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

CASE OF EDWARDS AND LEWIS v. THE UNITED KINGDOM

(Applications nos. 39647/98 and 40461/98)

JUDGMENT

STRASBOURG

27 October 2004

In the case of Edwards and Lewis v. the United Kingdom,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Mr G. RESS,
Sir Nicolas BRATZA,
Mr G. BONELLO,
Mr I. CABRAL BARRETO,
Mr K. JUNGWIERT,
Mr B. ZUPANČIČ,
Mrs H.S. GREVE,
Mr A.B. BAKA,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mrs A. MULARONI,
Mrs E. STEINER,
Mrs E. FURA-SANDSTRÖM,
Mrs A. GYULUMYAN, *judges*,

and Mr P.J. MAHONEY, *Registrar*,

Having deliberated in private on 6 October 2004,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in two applications (nos. 39647/98 and 40461/98) against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two United Kingdom nationals, Mr Martin John Edwards ("the first applicant"), and Mr Michael Lewis ("the second applicant"), on 6 September 1996 and 16 May 1997 respectively.

2. The applicants were represented by Mr D. Clarke, a lawyer practising in Tonbridge and, at the hearing on 10 September 2002, by Mr B. Emmerson QC and Mr J. Hall, counsel. The United Kingdom Government ("the Government") were represented by their Agent, Mr H. Llewellyn, of the Foreign and Commonwealth Office, and, at the hearing, by Mr D. Perry, counsel.

3. The applicants alleged that they had been denied fair trials, contrary to Article 6 of the Convention, as a result of the incitement of offences by

agents provocateurs and the procedure concerning the non-disclosure of evidence followed by the domestic courts.

4. The applications were transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The applications were allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). On 10 September 2002, following a hearing on admissibility and the merits (Rule 54 § 4), both applications were declared admissible by a Chamber of that Section, and on 1 July 2003 the Chamber decided to join them (Rule 43 § 1).

6. On 22 July 2003 judgment was delivered by the Chamber, composed of Mr M. Pellonpää, President, Sir Nicolas Bratza, Mrs E. Palm, Mr M. Fischbach, Mr R. Maruste, Mr S. Pavlovschi and Mr L. Garlicki, judges, and Mr M. O'Boyle, Section Registrar. The Chamber held, unanimously, that there had been violations of Article 6 § 1 of the Convention, that this finding constituted sufficient just satisfaction for any non-pecuniary damage suffered by the applicants and that the respondent State should pay each applicant 22,000 euros in respect of costs and expenses.

7. On 21 October 2003 the Government requested, in accordance with Article 43 of the Convention and Rule 73, that the case be referred to the Grand Chamber. A panel of the Grand Chamber accepted the request on 3 December 2003.

8. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

9. On 2 April 2004 the Government wrote to the Court as follows:

> "Having now had the opportunity to give even fuller consideration to the judgment of the Chamber of the Court of 22 July 2003 and its implications, the Government have decided that they no longer wish to pursue the referral of this application to the Grand Chamber which was accepted on 3 December 2003 at the request of the Government.
>
> In the circumstances the Government accept that it is open to the Grand Chamber to endorse the judgment of the Chamber of 22 July 2003, and confirm that they are content that the Grand Chamber should now do so."

10. On 22 April 2004 the President, Mr L. Wildhaber, decided that it was not necessary to hold a hearing (Rules 59 § 3 and 71 § 2).

11. The applicants and the Government filed observations under Article 41 of the Convention concerning the applicants' additional costs resulting from the Grand Chamber proceedings.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Martin John Edwards

12. The first applicant was born in 1946 and lives in Woking.

13. On 9 August 1994, following a surveillance and undercover operation, he was arrested in a van in the company of an undercover police officer known only as "Graham". In the van was a briefcase containing 4.83 kilograms of 50% pure heroin. On 7 April 1995 the applicant was convicted in Snaresbrook Crown Court of possessing a Class A drug with intent to supply and was sentenced to nine years' imprisonment.

14. The first applicant's defence was that at the time of his arrest he believed he was taking part in a transaction to sell stolen jewellery. He alleged that his participation had been organised by a man named Geoffrey Lerway, whom he had met the previous year while both were detained on remand in Brixton Prison. According to the applicant, the week before his arrest Lerway had introduced him to a man called Jim Humphries and a man introduced to him only as "Martin". The day before the arrest, the applicant was contacted by Lerway and asked if he would be interested in going to Birmingham in connection with a jewellery deal in which Lerway was acting as intermediary to Martin. He would be given a cut of the purchase price. The applicant agreed that Lerway would pick him up from his home the next day.

15. The following morning he was told that the plans had changed, as Martin was now coming to London. The first applicant agreed to accompany Lerway to a public house where, at approximately 12.45 p.m., a red Jaguar and a white van drew up. The driver of the Jaguar was introduced to the applicant as "Jeff"; he was accompanied by a man and a woman, subsequently addressed as "Terry" and "Carol". The driver of the van was introduced as "Graham". Jeff gave Lerway a briefcase containing 125,000 pounds sterling (GBP). They all then left in convoy for the Clive Hotel, Primrose Hill, where they were to meet Martin.

16. At the hotel, Lerway decided to stay with the money in the car and asked the applicant to see if Martin had arrived. The applicant therefore went into the hotel where he met Jim Humphries, who told him that the arrangements had changed again as Martin was now in Euston. Humphries and Lerway asked the applicant to take a taxi to Euston and ask Martin to return with him to the Clive Hotel. The applicant followed these instructions and found Martin, who told him he had to leave immediately for another meeting. Martin, having spoken to Humphries or Lerway on a mobile

phone, gave the applicant the key to a room in the nearby Ibis Hotel, and explained that the "goods" were in a briefcase in the room.

17. According to the applicant, Graham came from Primrose Hill in his van and met the applicant outside the Ibis Hotel. Graham then suggested that the applicant should accompany him up to the room and offered to give him a lift back to Primrose Hill afterwards. In the hotel room, Graham forced the lock on the case while the applicant was in the bathroom, and when he came out Graham was ready to go. They returned to the van, where the briefcase was opened, and within moments the applicant was arrested.

18. Of all the participants in the above transaction, only the applicant was arrested and charged. The applicant suspects that the other participants were undercover police officers or informers acting on police instructions, but their identities and status have never been revealed to him. In this regard, he considers it relevant that, at the time of the alleged dealings, Lerway was on bail to the Middlesex Crown Court in respect of a large-scale conspiracy to supply cannabis. One of the conspirators was a former Flying Squad detective. It was known to the applicant that Lerway had acted as a participating police informer in that case and it was further known that the police officers involved in the applicant's case had also investigated the conspiracy for which Lerway was on bail. The applicant believes that sentencing in Lerway's trial was deliberately postponed until 12 April 1995, some five days after the conclusion of the applicant's own trial, as a disincentive for Lerway to come forward and give evidence concerning the true nature of the transaction.

19. Prior to the commencement of the applicant's trial, the prosecution gave notice to the defence that an application to withhold material evidence had been made *ex parte* in advance of the trial under the procedure approved in *R. v. Davis, Johnson and Rowe* (see paragraph 37 below). Judge Owen Stable QC, who considered the material in the absence of the defence, concluded that it would not assist the defence and that there were genuine public interest grounds for withholding it. This ruling was subsequently reconsidered by the trial judge, who had the benefit of a document prepared by the defence outlining the issues in the case, as well as of the oral submissions of defence counsel. In the course of the proceedings before the Chamber, the Government revealed for the first time that the material placed before the trial judge had included information indicating that the applicant had been involved in the supply of heroin before the start of the undercover operation. The subject matter of the public interest immunity evidence was not disclosed to the applicant during the domestic proceedings, either at first instance or on appeal. The trial judge, who directed himself in accordance with the approach set out by the Court of Appeal in *R. v. Keane* (see paragraph 39 below), decided that the evidence in question would not assist the defence and found genuine public interest grounds in favour of non-disclosure.

20. Following the ruling on disclosure, the defence made an application to the trial judge under section 78 of the Police and Criminal Evidence Act 1984 (PACE – see paragraph 32 below) to exclude the evidence of Graham, on the basis that the applicant had been entrapped into committing the offence. These submissions were rejected. The judge held that in the course of the *ex parte* application he had heard nothing and seen no material which would have assisted the defence in their argument that evidence should be excluded under section 78 on grounds of entrapment. He continued that, if he had seen or heard any such material, he would have ordered disclosure.

21. Apart from the applicant, Graham was the only participant in the offence to give evidence at the trial. He testified that the applicant had made a number of incriminating statements to him when they were alone together in the van and hotel room. Although Graham claimed to have made a full note of the alleged conversations, these notes were never shown to the applicant and the applicant was not questioned in connection with their content by the investigating police officers. According to the applicant, it was, however, difficult for the defence to undermine Graham's credibility because his full name and other identifying details were not disclosed.

22. Following his conviction, the applicant appealed to the Court of Appeal on the ground, *inter alia*, that the judge had been wrong to refuse to order disclosure. Dismissing the appeal on 18 July 1996, the Court of Appeal, having itself examined the undisclosed evidence, observed that "each one of us reached the clearest possible view that nothing in the documents withheld could possibly have assisted the defence at trial; indeed quite the reverse".

B. Michael Lewis

23. The second applicant was born in 1953 and lives in Tonbridge. Prior to the events in question, he had been of good character and employed as accounts director in a firm which had gone into liquidation a year earlier. At the time of his arrest in July 1995, he was unemployed and in considerable debt.

24. The applicant's version of events, which he maintained from the time of his first interview with the police, was that he had been introduced to a man named "Terry" by an acquaintance, Colin Phelps, since Terry appeared interested in purchasing from the applicant some bankrupt stock. At a meeting in July 1995, Terry had started talking about counterfeit currency and had pressed the applicant to obtain some as part of the transaction. Although the applicant had never hitherto been involved with counterfeit currency, he did have a contact, "John", who was able to supply forged banknotes.

25. Terry went on to introduce the applicant to two men called "Jag" and "Jazz". At a third meeting on 14 July 1995, Jag turned up with "Chris", who

was subsequently revealed to be an undercover police officer, and an order for a large amount of currency was placed. It appears from the transcript of covert tape recordings made during this meeting that, while the applicant was not unwilling to become involved, he was actively encouraged to do so by Jag and Chris, who put a certain amount of pressure on him to supply more notes of a higher denomination than had at first been agreed. On 25 July 1995 the applicant met Chris and another undercover officer, "Ian", in a public house car park. He showed them some counterfeit notes, and was immediately arrested by uniformed officers. More counterfeit notes were found when his house was searched.

26. The applicant maintained that he had been entrapped by undercover police officers and/or participating informers into committing the offences. On 11 November 1996 he applied to the Crown Court judge for an order that the indictment should be stayed on the grounds that, as a result of the covert activities of undercover police officers and/or participating informers, (a) it was not possible for him to have a fair trial and (b) the moral integrity of the criminal proceedings had been impaired. He also requested the judge to order the prosecution to provide more information and documents, including information relating to the question whether Colin Phelps, Terry or "Tel", Jazz or Jag were participating informers or undercover police officers.

27. Prior to making his ruling on the defence application, the judge heard, *ex parte*, an application by the prosecution to withhold certain material evidence on grounds of public interest immunity. The judge refused to grant a stay or to order further disclosure, indicating that most of the information sought was subject to public interest immunity. He also ruled that, while it was clear that Chris had been coaxing the applicant, there was no evidence of pressure having been applied.

28. A second submission was then made on the applicant's behalf to exclude the evidence of undercover police officers under section 78 of PACE. However, before evidence was called from the officers in question – Chris and Ian –defence counsel sought guidance from the judge as to the areas of cross-examination which would or would not be allowed, given that certain issues relating to the investigation were covered by public interest immunity. It became apparent that most of the areas of cross-examination necessary to develop the submission were not to be allowed. Accordingly, the submission was withdrawn and the applicant entered guilty pleas to the indictment on 12 November 1996.

29. On 20 November 1996 he was sentenced to a total of four and a half years' imprisonment.

30. On 28 November 1996 counsel advised that the applicant had no prospects of success in appealing against conviction, since he would have to demonstrate that the convictions were unsafe before an appeal could succeed. This would be impossible given that, on his own account, he had

been motivated by money to enter into the deal to sell counterfeit currency. Counsel also expressed the view that:

> "Had there been anything within the [public interest immunity] material which could have assisted the Defendant in developing his case to exclude the evidence under s.78 PACE I am confident the Judge would have released it. In those circumstances, I advise that there are no grounds of appeal against conviction."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Entrapment under English law

31. The fact that a defendant would not have committed an offence were it not for the activity of an undercover police officer or an informer acting on police instructions does not provide a defence under English law. The judge does, however, have a discretion to order a stay of a prosecution where it appears that entrapment has occurred, as the House of Lords affirmed in *R. v. Looseley; Attorney-General's Reference (no. 3 of 2000)* ([2001] United Kingdom House of Lords Decisions 53), a judgment which followed and approved earlier case-law, including case-law which applied at the time of the applicants' trials (for example, the judgment of the House of Lords in *R. v. Latif* [1996] 1 Weekly Law Reports 104).

In *Looseley*, Lord Nicholls of Birkenhead explained (§ 1):

> "My Lords, every court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law. By recourse to this principle courts ensure that executive agents of the State do not misuse the coercive, law-enforcement functions of the courts and thereby oppress citizens of the State. Entrapment ... is an instance where such misuse may occur. It is simply not acceptable that the State through its agents should lure its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so. That would be entrapment. That would be a misuse of State power, and an abuse of the process of the courts. The unattractive consequences, frightening and sinister in extreme cases, which State conduct of this nature could have are obvious. The role of the courts is to stand between the State and its citizens and make sure this does not happen."

32. In addition, the court has a discretion, under section 78 of the Police and Criminal Evidence Act 1984, to exclude evidence obtained by an undercover police officer where, *inter alia*, the defendant would not have committed the offence without police incitement (see *R. v. Smurthwaite; R. v. Gill* (1994) 98 Criminal Appeal Reports 437, judgment of the Court of Appeal; and *Looseley*, cited above). Of the two remedies, the grant of a stay, rather than the exclusion of evidence, is the more appropriate remedy because a prosecution founded on entrapment is an abuse of the court's process and should not have been brought in the first place.

33. In *Looseley*, the House of Lords agreed that it was not possible to set out a comprehensive definition of unacceptable police conduct or "State-created crime". In each case it was for the judge, having regard to all the circumstances, to decide whether the conduct of the police or other law-enforcement agency was so seriously improper as to bring the administration of justice into question. Factors to be taken into account included the nature of the offence, the reason for the particular police operation, the possibility of using other methods of detection and the nature and extent of police participation in the crime; the greater the inducement offered by the police, and the more forceful and persistent the police overtures, the more readily a court might conclude that the police had overstepped the boundary, since their conduct might well have brought about the commission of a crime by a person who would normally avoid crime of that kind. The police should act in good faith to uncover evidence of criminal acts which they reasonably suspected the accused was about to commit or was already engaged in committing, and the police operation should be properly supervised. The defendant's criminal record was unlikely to be relevant unless it could be linked to other factors grounding reasonable suspicion that he or she had been engaged in the criminal activity in question prior to the involvement of the police (per Lord Nicholls, §§ 26-29; Lord Hoffmann, §§ 50-71).

B. Disclosure of evidence by the prosecution

34. At common law, the prosecution has a duty to disclose any material which has or might have some bearing on the offence charged. This duty extends to any earlier written or oral statement of a prosecution witness which is inconsistent with evidence given by that witness at the trial and statements of any witnesses potentially favourable to the defence.

35. In December 1981 the Attorney-General issued guidelines, which did not have force of law, concerning exceptions to the common-law duty to disclose to the defence evidence of potential assistance to it ((1982) 74 Criminal Appeal Reports 302 – "the Guidelines")). According to the Guidelines, the duty to disclose was subject to a discretionary power for prosecuting counsel to withhold relevant evidence if it fell within one of the categories set out in paragraph 6. One of these categories (6(iv)) was "sensitive" material which, because of its sensitivity, it would not be in the public interest to disclose. "Sensitive material" was defined as follows:

> "... (a) it deals with matters of national security; or it is by, or discloses the identity of, a member of the Security Services who would be of no further use to those services once his identity became known; (b) it is by, or discloses the identity of, an informant and there are reasons for fearing that the disclosure of his identity would put him or his family in danger; (c) it is by, or discloses the identity of, a witness who might be in danger of assault or intimidation if his identity became known; (d) it contains details which, if they became known, might facilitate the commission of other offences or

alert someone not in custody that he is a suspect; or it discloses some unusual form of surveillance or method of detecting crime; (e) it is supplied only on condition that the contents will not be disclosed, at least until a subpoena has been served upon the supplier – e.g. a bank official; (f) it relates to other offences by, or serious allegations against, someone who is not an accused, or discloses previous convictions or other matters prejudicial to him; (g) it contains details of private delicacy to the maker and/or might create risk of domestic strife."

36. In *R. v. Ward* ([1993] 1 Weekly Law Reports 619), the Court of Appeal stressed that the court and not the prosecution was to decide whether or not relevant evidence should be retained on grounds of public interest immunity. It explained that "... a judge is balancing on the one hand the desirability of preserving the public interest in the absence of disclosure against, on the other hand, the interests of justice. Where the interests of justice arise in a criminal case touching and concerning liberty or conceivably on occasion life, the weight to be attached to the interests of justice is plainly very great indeed".

37. In *R. v. Davis, Johnson and Rowe* ([1993] 1 Weekly Law Reports 613), the Court of Appeal held that it was not necessary in every case for the prosecution to give notice to the defence when it wished to claim public interest immunity, and outlined three different procedures to be adopted. The first procedure, which had generally to be followed, was for the prosecution to give notice to the defence that they were applying for a ruling by the court and indicate to the defence at least the category of the material which they held. The defence would then have the opportunity to make representations to the court. Secondly, however, where the disclosure of the category of the material in question would in effect reveal that which the prosecution contended should not be revealed, the prosecution should still notify the defence that an application to the court was to be made, but the category of the material need not be disclosed and the application should be *ex parte*. The third procedure would apply in an exceptional case where to reveal even the fact that an *ex parte* application was to be made would in effect be to reveal the nature of the evidence in question. In such cases the prosecution should apply to the court *ex parte* without notice to the defence.

38. The Court of Appeal observed that although *ex parte* applications limited the rights of the defence, in some cases the only alternative would be to require the prosecution to choose between following an *inter partes* procedure or declining to prosecute, and in rare but serious cases the abandonment of a prosecution in order to protect sensitive evidence would be contrary to the public interest. It referred to the important role performed by the trial judge in monitoring the views of the prosecution as to the proper balance to be struck and remarked that, even in cases in which the sensitivity of the information required an *ex parte* hearing, the defence had "as much protection as can be given without pre-empting the issue". Finally, it emphasised that it was for the trial judge to continue to monitor the position as the trial progressed. Issues might emerge during the trial which

affected the balance and required disclosure "in the interests of securing fairness to the defendant". For this reason it was important for the same judge who heard any disclosure application also to conduct the trial.

39. The leading case on disclosure at the time of the applicants' trials was the judgment of the Court of Appeal in *R. v. Keane* ([1994] 1 Weekly Law Reports 746). The Lord Chief Justice, giving the judgment of the court, held that the prosecution should put before the judge only those documents which it regarded as material but wished to withhold on grounds of public interest immunity. "Material" evidence was defined as evidence which could be seen, "on a sensible appraisal by the prosecution: (1) to be relevant or possibly relevant to an issue in the case; (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence which the prosecution proposes to use; (3) to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2)".

40. Once the judge was seized of the material, he or she had to perform the balancing exercise between the public interest in non-disclosure and the importance of the documents to the issues of interest, or likely to be of interest, to the accused. If the disputed material might prove the defendant's innocence or avoid a miscarriage of justice, the balance came down firmly in favour of disclosing it. Where, on the other hand, the material in question would not be of assistance to the accused, but would in fact assist the prosecution, the balance was likely to be in favour of non-disclosure.

41. In the case of *R. v. Turner* ([1995] 1 Weekly Law Reports 264), the Court of Appeal returned to the balancing exercise, stating, *inter alia*:

> "Since *R. v. Ward* ... there has been an increasing tendency for defendants to seek disclosure of informants' names and roles, alleging that those details are essential to the defence. Defences that the accused has been set up, and allegations of duress, which used at one time to be rare, have multiplied. We wish to alert judges to the need to scrutinise applications for disclosure of details about informants with very great care. They will need to be astute to see that assertions of a need to know such details, because they are essential to the running of the defence, are justified. If they are not so justified, then the judge will need to adopt a robust approach in declining to order disclosure. Clearly, there is a distinction between cases in which the circumstances raise no reasonable possibility that information about the informant will bear upon the issues and cases where it will. Again, there will be cases where the informant is an informant and no more; other cases where he may have participated in the events constituting, surrounding, or following the crime. Even when the informant has participated, the judge will need to consider whether his role so impinges on an issue of interest to the defence, present or potential, as to make disclosure necessary ..."

42. The requirements of disclosure have since been set out in a statutory scheme. Under the Criminal Procedure and Investigations Act 1996 (CIPA), which came into force in England and Wales immediately upon gaining Royal Assent on 4 July 1996, the prosecution must make "primary disclosure" of all previously undisclosed evidence which, in the prosecutor's view, might undermine the case for the prosecution. The defendant must then give a defence statement to the prosecution and the

court, setting out in general terms the nature of the defence and the matters on which the defence takes issue with the prosecution. The prosecution must then make a "secondary disclosure" of all previously undisclosed material "which might reasonably be expected to assist the accused's defence as disclosed by the defence statement". Disclosure by the prosecution may be subject to challenge by the accused and review by the trial court.

C. "Special Counsel"

43. Following the judgments of the European Court of Human Rights in *Chahal v. the United Kingdom* (15 November 1996, *Reports of Judgments and Decisions* 1996-V) and *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom* (10 July 1998, *Reports* 1998-IV), the United Kingdom introduced legislation making provision for the appointment of a "special counsel" in certain cases involving national security. The provisions are contained in the Special Immigration Appeals Commission Act 1997 ("the 1997 Act") and the Northern Ireland Act 1998 ("the 1998 Act"). Under this legislation, where it is necessary on national security grounds for the relevant tribunal to sit in camera, in the absence of the affected individual and his or her legal representatives, the Attorney-General may appoint a special counsel to represent the interests of the individual in the proceedings. The legislation provides that the special counsel is not however "responsible to the person whose interest he is appointed to represent", thus ensuring that the special counsel is both entitled and obliged to keep confidential any information which cannot be disclosed. The relevant rules giving effect to the 1997 and 1998 Acts are set out in the Court's judgment in *Jasper v. the United Kingdom* ([GC], no. 27052/95, § 36, 16 February 2000).

44. In December 1999 the government commissioned a comprehensive review of the criminal justice system, under the chairmanship of a senior Court of Appeal judge, Sir Robin Auld. The report, published in September 2001 after extensive consultation and entitled "The Review of the Criminal Courts in England and Wales" ("the Auld Report"), recommended, *inter alia*, the introduction of a "special counsel" scheme in cases where the prosecution wished to seek, *ex parte*, non-disclosure on grounds of public interest immunity. The recommendation was explained in the Auld Report as follows (footnotes omitted):

> "193. The scheme [developed by the common law since *R. v. Ward* and reflected in the Criminal Procedure and Investigations Act 1996: see above] is an improvement on what went before and has been generally welcomed on that account. But there is widespread concern in the legal professions about lack of representation of the defendant's interest in the [*ex parte*] forms of application, and anecdotal and reported instances of resultant unfairness to the defence. ... A suggestion, argued on behalf of applicants in Strasbourg and widely supported in the Review, is that the exclusion of

the defendant from the procedure should be counterbalanced by the introduction of a 'special independent counsel'. He would represent the interest of the defendant at first instance and, where necessary, on appeal on a number of issues: first, as to the relevance of the undisclosed material if and to the extent that it has not already been resolved in favour of disclosure but for a public interest immunity claim; second, on the strength of the claim to public interest immunity; third, on how helpful the material might be to the defence; and fourth, generally to safeguard against the risk of judicial error or bias.

194. In my view, there is much to be said for such a proposal, regardless of the vulnerability or otherwise of the present procedures to Article 6. Tim Owen QC, in a paper prepared for the Review, has argued powerfully in favour of it. It would restore some adversarial testing of the issues presently absent in the determination of these often critical and finely balanced applications. It should not be generally necessary for special counsel to be present throughout the trial. Mostly the matter should be capable of resolution by the court before trial and, if any question about it arises during trial, he could be asked to return. If, because of the great number of public interest immunity issues now being taken in the courts, the instruction of special counsel for each would be costly, it simply indicates, as Owen has commented, the scale of the problem and is not an argument against securing a fair solution.

195. The role would be similar to that of an *amicus curiae* brought in to give independent assistance to a court, albeit mostly on appeal. In rape cases, where an unrepresented defendant seeks to cross-examine a complainant, the court must inform him that he may not do so, and should he refuse to instruct counsel, the court will appoint and instruct one. After the decisions of the European Court of Human Rights in *Chahal* and *Tinnelly*, the government introduced such a procedure in immigration cases involving national security. Although such cases are extremely rare, it is sufficient that the principle of a 'third' or 'special' counsel being instructed on behalf of a defendant has been conceded in a number of areas.

196. The introduction of a system of special independent counsel could, as Owen has also noted, in part fill a lacuna in the law as to public interest immunity hearings in the absence of a defendant appellant in the Court of Appeal, to which the 1996 Act and supporting Rules do not apply. Where there has been a breach of Article 6 because a trial judge did not conduct a public interest immunity hearing due to the emergence of the material only after conviction, the European Court of Human Rights has held that the breach cannot be cured by a hearing before the Court of Appeal in the absence of the appellant. The Court's reasons for so holding were that the appeals court is confined to examining the effect of non-disclosure on the trial *ex post facto* and could possibly be unconsciously influenced by the jury's verdict into underestimating the significance of the undisclosed material.

197. However, even the introduction of special counsel to such hearings would not solve the root problem to which I have referred of police failure, whether out of incompetence or dishonesty, to indicate to the prosecutor the existence of critical information. Unless, as I have recommended, the police significantly improve their performance in that basic exercise, there will be no solid foundation for whatever following safeguards are introduced into the system.

I recommend the introduction of a scheme for instruction by the court of special independent counsel to represent the interests of the defendant in those cases at first

instance and on appeal where the court now considers prosecution applications in the absence of the defence in respect of the non-disclosure of sensitive material."

45. In *R. v. H.; R. v. C.* [2004] United Kingdom House of Lords Decisions 3, decided on 5 February 2004 after the Chamber judgment in the present case, the Judicial Committee of the House of Lords held, *inter alia*:

"The years since the decision in *R. v. Davis* [see paragraph 37 above] and the enactment of the CIPA [see paragraph 42 above] have witnessed the introduction in some areas of the law of a novel procedure designed to protect the interests of a party against whom an adverse order may be made and who cannot (either personally or through his legal representative), for security reasons, be fully informed of all the material relied on against him. The procedure is to appoint a person, usually called a 'special advocate', who may not disclose to the subject of the proceedings the secret material disclosed to him, and is not in the ordinary sense professionally responsible to that party but who, subject to those constraints, is charged to represent that party's interests. ...

There is as yet little express sanction in domestic legislation or domestic legal authority for the appointment of a special advocate or special counsel to represent, as an advocate in PII [public interest immunity from disclosure] matters, a defendant in an ordinary criminal trial ... But novelty is not of itself an objection, and cases will arise in which the appointment of an approved advocate as special counsel is necessary, in the interests of justice, to secure protection of a criminal defendant's right to a fair trial. Such an appointment does however raise ethical problems, since a lawyer who cannot take full instructions from his client, nor report to his client, who is not responsible to his client and whose relationship with the client lacks the quality of confidence inherent in any ordinary lawyer-client relationship, is acting in a way hitherto unknown to the legal profession. While not insuperable, these problems should not be ignored, since neither the defendant nor the public will be fully aware of what is being done. The appointment is also likely to cause practical problems: of delay, while the special counsel familiarises himself with the detail of what is likely to be a complex case; of expense, since the introduction of an additional, high-quality advocate must add significantly to the cost of the case; and of continuing review, since it will not be easy for a special counsel to assist the court in its continuing duty to review disclosure, unless the special counsel is present throughout or is instructed from time to time when need arises. Defendants facing serious charges frequently have little inclination to cooperate in a process likely to culminate in their conviction, and any new procedure can offer opportunities capable of exploitation to obstruct and delay. None of these problems should deter the court from appointing special counsel where the interests of justice are shown to require it. But the need must be shown. Such an appointment will always be exceptional, never automatic; a course of last and never first resort. It should not be ordered unless and until the trial judge is satisfied that no other course will adequately meet the overriding requirement of fairness to the defendant. ..."

THE LAW

I. THE FINDINGS OF THE CHAMBER

46. The "Law" part of the Chamber's judgment of 22 July 2003 stated as follows (original paragraph numbering omitted):

"I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

The applicants complained that they had been deprived of fair trials, contrary to Article 6 § 1 of the Convention, which provides:

> 'In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...'

A. The parties' submissions

1. The Government

The Government contended that the applicants had been given fair trials. They submitted that the principle set out by the Court in *Teixeira de Castro v. Portugal* (judgment of 9 June 1998, *Reports* 1998-IV) had been respected, in that there was no material to suggest that either applicant had been incited or procured by police officers or others on their behalf to commit an offence which he would not otherwise have committed. This was the conclusion reached by the trial judge in each case, who had considered the public interest immunity material and ruled that, since there was nothing in it that would assist the defence, it should not be disclosed.

They pointed out that, in the first applicant's case, not only the trial judge but also the Court of Appeal had examined the undisclosed evidence and held that Mr Edwards had not been disadvantaged as a result of the non-disclosure. The information placed before the trial judge and the Court of Appeal in the *ex parte* procedures suggested that the first applicant had already been engaged in the supply of heroin at the time of the undercover operation. The Government submitted that, according to the evidence given by 'Graham' at the first applicant's trial, the first applicant had voluntarily, actively and knowingly involved himself in the supply of drugs.

The Government further contended that the *ex parte* procedure followed by the domestic courts in respect of both the first and second applicants afforded adequate safeguards to the defence, and that the present case was indistinguishable from *Jasper* [cited in paragraph 43 above], where the Court had found no violation of Article 6 § 1. In particular, the Government emphasised that in each of the instant cases the trial judge, who was under a duty to order disclosure if the material in question assisted the defence, had examined the evidence having heard the submissions of defence counsel and with knowledge of the defence case on entrapment.

2. The applicants

The applicants submitted that it was impossible for them to establish, on the available evidence, whether or not the involvement of *agents provocateurs* in the offences they had committed rendered the proceedings against them unfair. Evidence on this point had been withheld from the defence on grounds of public interest immunity.

They considered that the domestic proceedings were fundamentally unfair because the trial judge, who had to decide the question of fact as to whether the accused had been the victim of entrapment and abuse of process, also had to review the material for which the prosecution claimed public interest immunity, in the absence of any representative of the defendant and without any adversarial process. The present case could be distinguished from *Jasper*, cited above, because, in a case such as *Jasper* where no issue of entrapment arose, the separation of function between judge and jury ensured that neither side could rely on the undisclosed evidence and therefore that equality of arms was maintained. The tribunal of fact saw nothing which the accused and his lawyers were not permitted to see, and the judge was under a duty to order disclosure if the material in question was likely to assist the defence (see *R. v. Keane*, [paragraph 39] above). In the present case, it appeared that the undisclosed material was positively damaging to the accused's allegations of entrapment, which he had the burden of proving and which the judge had to decide, but the defence remained ignorant of the nature or content of the evidence placed before the judge and was unable to challenge it.

The applicants pointed out that the Auld Report [see paragraph 44 above] constituted recognition by a respected member of the senior judiciary, following wide consultation, that the present *ex parte* system was unfair and that the practical obstacles to the introduction of a 'special counsel' to ensure some adversarial testing of the issues could reasonably be overcome.

B. The Court's view

The applicants claim to have been victims of entrapment. The Court reiterates that, although the admissibility of evidence is primarily a matter for regulation by national law, the requirements of a fair criminal trial under Article 6 entail that the public interest in the fight against crime cannot justify the use of evidence obtained as a result of police incitement (see *Teixeira de Castro*, cited above, pp. 1462-63, §§ 34-36). In *Teixeira de Castro* the Court found that the activities of the two police officers had gone beyond that of undercover agents, in that they had not 'confined themselves to investigating the applicant's criminal activity in an essentially passive manner', but had 'exercised an influence such as to incite the commission of the offence'. Their actions had 'gone beyond those of undercover agents because they [had] instigated the offence and there [was] nothing to suggest that without their intervention it would have been committed' (ibid., pp. 1463-64, § 38-39).

In arriving at this conclusion the Court laid stress on a number of features of the case before it, particularly the facts that the intervention of the two officers had not been part of a judicially supervised operation and that the national authorities had had no good reason to suspect the applicant of prior involvement in drug trafficking: he had no criminal record and there was nothing to suggest that he had a predisposition to

become involved in drug dealing until he was approached by the police (ibid., p.1463, §§ 37-38).

Under English law, although entrapment does not constitute a substantive defence to a criminal charge, it does place the judge under a duty either to stay the proceedings as an abuse of process or to exclude any evidence obtained by entrapment on the ground that its admission would have such an adverse effect on the fairness of the proceedings that the court could not admit it (see *R. v. Looseley*, [cited in paragraph 31 above], and the earlier case-law referred to therein).

As the applicants point out, it is impossible for this Court to determine whether or not either applicant was the victim of entrapment, contrary to Article 6, because the relevant information has not been disclosed by the prosecuting authorities. It is, therefore, essential that the Court examine the procedure whereby the plea of entrapment was determined in each case, to ensure that the rights of the defence were adequately protected (see, *mutatis mutandis*, *Jasper*, cited above, § 53).

It is in any event a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (ibid., § 51). In addition, Article 6 § 1 requires that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused (ibid.).

The entitlement to disclosure of relevant evidence is not, however, an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. Nonetheless, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1. Furthermore, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (ibid., § 52).

In cases where evidence has been withheld from the defence on public interest grounds, it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them. In any event, in many cases, including the present, where the evidence in question has never been revealed, it would not be possible for the Court to attempt to weigh the public interest in non-disclosure against that of the accused in having sight of the material. It must therefore scrutinise the decision-making procedure to ensure that, as far as possible, the procedure complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused (ibid., § 53).

In *Jasper*, the Court examined the procedure set out by the Court of Appeal in *Davis, Johnson and Rowe* [see paragraph 37 above], whereby evidence which is too sensitive to be safely revealed to the defence is examined *ex parte* by the trial judge.

The Court found that the fact that it was the trial judge, with full knowledge of the issues in the trial, who carried out the balancing exercise between the public interest in maintaining the confidentiality of the evidence and the need of the defendant to have it revealed, was sufficient to comply with Article 6 § 1. It was satisfied that the defence were kept informed and permitted to make submissions and participate in the decision-making process as far as was possible without disclosing to them the material which the prosecution sought to keep secret on public interest grounds (see *Jasper*, §§ 55-56).

Under the English system of trial by jury, it is the jury which decides upon the guilt or innocence of the accused. The Court considered it relevant, in finding no violation in *Jasper*, that the material which was withheld from the defence and which was found by the trial judge to be subject to public interest immunity formed no part of the prosecution case whatsoever, and was never put to the jury (ibid., § 55).

In the present case, however, it appears that the undisclosed evidence related, or may have related, to an issue of fact decided by the trial judge. Each applicant complained that he had been entrapped into committing the offence by one or more undercover police officers or informers, and asked the trial judge to consider whether prosecution evidence should be excluded for that reason. In order to conclude whether or not the accused had indeed been the victim of improper incitement by the police, it was necessary for the trial judge to examine a number of factors, including the reason for the police operation, the nature and extent of police participation in the crime and the nature of any inducement or pressure applied by the police ... Had the defence been able to persuade the judge that the police had acted improperly, the prosecution would, in effect, have had to be discontinued. The applications in question were, therefore, of determinative importance to the applicants' trials, and the public interest immunity evidence may have related to facts connected with those applications.

Despite this, the applicants were denied access to the evidence. It was not, therefore, possible for the defence representatives to argue the case on entrapment in full before the judge. Moreover, in each case the judge, who subsequently rejected the defence submissions on entrapment, had already seen prosecution evidence which may have been relevant to the issue. For example, in Mr Edwards' case, the Government revealed before the European Court that the evidence produced to the trial judge and Court of Appeal in the *ex parte* hearings included material suggesting that Mr Edwards had been involved in drug dealing prior to the events which led to his arrest and prosecution. During the course of the criminal proceedings, the applicant and his representatives were not informed of the content of the undisclosed evidence and were thus denied the opportunity to counter this allegation, which might have been directly relevant to the judges' conclusions that the applicant had not been charged with a 'State-created crime' [see paragraph 33 above]. In Mr Lewis' case, the nature of the undisclosed material has not been revealed, but it is possible that it was also damaging to the applicant's submissions on entrapment. Under English law, where public interest immunity evidence is not likely to be of assistance to the accused, but would in fact assist the prosecution, the trial judge is likely to find the balance to weigh in favour of non-disclosure (see *R. v. Keane*, [paragraph 39] above).

In these circumstances, the Court does not consider that the procedure employed to determine the issues of disclosure of evidence and entrapment complied with the requirements to provide adversarial proceedings and equality of arms or incorporated adequate safeguards to protect the interests of the accused. It follows that there has been a violation of Article 6 § 1 of the Convention in this case.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

Article 41 of the Convention provides:

> 'If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.'

A. Damage

The applicants claimed 4,000 pounds sterling (GBP) each for non-pecuniary damage. They pointed out that in *Teixeira de Castro* (cited above), the Court had awarded compensation for pecuniary and non-pecuniary damage on the ground that the applicant's detention had resulted directly from the use of evidence obtained by *agents provocateurs* in breach of Article 6 § 1 of the Convention. Although the present applicants were unable to prove that their detention resulted similarly from unlawful entrapment, their inability to establish this link resulted directly from the breach of Article 6. Their cases were distinguishable from *Rowe and Davis v. the United Kingdom* ([GC], no. 28901/95, ECHR 2000-II), where the Court awarded no damages, because in *Rowe and Davis* the undisclosed evidence formed no part of the prosecution case against the applicants, whereas in the present case it formed part of the material on which the judges decided not to stay the prosecutions. There was, therefore, a direct causal link between the violations claimed and the anxiety, frustration, distress and feelings of injustice and exclusion the applicants suffered because of their inability fully to participate in criminal proceedings which were likely to, and did, yield lengthy periods of detention.

The Government resisted the applicants' claims. They submitted that the applicants' position was quite different from that in *Teixeira de Castro*, where the Court had found that the applicant had been subject to a term of imprisonment which would not have been imposed but for the actions of the police officers who had incited the offence. In the present case, the applicants were, in effect, inviting the Court to speculate as to whether the outcome of the trial might have been different had a different procedure been followed in the Crown Court.

It is well established that the principle underlying the provision of just satisfaction for a breach of Article 6 is that the applicant should as far as possible be put in the position he would have enjoyed had the proceedings complied with the Convention's requirements. The Court will award pecuniary compensation under Article 41 only where it is satisfied that the loss or damage complained of was actually caused by the violation it has found, since the State cannot be required to pay damages in respect of losses for which it is not responsible (see *Kingsley v. the United Kingdom*, no. 35605/97, § 40, 7 November 2000). The finding of a violation of Article 6 § 1 in the present case does not entail that the applicants were wrongly convicted and the Court does not consider it appropriate to award pecuniary compensation to them in respect of loss of procedural opportunity or any distress, loss or damage allegedly caused thereby (see, *mutatis mutandis*, *Rowe and Davis*, § 70, and *Kingsley*, § 43, both cited above).

The Court considers that the finding of a violation constitutes sufficient just satisfaction in this case. It therefore rejects the applicants' claim in respect of non-pecuniary damage.

B. Costs and expenses

Each applicant claimed a total of GBP 23,268.23 in respect of the costs of the application to the Court. This included solicitors' costs of GBP 14,128.20 per applicant and counsels' fees of GBP 7,694.67 per applicant (all figures are inclusive of value-added tax – VAT).

The Government considered that it had been unreasonable to instruct two senior solicitors, and moreover commented that an hourly rate of GBP 180 was excessive for a firm outside London. Similarly, they took the view that it had been unnecessary for both senior and junior counsel to work on the case since the Government themselves had employed only one barrister. In their view, solicitors' fees of GBP 7,000, including VAT, and counsel's fees of GBP 4,000, again including VAT, would have been more reasonable, bringing the total for each applicant to GBP 11,000.

The Court notes that the applicants were represented jointly by the same solicitors and counsel. It considers that 44,000 euros (EUR) (22,000 per applicant) would be a reasonable amount for costs in this case. It therefore awards EUR 44,000, plus any tax that may be chargeable.

C. Default interest

The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points."

II. THE GRAND CHAMBER'S CONCLUSIONS

A. Alleged violation of Article 6 § 1 of the Convention

47. As noted in paragraph 9 above, the Government, which requested the referral of this case to the Grand Chamber, no longer wish to pursue the referral and confirm that they are content for the Grand Chamber simply to endorse the judgment of the Chamber of 22 July 2003. The applicants accept the Chamber's judgment and do not object to the procedure proposed by the Government.

48. Having examined the issues raised by the case in the light of the Chamber's judgment, the Grand Chamber sees no reason to depart from the Chamber's findings. It therefore concludes that there has been a violation of Article 6 § 1 of the Convention, for the reasons elaborated by the Chamber.

B. Application of Article 41 of the Convention

49. The Grand Chamber further endorses the Chamber's conclusion under Article 41 of the Convention: thus, it decides that the finding of a violation constitutes sufficient just satisfaction for any non-pecuniary

damage suffered by the applicants and it awards a total of EUR 44,000 (together with any tax that may be chargeable) in respect of the two applicants' costs and expenses before the Chamber.

50. The applicants submitted additional claims for outstanding costs and expenses incurred between December 2002 and June 2004. The first applicant's claim included GBP 3,054 for solicitors' costs (plus VAT) and GBP 6,063.69 for counsel's fees (of which only GBP 825 plus VAT was incurred after the delivery of the Chamber's judgment); and the second applicant's claim included GBP 3,126 for solicitors' costs (plus VAT) and GBP 5,375.63 for counsel's fees (of which, again, only GBP 825 plus VAT was incurred after the delivery of the Chamber's judgment).

51. The Government repeated the comments they had made to the Chamber, that it had been unnecessary for two senior solicitors to handle the case and to charge as much as GBP 180 per hour. Counsel's fees were disproportionately high and, as regards work undertaken prior to the Chamber's judgment of 22 July 2003, no increase should be made to the sum awarded by the Chamber.

52. As previously mentioned, the Grand Chamber endorses the Chamber's award of costs and expenses arising prior to its judgment of 22 July 2003, and makes no further award in respect of costs incurred before that date. As regards the claims for costs generated since then, it notes that both applicants were represented by the same solicitors and counsel, and that, as a result of the Government's decision not to pursue its referral request, the proceedings before the Grand Chamber have not been extensive. It awards a total of EUR 3,000 under this head, together with any tax that may be chargeable.

53. Finally, the Grand Chamber considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

2. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants;

3. *Holds*

   (a) that the respondent State is to pay the applicants, within three months, a total of EUR 47,000 (forty-seven thousand euros) in respect of costs and expenses, to be converted into pounds sterling at the rate applicable at the date of settlement, plus any tax that may be chargeable;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English and in French, and notified in writing on 27 October 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Luzius WILDHABER
President

Paul MAHONEY
Registrar