Application No. 13585/88

THE OBSERVER Ltd and Others

and

GUARDIAN NEWSPAPERS Ltd and Others

against

the UNITED KINGDOM

REPORT OF THE COMMISSION

(adopted on 12 July 1990)

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I. INTRODUCTION

1. The following is an outline of the case, as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2. The application is brought by The Observer Ltd, Donald Trelford, David Leigh, Paul Lashmar, Guardian Newspapers Ltd, Peter Preston and Richard Norton-Taylor. The Observer Ltd are the proprietors and publishers of the national Sunday newspaper the "Observer", published in the United Kingdom (hereafter abbreviated to UK). Mr. Trelford is the editor of the Observer and MM. Leigh and Lashmar are reporters employed on the Observer. Guardian Newspapers Ltd are the proprietors and publishers of the UK national daily newspaper "The Guardian". Mr. Preston is the editor of The Guardian and Mr. Norton-Taylor one if its reporters. All these gentlemen are British citizens. The applicants were represented before the Commission by Messrs. Lovell White and Durrant, Solicitors, London, in particular Mrs. J. McDermott, Solicitor, together with Mr. D. Browne, Counsel, and Miss J. Braybrook, Solicitor.

3. The application is directed against the United Kingdom. The respondent Government were represented by their Agent, Mr. M. Wood of the Foreign and Commonwealth Office, Sir Patrick Mayhew, QC, MP, Attorney General, Counsel, Mr. N. Bratza, QC, Counsel, Mr. P. Havers, Counsel, Mrs. S. Evans, Home Office, and Mrs. S. Marsh, Legal Secretariat to the Law Officers.

4. The application concerns temporary injunctions preventing newspaper publication of details of the contents of the book "Spycatcher" by Peter Wright, a retired member of the British Security Service. It raises issues under Articles 10, 13 and 14 of the Convention.

B. The proceedings

5. The application was introduced on 27 January 1988 and registered on 3 February 1988. After a preliminary examination of the case by the Rapporteur, the Commission decided on 7 October 1988 to give notice of the application to the respondent Government, pursuant to Rule 42 para. 2 (b) of the Rules of Procedure, and to invite the parties to submit their written observations on the admissibility and

merits of the application. On 27 January 1989 the Government submitted their observations on admissibility and merits, to which the applicants replied on 25 April 1989.

6. On 9 May 1989 the Commission decided to hold a hearing on the admissibility and merits of the application, to be joined with that of Times Newspapers Ltd and Neil v. UK, Application No. 13166/87. The hearing was held on 5 October 1989 with the parties represented as above (paras. 2 and 3). Following the hearing and deliberations, the Commission declared the two applications admissible and disjoined them. On 8 November 1989 the parties were sent the text of the Commission's decision on admissibility and they were invited to submit further information and observations on the merits of the case. The applicants submitted the information requested on 15 December 1989. The Government submitted observations and information on 8 January 1990 to which the applicants replied on 21 February 1990. The Government submitted further observations on 2 July 1990.

7. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reactions the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

8. The present Report has been drawn up by the Commission in pursuance of Article 31 para. 1 of the Convention and after deliberations and votes, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
E. BUSUTTIL
G. JÖRUNDSSON
A. WEITZEL
H.G. SCHERMERS
H. DANELIUS
Mrs. G.H. THUNE
Sir Basil HALL
M. C.L. ROZAKIS
Mr. L. LOUCAIDES

9. The text of this Report was adopted by the Commission on 12 July 1990 and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

10. The purpose of the Report, pursuant to Article 31 para. 1 of the Convention, is

1) to establish the facts, and

2) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

11. A schedule setting out the history of the proceedings before the Commission is attached hereto as APPENDIX I and the Commission's decision on the admissibility of the application as APPENDIX II.

12. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

13. The application concerns restrictions imposed on the reporting of details about the book "Spycatcher" by Peter Wright.

14. Mr. Wright was for many years employed by the British Government as a member of MI5, a branch of the British Security Service. He retired in 1976. He now lives in Australia. He decided to write his memoirs, including an account of what he claimed were illegal activities by the British Security Service in particular MI5. In those memoirs entitled "Spycatcher" (hereafter referred to as the book), Mr. Wright alleged, inter alia, that MI5 conducted unlawful actitivies calculated to undermine the Labour Government of 1974-79, burgled and bugged the embassies of allied and hostile countries, planned and participated in other unlawful and covert activities at home and abroad and that Sir Roger Hollis, who led MI5 during the latter part of Mr. Wright's employment, was a Soviet agent. Mr Wright unsuccessfully sought to persuade the British Government to institute an independent inquiry into these allegations. Such an inquiry was also sought by, amongst others, James Callaghan (Prime Minister 1976-79 and a senior member of the Cabinet of Harold Wilson 1974-76) and other prominent members of the Labour Government of 1974-79 including two former Home Secretaries, Roy Jenkins and Merlyn Rees. Part of the material in "Spycatcher" had already been published in a number of books about the British Security Service written by Chapman Pincher. Moreover, on 16 July 1984 Mr. Wright had given a lengthy interview to Granada Television in its "World in Action" programme about the work of the British Security Service. The programme was shown again in December 1986. Other books and another television programme on the workings and secrets of the Service were produced around the same time, but little Government action was taken against these authors or the media.

15. In September 1985 the Attorney General of England and Wales (the Attorney General), on behalf of the UK Government, began proceedings in the Equity Division of the Supreme Court of New South Wales, Australia, to restrain publication of Mr. Wright's memoirs and of any information contained therein derived from his work for the British Security Service. The evidential basis for the claim by the Attorney General was two affidavits sworn by Sir Robert Armstrong, Secretary to the British Cabinet, on 9 and 27 September 1985. On 17 September 1985 Mr. Wright and his Australian publishers, Heinemann Publishers Australia Pty Ltd. (Heinemann Australia), gave an undertaking not to publish pending the hearing of the British Government's claim for an injunction. The British Government refused to indicate to Mr. Wright and Heinemann Australia which parts of the book, if any, they wished to have "blue pencilled" as containing information damaging to national security.

16. On Sunday 22 June 1986, whilst the Australian proceedings were still pending, the applicants David Leigh and Paul Lashmar published a short joint article in the Observer, on an inside page, giving details of some of the contents of Mr. Wright's book. This was followed the next day by a similar short article written by the applicant Richard Norton-Taylor and published in The Guardian. The details disclosed by these reports included the following allegations of improper, criminal and unconstitutional conduct on the part of MI5 officers:

(i) MI5 "bugged" all diplomatic conferences at Lancaster House in London throughout the 1950s and 1960s, as well as the Zimbabwe Independence negotiations in 1979.

(ii) MI5 "bugged" diplomats from France, Germany, Greece and Indonesia, as well as the hotel suite of Mr. Kruschev during his visit to Britain in the 1950s, and were guilty of routine burglary and bugging (including the entering of Russian consulates abroad).

(iii) MI5 plotted unsuccessfully to assassinate President Nasser of Egypt at the time of the Suez crisis.

(iv) MI5 plotted against Harold Wilson during his premiership from 1974 to 1976.

(v) MI5 (contrary to its guidelines) diverted its resources to investigate left-wing political groups in Britain.

17. It was conceded by the applicants that the reports were not based on generally available international press releases or similar material. They were based on the journalists' investigations from confidential sources. However, much of the actual information contained in the articles had already been published in other books, newspapers and television interviews given by Mr. Wright and other British Security Service officers. The British Courts subsequently inferred that, on the balance of probabilities, the journalists' sources must have come from the offices of the publishers of "Spycatcher" or the solicitors acting for Mr. Wright and his publishers (Scott J. judgment of 21 December 1987 (1988) 2WLR 805 at p. 815 F-G, see also paras. 52-53 below).

18. The Attorney General instituted proceedings for breach of confidence in the Chancery Division of the High Court of Justice of England and Wales against the applicants and on 27 June 1986 obtained ex parte interim injunctions to restrain further such publication by any of the applicants pending the trial of the actions. After an inter partes hearing on 11 July 1986, Mr. Justice Millett (sitting in the Chancery Division of the High Court of Justice) varied these injunctions restraining publication. The evidential basis for the claim by the Attorney General was the two affidavits sworn by Sir Robert Armstrong in the Australian proceedings.

19. In his judgment Mr. Justice Millett noted that the newspapers intended printing further information about the alleged misconduct of the Security Service, which information was derived, directly or indirectly, from Mr. Wright, in breach of his duty of confidentiality to the Crown. In balancing the public interest in disclosure with the effective operation of the Security Service, the Court had to take all relevant considerations into account including the fact that this was an interlocutory application and not the trial, that the injunctions sought were merely temporary and that the refusal of injunctive relief might cause irreparable harm and effectively deprive the Attorney General of his rights as a litigant. At that stage Mr. Justice Millett held that some injunctive relief was necessary because there was credible evidence that the appearance of confidentiality was essential to the effective operation of the Security Service. Such efficacy would be impaired if senior officers were known to be free to disclose what they learned in the Service. While this evidence remained to be tested at the trial, the refusal of injunctive relief would permit indirect publication and deprive the Attorney General of his rights in advance of the trial. He found no overriding urgency in the public's right to information, which, in his view, could wait until after the trial.

20. The issue of these initial injunctions was deemed justified by the appellate courts throughout the interlocutory proceedings.

21. The applicants appealed the Order of Mr. Justice Millett and, on 25 July 1986, the Court of Appeal dismissed their appeal and upheld the injunctions, with minor modifications. Under the terms of the Orders the applicants were restrained from:

> "1. disclosing or publishing or causing or permitting to be disclosed or published to any person any information obtained by Peter Maurice Wright in his capacity as a member of the British Security Service and which they know, or have reasonable grounds to believe, to have come or been obtained, whether directly or indirectly, from the said Peter Maurice Wright;

2. attributing in any disclosure or publication made by them to any person any information concerning the British Security Service to the said Peter Maurice Wright whether by name or otherwise."

22. The Orders contained the following provisos:

"1. this Order shall not prohibit direct quotation of attributions to Peter Maurice Wright already made by Mr. Chapman Pincher in published works, or in a television programme or programmes broadcast by Granada Television;

2. no breach of this Order shall be constituted by the disclosure or publication of any material disclosed in open court in the Supreme Court of New South Wales unless prohibited by the Judge there sitting or which, after the trial there in action No. 4382 of 1985, is not prohibited from publication;

3. no breach of this Order shall be constituted by a fair and accurate report of proceedings in

(A) either House of Parliament in the United Kingdom whose publication is permitted by that House; or

(B) a court in the United Kingdom sitting in public."

23. In the judgment of the Court of Appeal interim injunctions restraining publication were granted because Mr. Wright's book contained secret information which, in the view of the Court, might well cause damage to national security if disclosed. The Appellate Committee of the House of Lords granted leave to appeal on 6 November 1986. A hearing was eventually scheduled for November 1987, but the appeal was subsequently withdrawn in the light of the House of Lords decision of 30 July 1987 (see paras. 41-46 below).

24. The trial of the British Government's action in Australia took place before Mr. Justice Powell in the Equity Division of the New South Wales Supreme Court in November and December 1986. Judgment was delivered on 13 March 1987. Mr. Justice Powell rejected the claim by the Attorney General against both Mr. Wright and Heinemann Australia. Pending an appeal before the New South Wales Court of Appeal, Mr. Wright and his publishers gave undertakings not to publish. The appeal was heard by the New South Wales Court of Appeal in the week commencing Monday, 27 July 1987. Judgment was reserved.

25. On 27 April 1987, The Independent published a major summary of certain of the allegations made in Mr. Wright's book. Later the same day, The London Evening Standard and The London Daily News published reports of what had appeared in The Independent. The next day the Attorney General applied for leave to move against the publishers and editors of those three newspapers for contempt of court (hereafter referred to as the Independent case). Leave was granted on 29 April 1987. In this application the Attorney General was acting independently of the Government in his capacity as "the guardian of the public interest in the due administration of justice" (judgment of the Master of the Rolls in Attorney General v. Newspaper Publishing Plc and Others (1987) 3WLR 942 at p. 965H). This is to be distinguished from his capacity as Government representative in the breach of confidence proceedings against the present applicants.

26. Similar reports appeared in Australian and American newspapers: on 29 April 1987 in The Melbourne Age and Canberra Times, and on 3 May 1987 in the Washington Post.

27. Following these British newspaper publications the applicants applied on 29 April 1987 to discharge the injunctions against them on

the ground that there had been a significant change in circumstances since the injunctions had been granted against them in 1986.

28. The Vice-Chancellor, Sir Nicolas Browne-Wilkinson, began to hear those applications on 7 May 1987, but adjourned them pending the determination of a preliminary issue of contempt law raised in the Independent case. He invited the Attorney General to pursue these latter proceedings in the same court as the former proceedings, the Chancery Division of the High Court. This the Attorney General did on 11 May 1988. On the same day, the Vice-Chancellor ordered the trial of the preliminary issue whether a publication made in the knowledge of an outstanding injunction against another party, and which, if made by that other party would amount to a breach of that injunction, constituted a criminal contempt of court for interfering with the process of justice concerning that injunction.

29. Viking Penguin Incorporated purchased from Heinemann Australia the United States (hereafter abbreviated to USA) publication rights to the book and on 14 May 1987 Viking Penguin announced its intention of publishing the book in the USA.

30. On 2 June 1987, the Vice-Chancellor decided the preliminary issue of law in the contempt proceedings. He held that publication by The Independent and the two London newspapers could not amount to contempt of court because such publication was not a breach of the express terms of the injunctions against the applicants and to which injunctions the former had anyway not been a party. The Attorney General lodged an appeal against the Vice-Chancellor's judgment. On 15 June 1987 the applicants applied to have the hearing of their discharge application restored. Consideration of the discharge of the injunctions was, however, further adjourned pending the outcome of the Attorney General's appeal on the contempt issue in The Independent case, the hearing of which began on 22 June 1987.

31. The Sunday Times purchased the British newspaper serialisation rights to the book from Heinemann Australia. On 12 July 1987, The Sunday Times published the first instalment of extracts from the book. The newspaper explained that publication of the extracts was being timed to coincide with publication of the book in the USA, which was due to take place on 14 July 1987. On 13 July 1987, the Attorney General commenced proceedings against Times Newspapers Limited and Andrew Neil for contempt of court. (Hereafter reference will only be made to The Sunday Times newspaper and not the company or Mr. Neil.) On 14 July 1987, Viking Penguin published the book in the USA. It was an immediate bestseller, some 310,000 copies having been printed in the USA, with its fifth print run by the date of the application to the Commission. A substantial number of copies were sold to British citizens visiting the USA or who purchased the book by telephone or post from bookshops in the USA. The British Government took no legal steps to attempt to restrain publication of the book in the USA or Canada, where it also became a bestseller. Immediately after publication of the book in the USA, people began to bring copies of the book into the UK. No steps were taken by the Government to prevent such imports. It took the view that it had the powers to ban import of the book but that any such ban was likely to be ineffective. Anyone in the UK could purchase a copy of the book by credit card or cash from the USA by post or by telephone. The telephone number and address of American bookshops willing to deliver the book to the UK were widely advertised in the UK.

32. In the contempt proceedings in the Independent case the Court of Appeal (Sir John Donaldson MR, Lloyd LJ and Balcombe LJ) announced on 15 July 1987 (for reasons handed down on 17 July 1987) that it would reverse the judgment of the Vice-Chancellor and decided unanimously that such publication could, as a matter of law, amount to a contempt of court. In his judgment, Sir John Donaldson, Master of the Rolls, stressed that confidentiality, not official secrecy, was

the central issue in the case. He held, inter alia, that if a court had prohibited publication of information pending trial which was said to be confidential, but publication was nevertheless made, there was no point in having a trial since the cloak of confidentiality could never be restored. The contempt issue in the present case involved an interference with the due administration of justice. The application of the law of contempt being universal, the fact that it was to be applied in novel circumstances, i.e. to newspapers not party to the injunction against the applicants, was not a widening of its application but a new example of its application. Third parties with a legitimate interest in the injunction could apply to the court for its modification or apply for clarification if they had doubts whether the action they contemplated was lawful.

33. In his concurring judgment, Lloyd LJ held, inter alia, as follows:

> "... I would accept that not all acts which are calculated to interfere with the course of justice will necessarily ground a charge of contempt. The act must be sufficiently serious and sufficiently closely connected with the particular proceedings. But in the present case the conduct relied on by the Attorney General is not marginal. It is not a mere prejudging of the issue to be decided in the particular proceeding. It is not a mere usurpation of the court's function. It is the destruction, in whole or in part, of the subject matter of the action itself. The central issue in the Guardian action is whether The Guardian should be restrained from publishing confidential information attributable to Mr. Wright. Once the information has been published by another newspaper, the confidentiality evaporates. The point of the action is gone. It is difficult to imagine a more obvious and more serious interference with the course of justice than to destroy the thing in dispute."

34. Balcombe LJ agreed with his colleagues. The Court of Appeal refused leave to appeal to the House of Lords. No petition for such an appeal was lodged with the House of Lords itself and no application was made to the High Court by The Independent, The London Evening Standard or The London Daily News to modify the interim injunctions against the applicants.

35. The Sunday Times made it clear that, unless restrained by law, the second set of extracts from the book would be published on Sunday, 19 July 1987. On 16 July, the Attorney General applied for an injunction to restrain The Sunday Times from publishing further extracts from the book. The Attorney General brought his claim to restrain what he said would be a contempt of court by reason of the injunctions against the applicants and by reason of the Court of Appeal's decision in the Independent case.

36. The Vice-Chancellor granted a temporary injunction restraining publication by The Sunday Times until Tuesday, 21 July 1987. It was agreed that on Monday, 20 July 1987 the Vice-Chancellor would consider the claim of the applicants to have the injunctions against them discharged and that The Sunday Times would (by reason of being effectively bound by those injunctions because of the Court of Appeal judgment in the Independent case) have a right to be heard in support of that claim. He was also to hear the Attorney General's application for an injunction against The Sunday Times. It was agreed that if the injunctions against the applicants were discharged, his claim against The Sunday Times would also fail.

37. The Vice-Chancellor heard argument from 20 to 22 July 1987. He gave judgment on 22 July as follows:

(i) If there had been a material change of circumstances since July 1986, he had to consider whether it was now appropriate to grant injunctions against the applicants.

(ii) There had been "a most substantial change in circumstances". He regarded as most significant the fact that the book had been published in the USA and was available in and had reached the UK.

(iii) The Vice-Chancellor was bound by the principles laid down by the House of Lords in American Cyanamid Co v. Ethicon Ltd <1975> AC 396 concerning the grant of interlocutory injunctions, namely, it is not the court's function at this intermediary stage to determine complex questions of law and fact which call for detailed argument and mature consideration. These matters are for the trial court to decide. However, if there is an arguable case that an injunction may be granted at trial, and if neither side could be adequately compensated in damages after trial, then whether an interlocutory injunction should be granted depends on the balance of convenience.

(iv) The Vice-Chancellor held that the Attorney General had an arguable case under the law of confidence (albeit one that he strongly doubted was correct), that he might obtain an injunction against the newspapers at trial even though they were neither confidants nor aiders and abettors of a confidant, and even though the information, the publication of which the Attorney General wished to restrain, was now known or available to the public as a result of publication in the USA.

(v) He held that damages would be an inadequate remedy to compensate the Attorney General if he failed to obtain an interlocutory injunction but were successful at trial. He also held that damages would not be a sufficient remedy to compensate the newspapers for restraints on publication were they to succeed at trial.

(vi) He then proceeded to consider the balance of convenience. He held that, weighing all the factors, it was inappropriate to continue the injunctions. This was because the information contained in the book was no longer secret and the only public interest in restraining publication - to deter other members of the Security Service from seeking to publish their memoirs - was outweighed by the public interest in freedom of expression and the freedom of the press in all the circumstances of this case. He commented as follows:

> "The truth of the matter is that in the contemporary world of electronics and jumbo jets news anywhere is news everywhere. But whilst the news is international, the jurisdiction of this court is strictly territorial. Once the news is out by publication in the United States and the importation of the book into this country, the law could, I think, be justifiably accused of being an ass and brought into disrepute if it closed its eyes to that reality and sought by injunction to prevent the press or anyone else from repeating information which is now freely available to all."

38. The Attorney General immediately appealed and pending that appeal the injunctions against the applicants, but not against The Sunday Times, were continued in force.

39. The Court of Appeal (Sir John Donaldson MR, Ralph Gibson LJ and Russell LJ) heard argument on this matter on 23 and 24 July 1987.

In its judgment of 24 July 1987 the Court of Appeal decided as follows:

(i) The Vice-Chancellor had erred in law in various respects.

(ii) Therefore it was appropriate for the Court of Appeal to exercise its own discretion.

(iii) In the light of the American publication of the book, it was inappropriate to continue the injunctions in their original form. However, it was appropriate to vary the original injunctions to restrain publication in the course of business of all or part of the book or other statements by or attributed to Peter Wright on security matters, but to permit a summary in general terms of his allegations.

40. The Court of Appeal gave leave to all parties to appeal to the Appellate Committee of the House of Lords.

41. The Appellate Committee of the House of Lords (Lord Bridge, Lord Brandon, Lord Templeman, Lord Ackner and Lord Oliver) heard argument from 27 to 29 July 1987. They gave judgment on Thursday, 30 July 1987. They decided, by a majority of 3-2, to continue the temporary injunctions granted by Mr. Justice Millett and the Court of Appeal in July 1986. Lord Bridge (the immediate past Chairman of the Security Commission, the Government body responsible for supervising aspects of the work of the British Security Service) and Lord Oliver dissented on the ground that no injunctions should lie against the applicants because the information was no longer secret. However, the majority of the Appellate Committee decided that the scope of the injunctions granted in 1986 should be widened to restrict certain reporting of what would take place in open court in the further Australian proceedings, otherwise passages from the book read out in the Australian courts might be reproduced in English newspapers, thus circumventing the injunctions. Its written reasons for the judgment were given on 13 August 1987 (1987 1WLR 1248).

42. Lord Brandon (with whose observations Lord Templeman agreed) held, inter alia, as follows:

(i) it was of the utmost importance that the injunctions in issue were interlocutory injunctions, that is temporary injunctions having effect until the trial of the action only; continuation of the injunction until trial did not in any way prejudge the validity of the Attorney General's claim to final injunctions, its purpose being only to hold the ring until a just decision on the validity of that claim could be made;

(ii) before the publication of the book in America the Attorney General had a strong arguable case for obtaining at trial final injunctions in terms similar to those of the temporary injunctions; this was the view taken by Millett J. and the Court of Appeal and was not really open to challenge;

(iii) the key issue was whether the publication of the book in the USA had the effect that the Attorney General no longer had an arguable claim to permanent injunctions at trial; although the Attorney General's case for obtaining final injunctions at trial had been much weakened by the publication of the book, it remained nevertheless an arguable case;

(iv) in order to enable a court to carry out properly the exercise of weighing and balancing the public right to freedom of expression in the press and the public interest in the

protection of the secrecy of the British Security Service, it was essential that it should have adduced before it the best possible evidence on the crucial questions which arose in the case in the form of oral evidence from witnesses subject to cross-examination; the only way in which it could thus justly be decided whether the Attorney General's case, being still arguable, should succeed or fail was by having the action tried;

(v) if the temporary injunction were discharged now, so that the newspapers were left free to disseminate generally the disclosures made in the book, there would be no point in the Attorney General proceeding to trial; his arguable case would have been completely destroyed by summary process at an interlocutory stage and without his ever having had the opportunity of having it fairly tried on appropriate evidence;

(vi) if, on the other hand, the temporary injunctions were continued until trial, the effect would be only to postpone and not to prevent the exercise by the newspapers of the rights to publish; although the exercise of such rights would certainly have been delayed, it was a material factor that Mr. Wright's disclosures related not to recent events but to events many years in the past; that being so, a further delay in the exercise of the newspapers' rights would in no way be equivalent to a complete denial of those which the Attorney General might have;

(vii) having regard to the matters in (v) and (vi) above, the discharge of the temporary injunctions was capable of causing much greater injustice to the Attorney General than the continuation of them until trial was capable of causing to the newspapers; in that situation it was clear that in the overall interests of justice continuation of the injunctions until trial was preferable to their discharge.

43. Lord Ackner, the third majority member of the Appellate Committee, held, inter alia, as follows:

(i) it was common ground and/or accepted by each member of the Appellate Committee

(a) that the Attorney General had an arguable case for a permanent injunction; (this had been conceded by the applicants given the domestic law;)

(b) that damages were a worthless remedy for the Crown and that, if the interlocutory injunctions were not continued, the Crown would immediately and irrevocably lose the prospect of obtaining a permanent injunction which it might obtain if a trial were to take place;

(c) that, by contrast to (b) above, the continuance of the interlocutory injunction was not, as the Vice-Chancellor had accepted, "a final locking out of the press"; if successful in the action, the press would then be able to publish the material which had no present urgency in that the allegations made in the book were in a number of respects stale;

(d) that there was a real public interest concerned with the efficient functioning of the Security Service and that interest required protection; this would extend, as was conceded by the applicants, to the need to restrain any market for the

unauthorised disclosure or use of the confidential memoirs of Secret Service officers;

(ii) it accordingly followed that, notwithstanding the publication of "Spycatcher" in the USA, it would be a denial of justice to refuse to allow the injunctions to be continued until the action was heard; to refuse to continue the interlocutory injunctions would result in the "sweeping aside" of the aforementioned public interest factor without any trial; the Attorney General would thus have been prematurely and permanently denied any protection from the courts.

44. Although arriving at a contrary conclusion on the facts of the case, the minority of the Appellate Committee (Lord Bridge and Lord Oliver) did not differ substantially from the above approach of the majority as to the proper test to be applied in determining whether to continue or discharge the interlocutory injunctions. In particular, Lord Oliver made clear, inter alia:

(i) that he entertained no doubt whatsoever that the interlocutory injunctions granted by Millett J. and confirmed by the Court of Appeal in July 1986 were, in the circumstances which existed at that time, entirely correct;

(ii) that if, notwithstanding the publication of the book, an arguable case was made out for the grant of a permanent injunction at trial, the question would become one of balance of convenience.

45. The principal respect in which Lord Oliver differed from the majority of the Appellate Committee was as to the question whether, following the publication of the book in the USA, there remained an arguable case for the grant of a permanent injunction at trial. While noting that the applicants had presented their arguments on the footing that there remained an arguable case, and while accepting that the point of law involved was a difficult and novel one, Lord Oliver took the view that the Appellate Committee had before it all the material on which to determine the point. Although he stated that he fully appreciated the point forcefully made in the speeches of the majority that the question should not now be determined without full argument at trial, Lord Oliver stated that, in the light of the degree of public availability of the information in "Spycatcher", he could not see how it could be successfully argued at trial that the appellants should be permanently enjoined from publishing such information. Lord Oliver thus concluded that there no longer existed any arguable case for a permanent injunction at the trial and that accordingly the interlocutory injunctions should be discharged.

46. This judgment of the House of Lords terminated the interlocutory proceedings in the UK.

47. During the interlocutory proceedings in this case the applicants made submissions to the domestic courts under Article 10 of the Convention. Account was taken of these submissions as was demonstrated in the judgment of the House of Lords. Lord Brandon commented as follows:

"The public right to freedom of expression cannot, even in a democratic country such as the United Kingdom, be absolute. It is necessarily subject to certain exceptions, of which the protection of national security is one. This is expressly recognised in Article 10 para. 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, to which the United Kingdom has adhered although its provisions have not been incorporated into our domestic law".

48. Lord Templeman (with whom Lord Ackner agreed) recognised that

the "conflict between the right of the public to be protected by the Security Service and the right of the public to be supplied with full information by the press" involved considerations under Article 10 of the Convention. He reviewed the Convention case-law on freedom of expression, in particular, The Sunday Times case (Eur. Court H.R., judgment of 26 April 1979, Series A No. 30). In terms of the Convention he found several reasons necessitating the imposition of injunctions: to prevent damage to national security, i.e. the Security Service, to deter or prevent any recurrence of publication by disgruntled public servants of damaging truths and falsehoods abroad, to protect the reputation or rights of others, to prevent disclosure of information obtained by a member of the Secret Service in confidence and to maintain the authority of the judiciary.

49. However, Lord Harwich considered that the imposition of injunctions would create an "unnecessary fetter on freedom of speech" and doubted the ability of the English "common law to safeguard the fundamental freedoms essential to a free society including the right to freedom of speech which is specifically safeguarded by Article 10 of the Convention".

50. On 24 September 1987 the New South Wales Court of Appeal delivered its reserved judgment dismissing the Attorney General's appeal. The Attorney General applied for leave to appeal to the High Court of Australia against the Court of Appeal's decision. Pending the hearing the High Court declined to grant temporary injunctions against publication of the book. Proceedings against newspapers for injunctions were also brought by the Attorney General in Hong Kong and New Zealand. In Hong Kong temporary injunctions were granted, but in New Zealand it was reported in The Independent on 16 December 1987 that the Chief Justice had given judgment against the Attorney General and permanent injunctions had been refused.

51. In the meantime publication and dissemination of "Spycatcher" and its contents continued worldwide, not only in the USA (around 715,000 copies were printed and nearly all were sold by October 1987) and Canada (around 100,000 copies printed), but also in Australia (145,000 copies printed, half of which were sold within a month of publication), Ireland (30,000 copies printed and distributed) and several thousand copies were sent to various European countries from the USA (80,000 copies to Holland, 10,000 to Germany, 500 to Norway, 2,000 to Malta and 1,000 to Cyprus). From Australia copies were distributed in Asian countries. Radio broadcasts in English about the book were made in Denmark and Sweden, and translations of the book were made in 12 other languages, including Spanish, Catalan, French, German, Swedish, Italian, Danish, Icelandic, Dutch and Portuguese.

52. Against the background of this wide dissemination of the book, the substantive trial of the Attorney General's actions against the applicants lasted several days and took place before Scott J. during the latter part of November and early December 1987. The Sunday Times newspaper was also party to these proceedings, in respect of a determination of the Attorney General's claim against Times Newspapers Ltd and The Sunday Times' editor, Andrew Neil, for an alleged breach of confidence, which claim had been initiated by the Attorney General in a writ issued on 27 October 1987. On 21 December 1987 Scott J. delivered judgment dismissing the actions and discharging the injunctions against the applicants ((1988) 2WLR 805).

53. Scott J. held that Mr. Wright owed a duty to the Crown not to disclose any information obtained by him in the course of his employment in MI5, that he broke that duty by writing "Spycatcher" and submitting it for publication, and that the subsequent publication of the book in July 1987 and its subsequent dissemination amounted to a further breach, so that the Attorney General would be entitled to an injunction against Mr. Wright or any agent of his restraining publication of the book in the UK. He found that the applicants were

not in breach of their duty of confidentiality, created by being recipients of Mr. Wright's unauthorised disclosures, when they fairly reported in general terms the litigation in Australia and the allegations in the book in their respective articles of 22 and 23 June 1986. The Sunday Times on the other hand had published extracts from the book containing certain material which did not raise questions of public interest outweighing those of national security. Accordingly it had been in breach of duty in publishing the first instalment of extracts from the book on 12 July 1987. However, the Attorney General was not entitled to an injunction to restrain further serialisation by The Sunday Times or any other newspaper since the wide publication of the book abroad had destroyed any secrecy as to the contents. Nevertheless the judge held that The Sunday Times was liable to account for the profits accruing to it as a result of the publication of the first extract. In his judgment he took account, inter alia, of the defendants' pleadings under Article 10 of the Convention, the Government's ensuing treaty obligations and the case-law of the Convention organs, which establishes that the limitation of free expression in the interests of national security should not be regarded as necessary unless there is a pressing social need for the limitation and unless the limitation is proportionate to the legitimate aims pursued. He found the arguments for press freedom overwhelming and the Government's desire for absolute protection of the Secret Service draconian and impracticable once information is released and easily available abroad. He therefore dismissed the Attorney General's claim for a permanent injunction to restrain publication of material from the book, but imposed further temporary injunctions pending an appeal to the Court of Appeal.

54. On appeal by the Attorney General and a cross-appeal by The Sunday Times, the Court of Appeal (Sir John Donaldson MR, Dillon and Bingham LJJ) on 10 February 1988 (the hearings having been held from 18 to 25 January 1988) affirmed the decision of Scott J.. As regards the reports of 22 and 23 June 1986 in the Observer and The Guardian, Dillon LJ said:

> "In so far as the detail given goes beyond what had previously been published, I cannot see any detriment to national security or the public interest, to outweigh the benefit of free speech and the advantage in the public interest of restrained and responsible, but adequately detailed, reports of the Australian proceedings."

55. However, again, the temporary injunctions were continued pending appeal to the House of Lords.

56. The House of Lords (Lord Keith of Kinkel, Lord Brightman, Lord Griffiths, Lord Goff of Chieveley and Lord Jauncey of Tullichettle) also affirmed the decision of Scott J. in a judgment dated 13 October 1988 ((1988) 3WLR 776). Dismissing the appeal by the Attorney General and the cross-appeal by The Sunday Times, it held as follows:

> "(i) That a duty of confidence could arise in contract or in equity and a confidant who acquired information in circumstances importing such a duty should be precluded from disclosing it to others; that a third party in possession of information known to be confidential was bound by a duty of confidence unless the duty was extinguished by the information becoming available to the general public or the duty was outweighed by a countervailing public interest requiring disclosure of the information; that in seeking to restrain the disclosure of government secrets the Crown must demonstrate that disclosure was likely to damage or had damaged the public interest before relief could be granted; that since the world-wide publication of 'Spycatcher' had destroyed any secrecy as to its contents, and copies of it were readily

available to any individual who wished to obtain them, continuation of the injunctions was not necessary; and that, accordingly, the injunctions should be discharged.

(ii) (Lord Griffiths dissenting) That the articles of 22 and 23 June had not contained information damaging to the public interest; that the Observer and The Guardian were not in breach of their duty of confidentiality when they published the articles of 22 and 23 June 1986; and that, accordingly, the Crown would not have been entitled to a permanent injunction against both newspapers.

(iii) That The Sunday Times was in breach of its duty of confidence in publishing its first serialised extract from 'Spycatcher' on 12 July 1987; that it was not protected by either the defence of prior publication or disclosure of iniquity; that imminent publication of the book in the USA did not amount to a justification; and that, accordingly, The Sunday Times was liable to account for the profits resulting from that breach.

(iv) That since the information in 'Spycatcher' was now in the public domain and no longer confidential no further damage could be done to the public interest that had not already been done; that no injunction should be granted against the Observer and The Guardian restraining them from reporting on the contents of the book; and that (Lord Griffiths dissenting) no injunction should be granted against The Sunday Times to restrain serialising of further extracts from the book.

(v) That members and former members of the Security Service owed a lifelong duty of confidence to the Crown, and that since the vast majority of them would not disclose confidential information to the newspapers it would not be appropriate to grant a general injunction to restrain the newspapers from future publication of any information on the allegations in 'Spycatcher' derived from any member or former member of the Security Service."

57. As regards the reports of 22 and 23 June 1986 in the Observer and The Guardian Lord Goff said:

"... in so far as the articles went beyond what had previously been published, I do not consider that the Judge erred in holding that in the circumstances, the claim to an injunction was not proportionate to the legitimate aim pursued."

III. OPINION OF THE COMMISSION

A. Points of issue

58. The following are the points at issue in the present application:

- whether the interlocutory injunctions imposed on the applicant newspapers by Mr. Justice Millett on 11 July 1986 were in violation of the applicants' freedom of expression ensured by Article 10 (Art. 10) of the Convention;

- whether the refusal to discharge these injunctions by the House of Lords on 30 July 1987 was in further violation of the applicants' rights under Article 10 (Art. 10) of the Convention;

- whether the applicants had an effective remedy, pursuant to Article 13 (Art. 13) of the Convention, in respect of their complaint

under Article 10 (Art. 10);

- whether the interlocutory injunctions also constituted discrimination in violation of Article 14 of the Convention read in conjunction with Article 10 (Art. 14+10).

B. As regards Article 10 (Art. 10) of the Convention

59. Article 10 (Art. 10) of the Convention provides as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibiities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

60. There are two separate periods to be considered in the present case: the first period ran from Mr. Justice Millett's judgment of 11 July 1986 until 30 July 1987, when the House of Lords refused to discharge the interlocutory injunctions against the applicants, despite the publication of "Spycatcher" in the USA on 14 July 1987. Thereafter the second period ran until the House of Lords' judgment of 13 October 1988, finally refusing the Attorney General's application for permanent injunctions against the applicants. Certain elements of the analysis of the issues in the present case are common to the two periods in question, namely whether the interlocutory injunctions imposed on the applicants constituted an interference with the applicants' freedom of expression ensured by Article 10 para. 1 (Art. 10-1) of the Convention; if so, whether that interference was prescribed by law and whether it had a legitimate aim or aims. The Commission will examine these elements together. However, apart from general considerations, different elements arise regarding the question of necessity, i.e. whether the purported interference corresponded to a pressing social need and was proportionate to the pursuit of a legitimate aim throughout the two periods, because the facts of the case radically altered in July 1987. The Commission will, therefore, separate this aspect of the case for the two periods.

a) Interference with freedom of expression

61. It is undisputed in the present case that the interlocutory injunctions imposed on the applicants in varying forms as of 11 July 1986 constituted an interference with the applicants' freedom of expression ensured by Article 10 para. 1 (Art. 10-1) of the Convention. These injunctions prevented the applicants from, inter alia, publishing further details about the allegedly unlawful conduct of the British Secret Service described in the book "Spycatcher", or further information obtained from the book's author, Peter Wright, a retired member of that Service (paras. 21-22 above). The Commission finds that the gagging effect of the injunctions, imposing prior restraint on further publication of matters of legitimate public interest, constituted an interference with the applicants' freedom of expression with wide repercussions. The Commission must examine

whether that interference was justified under Article 10 para. 2 (Art. 10-2) of the Convention.

b) Prescribed by law

62. Any interference with freedom of expression must be prescribed by law. The word "law" in the expression "prescribed by law" covers not only statute but also unwritten law such as the law of contempt of court or breach of confidence in English common law. Two requirements flow from this expression, that of the adequate accessibility and foreseeability of law, to enable the individual to regulate his conduct in the light of the foreseeable consequences of a given action (Eur. Court H.R., Sunday Times judgment of 26 April 1979, Series A No. 30, pp. 30-31, paras. 47-49).

63. The applicants have contended that the imposition of temporary injunctions in the present case was not "prescribed by law" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention, the relevant domestic law being insufficiently foreseeable. The Government refuted this contention. They submitted that the relevant principles of law concerning the grant of interim injunctions pending trial of an action were clear and well-established.

64. The Commission notes that the relevant domestic law in the present case concerned not only that of interim injunctions, but also the law of contempt of court and breach of confidence, all being aspects of English common law, i.e. non-statutory law. At the outset the Government were concerned to prevent the publication of information directly or indirectly obtained from Peter Wright, a retired member of the British Secret Service, who, in breach of his professional duty of confidence, had divulged information about that Service.

65. A legal dispute arose between the Government, represented by the Attorney General, and the applicants over whether, inter alia, a third party, such as a newspaper, could be bound by that duty of confidence and thereby prevented, by permanent injunction, from publishing information obtained from Mr. Wright. It seems that the applicants had conceded in the interlocutory proceedings that, for the purposes of domestic law, the Attorney General had an arguable point, albeit unfounded on the merits. To protect the Attorney General's interests as a litigant and maintain the procedural status quo until the trial on the merits, the law of interim injunctions, as set out in the case of American Cyanamid Co. v. Ethicon Ltd <1975> AC 396, was applied in this case (see para. 37 (iii) above). Once the interim injunctions were imposed on the applicant newspapers the whole of the British media was bound by them for as long as they lasted by virtue of the law of contempt of court (see paras. 32-34 above).

66. The Commission is of the opinion that a rule which authorises prior restraint of a publication must specify the criteria for such a restriction with sufficient precision to be compatible with the Convention requirement "prescribed by law". Having noted that even after the publication of the book in the USA the English judges, including the Law Lords, were not able to agree on what importance should be attached to the availability of the information contained in "Spycatcher" on the open market, the Commission queries whether the different aspects of common law applied in the present case were entirely clear. However, the Commission finds that the dominant legal principles in the present case were those concerning the grant of interim injunctions. It also finds that they were well-established in English common law, at least since 1975 in the aforementioned American Cyanamid case. They can therefore be said to have been adequately foreseeable. The differences between the parties in the present case have turned principally on the necessity of imposing the interim injunctions, not on the absence of any legal authority for doing so. In these circumstances, the Commission concludes that the interference

with the applicants' freedom of expression by interim injunctions imposed on them from 11 July 1986 until 13 October 1988 was "prescribed by law" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

c) Legitimate aim

67. Interference with freedom of expression may only be justified if it pursues a legitimate aim such as protecting the interests of national security, preventing the disclosure of information received in confidence or maintaining the authority of the judiciary.

68. It is not disputed by the parties that the central purpose of the interlocutory injunctions in the present case has been to protect the position of the Attorney General as a litigant pending the trial of the confidentiality claim on the merits. The Commission considers that such a purpose falls within the scope of the legitimate aim of maintaining the authority and impartiality of the judiciary, within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

69. Indirectly the imposition of the original injunctions of Mr. Justice Millett on 11 July 1986 was also intended to serve the purpose of protecting national security. Mr. Justice Millett considered that one of the elements to be tested at the eventual trial was whether the efficacy of the British Secret Service would be impaired if its officers felt free to divulge confidential matters (para. 19 above). The Commission considers that this, in principle, falls within the scope of the legitimate aim of protecting the interests of national security, within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention. However, the Government have not directly relied on this aspect of justification for the purposes of the proceedings before the Commission.

d) Necessary in a democratic society

70. The key issue in the present case is whether it was necessary in the circumstances to impose temporary injunctions on the applicants at any stage.

71. The adjective "necessary" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention is not synonymous with "indispensable" or as flexible as "reasonable" or "desirable", but it implies the existence of a pressing social need.

72. The notion of necessity implies that the interference of which complaint is made corresponds to this pressing social need, that it is proportionate to the legitimate aim pursued and that the reasons given by the national authorities to justify it are relevant and sufficient (Eur. Court H.R., Barthold judgment of 25 March 1985, Series A No. 90, pp. 24-25, para. 55).

73. The initial responsibility for securing Convention rights and freedoms lies with the individual Contracting State. Accordingly Article 10 para. 2 (Art. 10-2) of the Convention leaves the Contracting State a margin of appreciation, ultimate supervision of which remains with the Convention organs. The scope of the margin of appreciation will vary depending on the aim pursued under Article 10 para. 2 (Art. 10-2) of the Convention. The aim of the restriction in the present case is the maintenance of the authority of the judiciary, the protection of national security being a background element (see paras. 67-69 above).

74. The Court has acknowledged that the margin of appreciation available to States in assessing the pressing social need to protect certain aspects of national security is a wide one (Eur. Court H.R., Leander judgment of 26 March 1987, Series A No. 116, p. 25, para. 59). The Court has also held that the expression "maintaining the authority

and impartiality of the judiciary" not only refers to maintaining public confidence in the ability of the machinery of justice to determine legal rights and obligations and to settle disputes, but also encompasses the protection of the rights of litigants (Eur. Court H.R., aforementioned Sunday Times judgment, p. 34, paras. 55-56). However, the State's margin of appreciation in this area is more restricted as the notion of the "authority" of the judiciary has a more objective basis, reflecting a fairly substantial measure of common ground in the domestic law and practice of the Contracting States (ibid, pp. 35-37, para. 59).

75. Freedom of expression constitutes one of the essential foundations of a democratic society, in particular freedom of political and public debate. This is of special importance for the free press which has a legitimate interest in reporting on and drawing the public's attention to deficiencies in the operation of Government services, including possible illegal activities. It is incumbent on the press to impart information and ideas about such matters and the public has a right to receive them (cf. mutatis mutandis the aforementioned Sunday Times judgment, p. 40, para. 65, and Eur. Court H.R., Lingens judgment of 8 July 1986, Series A No. 103, p. 26, paras. 41-42).

76. The Commission must now examine whether, in the circumstances of the present case, there was a pressing social need to issue and maintain the interlocutory injunctions against the applicants and whether they were proportionate to the aim pursued.

77. The applicants contended that there was no pressing social need for any injunction. They submitted, inter alia, that their reporting in June 1986 was fair and brief on a subject of major public importance, namely, allegations of misconduct by the Security Service. Most of these allegations were already public knowledge, the Government having failed to prevent previous publication and the confidentiality apparently necessary for the effective operation of that Service having been broken (para. 14 above). The application of private litigation principles through the American Cyanamid case and its test of the "balance of convenience" fell short of the Convention's necessity test, and the need to balance the public's right to be informed against the unrealistic confidentiality claim by the Attorney General.

78. The Government replied, inter alia, that the temporary injunctions imposed by Mr. Justice Millett on 11 July 1986 were not concerned with the articles which the applicants had published but with further reports which they might wish to make. The fact that much of the information was already in the public domain ignored this new source of information provided by an insider, namely, Mr. Wright and his book "Spycatcher". It was his authoritative role as a retired member of the Security Service, his breach of confidence with its repercussions on the effective operation of the Service, which concerned the Government. There was a clear need to preserve the subject matter of the case for mature determination of the issues at the trial. The applicants had even conceded that under domestic law the Attorney General had an arguable claim to a permanent injunction against them based on the law of breach of confidence. The imposition of merely temporary injunctions until trial justifiably and proportionately responded to the pressing social need of maintaining the authority of the judiciary, within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

aa) Necessity: the period 11 July 1986 until 30 July 1987

Opinion of MM. Frowein, Busuttil and Weitzel

79. In analysing the necessity issue in the present case it is essential to keep in mind the nature of the proceedings in question.

We note that the Attorney General's claim was based on the rules concerning breach of confidence and it was the purpose of the temporary injunctions imposed on the applicants to protect the subject matter of the trial until it could be fully examined by the competent courts. We accept that the imposition of a temporary injunction to protect the interests of the parties until the full trial, which trial is decisive for the question whether or not material may be published, must, under normal circumstances, be considered necessary in a democratic society for maintaining the authority of the judiciary within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention. To find otherwise would be to deprive the trial of its purpose. However, the need for a temporary injunction must be established with particular clarity where it is the Government which rely on a private law concept of a breach of confidence to restrict the dissemination of information which is of considerable interest to the public, as in the present case. Whilst a binding rule of confidentiality between private persons is, in principle, compatible with Article 10 (Art. 10) of the Convention, since this Article (Art. 10) guarantees individual rights vis-à-vis the State, a stricter test of necessity must be applied where the Government seek to restrict press freedom by that same rule.

80. We note that the primary concern of the English courts in the present case was not the protection of national security, but the protection of confidentiality. This had important consequences for the criteria which they applied: Whilst the applicants had argued that their short reports published on 22 and 23 June 1986 did not contain any substantial information which had not already been published in books, newspapers or on television, this was not seen as particularly relevant by the judges concerned. Indeed, at first instance Mr. Justice Millett considered that the key issue was whether the information to be published derived directly or indirectly from Mr. Wright, not whether it had already been published elsewhere (transcript of judgment of 11 July 1986 p. 15 B-F). The Court of Appeal in its judgment of 25 July 1986 considered the earlier publication of the material but found, nevertheless, that, as there was no evidence that the prior publication of Mr. Wright's remarks had been authorised by the Government, the essential confidentiality of the material had not been destroyed (transcript of judgment of 25 July 1986 p. 15 A-D). Although falling outside the period under consideration, the majority judgment of the House of Lords on 30 July 1987 also clearly demonstrates the effect of the relevant domestic law. The majority of the House of Lords found that even the publication of the book in the USA and its importation into and availability in the UK did not fundamentally alter the arguability of the Attorney General's claim for breach of confidence. This shows that the decisive test for the English courts was not whether reasons of national security justified the injunctions or even whether such reasons would be at issue in the trial. Only the application of the general principles relating to breach of confidence was substantially at issue throughout these proceedings. We are therefore of the opinion that the confidentiality rule applied on the "balance of convenience" by these courts fails the necessity test laid down in Article 10 para. 2 (Art. 10-2) of the Convention.

81. We have also examined the newspaper reports printed in the Observer on 22 June 1986 and The Guardian on 23 June 1986 which gave rise to the litigation in question. We observe that these articles were short, objective and fair. They were based on information, which, although confirmed by undisclosed confidential sources, appears to have been already disclosed to the public in television interviews given by Mr. Wright and in books on the Secret Service written by Chapman Pincher and others (see para. 14 above). The Government had taken no steps to prevent this earlier disclosure of information by Mr. Wright. Moreover, in view of the previous publication of the information in question, we consider that the Government have not established that there was a pressing social need for imposing the

interlocutory injunctions on the applicants. Accordingly, we are of the opinion that it has not been established that the injunctions imposed by Mr. Justice Millett on 11 July 1986, and confirmed by the Court of Appeal on 25 July 1986, were necessary, within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

Opinion of Mrs. Thune, MM. Rozakis and Loucaides

82. In considering the necessity issue in the present case for the period 11 July 1986 until 30 July 1987, we keep in mind the nature of the proceedings in question: The Attorney General was seeking through these proceedings to protect the confidentiality of the information received by a retired member of the British Secret Service during his employment, such confidentiality being essential for the efficacy of this Service. The purpose of the temporary injunctions imposed on the applicants was the protection of the subject matter of the trial until it could be fully examined by the competent courts.

83. The imposition of a temporary injunction to protect the interests of the parties until the full trial may be considered necessary in a democratic society for maintaining the authority of the judiciary, within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention. Furthermore the imposition of a temporary injunction in order to maintain the essential confidentiality of the State Secret Service pending the final determination of related issues by the courts may, in principle, be considered necessary in a democratic society in order to protect national security. However, such a restriction on freedom of expression and the right to receive and impart information must be balanced against the public interest in receiving the information in question. Moreover, the need for any such temporary injunction should be established with particular clarity and certainty where it is the Government which seek to restrict the dissemination of information which is of considerable interest to the public, as in the present case.

84. We must examine whether the interference was necessary in a democratic society within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention. This implies, inter alia, that a pressing social need must be demonstrated with regard to the temporary injunctions imposed on the applicants. We are of the opinion that the injunctions imposed by Mr. Justice Millett on 11 July 1986, confirmed by the Court of Appeal on 25 July 1986, did not meet in a proportionate manner any pressing social need either to maintain the authority of the judiciary, or to protect national security, in the circumstances of the present case, account being taken of the following factors:

a) The confidentiality which was supposed to have been protected had been substantially destroyed by previous publications such as the Chapman Pincher books, the television interviews with Mr. Wright and the Australian proceedings. In this respect it should be noted that the Government took no action against these previous disclosures and publications in the UK.

b) The injunctions could not effectively preserve the status quo, given the inevitable leakage of the confidential information in question from other sources, such as the Australian proceedings and the previous publications.

c) The reports printed in the Observer on 22 June 1986 and The Guardian on 23 June 1986 which gave rise to the litigation in question were short, objective and fair. They were based on information, which, although confirmed by undisclosed confidential sources, was derived from the material mentioned above in point a). Moreover, the information concerned events arising years before, which by 1986 do not appear to have posed any major threat to national security.

d) The Attorney General's claim and the imposition by the courts of the injunctions in question failed to give sufficient weight to the public's right to know about the workings of Government and the duty of the press to denounce alleged misconduct by a governmental authority. In our view, considerable emphasis must be placed on the public's interest in this information.

85. In balancing the conflicting interests at issue in this case, we consider that the Government have failed to establish a pressing social need for the temporary injunctions imposed on the applicants at the outset. We are, therefore, of the opinion that the interference in the present case was not necessary in a democratic society within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

Conclusion

86. The Commission concludes, by 6 votes to 5, that there has been a violation of Article 10 (Art. 10) of the Convention in respect of temporary injunctions imposed on the applicants for the period 11 July 1986 to 30 July 1987.

bb) Necessity: the period 30 July 1987 until 13 October 1988

87. The Commission notes that by the end of July 1987 extensive details about the contents of "Spycatcher" had been divulged in major newspapers in Britain, Australia and the USA (paras. 25 and 26 above). The Sunday Times published extracts of the book on 12 July 1987 and the book itself went on sale in the USA on 14 July 1987 where it became an instant best seller. As of April 1987 the applicants unsuccessfully applied for discharge of the interlocutory injunctions originally imposed in July 1986 in view of the significant change in circumstances.

88. The applicants contended that the perpetuation of these injunctions by the House of Lords on 30 July 1987 and by subsequent courts until 13 October 1988 was a wholly disproportionate measure corresponding to no pressing social need by that time. The Government persisted in their submission that the continuation of the temporary injunctions pending the final negative determination of the merits of the Attorney General's claim by the House of Lords on 13 October 1988 was necessary for the maintenance of the authority of the judiciary, within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

89. The Commission is unable to accept the Government's proposition. It was clear by the time the book was published in the USA that the confidentiality of the information held by Peter Wright had been destroyed. The Commission observes that the Government made no attempt to prevent the book's importation into the UK. The Commission fails to see a pressing social need to prevent the British public reading about something which the rest of the world was free to read by then and which concerned a matter of major interest to them. Moreover, the argument concerning the merely temporary nature of the injunctions loses its cogency when account is taken of the fact that the proceedings in question took over two years and the fact that the evidence upon which the House of Lords based its decision on the merits in October 1988 was substantially available at the outset in July 1986 and fully available by July 1987.

90. In these circumstances the Commission is of the opinion that the refusal to discharge the interlocutory injunctions against the applicants as of 30 July 1987 was not necessary and met no pressing social need to maintain the authority and impartiality of the judiciary within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

Conclusion

91. The Commission concludes, by a unanimous vote, that there has been a violation of Article 10 (Art. 10) of the Convention in respect of temporary injunctions imposed on the applicants for the period 30 July 1987 to 13 October 1988.

C. As regards Article 13 (Art. 13) of the Convention

92. Article 13 (Art. 13) provides:

> "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."

93. The applicants have contended that the House of Lords in its judgment of 30 July 1987 failed to apply the principles laid down in Article 10 para. 2 (Art. 10-2) of the Convention. Because the Convention, or its standards, are not incorporated into UK domestic law, the applicants submitted that they had no effective remedy before a national authority for their claims of a breach of Article 10 (Art. 10) of the Convention. The Government contended that just as Article 13 (Art. 13) of the Convention does not guarantee a remedy by which legislation can be controlled as to its conformity with the Convention, so too Article 13 (Art. 13) cannot be interpreted as guaranteeing a remedy against the decision of the highest court in the domestic legal system which is allegedly in breach of a substantive Article of the Convention.

94. The Commission is of the opinion that the interpretation of the Convention as a whole imposes certain limitations on the right to a remedy recognised by Article 13 (Art. 13). In the present case the applicants complain of a decision by the highest judicial authority in the English legal system. The Commission considers that in this situation Article 13 (Art. 13) does not require yet a further remedy. Article 13 (Art. 13) does not, therefore, apply in this case.

Conclusion

95. The Commission concludes, by a unanimous vote, that there has been no violation of Article 13 (Art. 13) of the Convention.

D. As regards Article 14 (Art. 14) of the Convention

96. Article 14 (Art. 14) provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

97. The applicants have contended that as a result of the House of Lords' judgment of 30 July 1987 the applicants' rights and those of their readers under Article 10 (Art. 10) of the Convention could not be enjoyed without discrimination. People in the USA and European countries could purchase and read freely distributed copies of "Spycatcher" whereas those in the UK most closely affected by its contents could not. Furthermore those people in the UK who had "the necessary money and knowhow" could purchase "Spycatcher" from American retailers. The applicants therefore allege that there has been discrimination on the basis of national or social origin and discrimination based on property, wealth and the acquisition of privileged knowledge.

98. The Government contended that the applicants were in the same position as other newspaper publishers or other sections of the media in the UK; they were not subject to any different treatment under the law than others in a comparable position. Moreover the applicants were not responsible for publishing, distributing or marketing "Spycatcher". Accordingly they could not claim to be victims of discriminatory treatment with regard to the sale or distribution of the book. Nor can the Convention organs entertain an "actio popularis" concerning the ability of members of the UK public to purchase the book. The Government submitted, therefore, that the applicants did not suffer any discrimination contrary to Article 14 (Art. 14) of the Convention.

99. The Commission is of the opinion that the applicants cannot claim to be victims of a violation of Article 14 (Art. 14) of the Convention on behalf of the UK public who may have had difficulties purchasing "Spycatcher" at the material time. It also agrees with the Government's contentions that the applicants were not subject to any different treatment under the domestic law than others in a comparable position. The Government's liability under the Convention is limited to its jurisdiction. Within the UK the whole of the British media was bound by the House of Lords' judgment of 30 July 1987, by virtue of the law of contempt of court, to refrain from publishing details of the contents of "Spycatcher". In these circumstances the Commission considers that the applicants did not suffer any discrimination in the enjoyment of their Article 10 (Art. 10) rights, contrary to Article 14 (Art. 14) of the Convention.

Conclusion

100. The Commission concludes, by a unanimous votes, that there has been no violation of Article 14 (Art. 14) of the Convention.

E. Recapitulation

101. The Commission concludes, by 6 votes to 5, that there has been a violation of Article 10 (Art. 10) of the Convention in respect of temporary injunctions imposed on the applicants for the period 11 July 1986 to 30 July 1987 (para. 86).

102. The Commission concludes, by a unanimous vote, that there has been a violation of Article 10 (Art. 10) of the Convention in respect of temporary injunctions imposed on the applicants for the period 30 July 1987 to 13 October 1988 (para. 91).

103. The Commission concludes, by a unanimous vote, that there has been no violation of Article 13 (Art. 13) of the Convention (para. 95).

104. The Commission concludes, by a unanimous vote, that there has been no violation of Article 14 (Art. 14) of the Convention (para. 100).

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)

Concurring opinion of Sir Basil Hall in respect of the period 30 July 1987 until 13 October 1988

While I am in agreement with the Commission that there was a violation of Article 10 of the Convention in the maintenance of interim injunctions until 13 October 1988, when the House of Lords gave their opinions that permanent injunctions should not be ordered, I reach that conclusion on somewhat different grounds:

The only effective remedy available to the Government of the

United Kingdom was an action seeking an order preventing publication of information obtained in breach of an obligation of confidentiality. As the opinion of the minority of the Commission indicates, it was proper, in order to maintain the authority of the judiciary, for the Court to impose temporary injunctions to be effective until the trial of the action brought on behalf of the Government. It was accepted that the Government had an arguable case. But for such an interim injunction, a judgment of the Court on the merits would, if in the Government's favour, have had no practical effect. In circumstances such as these interim injunctions are necessary to maintain the authority of the judiciary.

Where such an order restricting publication pending a hearing on the merits is made, the effect is to restrict the right of freedom of expression given by Article 10 of the Convention. The national authorities then have a duty to ensure that the restriction is limited in duration, and, accordingly, that the hearing on the merits takes place expeditiously.

The proceedings in this case were instituted on 27 June 1986. The hearing at first instance on the merits took place in November and December 1987. The appeal to the Court of Appeal was decided in February 1988. The opinions of the House of Lords were delivered on 13 October 1988, a period of more than two years after the initial ex parte interim injunctions.

Comparison may be made with the description of the domestic proceedings in The Sunday Times case (Eur. Court H.R., judgment of 26 April 1979, Series A No. 30 pp. 16-25 paras. 22-34): A writ claiming an injunction against publication was issued on 12 October 1972. The final decision on the merits - the judgment of the House of Lords - was delivered on 18 July 1973, nine months later. Other instances of speedy disposal of comparable cases can be found in other Law Reports.

In this case no effort appears to have been made to expedite a hearing on the merits. When the House of Lords delivered their opinions on the application to discharge the interim injunctions on 13 August 1987, Lord Brandon remarked :

> "For obvious reasons that trial should have taken place as soon as possible, it has already been delayed far too long."

In my view that was indeed so. Because of that delay, for which the United Kingdom cannot escape responsibility, the freedom of newspapers to impart information and the freedom of the public to receive information about the "Spycatcher" case was restricted for a period which cannot be justified. There was, accordingly, a violation of Article 10 of the Convention.

Partly dissenting opinion of MM. Nørgaard, Jörundsson, Schermers, Danelius and Sir Basil Hall

We found ourselves unable to agree with the finding of the majority in paras. 79-86 above that there has been a violation of Article 10 of the Convention in respect of temporary injunctions imposed on the applicants for the period 11 July 1986 to 30 July 1987.

Despite the fact that certain allegations in the newspaper reports printed in the Observer on 22 June 1986 and The Guardian on 23 June 1986, which gave rise to the litigation in question, had apparently already been made public, the applicants have conceded that the articles were written on the basis of information which they had obtained from undisclosed confidential sources. In these circumstances, although the reports were short and fair, we consider

that the Government had sufficient reason to believe that the applicants had access to further confidential information directly or indirectly obtained from Mr. Wright about the British Secret Service, the publication of which information the Government were seeking to prevent in Australia and elsewhere. This led to the Government's initiative to apply for temporary injunctions against the applicant newspapers pending the trial of the substantive claim for permanent injunctions against them. We consider that in July 1986 the Attorney General, on behalf of the Government, could be said to have had an arguable claim for permanent injunctions against the applicants. We also consider that the object of this claim, namely, preventing the publication of confidential information about the operation of the Secret Service, would have been destroyed if the applicants had been allowed to continue publication of Mr. Wright's allegations about the misconduct of the Secret Service before the trial on the merits. This created a conflict between two fundamental rights, i.e. the right of the press to impart information as quickly as possible on the one hand, and, on the other hand, the right of the Attorney General to have a legal dispute decided by a court rather than by a unilateral act of the opposing party.

Unlike the majority of the Commission, we are of the opinion that the grant of interlocutory injunctions by Mr. Justice Millett on 11 July 1986 was justified. Although the role of the press in a democratic society is to keep the public informed of matters of public interest, nevertheless account must be taken of the temporary nature of the injunctions pending trial and the fact that the interests of the plaintiff, the Attorney General as litigant, could only be effectively protected by temporary injunctions on further publication rather than by damages. In these circumstances we are of the opinion that the grant of interlocutory injunctions by Mr. Justice Millett on 11 July 1986 was necessary and met, with due proportion, the pressing social need of maintaining the authority and impartiality of the judiciary, which notion under Article 10 para. 2 of the Convention encompasses the rights of litigants. We are of the view that this need continued until July 1987.

Appendix I

HISTORY OF THE PROCEEDINGS

Date	Item
27.01.88	Introduction of the application
03.02.88	Registration of the application
Examination of admissibility	
07.10.88	Commission's deliberations and decision to invite the parties to submit their written observations on admissibility and merits
27.01.89	Government's observations
25.04.89	Applicants' reply
09.05.89	Commission's deliberations and decision to hold a hearing. Application joined to Application No. 13166/87
05.10.89	Hearing on admissibility and merits, the parties being represented as follows:

	Government: Mr. M. Wood, Government Agent Sir Patrick Mayhew, QC, MP, Attorney General, Counsel Mr. N. Bratza, QC, Counsel Mr. P. Havers, Counsel Mrs. S. Evans, Home Office Mrs. S. Marsh, Legal Secretariat to the Law Officers. Applicants: Mr. D. Browne, Counsel Mrs. J. McDermott, Solicitor Miss J. Braybrook, Solicitor
05.10.89	Commission's deliberations and decision to declare the application admissible. Application disjoined from Application No. 13166/87
Examination of the merits	
08.11.89	Parties invited to submit further information and written observations on the merits
15.12.89	Information submitted by the applicants
08.01.90	Government's observations
21.02.90	Applicants' observations
02.07.90	Government's further observations
03.07.90	Commission's deliberations on the merits and final votes
09.07.90	Commission's deliberations on the text of its Article 31 Report
12.07.90	Adoption of Report