall Road ("interception material") which might assist the defence without breaching section 9 of the 1985 Act. Prosecution counsel also revealed something of what he knew the intercepts did and did not contain.

The matter came back before the court on 3 December 1990 by which time prosecution counsel had spoken to a senior adviser to the Attorney General. He was able to tell the court, inter alia, that a senior officer in the case had informed him that so far as that officer was aware there was no material derived from the intercept which would assist the case of the first applicant. He made it clear that further information sought by the defence counsel was not going to be revealed by him. It was also made clear that the interception tape and transcripts had been destroyed. Prosecution counsel was invited by the trial judge to go back to the Attorney General to see whether there was anything in the interception material which could conceivably be of use to the defence.

Having consulted the Attorney General and advisers to the Director of Public Prosecutions and to the Home Office, counsel for the prosecution informed the court sitting in camera on 5 December 1990 that the Attorney General was of the opinion that it was not a part of the duties of counsel for the prosecution to acquaint himself with such material as existed relating to the interceptions for the purposes of assessing whether or not it should be disclosed to the defence. The argument of the Crown was that in the light of the terms of section 9 of the 1985 Act it was impossible to envisage any manner in which evidence relating to, or concerned with, or arising out of, the intercept might be introduced into this case whether orally, by admission of fact or otherwise, as it would tend to suggest the existence of a warrant. Consequently, it was unnecessary for prosecution counsel to acquaint himself with such material as existed for the purpose of disclosure.

This was treated as the end of the matter as far as disclosure was concerned, the trial judge commenting that he would have preferred "some sort of screening process" by prosecuting counsel as he had previously suggested. The second applicant's counsel then applied for an order under section 78 of the Police and Criminal Evidence Act 1984

to exclude the evidence as to the amount of telephone calls made to and from the telephone at Waterfall Road as well as the source of the calls made to that telephone ("telephonic activity evidence"). On 6 December 1990 the trial judge, still sitting in camera, refused the application under section 78 of the 1984 Act. Referring to the remainder of the trial, he ruled that "no evidence may be given about the matter and no questions asked". As regards the previously made order that neither the defendants nor their solicitors should be informed about the nature of what had occurred during the in camera sessions, the trial judge directed that counsel should respond, if asked whether there had been an interception, that they did not know.

The applicants and their solicitors were excluded from the trial for about 30 working hours due mainly to the above described applications and submissions made by counsel for the prosecution and defence in relation to the interceptions. The first applicant submits that later on that day (6 December 1990), on the advice of counsel and in light, inter alia, of the rulings in relation to the interception material and the telephonic activity evidence, he pleaded guilty to the first charge of conspiracy to import cannabis resin and the jury was discharged from giving a verdict on the other charges. On 25 February 1991 the first applicant was sentenced to ten years and six months imprisonment.

The second applicant maintained her plea of innocence and claims that she was subsequently extensively cross-examined by the prosecution about the nature of her alleged communication with, among others, the first applicant, which contact the second applicant continued to maintain was innocent. The second applicant was convicted of three charges namely, conspiracy to import cannabis resin together with the unlawful possession and use of a passport which was and she knew to be false. She received three (it appears concurrent) prison sentences of seven, two and two years for the three convictions. A confiscation order in the sum of £4000 and a costs order in the sum of £2949 were also made against the second applicant. The applicants' co-defendants were also convicted.

Both applicants were given leave to appeal to the Court of Appeal (Criminal Division) against conviction and sentence where they raised the exclusion from evidence of the interception material, the admission of the telephonic activity evidence and their exclusion from part of the trial.

The Court of Appeal asked counsel for the prosecution whether he had at some stage received information which enabled him to satisfy himself that, in his judgment, the Crown's case was not presented in relation to any defendant in a manner which was inconsistent with information known to the Crown and that there was no information known to the Crown which was not disclosed and which might have assisted the defence. The prosecution counsel answered both questions in the affirmative. The appeals against conviction were dismissed though the appeals against sentence were allowed in part, their sentences being reduced.

The applicants were given leave to appeal to the House of Lords. The questions that concerned the House of Lords were reported ([1993] 4 All ER 640) as including the question of what retention, use and disposal of materials and information derived from interceptions was permissible; to what extent the fact of an interception and the results thereof could be disclosed and put in evidence at a criminal trial; to what extent the prosecution was under a duty to disclose material derived from an interception which was or might be favourable to the defendant; whether it was fair to put in evidence the fact that telephone calls had been made without disclosing to the jury either the fact that some had been intercepted or were the fruits of such interceptions; and as to the scope of the general principle that a criminal trial should take place in the presence of the defendant.

During the hearing in the House of Lords counsel for the prosecution confirmed that all the physical products of the interceptions had been destroyed and that those involved in the interceptions could probably not be identified and, even if they could be, could probably not remember what had been said. The House of Lords noted in this latter respect that, from the submissions of prosecution counsel in chambers to the trial judge, it was clear that at least one senior police officer appeared to have been able to recall at least some information about the interception material.

On 4 November 1993 the House of Lords gave their reasons for rejecting the appeal. The principal judgment was given by Lord Mustill, who pointed out that the obligation in domestic law was to disclose unused material to the defence and that the broader dictates of justice could not be served if the prosecution counsel was not aware of all the evidence when deciding on disclosure. However, the prosecution's duty to retain and disclose to the defence all material evidence did not extend to interception material obtained pursuant to section 2 of the 1985 Act. The purpose of the 1985 Act was that such material should not be used as evidence and, in particular, that material should not be adduced in a trial which would suggest that a telephone interception had been made. This interpretation of the 1985 Act was reinforced by sections 6 and 9 of that Act. Therefore non-disclosure of the fact of an interception and the material derived therefrom was an exception to the rule that the prosecution must disclose all unused material to the defence. It was noted that the issue had arisen due to the cross-examination by the first applicant's counsel of witnesses in a manner prohibited by the 1985 Act.

In addition, Lord Mustill held (though he noted that this question caused him "considerable anxiety") that the defendants could not argue under section 78 of the Police and Criminal Evidence 1984 that telephonic activity evidence should not have been admitted without the disclosure of the interception material. Lord Mustill noted, in this respect, that it was the cross-examination by the first applicant's own counsel in a manner prohibited by the 1985 Act that brought into evidence the material in relation to the intercepted telephone calls and that the applicants could not be allowed to take advantage of this to raise the question they did under section 78 of the 1984 Act. As to the conduct of several days of the hearing without the applicants or their solicitors in attendance, Lord Mustill stated that it had been wrong to conduct so much of the trial in camera and to prevent counsel from informing their clients and solicitors about what had transpired during those hearings. However he concluded by stating that, although it amounted to a serious irregularity, it had not affected the outcome of the trial and or the reliability of the verdicts.

B. Relevant domestic law and practice

1. The Interception of Communications Act 1985

On 10 April 1986 the Interception of Communications Act 1985 ("the 1985 Act") came into force in the United Kingdom pursuant to the judgment of the Court in the Malone case (Eur. Court HR, Malone v. the United Kingdom judgment of 2 August 1984, Series A no. 82). Its objective, as outlined in the Home Office White Paper dated February 1985, is to provide a clear statutory framework within which the interception of communications on public systems will be authorised and controlled in a manner commanding public confidence.

(a) Warrants

Section 1 of the 1985 Act makes it a criminal offence for anyone to intentionally intercept a communication in the course of its transmission by means of a public telecommunications system except in four statutorily defined situations, including when that interception

is in obedience of a warrant issued in accordance with sections 2-6 of the 1985 Act. Section 2 of the 1985 Act empowers the Secretary of State to issue a warrant requiring the interception of telecommunications and the disclosure of interception material in such a manner and to such persons as are described in the warrant for the purpose, inter alia, of "preventing or detecting serious crime". Section 3 of the 1985 Act contains a detailed series of provisions restricting the scope of any warrant issued. Section 4 deals with the manner in which a warrant may be issued and with the duration of the warrant.

Under Section 6 the Secretary of State is required, when issuing a warrant, to make arrangements to secure that disclosure of interception material is limited to the minimum necessary for the purpose of, inter alia, preventing or detecting serious crime and that any interception material is destroyed as soon as its retention is no longer necessary for such purpose.

(b) Exclusion of evidence

Section 9 of the 1985 Act provides that no evidence shall be adduced, and no question in cross-examination shall be asked, by any party in any proceedings before a court or tribunal which tends to suggest that a warrant has been or is to be issued to a person holding office under the Crown. There are some clearly defined exceptions to this rule, none of which are relevant to the present application.

(c) The Tribunal

Any person can complain to the Interception of Communications Tribunal ("the Tribunal") in respect of a suspected interception. The Tribunal consists of five members each of whom must be a lawyer of not less than 10 years standing and can hold office for five years subject to re-appointment. Section 7 of and Schedule 1 to the 1985 Act contains detailed provisions for the investigation of complaints by the Tribunal. If the application does not appear to the Tribunal to be frivolous the Tribunal will investigate whether there is or has been a relevant warrant and, if so, will apply the principles of judicial review in determining whether there has been a breach of sections 2-5 of the 1985 Act.

If there has been no such breach the Tribunal merely confirms this fact but does not confirm whether a warrant has been issued or not. However if there has been a breach, the Tribunal must notify the applicant of its conclusion on this point, and report on its findings to the Prime Minister and to the Commissioner and, if the Tribunal thinks fit, it may order the quashing of the warrant, destruction of the interception material and payment by the Secretary of State of compensation. The Tribunal does not give reasons for its decisions and there is no appeal from a decision of the Tribunal.(d) The Commissioner

The Commissioner is appointed by the Prime Minister and must have held or hold high judicial office. The Commissioner's role is mainly a supervisory one. His functions include the following:

(i) to keep under review the carrying out by the Secretary of State of the functions conferred on him by sections 2-5 of the 1985 Act;

(ii) to keep under review the adequacy of the arrangements under section 6 of the 1985 Act;

(iii) to assist the Tribunal;

(iv) to report to the Prime Minister if the Commissioner is of the opinion that there has been a breach of sections 2-5 of the 1985 Act which has not been so reported by the Tribunal or if the

arrangements under section 6 of the 1985 Act are inadequate;

(v) to make an annual report to the Prime Minister on the exercise of his functions, which report must be laid before the House of Parliament. The Prime Minister has the power to exclude any matter from the report if publication would be prejudicial to national security, to the prevention or detection of serious crime or to the economic well-being of the United Kingdom. The report must state if any matter has been excluded.

2. The Police and Criminal Evidence Act 1984

Section 78 of this Act reads as follows:

"In any proceedings the Court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the Court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

COMPLAINTS

The applicants complain under Article 6 paras. 1, 3 (b) and 3 (d) of the Convention that their trial was unfair in that the interception material was not admitted in evidence whereas the telephonic activity evidence was admitted, submitting that this amounted to an inequality of arms. The applicants also argue that the trial was unfair in that they were excluded (together with their solicitors) from several days of their trial. Secondly, the applicants complain about an infringement of their rights under Article 8 of the Convention by reason of law and practice laid down in the 1985 Act in relation to telephone interceptions, because of the absence of the substantive involvement in the process of an independent judicial authority. Thirdly, the applicants argue under Article 13 of the Convention that they have no effective domestic remedy in respect of the above claims.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 3 May 1994 and was registered on 25 May 1994.

On 28 June 1995 the Commission decided to communicate the applicants' complaints under Articles 6 and 13 of the Convention.

On 22 November 1995 the observations of the respondent Government were received and those of the applicants in response were received on 19 January 1996.

THE LAW

1. The applicants complain under Article 6 (Art. 6) of the Convention about the exclusion of the interception material, about the admission in evidence of the telephonic activity evidence and about their and their solicitor's exclusion from part of the trial. The relevant parts of Article 6 (Art. 6) read as follows:

"1. In the determination ... 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. ...

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

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

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ..."

As regards the interception material itself, the Government specify that only the telephone at Waterfall Road was intercepted and they point out, inter alia, that such material was destroyed pursuant to section 6 of the 1985 Act on or about the date of the applicants' arrest. The Government also submit that the case against both applicants was a strong one aside from the interception material.

As regards access to and use of the interception material, the Government submit that there are three important but competing public interests at stake. The first is the public interest in ensuring that interception of communications is only authorised on strictly limited and necessary grounds and that the dissemination and retention of any interception material is limited to the minimum necessary for the purpose for which interception was authorised (preventing or detecting serious crime). The second is the public interest in maintaining the secrecy of secret surveillance. These two interests are reflected in the 1985 Act and in Article 8 (Art. 8) of the Convention. The countervailing and third public interest involved is the need to ensure the fullest practical disclosure of material to the defence.

It is the Government's view that the 1985 Act strikes a fair balance between the various public interests involved and ensures an equality of arms between the defence and the prosecution. They consider that the concern to ensure that invasions of privacy are strictly limited to the minimum necessary and the need to maintain the effectiveness of secret surveillance render it inevitable that the interception material is not available to the defence. However, the defence and the prosecution are in the same position from the outset of the criminal proceedings since neither can make use of the material and, insofar as any information derived from the product remained in the knowledge of certain police officers in the present case, that information was not helpful or relevant to the cases being put forward by the applicants. In any event, any information derived from the interception could not be used in any way adverse to the defence since if it was favourable to the defence there was an obligation to halt the prosecution or to inform the defence. As to Article 6 para. 3 (b) and 3 (d) (Art. 6-3-b, 6-3-d), the Government point out that the principal or essential purpose of those provisions is to achieve equality of arms between the prosecution and defence which, for the reasons set out above, was established.

As to the admission in evidence of telephonic activity on the telephone at Waterfall Road and the inferences the jury were invited to draw when evidence as to the content of the conversation was excluded, the Government point out that a risk would only arise if there had been an interception and if the evidence from that interception was beneficial to the defence and in contradiction therefore to the inferences against the defence which the prosecution sought to raise. The Government submit that such a risk is minimal and, in any event, the defence was free to give evidence which contradicted those inferences. In addition, the prosecuting counsel was able to inform the domestic courts that the police who had had access to the interception material knew of nothing which would support the defence submissions. It is true that the defence were not in a position to verify this, but the public interest considerations referred to above make no such verification possible.

As to the exclusion of the applicants and their solicitors from part of the trial, the Government submit that the right to be present

at trial is not an absolute one and that their exclusion in the circumstances did not undermine the applicants' ability effectively to participate in the trial; the domestic courts concluded on this point that, while it had been an error and gave the applicants cause for complaint, it did not cast doubt on the reliability of the verdicts. In addition, no evidence was heard in their absence and what took place was prolonged and repetitive legal argument which did not require input from the applicants.

The applicants at the outset contest three themes which they consider run through the Government's observations. In the first place, they point out that it is precisely when the prosecution case appears strong that the trial should be scrupulously fair to an apparently feeble defence. Secondly and as to the Government's proposition that disclosure of interception material would lead to more convictions than acquittals, the applicants simply claim that they fall into the latter category - the disclosure of that material would have proved their innocence and the United Kingdom is the only country in "the advanced world" which does not allow the admission of such evidence. Thirdly, the applicants consider that the Government has misconceived the necessity for secrecy surrounding interceptions - it is logical that those whose telephones are intercepted should not be notified during the interception but victims of an interception can thereafter be notified, and the relevant material disclosed, without any prejudice to an operation that has already terminated or to the existing technology or operational secrets used.

The core of the applicants' complaints is that the admission into evidence of the telephonic activity evidence (allowing the prosecution to invite the jury to draw adverse inferences from the fact of those telephone conversations) while at the same time not admitting into evidence the interception material (that is, the content of those conversations which would allegedly have proved the applicants' innocence) led to an inequality of arms between the prosecution and the defence and meant that the trial was unfair within the meaning of Article 6 (Art. 6) of the Convention.

The first applicant submits that he pleaded guilty on counsel's advice after the in camera hearing in light of the trial judge's rulings on the interception material and the telephonic activity evidence, after the judge's inducement as regards sentencing and as a result of the psychological oppression which resulted from his exclusion from his own trial. The second applicant submits that the evidence against her was thin and fragmentary in nature and that the interception material would have positively supported her defence and rebutted the inferences that the prosecution invited the jury to draw against her. She points out that, while the Government note that prosecution counsel answered in the affirmative the two questions put by the Court of Appeal as regards the content of the interception material, it was clear from the responses of prosecution counsel during the trial to questions put by counsel for the applicants' co-accused, that that material contained nothing prejudicial to the second applicant and constituted, as such, exculpatory material to which she should have had access.

The applicants further argue that it is not sufficient to say that the interception material had been destroyed prior to the trial - the adversarial system operates from the time of arrest and the prosecution had an unfair advantage because they alone had, at one stage, possession of the transcripts and could recollect the information therein and because they used some of the information to the applicants' detriment in preparing the prosecution case. In addition, although the police claimed that there was nothing in the information to support the applicants' cases, that claim could not be tested: police officers have a motive to lie and, being psychologically committed to a defendant's guilt, police officers are likely to overlook or fail to comprehend evidence pointing to innocence. The

applicants' consider that the destruction of the interception material shows contempt and not respect for their private lives. Their privacy was invaded and the fruits of such an interference were used to their detriment before being destroyed without their having had any opportunity to use that material to counter allegations made against them.

In addition, if they were not to get access to the interception material, the applicants submit that the telephonic activity evidence should have been excluded from the trial or that some possibility for a review of the interception material, by an independent counsel or by prosecuting counsel, for its relevance to the defence should have been afforded. Contrary to the Government's submission, the telephonic activity evidence should only have been admitted if it was fair in all the circumstances to the defence as laid down in section 78 of the Police and Criminal Evidence Act 1984.

As to their exclusion from the trial, the applicants argue that this meant that they could not effectively participate in the trial since they were excluded from 30 hours of the proceedings; their solicitor was also excluded; and their counsel could not make any reference to what had gone on in closed session. It is claimed that their exclusion had a traumatic effect on the applicants and that, whether or not evidence was heard during that closed session, the applicants did not know that at the time.

The Commission considers that the first applicant's plea of guilty does not affect his ability to claim to be a victim of a violation of Article 6 (Art. 6) of the Convention since he claims that it was the trial judge's position as to the admission of the above-mentioned evidence that led to his pleading guilty and since, in any event, the Commission recalls that the determination of the first applicant's sentence is also part of the "determination of a criminal charge" (No. 8289/78, Dec. 5.3.80, D.R. 18, p. 166).

The Commission has considered these complaints of the applicants under Article 6 para. 1 (Art. 6-1) of the Convention which provides for a general right to a fair trial of which the guarantees in paragraph 3 of Article 6 (Art. 6) are specific aspects (Eur. Court HR, T v. Italy judgment of 12 October 1992, Series A no. 245-C, p. 41, para. 25).

It is recalled that Article 6 (Art. 6) does not lay down any rules on the admissibility of evidence, as such, this being primarily a matter for regulation by national law. However, the role of the Convention organs is to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (Eur. Court HR, Vidal v. Belgium judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, para. 33, Schenk v. Switzerland judgment of 12 July 1988, Series A no. 140, pp. 29-30, paras. 45-49 and Asch v. Austria judgment of 26 April 1991, Series A no. 203, p. 10, para. 26).

The Commission further recalls that it is a requirement of fairness under Article 6 para. 1 (Art. 6-1) of the Convention that the prosecution authorities disclose to the defence "all material evidence for or against the accused" (Eur. Court HR, Edwards v. the United Kingdom judgment of 16 December 1992, Series A no. 247, p. 35, para. 36) and that the principle of equality of arms, requiring a fair balance between the prosecution and the defence, also constitutes a feature of the wider concept of a fair trial (Eur. Court HR, Ekbatani v. Sweden judgment of 26 May 1988, Series A. no. 134, p. 14, para. 30 and Dombo Beheer B.V. v. the Netherlands judgment of 27 October 1993, Series A no. 274, p. 19, para. 33).

Since the Commission is solely concerned, in this part of its decision, with whether the proceedings against the applicants were fair within the meaning of Article 6 (Art. 6) of the Convention outlined above, the Commission does not consider it necessary to comment on the

parties' submissions, made in the context of the fairness of the proceedings, as to the necessity or otherwise of the destruction of the interception material in view of the applicants' right to privacy guaranteed by Article 8 (Art. 8). Similarly, it is not the task of the Commission to comment on the applicants' submissions that the interception material contained material which would allegedly have proved their innocence or as to the likelihood of police officers overlooking that allegedly exculpatory material.

The matter at issue concerns the fairness of proceedings in which evidence of the contents of the telephone conversation was excluded, while evidence of the telephone activity was admitted), the prosecution using the latter material for the purpose of drawing inferences as to the content of calls made to and from the telephone at Waterfall Road.

The Commission notes that it is not disputed that the physical products of the interception were destroyed when the applicants were arrested or that, pursuant to section 9 of the 1985 Act, no party to the proceedings could adduce any evidence or put any question during the proceedings which could tend to suggest that an interception had taken place. Accordingly, the prosecution was prevented throughout the proceedings from basing the prosecution case on or referring in any way to the information gleaned from the interception material.

Further, the Commission does not consider that the applicants have shown how access to such interception material by the police prior to the applicants' arrest (and the consequent recollection by certain police officers of some information from that material) had any effect thereafter on the proceedings or in what respect that material was used to the applicants' detriment in preparing the prosecution case, other than to provide the prosecuting authorities with a starting point from which to gather admissible evidence against the applicants.

The Commission does not accept that the refusal to exclude the telephonic activity evidence led to an inequality between the parties. While the prosecution could invite the jury to draw inferences from the telephonic activity evidence, the applicants were free to give evidence to rebut those inferences.

The Commission further recalls that the prosecution case did not rest alone on the telephonic activity evidence and the inferences to be drawn therefrom - the prosecution adduced evidence relating to, inter alia, a number of monetary transactions between the applicants; the procurement of a false passport; various meetings between the applicants and between the second applicant's children and the first applicant in Amsterdam together with evidence from a police observation log; the money which the first applicant had in his possession when he was arrested; and the substantial amounts of cannabis found on the premises at Waterfall Road, at which the second applicant lived and which the first applicant had just left when he was arrested.

In addition, various papers were discovered at Waterfall Road which established connections between Waterfall Road and the bag containing the money which the first applicant retained and which papers also included lists of drug dealers together with lists of quantities of money and drugs. The prosecution case went on to refer to the finding by the police on 28 July 1989 of a van, which had obviously been the subject of a hijacking in that large quantities of cannabis had been stolen from it. The prosecution also referred to the telephone calls taken by a police officer in Waterfall Road after the applicants' arrest, the general nature of which calls is referred to above. It was on the basis of that evidence, as well as the inferences the prosecution requested the jury to draw from the telephonic activity evidence, that the prosecution invited the jury to find that the applicants were involved in a conspiracy to import drugs into the United Kingdom.

It is true that, in addition, the applicants and their solicitors were absent for approximately 30 hours of the trial hearing. The Commission recalls that it flows from the notion of a fair trial that an accused should as a general principle be entitled to be present at the trial hearing (Eur. Court HR, Ekbatani v. Sweden, loc. cit., p. 12, para. 25 and Colozza v. Italy judgment of 12 February 1985, Series A no. 89, pp. 15-16, paras. 29-30).

The Commission, however, notes that in the present case the applicants' trial lasted three and half months, whereas the applicants were excluded from the trial on various days for a total of thirty hours during which time the matters which were mainly dealt with related to the interception of the telephone at Waterfall Road. In addition, the applicants were each legally represented by a barrister during the period of their exclusion. Moreover, while the Commission is not convinced that the extent of the applicants' exclusion was strictly necessary, it notes that the matters discussed were of a legal nature and that the jury were not present.

Furthermore, the Commission considers that the order not to divulge the nature of the discussions during the in camera hearing does not give rise to a lack of fairness. The position prior to and after the in camera hearing as regards the interception material and the telephonic activity evidence did not change - any reliance on or reference to that material by any of the parties continued to be excluded in accordance with the 1985 Act while evidence as to the telephonic activity continued to be admitted. In any event, it appears, although it is not clear from the observations, that counsel was free to inform the applicants that the application to have the telephonic activity evidence excluded had been refused and the Commission notes, from the first applicant's observations, that he was informed of the judge's orders in that respect, which observations also imply that the first applicant was informed of the judge's orders as regards the inadmissibility of the interception material.

Finally, the effect of the non-disclosure of the interception material, of the refusal to exclude the telephonic activity evidence and of the absence of the applicants from the trial was the subject of a detailed analysis before the Court of Appeal and the House of Lords (Eur. Court HR, Edwards v. the United Kingdom judgment, loc. cit., pp. 34-35, paras. 34-39). The Commission notes the responses of prosecution counsel to the questions put by the Court of Appeal and that both the Court of Appeal and the House of Lords, having considered the matter in detail, found the verdicts against the applicants to be reliable.

In such circumstances, the Commission does not consider that the matters of which the applicants complain constitute factors of such a decisive nature as to affect the fairness of the proceedings viewed as a whole (No. 13445/87, Dec. 14.10.91, D.R. 71, p. 84). Accordingly, the Commission considers these complaints manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicants also complain about an infringement of their rights under Article 8 (Art. 8) of the Convention by the law and practice in relation to telephone interception as laid down by the 1985 Act.

> "1. Everyone has the right to respect for his private ... life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the prevention of disorder or crime, ..."

The applicants argue that the law and practice of interception are not in compliance with the Malone or Klass judgments (Eur. Court HR, Klass and others v. Germany judgment of 6 September 1978, Series A no. 28 and Malone v. the United Kingdom judgment loc. cit.), referring to the absence of the substantive involvement in the process of an independent judicial authority.

However, the Commission recalls its decision in the Christie case (No. 21482/93, Dec. 27.6.94, D.R. 78-A, p. 119) where the Commission considered the interception system laid down by the 1985 Act in the context of Article 8 (Art. 8) of the Convention, which Act had been introduced in response to the above-mentioned Malone judgment. The Commission noted the safeguards afforded by the Commissioner, the Tribunal and the Security Services Tribunal provided for in the 1985 Act. It considered that these were sufficient to render any interference with the rights guaranteed by Article 8 (Art. 8) which had been carried out in pursuance of that Act proportionate to the aims set out in paragraph 2 of that Article. Accordingly, the Commission considers this complaint manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. Finally, the applicants argue under Article 13 (Art. 13) of the Convention that they had no effective remedy for their complaints under Articles 6 and 8 (Art. 6, 8) of the Convention.

Article 13 (Art. 13) of the Convention reads 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 Government submit that the applicants' complaints under Article 6 (Art. 6) of the Convention were dealt with by the domestic courts on appeal and if the appeal court had been of the opinion that these matters, either individually or cumulatively, rendered the proceedings unfair it is "overwhelmingly likely" that the convictions would have been quashed. The applicants rely on the above-cited Malone judgment in asserting that the 1985 Act is designed to exclude any effective remedy either for invasion of privacy or for unfair trial by preventing any mention of telephone interception in the courts. In addition, the applicants point out that the House of Lords accepted that they had been unlawfully treated and had suffered real hardship. Yet their appeal was dismissed.

As regards the applicants' complaints under Article 6 (Art. 6) of the Convention, the Commission recalls that the guarantees of Article 13 (Art. 13) are less strict than, and are absorbed by, those of Article 6 (Art. 6) of the Convention (No. 24142/94, Dec. 6.4.95, D.R. 81, p. 108). As regards their complaints under Article 8 (Art. 8) of the Convention, the Commission recalls that Article 13 (Art. 13) does not require a remedy under domestic law in respect of any alleged violation of the Convention. It only applies if the individual can be said to have an "arguable claim" of a violation of the Convention (Eur. Court HR, Boyle and Rice v. the United Kingdom judgment of 27 April 1988, Series A no. 131, p. 23, para. 52). The Commission finds that the applicants cannot be said, in light of its findings above as regards the applicants' complaint under Article 8 (Art. 8), to have an "arguable claim" of a violation of their Convention rights (No. 21482/93, loc. cit.).

It follows that these complaints must be dismissed as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber