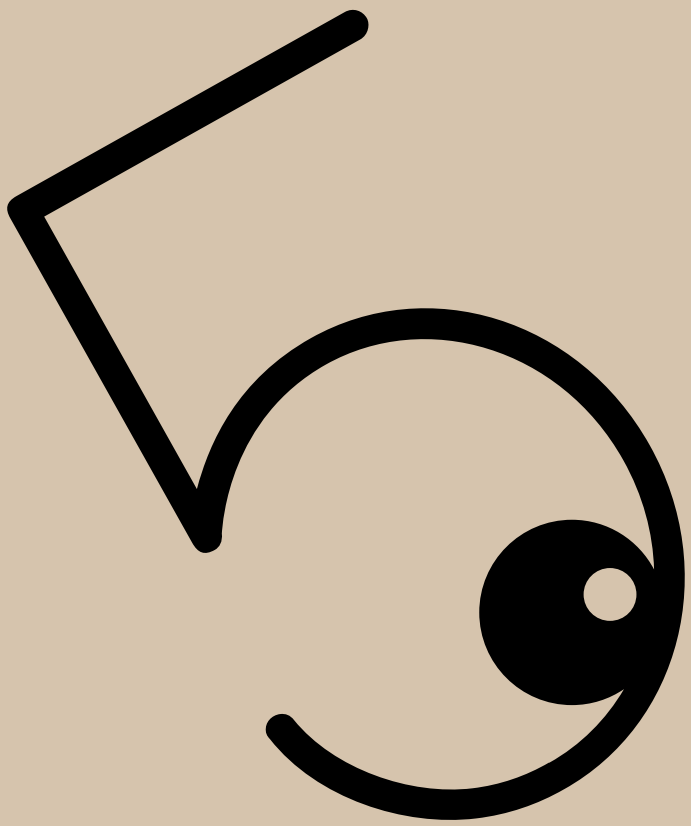
PRIVACY INTERNATIONAL

Eyes Wide Open

Special Report



Executive Summary

The recent revelations, made possible by NSA-whistleblower Edward Snowden, of the reach and scope of global surveillance practices have prompted a fundamental re-examination of the role of intelligence services in conducting coordinated cross-border surveillance.

The Five Eyes alliance of States – comprised of the United States National Security Agency (NSA), the United Kingdom's Government Communications Headquarters (GCHQ), Canada's Communications Security Establishment Canada (CSEC), the Australian Signals Directorate (ASD), and New Zealand's Government Communications Security Bureau (GCSB) – is the continuation of an intelligence partnership formed in the aftermath of the Second World War. Today, the Five Eyes has infiltrated every aspect of modern global communications systems.

The world has changed dramatically since the 1940s; then, private documents were stored in filing cabinets under lock and key, and months could pass without one having the need or luxury of making an international phone call. Now, private documents are stored in unknown data centers around the world, international communications are conducted daily, and our lives are lived – ideas exchanged, financial transactions conducted, intimate moments shared – online.

The drastic changes to how we use technology to communicate have not gone unnoticed by the Five Eyes alliance. A leaked NSA strategy document, shared amongst Five Eyes partners, exposes the clear interest that intelligence agencies have in collecting and analyzing signals intelligence (SIGINT) in the digital age:

> "Digital information created since 2006 grew tenfold, reaching 1.8 exabytes in 2011, a trend projected to continue; ubiquitous computing is fundamentally changing how people interact as individuals become untethered from information sources and their communications tools; and the traces individuals leave when they interact with the global network will define the capacity to locate, characterize and understand entities."[1]

Contrary to the complaints of the NSA and other Five Eyes agencies that they are 'going dark' and losing the visibility they once had, the Five Eyes intelligence agencies are in fact the most powerful they've ever been. Operating in the shadows and misleading the public, the agencies boast in secret how they "have adapted in innovative and creative ways that have led some to describe the current day as 'the golden age of SIGINT'."

The agencies are playing a dirty game; not content with following the already permissive legal processes under which they operate, they've found ways to infiltrate all aspects of

[1] NSA SIGINT Strategy, 23 February 2012, available at: http://www.nytimes.com/interactive/2013/11/23/us/politics/23nsa-sigint-strategy-document.html?ref=politics&gwh=5E154810A5FB56B3E9AF98DF667AE3C8

modern communications networks. Forcing companies to handover their customers' data under secret orders, and secretly tapping fibre optic cables between the same companies' data centers anyway. Accessing sensitive financial data through SWIFT, the world's financial messaging system, spending years negotiating an international agreement to regulate access to the data through a democratic and accountable process, and then hacking the networks to get direct access. Threatening politicians with trumped up threats of impending cyber-war while operating intrusion operations that weaken the security of networks globally; sabotaging encryption standards and standards bodies thereby undermining the ability of internet users to secure information.

Each of these actions have been justified in secret, on the basis of secret interpretations of international law and classified agreements. By remaining in the shadows, our intelligence agencies – and the governments who control them – have removed our ability to challenge their actions and their impact upon our human rights. We cannot hold our governments accountable when their actions are obfuscated through secret deals and covert legal frameworks. Secret law has never been law, and we cannot allow our intelligence agencies to justify their activities on the basis of it.

We must move towards an understanding of global surveillance practices as fundamentally opposed to the rule of law and to the well-established international human right to privacy. In doing so, we must break down legal frameworks that obscure the activities of the intelligence agencies or that preference the citizens or residents of Five Eyes countries over the global internet population. These governments have carefully constructed legal frameworks that provide differing levels of protections for internal versus external communications, or those relating to nationals versus non-nationals, attempt to circumvent national constitutional or human rights protections governing interferences with the right to privacy of communications.

This notion must be rejected. The Five Eyes agencies are seeking not only defeat the spirit and purpose of international human rights instruments; they are in direct violation of their obligations under such instruments. Human rights obligations apply to all individuals subject to a State's jurisdiction. The obligation to respect privacy extends to the privacy of all communications, so that the physical location of the individual may be in a different jurisdiction to that where the interference with the right occurs.

This paper calls for a renewed understanding of the obligations of Five Eyes States with respect to the right to privacy, and demands that the laws and regulations that enable intelligence gathering and sharing under the Five Eyes alliance be brought into the light.

It begins, in **Chapter One**, by shining a light on the history and structure of the alliance, and draws on information disclosed by whistleblowers and investigative journalists to paint a picture of the alliance as it operates today. In **Chapter Two**, we argue that the laws and regulations around which Five Eyes are constructed are insufficiently clear and accessible to ensure they are in compliance with the rule of law. In **Chapter Three**, we turn to the obligations of Five Eyes States under international human rights law and argue for an "interference-based jurisdiction" whereby Five Eyes States owe a general duty not to interfere with communications that pass through their territorial borders. Through such a conceptualization, we argue, mass surveillance is cognisable within a

human rights framework in a way that provides rights and remedies to affected individuals.

While the existence of the Five Eyes has been kept secret from the public and parliaments, dogged investigative reporting from Duncan Campbell, Nicky Hager, and James Bamford has gone some way to uncovering the extent of the arrangement. Now, thanks to Edward Snowden, the public are able to understand more about the spying that is being done in their name than ever before.

Trust must be restored, and our intelligence agencies must be brought under the rule of law. Transparency around and accountability for these secret agreements is a crucial first step.

Privacy International to grateful is Ben Jaffey, Caspar Bowden, Dan Squires, Duncan Campbell, Eric Metcalfe, Ian Brown, James Bamford, Mark Scott, Marko Milanovic, Mathias Vermeulen, Nicky Hager, Shamik Dutta, for their insight, feedback, discussions, investigation and support. We are grateful to all of the whistleblowers whose responsible disclosures in the public interest have brought transparency to the gross violations of human rights being conducted by the intelligence agencies in our name.

Given the current rapid nature of information disclosures regarding the intelligence agencies, this paper will be regularly updated to reflect the most accurate understanding we have of the nature of the Five Eyes arrangement. Any errors or omission are solely attributable to the authors.

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Chapter 1 – Understanding the Five Eyes

The birth of the Five Eyes alliance

Beginning in 1946, an alliance of five countries (the US, the UK, Australia, Canada and New Zealand) developed a series of bilateral agreements over more than a decade that became known as the UKUSA (pronounced yew-kew-zah) agreement, establishing the Five Eyes alliance for the purpose of sharing intelligence, but primarily signals intelligence (hereafter "SIGINT"). While the existence of the agreement has been noted in history books and references are often made to it as part of reporting on the intelligence agencies, there is little knowledge or understanding outside the services themselves of exactly what the arrangement comprises.

Even within the governments of the respective countries, which the intelligence agencies are meant to serve, there has historically been little appreciation for the extent of the arrangement. The arrangement is so secretive the Australian Prime Minister reportedly wasn't informed of its existence until 1973[2]. Former Prime Minister of New Zealand, David Lange, once remarked that "it was not until I read this book [Nicky Hager's "Secret Power", which detailed GCSB's history] that I had any idea that we had been committed to an international integrated electronic network." He continued: "it is an outrage that I and other ministers were told so little, and this raises the question of to whom those concerned saw themselves ultimately answerable."[3]

There has been no debate around the legitimacy or purpose of the Five Eyes alliance in part due to the lack of publicly available information about it. In 2010, the US and UK declassified numerous documents, including memoranda and draft texts, relating to the creation of the UKUSA agreement. However, generally the Five Eyes States and their intelligence services have been far too slow in declassifying information that no longer needs to be secret, resulting in no mention on any government website of the arrangement until recently.

The intelligence agencies involved in the alliance are the United States National Security Agency (NSA), the United Kingdom's Government Communications Headquarters (GCHQ), Canada's Communications Security Establishment Canada (CSEC), the Australian Signals Directorate (ASD), and New Zealand's Government Communications Security Bureau (GCSB).

The extent of the original arrangement is broad and includes the

(1) collection of traffic;
(2) acquisition of communications documents and equipment;

[2] Canada's role in secret intelligence alliance Five Eyes, CTV News, 8 October 2013, available at: http://knlive.ctvnews.ca/mobile/the-knlive-hub/canada-s-role-in-secret-intelligence-alliance-five-eyes-1.1489170
[3] Secret Power, Nicky Hager, 1996, page 8 available at: http://www.nickyhager.info/Secret_Power.pdf

(3) traffic analysis;
(4) cryptanalysis;
(5) decryption and translation; and
(6) acquisition of information regarding communications organizations, procedures, practices and equipment.

A draft of the original UKUSA agreement, declassified in 2010, explains that the exchange of the above-listed information

> "will be unrestricted on all work undertaken except when specifically excluded from the agreement at the request of either party to limit such exceptions to the absolute minimum and to exercise no restrictions other than those reported and mutually agreed upon."

Indeed, in addition to facilitating collaboration, the agreement suggests that all intercepted material would be shared between Five Eyes States by default. The text stipulates that "all raw traffic shall continue to be exchanged except in cases where one or the other party agrees to forgo its copy."

The working arrangement that was reached in 1953 by UKUSA parties explained that "while Commonwealth countries other than the UK are not party to the UKUSA COMINT agreement, they will not be regarded as Third Parties."[4] Instead "Canada, Australia and New Zealand will be regarded as UKUSA-collaborating Commonwealth countries," also known as Second Parties. One retired senior NATO intelligence officer has suggested "there is no formal over-arching international agreement that governs all Five Eyes intelligence relationships."[5] It is not known how accurate that statement is, or how the agreement has been modified in subsequent years as the text of the Five Eyes agreement in its current form has never been made public.

Today, GCHQ simply states it has "partnerships with a range of allies […] [o]ur collaboration with the USA, known as UKUSA, delivers enormous benefits to both nations."[6] The NSA makes no direct reference to the UKUSA arrangement or the Five Eyes States by name, except by way of historical references to partnerships with "the British and the Dominions of Canada, Australia, and New Zealand" in the declassification section of their website.[7]

The original agreement mandated secrecy, stating "it will be contrary to this agreement to reveal its existence to any third party unless otherwise agreed" resulting in modern day references to the existence of the agreement by the intelligence agencies remaining

[4] Appendix J, Principles of UKUSA collaboration with commonwealth countries other than the UK. Page 39, available at: http://www.nationalarchives.gov.uk/ukusa/
[5] Canada and the Five Eyes Intelligence Community, James Cox, Strategic Studies Working Group Papers, December 2012, page 4, accessible at: http://www.cdfai.org/PDF/Canada%20and%20the%20Five%20Eyes%20Intelligence%20Community.pdf
[6] International Partners, GCHQ website, available at: http://www.gchq.gov.uk/how_we_work/partnerships/Pages/International-partners.aspx
[7] UKUSA Agreement Release 1940-1956, NSA website, available at: http://www.nsa.gov/public_info/declass/ukusa.shtml

limited. The existence of the agreement was not acknowledged publicly until March 1999, when the Australian government confirmed that the Defence Signals Directorate (now Australian Signals Directorate) "does co-operate with counterpart signals intelligence organisations overseas under the UKUSA relationship."[8]

Canada's CSEC[9] states it maintains intelligence relationships with NSA, GCHQ, ASD and GCSB, but only New Zealand's GCSB[10] and ASD[11] mention the UKUSA agreement by name.[12]

This obfuscation continues, with only cursory mentions made across a wide range of public policy documents to the existence of an intelligence sharing partnership. For example the UK Counter-Terrorist Strategy CONTEST, referred to the existence of the Five Eyes agreement only in passing when stating the UK will "continue to develop our most significant bilateral intelligence relationship with the US, and the 'Five Eyes' cooperation with the US, Australia, Canada and New Zealand."[13]

We have been unable to locate any major public strategic policy document that describes Australia's, Canada's, New Zealand's or the United States' involvement in the Five Eyes in any detail.

The extent of Five Eyes collaboration

The close relationship between the five States is evidenced by documents recently released by Edward Snowden. Almost all of the documents include the classification "TOP SECRET//COMINT//REL TO USA, AUS, CAN, GBR, NZL" or "TOP SECRET//COMINT//REL TO USA, FVEY." These classification markings indicate the material is top-secret communications intelligence (aka SIGINT) material that can be

[8] The state of the art in communications Intelligence (COMINT) of automated processing for intelligence purposes of intercepted broadband multi-language leased or common carrier systems, and its applicability to COMINT targetting and selection, including speech recognition, October 1999, page 1, available at: http://www.duncancampbell.org/menu/surveillance/echelon/IC2000_Report%20.pdf

[9] CSEC's International Partnerships, CSEC website, available at: http://www.cse-cst.gc.ca/home-accueil/about-apropos/peers-homologues-eng.html

[10] UKUSA Allies, GCSB website, available at: http://www.gcsb.govt.nz/about-us/UKUSA.html

[11] UKUSA Allies, ASD website, available at: http://www.asd.gov.au/partners/allies.htm

[12] The New Zealand Prime Minister, John Key, has specifically referred to "Five Eyes" on several occasions; at his 29 October 2013 press conference, for example, in answer to the question, 'Do you think the GCSB was aware of the extent of spying from the NSA on foreign leaders?" he replied: "Well I don't know all of the information they exchanged, the discussions they had with their counterparts. They are part of Five Eyes so they had discussions which are at a much more granular level than I have….", audio available at: http://www.scoop.co.nz/stories/HL1310/S00224/pms-press-conference-audio-meridian-spying-and-fonterra.htm. Similarly, at his 25 October, press conference, with reference to Edward Snowden, he stated "He has a massive amount of data, we're part of Five Eyes, it's highly likely he's got information related to New Zealand", video available at http://www.3news.co.nz/Snowden-highly-likely-to-have-spy-info/tabid/1607/articleID/322789/Default.aspx#ixzz2lgdCec1I.

[13] Securing Britain in an Age of Uncertainty: The Strategic Defence and Security Review, HM Government, 2010, page 46, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/62482/strategic-defence-security-review.pdf

released to the US, Australia, Canada, United Kingdom and New Zealand. The purpose of the REL TO is to identify classified information that a party has predetermined to be releasable (or has already been released) through established foreign disclosure procedures and channels, to a foreign country or international organisation.[14] Notably while other alliances and coalitions exist such as the North Atlantic Treaty Organisation (e.g. TS//REL TO USA, NATO), European Counter-Terrorism Forces (e.g TS//REL TO USA, ECTF) or Chemical Weapons Convention States (e.g. TS//REL TO USA, CWCS) none of the documents that have thus far been made public refer to any of these arrangements, suggesting the Five Eyes alliance is the preeminent SIGINT collection alliance.

The arrangement in this way was not just to create a set of principles of collaboration, or the facilitation of information sharing, but to enable the dividing of tasks between SIGINT agencies. The agreement explains that

> "[a]llocation of major tasks, conferring a one-sided responsibility, is undesirable and impracticable as a main principle; however, in order that the widest possible cover of foreign cypher communications be achieved the COMINT agencies of the two parties shall exchange proposals for the elimination of duplication. In addition, collaboration between those agencies will take the form of suggestion and mutual arrangement as to the undertaking of new tasks and changes in status of old tasks."[15]

The continuation of this sharing of tasks between agencies has been acknowledged with former Defense Secretary Caspar Weinberger observing that the "United States has neither the opportunity nor the resources to unilaterally collect all the intelligence information we require. We compensate with a variety of intelligence sharing arrangements with other nations in the world."[16] The Canadian SIGINT agency CSEC explain how it "relies on its closest foreign intelligence allies, the US, UK, Australia and New Zealand to share the collection burden and the resulting intelligence yield."[17] Other former intelligence analysts have confirmed[18] there is "task-sharing" between the Five Eyes groups.

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[14] Security Classification Markings—Authorization for ReleaseTo (RELTO)and Dissemination Control/ Declassification Markings, USTRANSCOM Foreign Disclosure Office, available at: http://www.transcom.mil/publications/showPublication.cfm?docID=04A4D891-1EC9-F26D-0715CB3E5AF1309B

[15] Appendix E, Co-ordination of, and exchange of information on, cryptanalysis and associated techniques. page 34, available at: http://www.nationalarchives.gov.uk/ukusa/PDF page 34

[16] Declaration of the Secretary of Defence Caspar W Weinberger in USA v Jonathan Pollard, 1986. Available at: http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB407/docs/EBB-PollardDoc6.pdf

[17] Safeguarding Canada's security through information superiority, CSEC website, available at: http://www.cse-cst.gc.ca/home-accueil/media/information-eng.html

[18] Britain's GCHQ 'the brains,' America's NSA 'the money' behind spy alliance, Japan Times, 18th November, 2013, accessible at: http://www.japantimes.co.jp/news/2013/11/18/world/britains-gchq-the-brains-americas-nsa-the-money-behind-spy-alliance/#.UozmbMvTnqB

The level of co-operation under the UKUSA agreement is so complete that "the national product is often indistinguishable."[19] This has resulted in former intelligence officials explaining that the close-knit cooperation that exists under the UKUSA agreement means "that SIGINT customers in both capitals seldom know which country generated either the access or the product itself."[20] Another former British spy has said that "[c]ooperation between the two countries, particularly, in SIGINT, is so close that it becomes very difficult to know who is doing what [...] it's just organizational mess."[21]

The division of SIGINT collection responsibilities

Investigative journalist Duncan Campbell explains that historically

> "[u]nder the UKUSA agreement, the five main English-speaking countries took responsibility for overseeing surveillance in different parts of the globe. Britain's zone included Africa and Europe, east to the Ural Mountains of the former USSR; Canada covered northern latitudes and polar regions; Australia covered Oceania. The agreement prescribed common procedures, targets, equipment and methods that the SIGINT agencies would use."[22]

More recently an ex-senior NATO intelligence officer elaborated on this point, saying

> "[e]ach Five Eyes partner collects information over a specific area of the globe […] but their collection and analysis activities are orchestrated to the point that they essentially act as one. Precise assignments are not publicly known, but research indicates that Australia monitors South and East Asia emissions. New Zealand covers the South Pacific and Southeast Asia. The UK devotes attention to Europe and Western Russia, while the US monitors the Caribbean, China, Russia, the Middle East and Africa."[23]

Jointly run operations centres

In addition to fluidly sharing collected SIGINT, it is understood that many intelligence facilities run by the respective Five Eyes countries are jointly operated, even jointly staffed, by members of the intelligence agencies of Five Eyes countries. Each facility

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[19] Robert Aldrich (2006) paper 'Transatlantic Intelligence and security co-operation', available at: http://www2.warwick.ac.uk/fac/soc/pais/people/aldrich/publications/inta80_4_08_aldrich.pdfIntelligence'
[20] S. Lander, 'International intelligence cooperation: an inside perspective', in Cambridge Review of International Affairs, 2007, vol. 17, n°3, p.487.
[21] Britain's GCHQ 'the brains,' America's NSA 'the money' behind spy alliance, Japan Times, 18th November, 2013, accessible at: http://www.japantimes.co.jp/news/2013/11/18/world/britains-gchq-the-brains-americas-nsa-the-money-behind-spy-alliance/#.UozmbMvTnqB
[22] Inside Echelon, Duncan Campbell, 2000, available at: http://www.heise.de/tp/artikel/6/6929/1.html
[23] Canada and the Five Eyes Intelligence Community, James Cox, Strategic Studies Working Group Papers, December 2012, accessible at: http://www.cdfai.org/PDF/Canada%20and%20the%20Five%20Eyes%20Intelligence%20Community.pdf page 6

collects SIGINT, which can then be shared with the other Five Eyes States.

An earlier incarnation of ASD, the Defence Signals Branch in Melbourne,[24] was described in the original 1956 UKUSA agreement as

> "not purely a national centre. It is and will continue to be a joint U.K – Australian – New Zealand organization manned by and integrated staff. It is a civilian organization under the Australian Department of Defence and undertakes COMINT tasks as agreed between the COMINT governing authorities of Australia and New Zealand on the one hand and the London Signal Intelligence Board on the other. On technical matters control is exercised by GCHQ on behalf of the London Signal Intelligence Board."

This jointly run operation has continued, with the Australian Joint Defence Facility at Pine Gap being staffed by both Australian and US intelligence officers. The facility collects intelligence that is jointly used and analysed.[25] In fact, only half of the staff are Australian,[26] with US intelligence operatives from NSA and other agencies likely accounting for the rest. An American official runs the base itself, with the posting being considered "a step towards promotion into the most senior ranks of the US intelligence community" with an Australian acts as deputy.[27] With such an overwhelming US presence, it is likely that that majority of the cost of running is base is paid for by the US; the Australian Defence Department says Australia's contribution to Pine Gap's in 2011-12 was a mere AUS$14 million.[28]

The systems run at the base are tied into the largest Five Eyes intelligence structure with "personnel sitting in airconditioned offices in central Australia [being] directly linked, on a minute-by-minute basis, to US and allied military operations in Afghanistan and indeed anywhere else across the eastern hemisphere."[29] As a result it has been reported that "[t]he practical reality is that Pine Gap's capabilities are now deeply and inextricably entwined with US military operations, down to the tactical level, across half the world."[30] The New Zealand GCSB was similarly entwined with the NSA: the GCSB's Director of

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[24] See: "The Defence Signals Bureau was established in 1947, as part of the Department of Defence, with responsibility for maintaining a national sigint capability in peacetime. In 1977, DSD assumed its current name" available at: http://www.dpmc.gov.au/publications/intelligence_inquiry/chapter7/4_dsd.htm

[25] Pine Gap drives US drone kills, The Age, 21st July 2013, available at: http://www.smh.com.au/national/pine-gap-drives-us-drone-kills-20130720-2qbsa.html

[26] Australian outback station at forefront of US spying arsenal, The Sydney Morning Herald, 26th July 2013, available at: http://www.smh.com.au/it-pro/security-it/australian-outback-station-at-forefront-of-us-spying-arsenal-20130726-hv10h.html

[27] Australian outback station at forefront of US spying arsenal, The Sydney Morning Herald, 26th July 2013, available at: http://www.smh.com.au/it-pro/security-it/australian-outback-station-at-forefront-of-us-spying-arsenal-20130726-hv10h.html

[28] Pine Gap drives US drone kills, The Age, 21st July 2013, available at: http://www.smh.com.au/national/pine-gap-drives-us-drone-kills-20130720-2qbsa.html

[29] Pine Gap drives US drone kills, The Age, 21st July 2013, available at: http://www.smh.com.au/national/pine-gap-drives-us-drone-kills-20130720-2qbsa.html

[30] Australian outback station at forefront of US spying arsenal, The Sydney Morning Herald, 26th July 2013, available at: http://www.smh.com.au/it-pro/security-it/australian-outback-station-at-forefront-of-us-spying-arsenal-20130726-hv10h.html

Policy and Plans from 1984-1987, for example, was an NSA employee.[31]

In addition to bases in Australia and New Zealand, Britain's history of Empire left GCHQ with a widespread network of SIGINT outposts. Intelligence stations in Bermuda, Cyprus, Gibraltar, Singapore and Hong Kong have all played critical collection roles over the past 60 years.

One of the largest listening posts outside the US is based in northern England, yet has been under US ownership since the 1950s. In 1996 the base was renamed RAF Menwith Hill and it was reported that for the first time the Union Jack was raised alongside the Stars and Stripes. David Bowe, MEP for Cleveland and Richmond, said this was "designed to mislead" and that "[m]y information is that the RAF representation on the base amounts to one token squadron leader. The name change was presumably decided to make the whole site look more benign and acceptable."[32] The base was the subject of a six billion pound investment over last 20 years, with the majority of that likely to be US funds.[33]

Other bases, such as GCHQ's operation in the South West of England at Bude, are also jointly staffed. The Guardian reported[34] that in addition to jointly developing the TEMPORA program, 300 analysts from GCHQ and 250 from the NSA were located at Bude and directly assigned to examine material collected under the programme.

In his seminal report *Interception Capabilities 2000*, Duncan Campbell named a number of foreign or jointly run NSA bases. He wrote

> "[t]he US Air Force installed 500 metre wide arrays known as FLR-9 at sites including Chicksands, England, San Vito dei Normanni in Italy, Karamursel in Turkey, the Philippines, and at Misawa, Japan. Codenamed "Iron Horse", the first FLR-9 stations came into operation in 1964. The US Navy established similar bases in the US and at Rota, Spain, Bremerhaven, Germany, Edzell, Scotland, Guam, and later in Puerto Rico, targeted on Cuba."[35]

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[31] A fact unknown to the Prime Minister at the time: Hager, Secret Power, p. 21.
[32] US spy base `taps UK phones for MI5', The Independant, 22 September 1996, available at: http://www.independent.co.uk/news/uk/home-news/us-spy-base-taps-uk-phones-for-mi5-1364399.html
[33] US spy base `taps UK phones for MI5', The Independant, 22 September 1996, available at: http://www.independent.co.uk/news/uk/home-news/us-spy-base-taps-uk-phones-for-mi5-1364399.html
[34] An early version of TEMPORA is referred to as the Cheltenham Processing Centre, additionally codenamed TINT, and is described as a "joint GCHQ/NSA research initiative". The Guardian quotes an internal GCHQ report that claims "GCHQ and NSA avoid processing the same data twice and proactively seek to converge technical solutions and processing architectures." It was additionally reported that NSA provided GCHQ with the technology necessary to sift through the material collected. The Guardian reported that 300 analysts from GCHQ and 250 from NSA were directly assigned to examine the collected material, although the number is now no doubt much larger. GCHQ have had staff examining collected material since the project's incarnation in 2008, with NSA analysts brought to trials in Summer 2011. Full access was provided to NSA by Autumn 2011. An additional 850,000 NSA employees and US private contractors with top secret clearance reportedly also have access to GCHQ databases
[35] Inside Echelon, Duncan Campbell, 2000, available at: http://www.heise.de/tp/artikel/6/6929/1.html

Many of these sites remain active, as an NSA presentation displaying the primary foreign collection operations bases shows. The presentation[36] details both the US sites distributed around the world as well as the 2nd party bases as follows:

Type	Location	Country	Codename
US site	Yakima	US	JACKNIFE
US site	Sugar Grove	US	TIMBERLINE
US site	Sabana Seca	Puerto Rico	CORALINE
US site	Brasillia	Brasil	SCS
US site	Harrogate (aka Menwith Hill)	UK	MOONPENNY
US site	Bad Aibling[37]	Germany	GARLICK
US site	New Delhi	India	SCS
US site	Thailand	Thailand	LEMONWOOD
US site	Misawa[38]	Japan	LADYLOVE
2nd Party	Bude	UK	CARBOY
2nd Party	Oman	Oman	SNICK
2nd Party	Nairobi	Kenya	SCAPEL
2nd Party	Geraldton	Australia	STELLAR
2nd Party	Cyprus	Cyprus	SOUNDER
2nd Party	New Zealand	New Zealand	IRONSAN

It is important to note that, just because a base is being operated from within a particular country, this does not forestall Five Eyes parties from collecting intelligence therein on the host country. Ex-NSA staff have confirmed that communications are monitored from "almost every nation in the world, including the nations on whose soil the intercept bases are located."[39]

Intelligence collection, analysis and sharing activities

It is believed that much of the intelligence collected under the Five Eyes arrangement can be accessed by any of the Five Eyes partners at any time. Some codenamed programmes that have been revealed to the public over the last decade go some way to illustrating how the Five Eyes alliance collaborates on specific programmes of activity and how some of this information is shared. It should be noted that these are just a selection of programmes that have been made public, and are likely to represent a tiny fraction of the joint collection undertaken by Five Eyes partners. Nevertheless these codenamed programmes reveal just how integrated the Five Eyes SIGINT collection and analysis methods are, and the existence of shared SIGINT tools and technologies

[36] New slides about NSA collection programs, Electrospaces blog, 16th July, 2013, available at: http://electrospaces.blogspot.co.uk/2013/07/new-slides-about-nsa-collection-programs.html
[37] Bad Aibling Station, Wikipedia, available at: http://en.wikipedia.org/wiki/Bad_Aibling_Station
[38] http://www.misawa.af.mil/ and http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB23/docs/doc12.pdf
[39] Inside Echelon, Duncan Campbell, 2000, available at: http://www.heise.de/tp/artikel/6/6929/1.html

themselves.

As early as the 1980s, Five Eyes countries used a "global Internet-like communication network to enable remote intelligence customers to task computers at each collection site, and receive the results automatically."[40] This network was known as ECHELON and was revealed to the public in 1988 by Duncan Campbell.[41] An often-misunderstood term, ECHELON is in fact a

> "code name given by the NSA (U.S. National Security Agency) to a system that collects and processes information derived from intercepting civil satellite communications. The information obtained at ECHELON stations is fed into the global communications network operated jointly by the SIGINT organisations of the United States, United Kingdom, Australia, Canada and New Zealand. ECHELON stations operate automatically. Most of the information that is selected is automatically fed into the world-wide network of SIGINT stations."[42]

It is not known how long the ECHELON programme continued in that form, but the NSA went on to develop programmes such as THINTHREAD, which emerged at the turn of the millennium. THINTHREAD was a sophisticated SIGINT analysis tool used "to create graphs showing relationships and patterns that could tell analysts which targets they should look at and which calls should be listened to."[43] One of the creators of THINTHREAD, Bill Binney described the tool to the New Yorker:

> "As Binney imagined it, ThinThread would correlate data from financial transactions, travel records, Web searches, G.P.S. equipment, and any other "attributes" that an analyst might find useful in pinpointing "the bad guys." By 2000, Binney, using fibre optics, had set up a computer network that could chart relationships among people in real time. It also turned the N.S.A.'s data-collection paradigm upside down. Instead of vacuuming up information around the world and then sending it all back to headquarters for analysis, ThinThread processed information as it was collected – discarding useless information on the spot and avoiding the overload problem that plagued centralized systems. Binney says, "The beauty of it is that it was open-ended, so it could keep expanding."[44]

This programme was distributed around the world and trialed in conjunction with the Five Eyes partners. Tim Shorrock explains:

> "The THINTHREAD prototype went live in the fall of 2000 and […] several allied foreign intelligence agencies were given the programme to conduct lawful

[40] Inside Echelon, Duncan Campbell, 2000, available at: http://www.heise.de/tp/artikel/6/6929/1.html
[41] Somebody's listening, New Statesmen, 12 August 1988, available at: http://web.archive.org/web/20070103071501/http://duncan.gn.apc.org/echelon-dc.htm
[42] http://www.duncancampbell.org/menu/surveillance/echelon/IC2001-Paper1.pdf, page 2.
[43] US spy device 'tested on NZ public', The New Zealand Herald, 25th May 2013, available at: http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10886031
[44] The Secret Sharer, The New Yorker, 23 May 2011, available at: http://www.newyorker.com/reporting/2011/05/23/110523fa_fact_mayer?currentPage=all

surveillance in their own corners of the world. Those recipients included Canada, […] Britain, Australia and New Zealand."[45]

Analysis tools such as these have been developed in secret over many years, often at huge cost. That this tool was shared, even in trial version with Five Eyes partners, is an important indicator of how tightly integrated the relationship is. Subsequent related programmes codenamed TRAILBLAZER, TURBULENCE and TRAFFICTHIEF were later adopted and used by Five Eyes partners.[46]

More recently, the Guardian reported[47] that 300 analysts from GCHQ and 250 from the NSA were directly assigned to examine material collected under the TEMPORA programme. By placing taps at key undersea fibre optic cable landing stations, the programme is able to intercept a significant portion of the communications that traverses the UK. TEMPORA stores content for three days and metadata for 30 days. Once content and data are collected, they can be filtered.

The precise nature of GCHQ's filters remains secret. Filters could be applied based on type of traffic (e.g. Skype, Facebook, Email), origin/destination of traffic, or to conduct basic keyword searches, among many other purposes. Reportedly, approximately 40,000 search terms have been chosen and applied by GCHQ, and another 31,000 by the NSA to information collected via TEMPORA.

GCHQ have had staff examining collected material since the project's inception in 2008, with NSA analysts brought to trial runs of the technology in summer 2011. Full access was provided to NSA by autumn 2011. An additional 850,000 NSA employees and US private contractors with top-secret clearance reportedly also have access to GCHQ databases. GCHQ boasted that it had "given the NSA 36% of all the raw information the British had intercepted from computers the agency was monitoring."[48] Additional reporting from GCHQ internal documents explains how they "can now interchange 100% of GCHQ End Point Projects with NSA."[49]

GCHQ received £100 million ($160 million) in secret NSA funding over the last three years to assist in the running of this project. This relationship was characterized by Sir David Omand, former Director of GCHQ, as "a collaboration that's worked very well […] [w]e have the brains; they have the money."[50]

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[45] http://motherboard.vice.com/blog/the-nsa-reportedly-tested-its-top-spyware-on-new-zealand
[46] http://www.smh.com.au/world/snowden-reveals-australias-links-to-us-spy-web-20130708-2plyg.html
[47] An early version of TEMPORA is referred to as the Cheltenham Processing Centre, additionally codenamed TINT, and is described as a "joint GCHQ/NSA research initiative". The Guardian quotes an internal GCHQ report that claims "GCHQ and NSA avoid processing the same data twice and proactively seek to converge technical solutions and processing architectures." It was additionally reported that NSA provided GCHQ with the technology necessary to sift through the material collected.
[48] http://www.theguardian.com/world/2013/nov/02/nsa-portrait-total-surveillance
[49] GCHQ: Inside the top secret world of Britain's biggest spy agency, The Guardian, 2 August 2013, available at http://www.theguardian.com/world/2013/aug/02/gchq-spy-agency-nsa-snowden
[50] http://www.japantimes.co.jp/news/2013/11/18/world/britains-gchq-the-brains-americas-nsa-the-money-behind-spy-alliance/

Liaison officers are charged with the ultimate responsibility of ensuring continued harmony and cooperation between their agencies and as James Bamford, author or multiple books on the NSA explains "it is the senior liaison officers, the SIGINT community's version of ambassadors, who control the day-to-day relations between the UKUSA partners. And it is for that reason that the post of SUSLO (Office of the Senior United States Liaison Officer) at NSA is both highly prized and carefully considered."[51] These positions to facilitate co-operation continue to exist throughout the arrangement. A recent diplomatic cable from the US Ambassador in Wellington, New Zealand, released by WikiLeaks, noting that "[t]he National Security Agency (NSA) has requested a new, permanent position in Wellington."[52] The cable went on to state:

> "The new position will advance US interests in New Zealand by improving liaison and cooperation on vital signals intelligence matters. This is an area where the US and NZ already work together closely and profitably, and continuing to build and expand that relationship clearly stands to benefit both countries. This is especially true in the post-September 11 environment, where NZ SIGINT capabilities significantly enhance our common efforts to combat terrorism in the region and the world."

It is believed that much of the intelligence collected under the Five Eyes arrangement can be accessed by any of the Five Eyes partners at any time. Shared NSA-GCHQ wikis are used by both parties to exchange surveillance tips[53] and leaked NSA documents reveal that different Five Eyes partners have created shared and integrated databases, as revealed by one NSA document that references "GCHQ-accessible 5-eyes [redacted] databases."[54] One Guardian article explained:

> "Gaining access to the huge classified data banks appears to be relatively easy. Legal training sessions – which may also be required for access to information from Australian, Canadian, or New Zealand agencies – suggest that gaining credentials for data is relatively easy. The sessions are often done as self-learning and self-assessment, with "multiple choice, open-book" tests done at the agent's own desk on its "iLearn" system. Agents then copy and paste their passing result in order to gain access to the huge databases of communications."[55]

A core programme that provides this capability is known as XKEYSCORE. That has been described by internal NSA presentations as an "analytic framework" which enables a

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[51] The Puzzle Palace: A Report on America's Most Secret Agency, James Bamford, accessible at: http://cryptome.org/jya/pp08.htm
[52] http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10695100
[53] http://mobile.nytimes.com/2013/11/03/world/no-morsel-too-minuscule-for-all-consuming-nsa.html?pagewanted=2,all&hp=&_r=0; the New Zealand GCSB's 2001/2012 Annual Report refers the GCSB being able "to leverage off the training programmes of its overseas partners to increase opportunities for staff to develop their tradecraft skills. Available at: http://www.gcsb.govt.nz/newsroom/annual-reports/Annual%20Report%202012.pdf, p. 11.
[54] US and UK struck secret deal to allow NSA to 'unmask' Britons' personal data, 20 August 2013, available at: http://www.theguardian.com/world/2013/nov/20/us-uk-secret-deal-surveillance-personal-data#
[55] Portrait of the NSA: no detail too small in quest for total surveillance, 2 November 2013, accessible at: http://www.theguardian.com/world/2013/nov/02/nsa-portrait-total-surveillance

single search to query a "3-day rolling buffer" of "all unfiltered data" stored at 150 global sites on 700 database servers.[56]

The NSA XKEYSCORE system has sites that appear in Five Eyes countries,[57] with the New Zealand's Waihopai Station, Australia's Pine Gap, Shoal Bay, Riverina and Geraldton Stations, and the UK's Menwith Hill base all present. It has been confirmed that all these bases use XKEYSCORE and "contribute to the program."[58] The system indexes e-mail addresses, file names, IP addresses and port numbers, cookies, webmail and chat usernames and buddylists, phone numbers, and metadata from web browsing sessions including searches queried among many other types of data that flows through their collection points. It has been reported that XKEYSCORE

> "processes all signals before they are shunted off to various "production lines" that deal with specific issues and the exploitation of different data types for analysis - variously code-named NUCLEON (voice), PINWALE (video), MAINWAY (call records) and MARINA (internet records)"[59]

One of these programmes, MARINA, "has the ability to look back on the last 365 days' worth of DNI metadata seen by the SIGINT collection system, regardless whether or not it was tasked for collection"[60] giving Five Eyes partners the ability to look back on a full year's history for any individual whose data was collected – either deliberately or incidentally – by the system.

The no-spy deal myth

While UKUSA is often reported as having created a 'no spy pact' between Five Eyes States, there is little in the original text to support such a notion. Crucially, first and foremost no clause exists that attempts in any form to create such an obligation. Instead, if anything the converse is true: the scope of the arrangement consciously carves out space to permit State-on-State spying even by parties to UKUSA. It limits the scope to governing the "relations of above-mentioned parties in communications intelligence matters only" and more specifically that the "exchange of such … material … is not prejudicial to national interests."[61]

Additionally, while the text mandates that each party shall "maintain, in the country of the other, a senior liaison officer accredited to the other," once again the text is caveated, stating that

[56] http://www.theguardian.com/world/interactive/2013/jul/31/nsa-xkeyscore-program-full-presentation
[57] http://www.theguardian.com/world/interactive/2013/jul/31/nsa-xkeyscore-program-full-presentation page 5
[58] http://www.smh.com.au/world/snowden-reveals-australias-links-to-us-spy-web-20130708-2plyg.html
[59] http://www.smh.com.au/world/snowden-reveals-australias-links-to-us-spy-web-20130708-2plyg.html
[60] http://www.theguardian.com/world/2013/sep/30/nsa-americans-metadata-year-documents
[61] page 9

> "[l]iaison officers of one party shall normally have unrestricted access to those parts of the other's agencies which are engaged directly in the production of COMINT, except such parts thereof which contain unexchangable information."[62]

As best can be ascertained, therefore, it seems there is no prohibition on intelligence-gathering by Five Eyes States with respect to the citizens or residents of other Five Eyes States. There is instead, it seems, a general understanding that citizens will not be directly targeted, and where communications are incidentally intercepted there will be an effort to minimize the use and analysis thereof by the intercepting State. This analysis has been confirmed by a leaked draft 2005 NSA directive entitled "Collection, Processing and Dissemination of Allied Communications."[63] This directive carries the classification marking "NF" meaning "No Foreign", short for "NOFORN" or "Not Releasable to Foreign Nationals." The directive states:

> "Under the British-U.S. Communications Intelligence Agreement of 5 March 1946 (commonly known as the United Kingdom/United States of American (UKUSA) Agreement), both governments agreed to exchange communications intelligence products, methods and techniques as applicable so long as it was not prejudicial to national interests. This agreement has evolved to include a common understanding that both governments will not target each other's citizens/persons. However when it is in the best interest of each nation, each reserve the right to conduct unilateral COMINT against each other's citizens/persons. Therefore, under certain circumstances, it may be advisable and allowable to target Second Party persons and second party communications systems unilaterally when it in the best interests of the U.S and necessary for U.S national security. Such targeting must be performed exclusively within the direction, procedures and decision processes outlined in this directive."[64]

The directive continues:

> "When sharing the planned targeting information with a second party would be contrary to US interests, or when the second party declines a collaboration proposal, the proposed targeting must be presented to the signals intelligence director for approval with justification for the criticality of the proposed collection. If approved, any collection, processing and dissemination of the second party information must be maintained in NoForn channels."[65]

Significantly, the details of some NSA programmes, not intended to be shared with Five Eyes countries, indicate that intelligence collection is taking place in Five Eyes partner countries. NSA's big data analysis and data visualization system BOUNDLESS

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[62] page 23
[63] US and UK struck secret deal to allow NSA to 'unmask' Britons' personal data, 20 August 2013, available at: http://www.theguardian.com/world/2013/nov/20/us-uk-secret-deal-surveillance-personal-data#
[64] Draft 2005 directive, reprinted in "US and UK struck secret deal to allow NSA to 'unmask' Britons' personal data," *The Guardian,* 20 August 2013, available at: http://www.theguardian.com/world/2013/nov/20/us-uk-secret-deal-surveillance-personal-data#
[65] Ibid.

INFORMANT[66] are marked "TOP SECRET//SI//NOFORN". These documents show that in March 2013 the agency collected 97 billion pieces of intelligence from computer networks worldwide. The document grades countries based on a color scheme of green (least subjected to surveillance) through to yellow and orange and finally, red (most surveillance). Five Eyes partners are not excluded from the map and instead are shaded green, which is suggestive that some collection of these States' citizens or communications is occurring.

Changes to the original arrangement, however, suggest a convention is in place between at least two of the Five Eyes partners – UK and US – that prevents deliberate collection or targeting of each other's citizens unless authorised by the other State. The 2005 draft directive states: "[t]his agreement [UKUSA] has evolved to include a common understanding that both governments will not target each other's citizens/persons." This of course has not prevented spying without consent, but it appears it is preferable that when Five Eyes partners want to spy on another member of the agreement, they do so with the other country's consent. It is unclear on what basis consent may be given or withheld, but the directive explains:

> "There are circumstances when targeting of second party persons and communications systems, with the full knowledge and co-operation of one or more second parties, is allowed when it is in the best interests of both nations."[67]

The directive goes on to state that these circumstances might include "targeting a UK citizen located in London using a British telephone system;" "targeting a UK person located in London using an internet service provider (ISP) in France;" or "targeting a Pakistani person located in the UK using a UK ISP."

Historically, the Five Eyes members expected each other to make attempts to minimise the retention and dissemination of information about Five Eyes partners once intercepted. Duncan Campbell explains:

> "New Zealand officials were instructed to remove the names of identifiable UKUSA citizens or companies from their reports, inserting instead words such as "a Canadian citizen" or "a US company". British COMINT staff have described following similar procedures in respect of US citizens following the introduction of legislation to limit NSA's domestic intelligence activities in 1978. The Australian government says that "DSD and its counterparts operate internal procedures to satisfy themselves that their national interests and policies are respected by the others … the Rules [on SIGINT and Australian persons] prohibit the dissemination of information relating to Australian persons gained accidentally during the course of routine collection of foreign communications; or the reporting or recording of the

[66] David Cameron's phone 'not monitored' by US, BBC News, 26th October 2013, available at: http://www.theguardian.com/world/interactive/2013/jun/08/nsa-boundless-informant-data-mining-slides
[67] US and UK struck secret deal to allow NSA to 'unmask' Britons' personal data, 20 August 2013, available at: http://www.theguardian.com/world/2013/nov/20/us-uk-secret-deal-surveillance-personal-data#

names of Australian persons mentioned in foreign communications."[68]

A 2007 document explains that this is no longer an expectation, as the Five Eyes are consenting to the broad trawling of data incidentally intercepted by other Five Eyes partners. The document explains:

> "Sigint [signals intelligence] policy … and the UK Liaison Office here at NSAW [NSA Washington] worked together to come up with a new policy that expands the use of incidentally collected unminimized UK data in SIGINT analysis[…] Now SID analysts can unminimize all incidentally collected UK contact identifiers, including IP and email addresses, fax and cell phone numbers, for use in analysis."[69]

Outside the Second Party partners that make up the Five Eyes, there is no ambiguity about who else can be spied on, including third party partners. An internal NSA presentation made clear "[w]e can, and often do, target the signals of most 3rd party foreign partners."[70] In other words, the intelligence services of the Five Eyes agencies may spy on each other, with some expectation that they will be consulted when this occurs; everyone else is fair game, even if they have a separate intelligence-sharing agreement with one or several Five Eyes members.

This understanding that allies may still be spied upon has been echoed in other public statements made by the US, which in the wake of the Snowden revelations has confirmed, through an unnamed senior official, that "we have not made across the board changes in policy like, for example, terminating intelligence collection that might be aimed at all allies."[71]

Spying on heads of State

Questions remain, however, as to whether arrangements within Five Eyes may prevent the surveillance of the respective heads of States of Five Eyes partners. It has been confirmed by the White House that UK Prime Minister David Cameron's communications "have not, are not and will not be monitored by the US."[72] However, while New Zealand Prime Minister John Key has agreed that he is satisfied that the US has not spied on him and that he is "confident of the position," he will not confirm whether this is because the Five Eyes members have agreed to this.[73] Additionally after German Chancellor Angela

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[68] http://www.duncancampbell.org/menu/surveillance/echelon/IC2000_Report%20.pdf page 3
[69] http://www.theguardian.com/world/2013/nov/20/us-uk-secret-deal-surveillance-personal-data#
[70] http://www.spiegel.de/international/world/secret-documents-nsa-targeted-germany-and-eu-buildings-a-908609.html
[71] Feinstein: White House Will Stop Spying on Allies. White House: Not So Fast , The Atlantic Wire, 28th October 2013, available at: http://www.thewire.com/politics/2013/10/sen-feinstein-white-house-will-stop-spying-allies/71023/
[72] http://www.bbc.co.uk/news/uk-politics-24668861
[73]John Key, 29 October 2013, Post-Cabinet Press Conference, audio available at: http://www.scoop.co.nz/stories/HL1310/S00224/pms-press-conference-audio-meridian-spying-and-fonterra.htm
Key confident US didn't spy on him, Stuff.co.nz, 29th October 2013, available at: http://www.stuff.co.nz/national/politics/9338530/Key-confident-US-didn-t-spy-on-him

Merkel demanded[74] that the United States sign a no-spy agreement to prohibit the bilateral spying between nations, the US has indicated that while they would be willing to engage in "a new form of collaboration" a no-spy pact is not on the table.[75]

Allied spying more broadly is a common activity. In 1960, when Bernon Mitchell and William Martin infamously defected to the Soviet Union, they revealed the scope of NSA's activities, reporting that:

> "We know from working at NSA [that] the United States reads the secret communications of more than forty nations, including its own allies… NSA keeps in operation more than 2000 manual intercept positions… Both enciphered and plain text communications are monitored from almost every nation in the world, including the nations on whose soil the intercept bases are located."[76]

Other surveillance partnerships

Over almost seven decades, the Five Eyes alliance has splintered notably only once when, in 1985, New Zealand's new Labour Government refused to allow a US ship to visit New Zealand, in accordance with the government's anti-nuclear policy (not to allow ships into its New Zealand waters without confirmation they were neither nuclear-powered, nor carrying nuclear weapons). This policy was turned into law in 1987 with the creation of the New Zealand Nuclear Free Zone.[77] The political fallout from the introduction of the policy included the splintering off of New Zealand, at least temporarily, from the Five Eyes, and the creation of a Four Eyes alliance with the acronym ACGU. This split has been confirmed in a number of military classification marking documents.[78] It is understood that there was some distancing of New Zealand from the Five Eyes in the years immediately following the incident, but that the schism was less significant than previously thought;[79] by making reference to documents dated in the past decade, released as part of the Snowden leaks, it is clear that New Zealand remains an integral part of the Five Eyes alliance.

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[74] Germany to seek 'no spying' deal with US, Financial Times, 12th August 2013, available at: http://www.ft.com/cms/s/0/67eef7f4-0375-11e3-980a-00144feab7de.html

[75] Germans Rejected: US Unlikely to Offer 'No-Spy' Agreement, Der Spiegel, 12th November 2013, available at: http://www.spiegel.de/international/germany/us-declines-no-spy-pact-with-germany-but-might-reveal-snowden-secrets-a-933006.html

[76] Inside Echelon, Duncan Campbell, 2000, available at: http://www.heise.de/tp/artikel/6/6929/1.html

[77] New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987: s 9(2) states "The Prime Minister may only grant approval for the entry into the internal waters of New Zealand by foreign warships if the Prime Minister is satisfied that the warships will not be carrying any nuclear explosive device upon their entry into the internal waters of New Zealand." Section 11 states "Entry into the internal waters of New Zealand by any ship whose propulsion is wholly or partly dependent on nuclear power is prohibited.")

[78] http://www.afcea.org/events/pastevents/documents/LWN11_Track_1_Session_5.pdf; https://www2.centcom.mil/sites/foia/rr/CENTCOM%20Regulation%20CCR%2025210/Wardak%20CH-47%20Investigation/r_EX%2060.pdf

[79] See, Nicky Hager, Secret Power, 1996, pp. 23-24.

Additionally, other 'Eyes-like' relationships exist, in various forms with membership ranging through 3-, 4-, 6-, 7-, 8-, 9- and 10- and 14-Eyes communities. These 'Eyes' reference different communities with varying focuses dealing with military coalitions, intelligence partnerships with many having established dedicated communication networks.[80] The Guardian describes two such arrangements:

> "the NSA has other coalitions, although intelligence-sharing is more restricted for the additional partners: the 9-Eyes, which adds Denmark, France, the Netherlands and Norway; the 14-Eyes, including Germany, Belgium, Italy, Spain and Sweden; and 41-Eyes, adding in others in the allied coalition in Afghanistan."[81]

This is supported by statements made by an ex-senior NATO intelligence officer:

> "The Five Eyes SIGINT community also plays a 'core' role in a larger galaxy of SIGINT organizations found in established democratic states, both west and east. Five Eyes 'plus' gatherings in the west include Canada's NATO allies and important non-NATO partners such as Sweden. To the east, a Pacific version of the Five Eyes 'plus' grouping includes, among others, Singapore and South Korea. Such extensions add 'reach' and 'layering' to Five Eyes SIGINT capabilities."[82]

A New York Times article[83] again confirms such groups exist by acknowledging "[m]ore limited cooperation occurs with many more countries, including formal arrangements called Nine Eyes and 14 Eyes and Nacsi, an alliance of the agencies of 26 NATO countries." Different intelligence co-operation groups also exist outside the broader abovementioned structures dealing with narrower areas of collaboration.[84] Within these groups, no attempt to create a no-spy deal has been made; these countries "can gather intelligence against the United States through CNE (computer network exploitation) and therefore share CNE and CND (Computer Network Defense) can sometimes pose clear risks."[85]

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[80] http://electrospaces.blogspot.co.uk/2013/11/five-eyes-9-eyes-and-many-more.html
[81] http://www.theguardian.com/world/2013/nov/02/nsa-portrait-total-surveillance
[82] Canada and the Five Eyes Intelligence Community, James Cox, Strategic Studies Working Group Papers, December 2012, accessible at: http://www.cdfai.org/PDF/Canada%20and%20the%20Five%20Eyes%20Intelligence%20Community.pdf page 7
[83] No Morsel Too Minuscule for All-Consuming N.S.A. , New York Times, 2nd November, 2013 http://mobile.nytimes.com/2013/11/03/world/no-morsel-too-minuscule-for-all-consuming-nsa.html?pagewanted=2,all&hp=&_r=0
[84] One co-operation group is mentioned in an NSA document entitled "sharing computer networking operations cryptologic information with foreign partners". This document names the Five Eyes partnership a "Tier A" group that has 'comprehensive cooperation.' The much larger "Tier B" of 19 countries has 'focused co-operation' and is mostly made up of European States, except Japan, Turkey and South Korea. The full list includes Austria, Belgium, Czech Republic, Denmark, Germany, Greece, Hungry, Iceland, Italy, Japan, Luxembourg, Netherlands, Norway, Poland, Portugal, South Korea, Spain, Sweden, Switzerland and Turkey.
El CNI facilitó el espionaje masivo de EEUU a España , El Mundo, 10th October, 2013, accessible at: http://www.elmundo.es/espana/2013/10/30/5270985d63fd3d7d778b4576.html
[85] El CNI facilitó el espionaje masivo de EEUU a España , El Mundo, 10th October, 2013, accessible at: http://www.elmundo.es/espana/2013/10/30/5270985d63fd3d7d778b4576.html

It was reported[86] in 2010 when the UKUSA documents were first released, that "Norway joined [the eavesdropping network] in 1952, Denmark in 1954, and Germany in 1955" and that "Italy, Turkey, the Philippines and Ireland are also members." This however has been contested with a journalist working on the current Snowden documents staying they were "confused by that reference."[87]

The NATO Special Committee, made up of the heads of the security services of NATO member countries, also provides a platform for intelligence sharing, although due to the alliances diverse and growing membership it is thought there are concerns about sharing sensitive military and SIGINT documents on a systematic basis.[88] As explained by Scheinen and Vermeulen,[89] however:

> "The Agreement between the parties to the North Atlantic Treaty for the security of information of 1949 is quite short, but article 5 for instance gives states carte blanche 'to make any other agreement relating to the exchange of classified information originated by them,' leaving room for many technically detailed arrangements in which the actual cooperation is being regulated."

[86] http://www.theguardian.com/world/2010/jun/25/intelligence-deal-uk-us-released
[87] https://twitter.com/jamesrbuk/status/403643887685611520
[88] The 28 NATO countries are Albania, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey, United Kingdom, United States,
[89] Scheinin, M and Vermeulen, M, "Intelligence cooperation in the fight against terrorism through the lens of human rights law and the law of state responsibility," in Born, Leigh and Wills (eds), *International Intelligence Cooperation and Accountability* (Oxon: Routledge, 2011), 256.

Chapter Two – Secret law is not law

The intelligence agencies of the Five Eyes countries conduct some of the most important, complex and far-reaching activities of any State agency, and they do so under behind the justification of a thicket of convoluted and obfuscated legal and regulatory frameworks. The laws and agreements that make up the Five Eyes arrangement and apply it to domestic contexts lack any semblance of clarity or accessibility necessary to ensure that the individuals whose rights and interests are affected by them are able to understand their application. As such, they run contrary to the fundamental building blocks of the rule of law.

The rule of law and accessibility

The accessibility of law is a foundational element the rule of law. Many have different views of what exactly constitutes the rule of law, but it is widely understood to play a critical role in checking excessive or arbitrary power. Core to the rule of law is the idea that all individuals are able to know what law is exercised over them by those in power, and how conduct must be accordingly regulated to ensure it is in compliance with such laws. Lord Neuberger's first principle of the rule of law explains just how critical the accessibility of law is to the rule of law:

> "At its most basic, the expression connotes a system under which the relationship between the government and citizens, and between citizen and citizen, is governed by laws which are followed and applied. That is rule by law, but the rule of law requires more than that. First, the laws must be freely accessible: that means as available and as understandable as possible."[90]

If law itself isn't published in a clear and understandable way then citizens cannot evaluate when an action by another person, or by their government, is unlawful. As Tom Bingham explains, "if the law is not sufficiently clear, then it becomes inaccessible; if people cannot properly access (i.e. understand) the law that they are governed by, then so far as they are concerned, they are being governed by arbitrary power." For all actions by the State there must be a legal justification. Simply because there is law on the statute books does not necessarily mean that it isn't arbitrary.

Accessing the laws regulating the actions of the Five Eyes

It has been alleged that "there is no formal over-arching international agreement that governs all Five Eyes intelligence relationships,"[91] but rather a myriad of memoranda,

[90] http://www.supremecourt.gov.uk/docs/speech-131015.pdf
[91] Canada and the Five Eyes Intelligence Community, James Cox, Strategic Studies Working Group Papers, December 2012, accessible at: http://www.cdfai.org/PDF/Canada%20and%20the%20Five%20Eyes%20Intelligence%20Community.pdf

agreements, and conventions that must be considered in tandem with complex national legislation.

Scheinin and Vermeulen argue that

> "The overwhelming majority of these intelligence cooperation arrangements are secret – or at least they are never published nor registered at the UN Secretariat pursuant to Article 102 of the UN Charter.[92] From the perspective of international law they are likely to fall within a murky area of 'non-treaty arrangements', which can include arrangements such as 'memoranda of understanding', 'political agreements' 'provisional understanding', 'exchanges of notes', 'administrative agreements', 'terms of reference', 'declarations' and virtually every other name one can think of."[93]

However, taken together, the Five Eyes agreements arguably rise to the level of an enforceable treaty under international law. It is clear from their scope and wide-reaching ramifications that the Five Eyes agreements implicate the rights and interests of individuals sufficiently to raise the agreements to the level of legally-binding treaty.

In any event, it is impossible to know whether the initial intentions of the drafters or the scope of the legal obligations created under the agreements elevate them to the status of legally-binding treaty because the agreements are completely hidden from public view. Indeed, not only are the public unable to access and scrutinise the agreements that regulate the actions of the Five Eyes, but even the intelligence services themselves do not have a complete picture of the extent of intelligence sharing activities. The NSA admitted during legal proceedings in 2011 that the information-gathering infrastructure was so complex that "there was no single person with a complete understanding." [94]

The domestic legal frameworks implementing the obligations created by the Five Eyes obligations are equally obfuscated. With respect to the US, for example, the NSA acknowledged in a recently-released strategy document that

> "[t]he interpretation and guidelines for applying [American] authorities, and in some cases the authorities themselves, have not kept pace with the complexity of the technology and target environments, or the operational expectations levied on NSA's mission."[95]

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[92] Article 102 of the UN Charter states that: 1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it. 2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

[93] Scheinin, M and Vermuelen, M, "Intelligence cooperation in the fight against terrorism through the lens of human rights law and the law of state responsibility," in Born, Leigh and Wills (eds), *International Intelligence Cooperation and Accountability* (Oxon: Routledge, 2011), 256.

[94]http://www.theregister.co.uk/Print/2013/09/11/declassified_documents_show_nsa_staff_abused_tapping_misled_courts/

[95] (U) SIGINT Strategy, 2012-2016, 23 February 2012

The chair of the Senate intelligence committee, Diane Feinstein, has strongly criticised the actions taken by the NSA under the purported ambit of the relevant legislation, noting that "[…] it is clear to me that certain surveillance activities have been in effect for more than a decade and that the Senate Intelligence Committee was not satisfactorily informed."[96]

In the UK, the Intelligence and Security Committee – in charge of overseeing the actions of the UK intelligence agencies, including GCHQ – have responded to the Snowden leaks by remarking:

> "It has been alleged that GCHQ circumvented UK law by using the NSA's PRISM programme to access the content of private communications […] and we are satisfied that they conformed with GCHQ's statutory duties. The legal authority for this is contained in the Intelligence Services Act 1994."[97]

Yet the chair of the ISC has in fact admitted to confusion about whether "if British intelligence agencies want to seek to know the content of emails can they get round the normal law in the UK by simply asking an American agencies to provide that information?"[98]

When the head of the committee charged with overseeing the lawfulness of the actions of intelligence services is unsure as to whether such agencies have acted lawfully, there is plainly a serious dearth in the accessibility of law, calling into question the rule of law. Without law that is accessible, citizens are unable to regulate their conduct or scrutinise that of their governments. In such circumstances, it is impossible to verify whether governments are acting in accordance with the law as required of them under human rights law.

Ensuring the Five Eyes act 'in accordance with the law'

There is a significant body of European Court of Human Rights jurisprudence on what constitutes interference "in accordance with the law" in the context of secret surveillance and information gathering, such as that undertaken by the Five Eyes.

The Court begins from the perspective that surveillance, particularly secret surveillance, is a significant infringement on human rights, and in order to be justified under the European Convention on Human Rights must be sufficiently clear and precise "to give citizens an adequate indication as to the circumstances in which and the conditions on

[96] Paul Lewis and Spencer Ackerman, "NSA: Dianne Feinstein breaks ranks to oppose US spying on allies," *The Guardian,* 29 October 2013, available at http://www.theguardian.com/world/2013/oct/28/nsa-surveillance-dianne-feinstein-opposed-allies.
[97] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/225459/ISC-Statement-on-GCHQ.pdf
[98] Nicholas Watts, "GCHQ 'broke law if it asked for NSA intelligence on UK citizens', The Guardian, 10 June 2013, available at http://www.theguardian.com/world/2013/jun/10/gchq-broke-law-nsa-intelliegence

which public authorities are empowered to resort to this secret and potentially dangerous interference."[99]

It must be clear "what elements of the powers to intercept are incorporated in legal rules and what elements remain within the discretion of the executive" and the law must indicate "with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities"[100] in order that individuals may have some certainty about the laws to which they are subject and regulate their conduct accordingly.

Yet "the degree of certainty will depend on the circumstances."[101] As the Court has noted, "foreseeability in the special context of secret measures of surveillance, such as the interception of communications, cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly..."[102]

Where a power vested in the executive is exercised in secret, however, the risks of arbitrariness are evident: in the words of the Court in *Weber v Germany,* "a system of secret surveillance for the protection of national security may undermine or even destroy democracy under the cloak of defending it."[103] In such circumstances, "is essential to have clear, detailed rules on the subject, especially as the technology available for use is continually becoming more sophisticated…"[104]

What, then, does human rights law require of a law in order to ensure secret surveillance does not infringe the principles of accessibility and foreseeability? The Court's decision in *Weber* is authoritative on this point:

> "In its case law on secret measures of surveillance, the Court has developed the following minimum safeguards that should be set out in statute law in order to avoid abuses of power: the nature of the offences which may give rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or the tapes destroyed."[105]

[99] Malone v United Kingdom (1985) 7 EHRR 14 [67]
[100] Ibid, at [79].
[101] Ormerod., R. and Hooper, Blackstone's Criminal Practice 2012, London 2012.
[102] *Weber v Germany,* Application 54934/00, (2008) 46 EHRR SE5 at [77.]
[103] Ibid, at [106].
[104] Kruslin v France (1990) 12 EHHR 547, at [33].
[105] Ibid, at [95]

Applying human rights requirements to the laws of the Five Eyes

There is no clear and accessible legal regime that indicates the circumstances in which, and the conditions on which, Five Eyes authorities can request access to signals intelligence from, or provide such intelligence, to another Five Eyes authority. Each of the Five Eyes states have broad, vague domestic laws that purport to warrant the sharing of and access to shared signal intelligence with the authorities of other States, but fail to set out minimum safeguards or provide details of or restrictions upon the nature of intelligence sharing.

In the **United Kingdom**, the ISC has indicated that the authority to share and receive intelligence is granted by the *Intelligence Services Act 1994*. Section 3(1) of the 1994 Act specifies the functions of GCHQ in these terms:

> (1) There shall continue to be a Government Communications Headquarters under the authority of the Secretary of State; and, subject to subsection (2) below, its functions shall be –
>
> (a) to monitor or interfere with electromagnetic, acoustic and other emissions and any equipment producing such emissions and to obtain and provide information derived from or related to such emissions or equipment and from encrypted material; and
>
> (b) to provide advice and assistance [...]"

Section 3(2) of the 1994 Act specifies the purposes for which the functions referred to in s3(1)(a) shall be exercisable, and makes clear that they shall be exercisable only -

(a) in the interests of national security, with particular reference to the defence and foreign policies of Her Majesty's Government in the United Kingdom; or
(b) in the interests of the economic well-being of the United Kingdom in relation to the actions or intentions of persons outside the British Islands; or
(c) in support of the prevention or detection of serious crime.

Section 4(2)(a) of the 1994 Act imposes on the Director of GCHQ a duty to ensure –

(a) that there are arrangements for securing that no information is obtained by GCHQ except so far as necessary for the proper discharge of its functions and that no information is disclosed by it except so far as necessary for that purpose or for the purpose of any criminal proceedings.

In the **United States**, the scope of intelligence activities was initially set down in Executive Order 12333 – United States intelligence activities, of December 4, 1981.[106] Even though the structure of the United States intelligence community changed considerably after 9/11, the powers granted in the Executive Order nevertheless continue to be invoked.

[106] http://www.archives.gov/federal-register/codification/executive-order/12333.html#1.9

Section 1.12 (b) provides that the responsibilities of the National Security Agency shall include, inter alia:

> (5) Dissemination of signals intelligence information for national foreign intelligence purposes to authorized elements of the Government, including the military services, in accordance with guidance from the Director of Central Intelligence;
> (6) Collection, processing and dissemination of signals intelligence information for counterintelligence purposes;
> (7) Provision of signals intelligence support for the conduct of military operations in accordance with tasking, priorities, and standards of timeliness assigned by the Secretary of Defense. If provision of such support requires use of national collection systems, these systems will be tasked within existing guidance from the Director of Central Intelligence;
> […]
> (12) Conduct of foreign cryptologic liaison relationships, with liaison for intelligence purposes conducted in accordance with policies formulated by the Director of Central Intelligence […]

Section 1.7 deals with the responsibilities of Senior Officials of the Intelligence Community, and designates the following responsibility to the Director of Central Intelligence:

> (f) Disseminate intelligence to cooperating foreign governments under arrangements established or agreed to by the Director of Central Intelligence […]

Section 1.8 relates to the Central Intelligence Agency, and includes among that body's functions to

> (a) Collect, produce and disseminate foreign intelligence and counterintelligence, including information not otherwise obtainable […]

The legislation in **Australia** is slightly more detailed with regards to the circumstances in which intelligence can be shared with and received from foreign intelligence agencies. The actions of the Australian intelligence agencies are governed by the *Intelligence Services Act 2001*, section 7 of which articulates the functions of the Australian Signals Directorate, which include

> (1) to obtain intelligence about the capabilities, intentions or activities of people or organisations outside Australia in the form of electromagnetic energy, whether guided or unguided or both, or in the form of electrical, magnetic or acoustic energy, for the purposes of meeting the requirements of the Government, and in particular the requirements of the Defence Force, for such intelligence; and
> (2) to communicate, in accordance with the Government's requirements, such intelligence; and
> (3) to provide material, advice and other assistance to Commonwealth and State authorities on matters relating to the security and integrity of information that is processed, stored or communicated by electronic or similar means; […]

Pursuant to s11(2AA) of the Act, intelligence agencies may communicate incidentally obtained intelligence to appropriate Commonwealth or State authorities or to authorities of other countries approved under paragraph 13(1)(c) if the intelligence relates to the involvement, or likely involvement, by a person in one or more of the following activities:

(a) activities that present a significant risk to a person's safety;
(b) acting for, or on behalf of, a foreign power;
(c) activities that are a threat to security;
(d) activities related to the proliferation of weapons of mass destruction or the movement of goods listed from time to time in the Defence and Strategic Goods List (within the meaning of regulation 13E of the *Customs (Prohibited Exports) Regulations 1958*);
(e) committing a serious crime.

Section 13(1)(c) permits the agency to cooperate with "authorities of other countries approved by the Minister as being capable of assisting the agency in the performance of its functions."

The **New Zealand** similarly provides the Government Communications Security Bureau with broad powers and functions, including under section 8A

(a) to co-operate with, and provide advice and assistance to, any public authority whether in New Zealand or overseas, or to any other entity authorised by the Minister, on any matters relating to the protection, security, and integrity of—
(i) communications, including those that are processed, stored, or communicated in or through information infrastructures; and
(ii)information infrastructures of importance to the Government of New Zealand; […]

and under section 8B

(a) to gather and analyse intelligence (including from information infrastructures) in accordance with the Government's requirements about the capabilities, intentions, and activities of foreign persons and foreign organisations; and
(b) to gather and analyse intelligence about information infrastructures; and
(c) to provide any intelligence gathered and any analysis of the intelligence to—
(i) the Minister; and
(ii) any person or office holder (whether in New Zealand or overseas) authorised by the Minister to receive the intelligence.

Section 8B(2) also sanctions the sharing of information with foreign intelligence authorities, stipulating "[f]or the purpose of performing its function under subsection (1)(a) and (b), the Bureau may co-operate with, and provide advice and assistance to, any public authority (whether in New Zealand or overseas) and any other entity authorised by the Minister for the purposes of this subsection."

In **Canada,** the functions of the Communications Security Establishment Canada (CSEC) are articulated in Part V.1 to the *National Defence Act*. Section 273.64(1) sets out CSEC's three-part mandate, namely

(a) to acquire and use information from the global information infrastructure for the purpose of providing foreign intelligence, in accordance with Government of Canada intelligence priorities;
(b) to provide advice, guidance and services to help ensure the protection of electronic information and of information infrastructures of importance to the Government of Canada; and
(c) to provide technical and operational assistance to federal law enforcement and security agencies in the performance of their lawful duties.

Part V.1 of the *National Defence Act* in relation to CSEC does not contain any provisions on cooperation with other agencies, including foreign agencies.

An analysis of these cursory legal provisions reveals that they fall far short of describing the fluid and integrated intelligence sharing activities that take place under the ambit of the Five Eyes arrangement with sufficient clarity and detail to ensure that individuals can forsee their application. None of the domestic legal regimes set out the circumstances in which intelligence authorities can obtain, store and transfer nationals' or residents' private communication and other information that are intercepted by another Five Eyes agency, nor which will govern the circumstances in which any of the Five Eyes States can request the interception of communications by another party to the alliance. The same applies to obtaining private information such as emails, web-histories etc. held by internet and other telecommunication companies. There is there a legal regime that indicates, once such communications are provided to the authorities of one State, the procedure for examining, using or storing the communication, the conditions for transferring it to third parties and the circumstances in which it will be destroyed.

The legal and regulatory frameworks that govern and give effect to Five Eyes cannot be said to be sufficiently clear and detailed to meet the requirement of being "in accordance with the law," nor they are they sufficiently accessible to ensure that they comply with the rule of law. Secret, convoluted or obfuscated law can never be considered law within a democratic society governed by the rule of law. The actions of the Five Eyes run completely contrary to the fundamental building blocks of such a society.

Chapter Three – Holding the Five Eyes to account

The recent revelations of global surveillance practices have prompted a fundamental re-examination of the responsibility of States under international law with respect to cross-border surveillance. The patchwork of secret spying programmes and intelligence-sharing agreements implemented by parties to the Five Eyes arrangement constitutes an integrated global surveillance arrangement that now covers the majority of the world's communications.

At the heart of this arrangement are carefully constructed legal frameworks that provide differing levels of protections for internal versus external communications, or those relating to nationals versus non-nationals. These frameworks attempt to circumvent national constitutional or human rights protections governing interferences with the right to privacy of communications that, States contend, apply only to nationals or those within their territorial jurisdiction.

In doing so, the Five Eyes states not only defeat the spirit and purpose of international human rights instruments; they are in direct violation of their obligations under such instruments. Human rights obligations apply to all individuals subject to a State's jurisdiction.[107] Jurisdiction extends not only to the territory of the State, but to anyone within the power and effective control of the State, even if they are outside the territory.[108] It is argued here that jurisdiction extends to situations where a State interferes with the right to privacy of an individual whose communications are intercepted, stored or processed within that State's territory. In such circumstances, the State owes obligations to that individual regardless of their location.

By understanding State jurisdiction over human rights violations in this way we can give effect to international human rights obligations in the digital age. Through the concept of "interference-based jurisdiction", whereby, subject to permissible limitations, States owe a general duty not to interfere with communications that pass through their territorial borders, mass surveillance is cognisable within a human rights framework in a way that provides rights and remedies to affected individuals. Without such a perspective on responsibility for violations that properly reflects the nature and scope of Five Eyes surveillance, and the way in which privacy violations occur, States will continue to conduct surveillance in a way that renders human rights obligations meaningless.

[107] ICCPR, Article 2: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction…"; ECHR, Article 1: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention;" American Convention on Human Rights, Article 1: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

[108] Human Rights Committee General Comment 31, para 10.

We seek to introduce an alternative perspective on jurisdiction and to further understandings of how human rights law can be understood in the digital age. Our intention is to supplement - not to detract from – other arguments around how jurisdiction in international human rights law functions in relation to mass surveillance. For example, interferences occurring outside the territory of the state may be attributable to that state under the ordinary principles of state responsibility. However, we are concerned exclusively with a State's obligations in relation to interferences with the right to privacy (when communications are collected, stored or processed) occurring within the physical territory of that State.

The right to privacy of communications

The right to privacy is an internationally recognized right. Article 17 (1) of the International Covenant on Civil and Political Rights provides

> "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

According to the United Nations Human Rights Committee, in its General Comment No. 16:

> "Compliance with article 17 requires that the integrity and confidentiality of correspondence should be guaranteed de jure and de facto. Correspondence should be delivered to the addressee without interception and without being opened or otherwise read. Surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited."[109]

Article 8 of the European Convention on Human Rights provides a right to respect for one's "private and family life, his home and his correspondence", subject to certain restrictions that are "in accordance with law" and "necessary in a democratic society".

The European Court of Human Rights has consistently held that the interception of telephone communications, as well as facsimile and e-mail communications content,[110] are covered by notions of "private life" and "correspondence" and thus constitute an interference with Article 8.[111]

Importantly the European Court has found[112] the interception and/or storage of a communication constitutes the violation, and that the "subsequent use of the stored

[109] CCPR General Comment No. 16: Article 17 (Right to Privacy), para. 8.
[110] Liberty & Ors v United Kingdom (2008) Application 58243/00
[111] See Malone v United Kingdom (1985) 7 EHRR 14 [64]; Weber v Germany (2008) 46 EHRR SE5 at [77]; and Kennedy v United Kingdom (2011) 52 EHRR 4 at [118]).
[112] Amann v Switzerland (2000) application 27798/95; Leander v. Sweden judgment of 26 March 1987, Series A no. 116, p. 22, § 48

information has no bearing on that finding"[113] nor does it matter "whether the information gathered on the applicant was sensitive or not or as to whether the applicant had been inconvenienced in any way."[114] It is argued that the same reasoning applies to the processing of communications.

Therefore, the right to privacy, extending as it does to the privacy of communications, is a relatively unusual right in the sense that its realization can occur remotely from the physical location of the individual.

When an individual sends a letter, email or a text-message, or makes a phone call, that communication leaves their physical proximity and travels to its destination. In the course of its transmission the communication may pass through multiple other States and, therefore, multiple jurisdictions. The right to privacy of the communication remains intact, subject only to the permissible limitations set out under human rights law.[115]

Mass surveillance as a breach of the right to privacy of communications

The Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion has described the invasiveness of mass interception of fibre optic cables:[116]

> "By placing taps on the fibre optic cables, through which the majority of digital communication information flows, and applying word, voice and speech recognition, States can achieve almost complete control of tele- and online communications."

The Special Rapporteur reasons that "[m]ass interception technology eradicates any considerations of proportionality, enabling indiscriminate surveillance. It enables the State to copy and monitor every single act of communication in a particular country or area, without gaining authorization for each individual case of interception."[117]

Mass surveillance has also been found to be an interference with the right to privacy under European human rights law. In *Weber and Saravia v Germany* (2006) Application 54934/00, the Court reiterated that

> "the mere existence of legislation which allows a system for the

[113] Amann v Switzerland (2000) application 27798/95 para 69
[114] Amann v Switzerland (2000) application 27798/95 para 70
[115] A comprehensive account of the permissible limitations on the right to privacy is presented in the report of the UN Special Rapporteur on the freedom of expression and opinion of 17 April 2013 (A/HRC/23/40).
[116] Report of the Special Rapporteur on promotion and protection of the right to freedom of expression and opinion, Frank La Rue, 17 April 2013, A/HRC/23/40, available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf, at para. 38.
[117] Ibid, para. 62.

> secret monitoring of communications entails a threat of surveillance for all those to whom the legislation may be applied. This threat necessarily strikes at freedom of communication between users of the telecommunications services and thereby amounts in itself to an interference with the exercise of the applicants' rights under Article 8, irrespective of any measures actually taken against them."

The collection and storage of data that relates to an individual's private life is so invasive, and brings with it such risk of abuse, that it alone amounts to an interference with the right to privacy, according to European Court of Human Rights jurisprudence.[118] Accordingly, mass surveillance programmes must violate international law.

Jurisdiction and human rights obligations

Traditional conceptions of State human rights obligations focus on a nexus between the territory where the obligation is owed and an individual's connection with that territory (by virtue of nationality, residence or physical location within it). In the context of obligations under international human rights treaties, jurisdiction has traditionally served as a doctrinal bar to the recognition and realization of human rights obligations extra-territorially. Although, as noted by Milanovic:

> "[q]uestions as to when a state owes obligations under a human rights treaty towards an individual located outside its territory are being brought more and more frequently, before courts both international and domestic. Victims of aerial bombardment[119], inhabitants of territories under military occupation[120] – including deposed dictators[121], suspected terrorists detained in Guantanamo by the United States[122], and the family of a former KGB spy who was assassinated in London through the use of a radioactive toxin, allegedly at the orders or with the collusion of the Russian government[123] – all of these people have claimed protection from human rights law against a state affecting their lives while acting outside its territory."

The jurisdiction clauses in two of the most relevant human rights instruments – the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) – are notably different in their construction and numerous

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[118] S and Marper v United Kingdom (2009) 48 EHRR 50 at [67].
[119] Bankovic and Others v Belgium and Others, App. No. 52207/99, (dec.) [GC], 12 December 2001, hereinafter Bankovic.
[120] *R (Al-Skeini and others) v Secretary of State for Defence*, [2007] UKHL 26, [2007] 3 WLR 33, [2007] 3 All ER 685, on appeal from [2005] EWCA Civ 1609, [2007] QB 140, hereinafter *Al-Skeini*.
[121] *Saddam Hussein v 21 Countries*, App. No. 23276/04, (dec.), March 2006.
[122] See the Conclusions and Recommendations of the Committee against Torture: United States of America, CAT/C/USA/CO/2, 25 July 2006, paras. 14 & 15 and the Concluding Observations of the Human Rights Committee : United States of America, CCPR/C/USA/CO/3, 15 September 2006, para. 10, available at http://www.unhchr.ch/tbs/doc.nsf
[123] See 'Lawyers for slain Russian agent Litvinenko take case to European court', *International Herald Tribune*, 22 November 2007, available at http://www.iht.com/articles/ap/2007/11/23/europe/EU-GEN-Britain-Litvinenko.php?WT.mc_id=rsseurope.

arguments have been mounted to support an understanding of the obligations arising under such treaties as being applicable outside the strict territorial boundaries of the State.

Article 1 of the ECHR holds:

> "The High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention."

In *Al-Skeini v United Kingdom,*[124] the European Court of Human Rights moulded – if not departed from – its earlier jurisprudence in *Banković* [125] to issue a decision that affirms extra-territorial jurisdiction, stating:

> "whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored" (compare *Banković,* cited above, § 75)."[126]

While Milanovic (2011) notes[127] some inconsistencies in the Court's reasoning, particularly vis a vis *Banković*, crucially the case stands as authority that, although the jurisdictional competence of a State is primarily territorial, it is not limited by territory. It can also extend to those over whom the State exercises authority or control.

In contrast, Article 2(1) of the ICCPR holds:

> "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant…"

In 1966, the International Law Commission, in its Draft Articles on the Law of Treaties (subsequently the Vienna Convention on the Law of Treaties) noted that "[c]ertain types of treaty, by reason of their subject matter, are hardly susceptible of territorial application in the ordinary sense. Most treaties, however, have application to territory and a question may arise as to what is their precise scope territorially."[128]

For the purpose of defining the conditions of applicability of the Covenant, the notion of jurisdiction refers to the relationship between the individual and the state in connection with a violation of human rights, wherever it occurred, so that acts of States that take

[124] Application 55721/07, 7 July 2011
[125] Application 52207/99, 12 December 2001
[126] *Bankovic,* at para [73].
[127] http://www.ejiltalk.org/european-court-decides-al-skeini-and-al-jedda/
[128] ILC, 'Draft Articles on the law of Treaties with Commentaries,' (1966) 2 *Yearbook of the International Law Commission* 187 at 213.

place or produce effects outside the national territory may be deemed to fall under the jurisdiction of the state concerned.[129]

As noted above, the right to privacy extends to the privacy of cross-border communications, so that the physical location of the individual may be in a different jurisdiction to that where the interference with the right occurs.

This distinction is examined by Milanovic (2011) who asserts that extraterritorial application can take one of two forms:

> "it will most frequently arise from an *extraterritorial state act,* i.e. conduct attributable to the state, either of commission or of omission, performed outside its sovereign borders… However – and this is a crucial point – extraterritorial application does not *require* an extraterritorial state act, but solely that the individual concerned is located outside the state's territory, while the injury to his rights may as well take place inside it."[130]

With regard to the right to privacy, many violations are not due to extra-territorial acts, but jurisdictional acts with extra-territorial effects. The instances in which jurisdictional acts have extra-territorial effects are infrequent but not without precedent.

One example provided by Milanovic is the question of property rights of foreigners or those absent from the territory. A person may have property rights in the UK by virtue of owning a property in the territory, but may be temporarily or permanently located outside the UK. If the property were to be searched or seized without adherence to legal standards there would be a violation of the individual's right to privacy, regardless of their location at the time of the interference. This is an example of "interference-based" jurisdiction.

A second example is that of enjoyment of Article 6 ECHR fair trial rights during trials in absentia where the individual in question has absconded outside the State's territory. The European Court of Human Rights has repeatedly upheld the right of defendants to enjoy the protections of Article 6 even when they are absent from their trial and outside the territory of the State. In *Sejdovic v Italy,*[131] for example, the Court held, at [91]:

> "Although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial (see *Poitrimol*, cited above, § 34). A person charged with a criminal offence does not lose the benefit of this right merely on account of not being present at the trial (see *Mariani v. France*, no. 43640/98, § 40, 31 March 2005)."

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[129] Delia Salides de Lopez v. Uruguay, Communication No. 52/1979, 13th Sess., at 88, 91 ¶ 12.2, U.N. Doc. CCPR/C/OP/1 (29 July 1981).
[130] Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford: Oxford University Press, 2011).
[131] Application 56581/00, 1 March 2006

A further example is the situation in the European Court of Human Rights' case *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* (2005) 42 EHRR 1, where Irish authorities at Dublin Airport impounded an aircraft that had been leased by a Turkish company from the national airline of the former Yugoslavia. The company argued that the Irish authorities had acted in a way that was incompatible with the European Convention on Human Rights. In considering the issue of jurisdiction, the Court noted the territorial basis of jurisdiction in international law and observed:[132]

> "In the present case it is not disputed that the act about which the applicant company complained, the detention of the aircraft leased by it for a period of time, was implemented by the authorities of the respondent State on its territory following a decision made by the Irish Minister for Transport. In such circumstances the applicant company, as the addressee of the impugned act, fell within the "jurisdiction" of the Irish State, with the consequence that its complaint about that act is compatible ratione loci, personae and materiae with the provisions of the Convention."

With respect to the right to privacy, the European Court has considered at least two cases[133] in which surveillance has involved the interference with the right to privacy of those outside of the respective State's territory. In neither has the Court directly considered the issue of whether obligations owed are extended to individuals outside the territory.

Application to interferences with the right to privacy in the digital age

With the advent of the internet and new digital forms of communication, now most digital communications take the fastest and cheapest route to their destination, rather than the most direct. This infrastructure means that the sender has no ability to choose, nor immediate knowledge of, the route that their communication will take. Even when a digital communication is being sent to a recipient within the same country as the sender, it may travel around the world to reach its destination.

This shift in communications infrastructure means that communications travel through many more countries, are stored in a variety of countries (particularly through the growing popularity of cloud computing) and are thus vulnerable to inception by multiple intelligence agencies. From their bases within the territory of each country, each respective intelligence agency collects and analyses communications that traverse their territory and beyond. While there are many methods used by intelligence agencies to intercept communications, one of the consistent techniques is to exploit the

[132] Para 137.

[133] In *Weber and Saravia v. Germany,* Application 54934/00, 29 June 2006, the Court found that the application was inadmissible by other means; in *Liberty and Ors v United Kingdom,* Application 58243/00, 1 July 2008, the Government proceeded on the basis that the applicants could claim to be victims of an interference with their communications sent to or from their offices in the UK and Ireland.

communications infrastructure itself, often in the form of the transnational cables that carry the world's communications.

For more than 50 years the security agencies have intercepted these transnational links. From 1945 onwards the US intelligence agencies systematically intercepted telegraphic data entering or exiting the United States under the codename Project SHAMROCK. As technology developed, newer fibre optic cables were laid that could carry many more communications. These links were also intercepted by intelligence agencies within their territory. Investigative journalist Duncan Campbell explained in 2000 how the NSA was intercepting the foreign communications within US territory:

> "Internet traffic can be accessed either from international communications links entering the United States, or when it reaches major Internet exchanges. Both methods have advantages. Access to communications systems is likely to be remain clandestine - whereas access to Internet exchanges might be more detectable. […] According to a former employee, NSA had by 1995 installed "sniffer" software to collect such traffic at nine major Internet exchange points (IXPs)."[134]

The UK is using more modern versions of this technique to intercept, store and process communications that enter and exit the country in the form of their mass surveillance program TEMPORA. While these undersea fibre-optic cables will land in multiple different countries, due to the UK's geographical position, a disproportionate number of undersea cables land in the UK before they cross the Atlantic Ocean. The Guardian[135] reported that by the summer of 2011, GCHQ had attached probes to more than 200 links within their territory, including at main network switches and undersea cable landing stations. Similar capabilities exist allowing intelligence agencies to intercept satellite communications.[136][137]

Crucially, by intercepting communications in this way, the communication is being interfered with within the territory of the intercepting state. This amounts to an interference with the right to privacy and must be justified according to the restrictions of human rights law. Such an interference invokes the negative obligation and responsibility of the interfering State not to violate fundamental rights.

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[134] NSA slides explain the PRISM data-collection program, The Washington Post, June 6, 2013, Updated July 10, 2013, available at: http://www.washingtonpost.com/wp-srv/special/politics/prism-collection-documents/; see also, Temporary Committee of the European Parliament on the ECHELON Interception System, *Report on the existence of a global system for the interception of private and commercial communications (ECHELON interception system) (2001/2098(INI))*, tabled in the European Parliament on 11 July 2001.

[135] GCHQ taps fibre-optic cables for secret access to world's communications, The Guardian, 21 June 2013, available at: http://www.guardian.co.uk/uk/2013/jun/21/gchq-cables-secret-world-communications-nsa

[136] The state of the art in communications Intelligence (COMINT) of automated processing for intelligence purposes of intercepted broadband multi-language leased or common carrier systems, and its applicability to COMINT targetting and selection, including speech recognition, Duncan Campbell, Oct 1999 http://www.duncancampbell.org/menu/surveillance/echelon/IC2000_Report%20.pdf

[137] Secret Power, Nicky Hager, 1996, http://www.nickyhager.info/ebook-of-secret-power/

Regardless of their location or nationality, all individuals are entitled to have their right to privacy respected not only by the State upon whose territory they stand, but by the State within whose territory their rights are exercised. If their communications pass through the territory of another State, and that State interferes with the communications, it will activate that State's jurisdiction under international human rights law. Accordingly, the US and UK owe the same obligation to each individual whose communications pass through their territory: not to interfere with those communications, subject to permissible limitations established under international law. Such "interference-based jurisdiction" obligations extend globally, regardless of boundaries.

Five Eyes legal frameworks that circumvent human rights obligations

Each of the Five Eyes members have complex legal frameworks governing the interception, monitoring and retention of communications content and data. This paper does not attempt to comprehensively outline such frameworks, and only excerpts some relevant provisions to illustrate the obfuscatory nature of legal frameworks that enable the rights of non-nationals or those outside the territory to be diminished.

United States
FISA section 1881a is entitled "Procedures for targeting certain persons outside the United States other than United States persons".

Section 1881(a) ss (a) provides:

> (a) the Attorney General and the Director of National Intelligence may authorize jointly, for a period of up to 1 year from the effective date of the authorization, the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information.

An authorisation pursuant to FISA section 1881(a) permits "foreign intelligence information" to be obtained both by directly intercepting communications during transmission and by making a request to an electronic service provider that stores the information to make it available to the authorities.

United Kingdom
The Regulation of Investigatory Powers Act 2000 distinguishes between "internal" and "external" surveillance. Where the communication is internal (i.e. neither sent nor received outside the British Islands, see RIPA s 20), a warrant to permit lawful interception must describe one person as the "interception subject" (s 8(1)(a)) or identify a "single set of premises" for which the interception is to take place (s 8(1)(b)). The warrant must set out "the addresses, numbers, apparatus or other factors, or combination of factors, that are to be used for identifying the communications that may be or are to be intercepted" (s 8(2)).

Where the communication is "external", that is either sent or received outside the British Islands, RIPA s 8(1) and 8(2) do not apply. There is no need to identify any particular person who is to be subject of the interception or a particular address that will be

targeted.

New Zealand
The Government Security Communications Bureau (GCSB) is permitted to conduct interception by applying for an interception warrant under s15A of the Government Communications Security Bureau Act 2003 (amended 2013). However, s14 of the Act (as amended) states that in performing the function of intelligence gathering and analysis, the GSCB cannot "authorise or do anything for the purpose of intercepting the private communications of a person who is a New Zealand citizen or a permanent resident of New Zealand, unless (and to the extent that) the person comes within the definition of foreign person or foreign organisation....".

However, this limitation does not apply to the GCSB's two other functions – surveillance of New Zealanders related to cyber-security and assisting other agencies (such as the Police) – and the definition of "private communications" could be interpret to exclude meta-data.

Australia
Under the *Intelligence Services Act 2001*, the Australian intelligence agencies can conduct any activity connected with their functions[138] provided they have the authorisation of the relevant Minister (s8).

However, where there is an Australian person involved the Minister must be satisfied of the following before making an authorisation (s9):

(a) any activities which may be done in reliance on the authorisation will be necessary for the proper performance of a function of the agency concerned; and
(b) there are satisfactory arrangements in place to ensure that nothing will be done in reliance on the authorisation beyond what is necessary for the proper performance of a function of the agency; and
(c) there are satisfactory arrangements in place to ensure that the nature and consequences of acts done in reliance on the authorisation will be reasonable, having regard to the purposes for which they are carried out.

In addition, the Minister must (s9(1A))

(a) be satisfied that the Australian person mentioned in that subparagraph is, or is likely to be, involved in one or more of the following activities:
    (i) activities that present a significant risk to a person's safety;
    (ii) acting for, or on behalf of, a foreign power;
    (iii) activities that are, or are likely to be, a threat to security;
    (iv) activities related to the proliferation of weapons of mass destruction or the movement of goods listed from time to time in the Defence and

[138] Which include to obtain foreign intelligence (ASIS), to obtain intelligence relevant to security (ASIO), to obtain foreign intelligence using the electrical, magnetic or acoustic energy (ASD), or to obtain geospatial and imagery intelligence via electromagnetic spectrum (DIGO)

Strategic Goods List (within the meaning of regulation 13E of the *Customs (Prohibited Exports) Regulations 1958*);
(v) committing a serious crime by moving money, goods or people;
(vi) committing a serious crime by using or transferring intellectual property;
(vii) committing a serious crime by transmitting data or signals by means of guided and/or unguided electromagnetic energy; and

(b) if the Australian person is, or is likely to be, involved in an activity or activities that are, or are likely to be, a threat to security (whether or not covered by another subparagraph of paragraph (a) in addition to subparagraph (a)(iii))—obtain the agreement of the Minister responsible for administering the *Australian Security Intelligence Organisation Act 1979*.

There are separate *Rules to Protect the Privacy of Australians* for each of the intelligence agencies, stating that where it is not clear whether a person is an Australian, it is presumed that a person within Australia is Australian and outside of Australia is not Australian (Rule 1.1). Where an intelligence agency does retain intelligence information concerning an Australian person, the agency must ensure the information is protected by security safeguards, and access to the information is only to be provided to persons who require it (Rule 2.2).

Canada

The *National Defence Act* pertains to the Communications Security Establishment Canada (CSEC) and establishes that the mandate of CSEC is (s273.64 (1))

(a) to acquire and use information from the global information infrastructure for the purpose of providing foreign intelligence, in accordance with Government of Canada intelligence priorities;
(b) to provide advice, guidance and services to help ensure the protection of electronic information and of information infrastructures of importance to the Government of Canada; […]

Para (2) of the section provides that activities

(a) shall not be directed at Canadians or any person in Canada; and
(b) shall be subject to measures to protect the privacy of Canadians in the use and retention of intercepted information.

It is evident that the legal frameworks of the Five Eyes States currently distinguish between the obligations owed to nationals or those within the States' territories, and non-nationals and those outside. In doing so, these legal frameworks infringe upon the rights of all individuals within the respective States' jurisdiction (i.e. anyone whose communications pass through and are interfered with within the territory of that State) to enjoy human rights protections equally and without discrimination.

In human rights law, discrimination constitutes any distinction, exclusion, restriction or preference, or other differential treatment based on any ground, including national or social origin, or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise by all persons, on an equal footing, of

all rights and freedoms. The Human Rights Committee has deemed nationality a ground of "other status" with respect of article 2(1) of the ICCPR in *Gueye and ors v France*.[139]

It is both irrational and contrary to the spirit and purpose of international human rights norms to suppose that the privacy of a person's communications could be accorded different legal weight according to their nationality or residence. An equivalent distinction on the basis of ethnicity or gender would be deemed to be manifestly incompatible with human rights law; why then should States be able to purport to offer varying protections based on an individual's nationality or location? If an individual within a State's jurisdiction is granted lower or diminished human rights protections – or indeed is deprived of such protections – solely on the basis of their nationality or location, this will not only lead to a violation of the right they seek to enjoy, but will amounts to an interference with their right to be free from discrimination.

Towards an understanding of interference-based jurisdiction

Individuals have a legitimate expectation that their human rights will be respected not only by the State upon whose territory they stand, but by the State within whose territory their rights are exercised. The current legal frameworks of the Five Eyes States purport to discriminate between the rights and obligations owed to nationals or those physically within their territory, and those outside of it, or non-nationals. Yet the concept of jurisdiction, under human rights law, is not a rigid one. States have interference-based jurisdiction for particular negative human rights obligations when the interference with the right occurs within their territory. The way the global communications infrastructure is built requires that the right to privacy of communications can be exercised globally, and communications can be monitored in a place far from the location of the individual to whom they belong. Accordingly, the States Parties to the Five Eyes arrangement have jurisdiction over – and thus owe obligations to – individuals whose communications they monitor, which jurisdiction is invoked when the State interferes with the communication of an individual, thus infringing upon their right to privacy.

This understanding of jurisdiction and human rights obligations pertaining to the right to privacy is key to ensuring that individuals can seek redress against global surveillance arrangements that are threatening their rights to privacy and free expression.

[139] Gueye and Others v. France (Comm. No. 196/1985)

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4 March 2014

Sir Iain Lobban
Director
Government Communications Headquarters
Hubble Road
Cheltenham
GL51 0EX
By email: pressoffice@gchq.gsi.gov.uk

Dear Sir,

Re: Request under the Freedom of Information Act 2000

Pursuant to section 1 of the Freedom of Information Act 2000, we kindly request copies of any and all records consisting of or relating to:

1) An organisational chart(s) of the departments within GCHQ.
2) The number of people who work for GCHQ, broken down by departmental classifications that GCHQ uses in its normal course of business.
3) The current menu and price list for any restaurants, canteens, cafes or other food service providers that operate within any GCHQ controlled building.
4) Copies of all indoctrination declarations, official secrets act declarations, oaths, or other declarations GCHQ employees sign to receive confidential information.
5) A hierarchical list of the levels of security clearance and/or levels of access to classified information in use by GCHQ.
6) Documents describing the process and requirements a person must fulfill in order to obtain each level of security clearance and/or access to classified information, including but not limited to, counter-terrorism check, security check and developed vetting.
7) The number of people working for GCHQ who have obtained, respectively, each level of security clearance and/or access to classified information, including but not limited to counter-terrorism check, security check and developed vetting.
8) Documents, internal policies, or memoranda provided to new GCHQ employees regarding the legality of actions undertaken by GCHQ.
9) Documents provided to GCHQ employees setting out ways in which employees can raise concerns regarding the legality or ethical nature of activities undertaken by GCHQ.
10) Documents provided to GCHQ employees relating or regarding compliance with the Official Secrets Act.

11) Documents provided to GCHQ employees relating to compliance with section 4(2)(b) of the Intelligence Services Act 1994 (ISA).
12) Between 2000 and the present, the number of warrants issued pursuant to RIPA on which GCHQ has relied to carry out its activities, broken down by year and by the section of RIPA that authorized the warrant.
13) Between 1994 and the present, the number of warrants issued pursuant to the ISA on which GCHQ has relied to carry out its activities, broken down by year and by the section of the ISA that authorized the warrant.
14) A document index, including document title and number of pages, or similar inventory provided to the Interception of Communications Commissioner pursuant to the requirements of the Regulation of Investigatory Powers Act 2000 (RIPA) section 58.
15) A document index, including document title and number of pages, or similar inventory provided to the Intelligence Services Commissioner pursuant to the requirements of the RIPA section 60.
16) Number of instances, broken down by year, when the Director of GCHQ has refused to disclose information to the Intelligence and Security Committee pursuant to Schedule 3, sub-paragraph 3(1)(b)(i) of the ISA; and, the same information as regards sub-paragraph 3(1)(b)(ii) of the ISA.
17) Number of violations of any of the Codes of Practice promulgated under RIPA, broken down by year and section of the code violated.
18) The British-United States Communications Intelligence Agreement (now known as the UKUSA Agreement, also referred to as the Five Eyes Agreement) and subsequent instruments or other documents constituting agreements regarding the exchange of communications intelligence between the UK government and the United States, New Zealand, Australia and Canada.
19) Any other intelligence sharing agreements between the UK government and any other government, aside from the agreements described in request number 18.
20) Documents describing the process and requirements a foreign intelligence or security agency must fulfill in order to receive access to information classified by GCHQ.
21) The number of foreign intelligence or security agencies who currently have access to information classified by GCHQ.
22) The number of employees in foreign intelligence or security agencies, who currently have access to information classified by GCHQ, broken down by agency,

We anticipate your prompt release of these documents.

I look forward to receiving your response within thirty days. I would be grateful if you would acknowledge receipt of this letter. I would prefer to receive all correspondence relating to this request in electronic form to the following e-

mail address: caroline@privacyinternational.org.

Sincerely,

Caroline Wilson Palow
Privacy International

Cc: FOI and DPA Team
Information Management Department
Foreign and Commonwealth Office
Room K4.10 – K4.13
King Charles Street
London
SW1A 2AH
By email: foi-dpa.imd@fco.gov.uk

From: **Infoleg** infoleg@GCHQ.GSI.GOV.UK
Subject: RE: Freedom of Information Request
Date: 4 March 2014 16:36
To: caroline@privacyinternational.org
Cc: Infoleg infoleg@GCHQ.GSI.GOV.UK

Protective Marking: UNCLASSIFIED

Dear Ms Wilson Palow,

Thank you for your email of 4 March 2014 with your request attached.

It has been passed to me, as GCHQ's Information Legislation authority, for a response. The Freedom of Information Act 2000 ("the Act") does not apply to GCHQ by virtue of s.84, which provides that GCHQ is not a government department for the purposes of the Act. This means that GCHQ is excluded from the list of public authorities listed in Schedule 1 and to which the Act does apply. As such we are not obliged to comply with the provisions and requirements of the Act and we cannot assist you further.

I regret that we are unable to be of assistance in this matter.

Regards,

Head of Information Rights

-----Original Message-----
From: Caroline Wilson Palow [mailto:caroline@privacyinternational.org]
Sent: 04 March 2014 15:55
To: PressOffice
Cc: foi-dpa.imd@fco.gov.uk
Subject: Freedom of Information Request

Dear Sir/Madam,

Attached please find a request under the Freedom of Information Act 2000. I am also copying the request to the Foreign and Commonwealth Office.

Sincerely,

Caroline Wilson Palow
Legal Officer

Privacy International
62 Britton Street
London EC1M 5UY
United Kingdom

Email: caroline@privacy.org
Mobile: +44 (0)7538 976 609
Tel.: + 44 (0)203 422 4321
Web: www.privacyinternational.org

Privacy International is a registered charity (No. 1147471).
To donate please visit https://www.privacyinternational.org/donate

other UK information legislation. Refer disclosure requests to
GCHQ on 01242 221491 ext 30306 (non-secure) or email
infoleg@gchq.gsi.gov.uk

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LEANDER *v.* SWEDEN
(Security vetting and access to files)

BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

(*The President*, Judge Ryssdal; Judges Lagergren, Gölcüklü, Pettiti, Sir Vincent Evans, Russo and Bernhardt)

Series A No. 116
26 March 1987
App. No. 9248/81

The applicant had been refused permanent employment as museum technician with the Naval Museum on account of certain secret information which allegedly made him a security risk. He contended that the vetting had involved an attack on his reputation and that he should have had the opportunity of defending himself before a tribunal. The Commission found, unanimously, no breach of Article 8 and that no separate issue arose under Article 10 and, by 7 votes to 5, that no breach of Article 13 had occurred. The Court *held*, unanimously, that Articles 8 and 10 had not been breached and, by 4 votes to 3, that there had been no violation of Article 13.

1. Private life: secret surveillance, security vetting, national security, 'in accordance with the law', 'necessary in a democratic society'. (Art. 8).

(a) It was uncontested that an interference with the applicant's right under Article 8(1) had occurred through information being held in a secret police register about him, combined with the refusal to allow the applicant an opportunity to refute the information. [48]

(b) The Swedish personnel control system had the legitimate aim of protecting national security. [49]

(c) The Court referred to its MALONE judgment as indicating how the phrase 'in accordance with the law' must be interpreted in the context of secret security measures. [50–51]

(d) It found that Swedish law gave citizens an adequate indication of the scope and manner of the exercise of the discretion conferred on the responsible authorities to collect, record and release information under the personnel control system. [52–56]

(e) The respondent government enjoyed a wide margin of appreciation in choosing the means for protecting national security through secret vetting and personnel controls. [58–59]

(f) The Court had to be satisfied that adequate and effective safeguards against abuse existed because of the potential risk to democracy of secret surveillance. Having reviewed the safeguards, it reached the conclusion that they were adequate. [60–67] It therefore found no breach of Article 8.

2. Freedom of expression: secret surveillance, security vetting, expression of opinions, freedom of information. (Art. 10).

(a) The applicant's freedom to express opinions had not been interfered with by the operation of the personnel control system and the decision not to appoint him to the permanent post. [71–73]

(b) The right to freedom to receive information basically prohibited a Government from restricting a person from receiving information that others wished or might be willing to impart to him. It did not give the applicant a right of access to the entry about himself in the secret police register. [74]

3. Remedy before a National Authority: secret surveillance, security vetting. (Art. 13).

(a) The Court referred to its earlier case law as indicating how the right to an effective remedy before a national authority was to be interpreted. No breach of Article 13 occurs because secret files are withheld from the person concerned in the circumstances of this case. An 'effective remedy' meant a remedy that was as effective as could be having regard to the restricted scope for recourse inherent in any system of secret checks on candidates for employment in posts of importance from the point of national security. [77–78]

(b) Given that the Swedish personnel control system was found as such to comply with Article 8, Article 13 required that domestic machinery existed whereby, subject to the inherent limitations of the context, the individual could secure compliance with the relevant laws. [79]

(c) The Court concluded that the aggregate of remedies satisfied the conditions of Article 13 even if, taken alone, the complaint to the Government were not considered sufficient to ensure compliance with Article 13. [80–84]

This case was referred to the Court by the European Commission of Human Rights on 11 July 1985.

Mr. H. Corell, Ambassador, Under-Secretary for Legal and Consular Affairs, Ministry of Foreign Affairs (Agent);
Mr. K. Bergenstrand, Assistant Under-Secretary, Ministry of Justice, and *Mr. S. Höglund*, Head of Division, National Police Board (Advisers) for the Government.
Mr. H. Schermers (Delegate), for the Commission.
Mr. D. Töllborg (Counsel) and *Mr. J. Laestadius* (Adviser) for the applicant.

The Court heard addresses by Messrs. Corell, Schermers and Töllborg, as well as their replies to questions put by the Court and several judges.

The following cases are referred to in the judgment:

1. GILLOW *v.* UNITED KINGDOM, not yet reported.
2. GLASENAPP *v.* GERMANY (1987) 9 E.H.R.R. 25.
3. JAMES *v.* UNITED KINGDOM (1986) 8 E.H.R.R. 123.
4. KLASS *v.* GERMANY, 2 E.H.R.R. 214.
5. KOSIEK *v.* GERMANY (1987) 9 E.H.R.R. 328.

6. LITHGOW *v.* UNITED KINGDOM (1986) 8 E.H.R.R. 329.
7. MALONE *v.* UNITED KINGDOM (1985) 7 E.H.R.R. 14.
8. SILVER *v.* UNITED KINGDOM (1983) 5 E.H.R.R. 347.

The Facts

I. Particular Circumstances of the case

9. The applicant, Mr. Torsten Leander, is a Swedish citizen born in 1951 and a carpenter by profession.

10. On 20 August 1979, he started to work as a temporary replacement in the post of museum technician (*vikarierande museitekniker*) at the Naval Museum at Karlskrona in the south of Sweden. The museum is adjacent to the Karlskrona Naval Base which is a restricted military security zone.

The applicant maintained before the Court that the intention was that he should work for ten months in this post, while its ordinary holder was on leave. He alleged that on 3 September he was told to leave his work pending the outcome of a personnel control which had to be carried out on him in accordance with the Personnel Control Ordinance 1969 (*personalkontrollkungörels* 1969:446[1]). According to the applicant, this control had been requested on 9 August 1979.

The Government submitted that the applicant was employed only from 20 August to 31 August 1979, as evidenced by a notice to this effect, issued on 27 August 1979 by the Director of the Museum. It further contended that in employing Mr. Leander the Director had committed two errors. Firstly, it was not in accordance with the procedure prescribed in the Ordinance and the relevant regulations issued thereunder to employ a person before a personnel control had been undertaken and, secondly, the post had not properly been declared vacant.

11. The necessary steps were taken on 30 August 1979. The post was opened for application until 28 September 1979. Mr. Leander did not apply.

12. It appears that on 25 September the Director informed him that the outcome of the personnel control had been unfavourable and that he could therefore not be employed at the Museum.

13. Following the advice of the Security Chief of the Naval Base, the applicant wrote to the Commander-in-Chief of the Navy (*chef för marin*) requesting to be informed of the reasons why he could not be employed at the Naval Museum.

In his reply of 3 October 1979, the Commander-in-Chief of the Navy stated, *inter alia*:

> 'The Museum possesses several storage rooms and historical objects within the area for the security of which the Chief of the Naval Base (*örlogsbaschef*) is responsible. According to the information received by the Commander-in-Chief of the Navy, the person holding the post

[1] See paras. 18 to 34 *infra*.

in question must have freedom to circulate within areas subject to special restrictions regarding access. The rules on access to these areas must therefore also be applied to the personnel employed at the Museum.

It is for these reasons that the Chief of the Naval Base requested a personnel control.

The control carried out has provided such grounds for the Commander-in-Chief's assessment of you from a security point of view that the decision has been taken not to accept you.

However, if your duties at the Naval Museum will not necessitate that you have access to the naval installations at the Naval Base, the Commander-in-Chief sees no reason to oppose your employment. The decision whether or not to employ you is taken in a procedure distinct from the present one.'

14. On 22 October 1979, the applicant complained to the Government and requested that the assessment of the Commander-in-Chief of the Navy be cancelled and that he be declared acceptable for temporary employment at the Naval Museum, irrespective of the possibility of being reinstated in that employment. He pointed out in particular that he had left a permanent position in Dalarna, in the North of Sweden, on being told that he was accepted for employment at the Naval Museum and that a negative outcome of the personnel control could mean social misery, especially considering that he had a wife and child to support. In his original complaint, and also in a letter of 4 December 1979, Mr. Leander further requested that he be given information about the reasons for his not being accepted at the Naval Museum.

The Government requested the opinion of the Supreme Commander of the Armed Forces (*överbefälhavar*), who in turn consulted the Commander-in-Chief of the Navy.

The Commander-in-Chief of the Navy explained in a letter of 7 November 1979 that he had received the result of the personnel control from the Supreme Commander on 17 September 1979 together with the following proposal:

> Accepted in accordance with the assessment of the [Commander-in-Chief of the Navy], on condition that L. does not, through access to the Museum's premises or through his work, obtain insight into secret activities.

The Commander-in-Chief of the Navy added that, according to his information, the Director of the Museum required the person employed in the post in question to have free access to, and freedom to circulate in, the Naval Base and that accordingly, on 21 September 1979, he had taken the decision not to accept the applicant.

In his reply to the Government, the Supreme Commander of the Armed Forces stated, *inter alia*:

> However, the employment of Mr. Leander during this time, 15 August–1 September 1979, did not involve any access to the Naval Base. The Commander-in-Chief of the Navy has said that he does not oppose such employment. The Director of the Naval Museum has,

however, affirmed the requirement that Mr. Leander should have access to the Naval Base.

In view of the above and the fact that, if Mr. Leander was given access to the Naval Base, he would have access to secret installations and information, the Commander-in-Chief of the Navy decided not to accept the applicant.

When dealing with the present case, the Commander-in-Chief of the Navy has entirely followed existing regulations concerning the assessment of personal qualifications from a security point of view. . . .

Like the Commander-in-Chief of the Navy, the Supreme Commander of the Armed Forces considers that Mr. Leander may properly be employed by the Naval Museum provided that the holder of the appointment does not require access to the Naval Base.

The opinion of the Supreme Commander of the Armed Forces was accompanied by a secret annex, containing the information on Mr. Leander released by the National Police Board (*rikspolisstyrels*). This annex was never communicated to the applicant and has not been included in the material submitted to the Court.

15. In a letter of 5 February 1980, the applicant raised new grievances before the Government. These concerned the decision of the National Police Board not to exercise its powers under section 13 of the Personnel Control Ordinance to communicate to him the information released on him.[2] The applicant requested that the Government should, before taking a decision on his request of 22 October 1979, give him the right to be apprised of and to comment upon the information thus released by the Board.

On this matter, the Government sought the opinion of the Board. In its reply of 22 February 1980, the Board proposed that the applicant's complaints be dismissed. It added:

The entering of information in the register of the Board's Security Department is based mainly on a 1973 Royal Decree which is secret. Before information is entered, the question of registration is subject to assessment, at several levels, by civil servants under responsibility to verify compliance with the abovementioned rules in relation to each item of information. In the event of doubt, the question of registration is decided upon by the Chief of the Security Department.

Information from the register is handed out in accordance with section 9 of the Personnel Control Ordinance after decision by the National Police Board in plenary meeting. At least three of the six members of the Board who are appointed from amongst members of Parliament should be present when decisions are taken in matters of personnel control. In the case of the applicant, all six members were present. . . .

Under section 13 of the Personnel Control Ordinance, the person whom the information concerns ought to be given the opportunity to submit observations on the matter *if special reasons give cause for this.* However, the National Police Board did not see any cause to apply this provision in the case of the applicant as no special reasons were found, *and also* as the registering had been effected in accordance

[2] See para. 31 *infra.*

with the secret Royal Decree and disclosure of the information would have revealed part of the contents of that Decree.

Mr. Leander replied to this opinion in a letter of 11 March 1980 to the Government, in which he argued, *inter alia*, that the Board should have communicated to him, at least orally and subject to a duty of confidentiality, the information kept on him.

16. By decision of 14 May 1980, the Government rejected the whole of the applicant's complaint. In its operative parts, the decision read:

> The question whether or not a person is suitable for certain employment can only be examined by the Government in the context of a complaint about appointment to a post. Leander has lodged no appeal with the Government in respect of appointment. His request that the Government should declare him acceptable for the provisional employment concerned cannot therefore be examined.
>
> In the present case, there are no such special circumstances as are mentioned in section 13 of the Personnel Control Ordinance which would give Leander the right to be acquainted of the information about him released by the National Police Board to the Supreme Commander of the Armed Forces.
>
> The remainder of Leander's petition is a request to be given an extract from, or information about the contents of, a police register.
>
> The Government rejects [this] request . . .
>
> The Government does not examine Leander's request for a revised assessment of his person and takes no measure in regard to any other part of his petition.

17. The applicant maintained before the Court that he still did not know the content of the secret information recorded on him.

Regarding his personal background, he furnished the following details to the Commission and the Court. At the relevant time, he had not belonged to any political party since 1976. Earlier he had been a member of the Swedish Communist Party. He had also been a member of an association publishing a radical review—*Fib/Kulturfront*. During his military service, in 1971–72, he had been active in the soldiers' union and a representative at the soldiers' union conference in 1972 which, according to him, had been infiltrated by the security police. His only criminal conviction stems from his time in military service and consisted of a fine of 10 Skr. for having been late for a military parade. He had also been active in the Swedish Building Workers' Association and he had travelled a couple of times in Eastern Europe.

The applicant asserted however that, according to unanimous statements by responsible officials, none of the abovementioned circumstances should have been the cause for the unfavourable outcome of the personnel control.

II. Relevant domestic law and practice

A. Prohibition of registration of opinion

18. According to Chapter 2, section 3, of the Swedish Instrument of Government (*regeringsform*, which forms the main constituent

of the Swedish Constitution and is hereafter referred to as 'the Constitution'), 'no entry regarding a citizen in a public register may without his consent be founded exclusively on his political opinion'.

B. *Secret police register*

19. The legal basis of the register kept by the National Police Board's Security Department (the secret police register) is to be found in the Personnel Control Ordinance, which was enacted by the Government under its regulatory powers and which was originally published in the Swedish Official Journal.[3] Section 2 of the Ordinance (as amended by Ordinance 1972:505) provides:

> For the special police service responsible for the prevention and detection of offences against national security, *etc.*, the Security Department within the National Police Board shall keep a police register. In this register, the National Police Board may enter information necessary for the special police service.
>
> In the police register referred to in the first paragraph, no entry is allowed merely for the reason that a person, by belonging to an organisation or by other means, has expressed a political opinion. Further provisions concerning the application of this rule shall be laid down by the Government.

20. In consequence, the following instructions, published on 22 September 1972, were given to the National Police Board by the Government:

> In this country, there exist organisations and groups engaging in political activities which involve the use or the possible use of force or threats of compulsion as means to achieve their political aims.
>
> Some organisations have adopted a programme in which it is said that the organisation shall endeavour to change the social system by violence. It can be assumed, however, that a large part of the membership of such organisations will never take part in the realisation of the goals in the programme. The mere fact of being a member of such an organisation does not therefore constitute a reason for the Security Police to make an entry about a person in its register. An entry may be made, however, if a member or a supporter of such an organisation has acted in a way which justifies the suspicion that he may be prepared to participate in activities which endanger national security or which are aimed at, and may contribute towards, overthrowing the democratic system by force or affecting the status of Sweden as an independent State.
>
> There are also organisations and groups which may engage in, or may have engaged in, political subversion in Sweden or in other States, while using force, threats or compulsion as means for such subversion. Information about members or supporters of such organisations or groups shall be entered in the register of the Security Police.
>
> Further instructions concerning the application of section 2 of the Personnel Control Ordinance shall be issued by the Government following proposals from the National Police Board. If, in the special police service, circumstances appear which may call for amendments to the instructions issued by the Government the National Police Board should submit proposals for such amendments.

[3] Svensk Författningsamling, 1969:446.

21. Further instructions, this time secret, were issued by the Government on 27 April 1973 and again on 3 December 1981.

22. In addition to the circumstances provided for in the Personnel Control Ordinance[4] information from the secret police register appears also to be released by the National Police Board in certain cases of public prosecution and in matters relating to applications for Swedish citizenship.

C. *Personnel control*

23. In addition to the abovementioned provisions regarding the secret police register, the Personnel Control Ordinance contains provisions as to, *inter alia*, the posts which are to be security classified, the procedure for handing out information and the use of the information released. The main relevant provisions are summarised below.

24. According to section 1, personnel control means the obtaining of information from police registers in respect of persons holding or being considered for appointment to posts of importance for national security.

25. Section 3[5] enumerates certain authorities, including the Supreme Commander of the Armed Forces, entitled to request a personnel control.

26. Section 4 specifies that a personnel control may only be carried out with regard to certain posts of importance for national security. The posts concerned are divided into two security classes (*skyddsklasse*), depending upon whether or not they are of vital importance for national security. The decision to classify a post in Security Class 1 is taken by the Government, whereas the right to classify a post in Security Class 2 is normally delegated to the authority in question.

27. According to section 6, requests for release of information for the purposes of a personnel control are to be made to the National Police Board and the request shall be made only with regard to the person whom it is intended to appoint to the post.

28. Sections 8 and 9 deal with what information may be handed out to the appointing authority.

If the post in question falls within Security Class 1, the National Police Board may, under section 8, release all information on the person concerned contained in the secret police register or in any other police register. If the post comes within Security Class 2, the Board may, by virtue of section 9,[6] only supply a certain specific kind of information on the person concerned, namely

> 1. his conviction for, or his being suspected of having committed, crimes mentioned in paragraph 1 of the Act of 21 March 1952 (no. 98) laying down special provisions on investigation measures in certain

[4] See para. 24 *infra*.
[5] As amended by Ordinance 1976:110.
[6] As amended by Ordinance 1972:505.

criminal cases (*lag med särskilda bestämmelser om tvångsmedel i vissa brottmål*) or mentioned in Chapter 13, paragraphs 7 or 8, of the Penal Code—mainly crimes against public peace, national security or the Government—or his conviction for, or his being suspected of, an attempt, conspiracy or incitement to commit such crimes;

2. his conviction for, or his being suspected of having committed, such other acts as constitute crimes against the security of the State, or which are intended and liable to bring about the violent overthrow of the democratic government or to affect the country's position as an independent State; or his conviction for, or his being suspected of, an attempt or conspiracy to commit such crimes;

3. his being suspected, on the basis of his activities or otherwise, of being ready to participate in such acts as are mentioned in sub-paragraphs 1 and 2.

29. Section 11 provides that, when deciding whether or not to make information from the register available, the National Police Board shall be composed of the National Police Commissioner (*rikspolischef*), the Head of the Security Police and those members of the Board who have been appointed by the Government; there are six such lay members—usually Members or former Members of Parliament from different political parties, including the Opposition—and at least three of them must be present when the decision is taken.

Information may be released only if all the participating members of the Board agree on the decision. Where one or more of the lay members of the Board oppose release of certain information, the National Police Commissioner may refer the matter to the Government for decision if he considers that the information should be made available. Such reference to the Government shall also be made if one of the lay members so requests.

30. When a request for a personnel control is received by the National Police Board, the practice is as follows. The Security Department draws up a memorandum on the information contained in the relevant registers and presents this orally to the Board, which, after deliberation, decides whether the information should be handed out in whole or in part. In taking this decision, it considers among other things the nature of the post in question, the degree of reliability of the information and how old the entries are. When a file contains only a few entries, this is a factor which may militate against disclosure. There are no written instructions on disclosure apart from the provisions of the Ordinance and the Instructions of the Government.

31. At the relevant time, section 13 prescribed that before information was released by the National Police Board in cases relating to appointment to posts classified in Security Class 1, the person concerned should be given an opportunity of presenting his observations in writing or orally, unless there were special reasons to the contrary. In cases of appointment to posts classified in Security Class 2, the above notification procedure was to be applied

only if required on account of special circumstances. However, in no case concerning a Security Class 2 post does the Board ever seem to have found any special circumstances to be present and, accordingly, such notification was never made—in spite of the fact that various important authorities, including the Chancellor of Justice and the Parliamentary Ombudsman, called upon to comment on the legislative proposal which was to become the Ordinance had recommended the making of at least some form of notification.

This provision was amended as from 1 October 1983.[7] At present, before information is released in cases of appointment to posts in all Security Classes, the person concerned must be given the opportunity of presenting his observations in writing or orally. This rule does not, however, apply if the person would thereby come to know information classified as secret by virtue of any provision in the Secrecy Act 1980, except for section 17 in Chapter 7 of the Act,[8] or if the requesting authority, in cases not concerned with appointment to official posts, has been exempted by the Government from the requirement of informing the person concerned of the personnel control.[9]

32. At the time of the proceedings in Mr. Leander's case, the National Police Board was, under section 14, prohibited from adding any comments to the information released to the requesting authority.

33. Section 19 provided that before an authority initiated a personnel control, it had to inform the person concerned thereof—with one exception not relevant in the present case.

34. Section 20 prescribed that it was the requesting authority that should independently assess the importance of the information released from the police register(s), having regard to the nature of the activities connected with the post in question, the authority's own knowledge of the person concerned and other circumstances.

D. *Safeguards*

1. Minister of Justice

35. Over the years, the Minister of Justice has been actively engaged in the supervision of the security police and the personnel control. He has made a number of investigations of varying depth. The investigations made by the Minister of Justice do not result in any reports. However, the Government stated that the deliberations between the Minister and the National Police Board have led to amendments of both the public and the secret instructions.

2. Chancellor of Justice

36. The Office of the Chancellor of Justice has a long tradition

[7] Ordinance 1983:764.
[8] See para. 41 *infra*.
[9] See para. 33 *infra*.

and is now established in Chapter 11, section 6, of the Constitution. His functions and powers are set out in the 1975 Act on Supervision by the Chancellor of Justice (*lag 1975:1339 om justitiekanslerns tillsyn*) and in the Government's Instruction to the Chancellor (*förordning 1975:1345 med instruktion för justitiekanslern*).

The duties of the Chancellor of Justice, as laid down by Parliament (*riksdag*), include supervising the public authorities and their employees in order to ensure that their powers are exercised in accordance with the law and the applicable regulations. In this capacity, he often receives and examines complaints from individuals. He also has to act on the Government's behalf in order to safeguard the rights of the State and has to assist the Government with advice and investigations in legal matters.

The appointment as Chancellor of Justice is made by the Government and continues until retirement age. According to Chapter 11, section 6, of the Constitution, the Chancellor is subordinate to the Government. However, section 7 of the same Chapter provides: 'No public authority,'—including the Government—'nor the Parliament, nor the decision-making body of a municipality may determine how an administrative authority'—including the Chancellor of Justice—'shall make its decision in a particular case concerning the exercise of public authority against a private subject or against a municipality, or concerning the application of law.'

The Chancellor of Justice has the right to attend all deliberations held by courts and administrative authorities, although without expressing his opinion. He is also entitled to have access to all files or other documents kept by the authorities.

All public authorities as well as their employees must provide the Chancellor of Justice with such information and reports as he may request.[10]

In his supervisory capacity, he may institute criminal proceedings against public servants or he may report them with a view to disciplinary proceedings.

The Chancellor may, in agreement with the Parliamentary Ombudsman, transfer to him cases involving individual complaints, and *vice versa*. Thus, identical complaints will in practice be considered by either the Chancellor or the Ombudsman, but not by both.

37. The National Police Board, being a public authority, and its activities, including personnel control, fall under the Chancellor of Justice's supervision.

The Chancellor of Justice visits the Board and its Security Department regularly, generally once a year. In addition, visits take place if special reasons so warrant. A complaint from an

[10] See para. 41 *infra*.

individual may constitute such a special reason. His visits are always recorded and the minutes are drafted in such a way that they may be made public. If secret material has to be recorded, the secret passages in the minutes will not be made public. The Government has submitted a copy of the minutes of an inspection visit of 6 December 1983, from which it appears that the Chancellor of Justice together with two officials of the Chancellery inspected the premises of the Security Department and discussed, *inter alia*, questions concerning personnel control. Nothing emerged from the visit which called for special mention.

The Chancellor of Justice has no power to alter a decision by the Board or the Security Department, nor can he interfere with their decision-making in general, although he is free to make statements about actions that he deems to be contrary to law or inappropriate.

Since opinions expressed by the Chancellor in relation to an inspection of the personnel control procedure are not legally binding, it might perhaps be doubted whether they fall within the sphere where the Chancellor is guaranteed independence by virtue of Chapter 11, section 7, of the Constitution.[11] In view of Swedish legal tradition, it is however inconceivable that the Government would endeavour to use its powers under Chapter 11, section 6, of the Constitution so as to give the Chancellor instructions as to, for example, the opinion he should give in a matter concerning the application of the Personnel Control Ordinance, or generally to prohibit him from monitoring the activities of the National Police Board; no such instructions exist and none has ever been given.

3. Parliamentary Ombudsman

38. The functions and powers of the Parliamentary Ombudsmen, an institution that dates back to 1809, are laid down in particular in Chapter 12, section 6, of the Constitution, and in the Act of Instruction to the Parliamentary Ombudsmen (*lag 1975:1057 med instruktion för justitieombudsmännen*).

The four holders of the office of Parliamentary Ombudsman are elected by Parliament. Their main task is to supervise the application, within the public administration, of laws and other regulations.

It is the particular duty of an Ombudsman to ensure that courts of law and administrative authorities observe the provisions of the Constitution regarding objectivity and impartiality and that the fundamental rights and freedoms of citizens are not encroached upon in the processes of public administration.

If, while performing his supervisory duties, an Ombudsman should find cause to raise the question of amending legislation or of any other measure the State should take, he may present a statement on the subject to the Parliament or the Government.

[11] See para. 36 *supra*.

An Ombudsman exercises supervision either on complaint from individuals or by carrying out inspections and other investigations he deems necessary.

The examination of a matter is concluded by a report in which the Ombudsman states his opinion on whether the measure contravenes the law or is inappropriate in any other respect. The Ombudsman may also make pronouncements aimed at promoting uniform and proper application of the law.

The Ombudsman's reports are considered to be expressions of his personal opinion. Whether or not his statements will have any practical effects depends on his ability to convince the decision-maker or authority in question. Those concerned often, but by no means always, abide by the Ombudsman's opinion.[12]

An Ombudsman may institute a criminal prosecution or disciplinary proceedings against an official who has committed an offence by departing from the obligations incumbent upon him in his official duties.

An Ombudsman may be present at the deliberations of a court or an administrative authority and shall have access to the minutes and other documents of any such court or authority. Any court, any administrative authority and any civil servant in central or local government must provide the Ombudsman with such information and reports as he may request. In the performance of his duties, the Ombudsman may request the assistance of any public prosecutor.

39. It follows from the foregoing that the National Police Board and its activities come under the supervision of the Parliamentary Ombudsmen.

According to information submitted by the registrar of the Parliamentary Ombudsmen, the procedure in cases of individual complaint is the following. When the complaint is lodged, the Ombudsman responsible contacts the Board or the requesting authority.[13] He will then be furnished with oral information on the circumstances of the case and be afforded the opportunity to study the relevant documents and files. This information is not entered on any record kept by the Ombudsman, as that would entail problems as to how to preserve the secret character of the information. The Ombudsman arrives at his opinion on the basis of the inquiry described above and of the results of any other investigations undertaken. His report is always drawn up in writing and made accessible to the public. It does not therefore set out any secret information.

Since 1969 there have been at least eight individual complaints relating to the personnel control system. Four were complaints of a general nature by notorious complainants. After having investigated

[12] See Gustaf Petrén/Hans Ragnemalm: Sveriges Grundlagar, Stockholm 1980, p. 327.
[13] See para. 25 *supra*.

the factual circumstances underlying the other four complaints, the Ombudsman closed the file in two of them only after having expressed specific criticism in respect of certain issues.[14] The criticism expressed by the Ombudsman in the report of 20 February 1984 has, according to a recent judgment of the Labour Court,[15] led the Supreme Commander of the Armed Forces to change a previous practice regarding the application of section 19 of the Ordinance.

4. Parliamentary Committee on Justice (riksdagens justitieutskott)

40. The Parliamentary Standing Committee on Justice consists of fifteen Members of Parliament nominated on a proportional basis. Since 1971, it has considered the appropriations for the security branch of the police and, almost every year, scrutinised the expenses of the security police, its organisation and activities. A great interest has, according to the Government, been shown in matters concerning the Personnel Control Ordinance and its application and in the question of assessing the influence of the lay members of the National Police Board on the activities of the security police. The Committee normally keeps itself informed by holding hearings with spokesmen of the Board and its Security Department and by regular visits. Such visits took place in the spring of 1977, the autumn of 1979 and the spring of 1983. In the spring of 1980, special discussions took place between the Committee and the parliamentarians on the Board. In the spring of 1981, the Committee asked for, and received, a special report. In the spring of 1982, the Committee held a hearing with the National Police Commissioner and the Head of the Security Department.

According to the Government, the Principal Secretary to the Committee has confirmed that the members of the Committee, during their visits, have full access to the registers and that they have also examined the register kept at the Security Department. The members have also discussed various matters concerning the keeping of the register with the officials responsible for making the entries and putting data before the Board when a personnel control is carried out.

5. Principle of free access to public documents

41. Under section 2 of Chapter 2 of the Freedom of the Press Act (*tryckfrihetsförordning*), which is part of the Swedish Constitution, everyone is entitled to have access to a public document unless, within defined areas, such access is limited by law.

At the relevant time, the main provisions concerning these limitations were found in the Act on Restrictions on the Right of

[14] Reports of 20 February 1984 in case 684–1983 and of 15 February 1985 in case 2316–1984.
[15] No. 28 of 12 March 1986.

Access to Public Documents (*lag om inskränkningar i rätten att utbekomma allmänna handlingar* 1937:249, 'the 1937 Act'), which was in force until 1 January 1981.

Under section 11 of the 1937 Act (as amended), 'details of information entered on such registers as are mentioned in the Act on the General Criminal Register (*lag om allmänt kriminalregister* 1963:197) or in the Police Register Act (*lag om polisregister m.m.* 1965:94) may not be handed out in any other cases or manner than those provided for in those Acts'. According to section 3 of the Police Register Act[16]:

> Extracts from or information on the contents of police registers shall be given upon request from
>
> 1. the Chancellor of Justice, the Parliamentary Ombudsmen, the National Police Board, the Central Immigration Authority, County Administrative Boards, county administrative courts, Chiefs of Police or public prosecutors;
>
> 2. other authorities, if and to the extent that the Government, for certain types of cases or in a specific case, has given the necessary authorisation;
>
> 3. an individual, if he needs the extract in order to secure his rights in a foreign country, in order to enter a foreign country or in order to take up residence or domicile or to work there, or in order to have decided questions of employment or contracts related to activities concerned with health care or with matters of importance from a national security point of view, and the Government by way of special ordinance have authorised that extracts or information be given for such purposes, or, in other cases, if the individual can prove that he depends on obtaining information from the register in order to secure his rights, and the Government authorise such information to be given to him.

As of 1 January 1981, the 1937 Act was replaced by the Secrecy Act 1980 (*sekretesslag*, 1980:100) and similar regulations are now to be found in Chapter 7, section 17, of this Act.

No evidence has been adduced of any special ordinance allowing individuals in the applicant's situation to obtain extracts from the police registers.

42. A decision by an authority other than the Parliament or the Government to refuse access to a document is subject to appeal to the courts.[17]

In several recent cases decided by the Supreme Administrative Court, individuals have been refused access to information contained in the secret police register as they had not obtained or sought the previous authorisation by the Government required by the above-cited section 3 of the Police Register Act.[18]

This is consistent with the events in the present case, in that the Government declared themselves competent to examine Mr.

[16] As amended by Act 1977:1032, in force until 1 March 1985.
[17] Chapter 2, section 15 of the Freedom of the Press Act.
[18] Yearbook of the Supreme Administrative Court—1981:Ab 100 and Ab 282 and 1982:Ab 85.

Leander's request to be acquainted with the information about him released by the National Police Board.[19]

However, no appeal—either to the Government or to the administrative courts—against a decision of the Board to release information to the requesting authority seems to be available to the individual concerned, since he is not considered to be a party to the release procedure before the Board.[20]

43. Even if a certain document is secret, the Government always has a certain discretionary power to release it, and a person who is a party to judicial or administrative proceedings in which the document is of relevance may still be allowed access to it. The basic provisions in this respect were, until 30 December 1980, contained in section 38 of the 1937 Act,[21] which stated:

> Whenever it is found necessary in order to secure public or individual rights, the Government may, without being subject to the restrictions otherwise laid down in this Act, provide for the release of documents.
>
> If a document which may not be released to everybody can be presumed to be of importance as evidence in a trial or police investigation in a criminal matter, the court which handles the case or which is competent to decide questions relating to the police investigation may order that the document should be released to it or to the officer in charge of the police investigation. The foregoing does not however concern documents referred to in sections 1–4, 31 and 33. If the contents of a document are such that the person who has drawn it up may not, according to Chapter 36, section 5(2), (3) or (4), of the Code of Judicial Procedure, he heard as a witness in regard thereto, the document may not be presented in the judicial proceedings or in the course of the police investigation; neither, unless warranted by special circumstances, may the document be presented in the judicial proceedings or in the course of the police investigation if a professional secret would thereby be disclosed.

As from 1 January 1981, corresponding provisions are to be found in Chapter 14, sections 5 and 8, of the Secrecy Act 1980.

6. Damages

44. The civil liability of the State is dealt with in Chapter 3 of the Civil Liability Act 1972 (*skadeståndslag* 1972:207).

According to section 2, acts of public authorities may give rise to an entitlement to compensation in the event of fault or negligence.

However, under section 7, an action for damages will not lie in respect of decisions taken by Parliament, the Government, the Supreme Court, the Supreme Administrative Court or the National Social Security Court. Furthermore, with regard to decisions of lower authorities, such as the National Police Board, section 4 of the Act provides that such an action will not lie to the extent that

[19] See para. 16 *supra*.
[20] See the Supreme Administrative Court's decision of 20 June 1984 in case 1509–1984.
[21] As amended by Act 1974:567.

the person concerned could have avoided losses by exhausting available remedies.

PROCEEDINGS BEFORE THE COMMISSION

45. In his application[22] lodged with the Commission on 2 November 1980, Mr. Leander alleged violations of Articles 6, 8, 10 and 13 of the Convention. He complained that he had been prevented from obtaining a permanent employment and dismissed from a provisional employment on account of certain secret information which allegedly made him a security risk; this was an attack on his reputation and he ought to have had an opportunity to defend himself before a tribunal.

46. On 10 October 1983, the Commission declared inadmissible the complaint under Article 6 but declared admissible the complaints under Articles 8, 10 and 13.

In its report of 17 May 1985 (Article 31), the Commission expressed the opinion that there had been no breach of Article 8 (unanimously), that no separate issue arose under Article 10 with respect to freedom to express opinions or freedom to receive information (unanimously) and that the case did not disclose any breach of Article 13 (seven votes to five).

The text of the Commission's opinion and of the dissenting opinion was published in (1986) 8 E.H.R.R. 557.

JUDGMENT

I. *Alleged violation of Article 8*

47. The applicant claimed that the personnel control procedure, as applied in his case, gave rise to a breach of Article 8, which reads:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

He contended that nothing in his personal or political background[23] could be regarded as of such a nature as to make it necessary in a democratic society to register him in the Security Department's register, to classify him as a 'security risk' and accordingly to exclude him from the employment in question. He argued in addition that the Personnel Control Ordinance could not be considered as a 'law' for the purposes of paragraph 2 of Article 8.

[22] App. No. 9248/81.
[23] See para. 17 *supra*.

He did not, however, challenge the need for a personnel control system. Neither did he call in question the Government's power, within the limits set by Articles 8 and 10 of the Convention, to bar sympathisers of certain extreme political ideologies from security-sensitive positions and to file information on such persons in the register kept by the Security Department of the National Police Board.

A. *Whether there was any interference with an Article 8 right*

48. It is uncontested that the secret police register contained information relating to Mr. Leander's private life.

Both the storing and the release of such information, which were coupled with a refusal to allow Mr. Leander an opportunity to refute it, amounted to an interference with his right to respect for private life as guaranteed by Article 8(1).

B. *Whether the interference was justified*

1. *Legitimate aim*

49. The aim of the Swedish personnel control system is clearly a legitimate one for the purposes of Article 8, namely the protection of national security.

The main issues of contention were whether the interference was 'in accordance with the law' and 'necessary in a democratic society'.

2. *'In accordance with the law'*

(a) General principles

50. The expression 'in accordance with the law' in paragraph 2 of Article 8 requires, to begin with, that the interference must have some basis in domestic law. Compliance with domestic law, however, does not suffice: the law in question must be accessible to the individual concerned and its consequences for him must also be foreseeable.[24]

51. However, the requirement of foreseeability in the special context of secret controls of staff in sectors affecting national security cannot be the same as in many other fields. Thus, it cannot mean that an individual should be enabled to foresee precisely what checks will be made in his regard by the Swedish special police service in its efforts to protect national security. Nevertheless, in a system applicable to citizens generally, as under the Personnel Control Ordinance, the law has to be sufficiently clear in its terms to give them an adequate indication as to the circumstances in which and the conditions on which the public authorities are empowered to resort to this kind of secret and potentially dangerous interference with private life.[25]

[24] See, *mutatis mutandis*, MALONE *v.* UNITED KINGDOM, para. 66.
[25] MALONE *v.* UNITED KINGDOM (1985) 7 E.H.R.R. 14, para. 67.

In assessing whether the criterion of foreseeability is satisfied, account may be taken also of instructions or administrative practices which do not have the status of substantive law, in so far as those concerned are made sufficiently aware of their contents.[26]

In addition, where the implementation of the law consists of secret measures, not open to scrutiny by the individuals concerned or by the public at large, the law itself, as opposed to the accompanying administrative practice, must indicate the scope of any discretion conferred on the competent authority with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.[27]

(b) Application in the present case of the foregoing principles

52. The interference had a valid basis in domestic law, namely the Personnel Control Ordinance. However, the applicant claimed that the provisions governing the keeping of the secret police register, that is primarily section 2 of the Ordinance, lacked the required accessibility and foreseeability.

Both the Government and the Commission disagreed with this contention.

53. The Ordinance itself, which was published in the Swedish Official Journal, doubtless meets the requirement of accessibility. The main question is thus whether domestic law laid down, with sufficient precision, the conditions under which the National Police Board was empowered to store and release information under the personnel control system.

54. The first paragraph of section 2 of the Ordinance does confer a wide discretion on the National Police Board as to what information may be entered in the register.[28] The scope of this discretion is however limited by law in important respects through the second paragraph, which corresponds to the prohibition already contained in the Constitution[29], in that 'no entry is allowed merely for the reason that a person, by belonging to an organisation or by other means, has expressed a political opinion'. In addition, the Board's discretion in this connection is circumscribed by instructions issued by the Government.[30] However, of these only one is public and hence sufficiently accessible to be taken into account, namely the Instruction of 22 September 1972.[31]

The entering of information on the secret police register is also subject to the requirements that the information be necessary for

[26] See SILVER *v.* UNITED KINGDOM (1983) 5 E.H.R.R. 347, paras. 88–89.
[27] MALONE *v.* UNITED KINGDOM (1983) 5 E.H.R.R. 347, para. 68.
[28] See para. 19 *supra.*
[29] See para. 18 *supra.*
[30] See paras. 20–21 *supra.*
[31] See para. 20 *supra.*

the special police service and be intended to serve the purpose of preventing or detecting 'offences against national security, *etc.*'[32]

55. Furthermore, the Ordinance contains explicit and detailed provisions as to what information may be handed out, the authorities to which information may be communicated, the circumstances in which such communication may take place and the procedure to be followed by the National Police Board when taking decisions to release information.[33]

56. Having regard to the foregoing, the Court finds that Swedish law gives citizens an adequate indication as to the scope and the manner of exercise of the discretion conferred on the responsible authorities to collect, record and release information under the personnel control system.

57. The interference in the present case with Mr. Leander's private life was therefore 'in accordance with the law', within the meaning of Article 8.

3. *'Necessary in a democratic society in the interests of national security'*

58. The notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.[34]

59. However, the Court recognises that the national authorities enjoy a margin of appreciation, the scope of which will depend not only on the nature of the legitimate aim pursued but also on the particular nature of the interference involved. In the instant case, the interest of the respondent State in protecting its national security must be balanced against the seriousness of the interference with the applicant's right to respect for his private life.

There can be no doubt as to the necessity, for the purpose of protecting national security, for the Contracting States to have laws granting the competent domestic authorities power, firstly, to collect and store in registers not accessible to the public information on persons and, secondly, to use this information when assessing the suitability of candidates for employment in posts of importance for national security.

Admittedly, the contested interference adversely affected Mr. Leander's legitimate interests through the consequences it had on his possibilities of access to certain sensitive posts within the public service. On the other hand, the right of access to public service is not as such enshrined in the Convention,[35] and, apart from those consequences, the interference did not constitute an obstacle to his leading a private life of his own choosing.

[32] See first para. of section 2 of the Ordinance, see para. 19 *supra*.
[33] See paras. 25–29 *supra*.
[34] See, *inter alia*, GILLOW *v.* UNITED KINGDOM, not yet reported, para. 55.
[35] See, *inter alia*, KOSIEK *v.* GERMANY (1987) 9 E.H.R.R. 328, paras. 34–35.

In these circumstances, the Court accepts that the margin of appreciation available to the respondent State in assessing the pressing social need in the present case, and in particular in choosing the means for achieving the legitimate aim of protecting national security, was a wide one.

60. Nevertheless, in view of the risk that a system of secret surveillance for the protection of national security poses of undermining or even destroying democracy on the ground of defending it, the Court must be satisfied that there exist adequate and effective guarantees against abuse.[36]

61. The applicant maintained that such guarantees were not provided to him under the Swedish personnel control system, notably because he was refused any possibility of challenging the correctness of the information concerning him.

62. The Government invoked twelve different safeguards, which, in their opinion, provided adequate protection when taken together:

(i) the existence of personnel control as such is made public through the Personnel Control Ordinance;
(ii) there is a division of sensitive posts into different security classes[37];
(iii) only relevant information may be collected and released[38];
(iv) a request for information may be made only with regard to the person whom it is intended to appoint[39];
(v) parliamentarians are members of the National Police Board[40];
(vi) information may be communicated to the person in question; the Government did, however, concede that no such communication had ever been made, at least under the provisions in force before 1 October 1983[41];
(vii) the decision whether or not to appoint the person in question rests with the requesting authority and not with the National Police Board[42];
(viii) an appeal against this decision can be lodged with the Government[43];
(ix) the supervision effected by the Minister of Justice[44];
(x) the supervision effected by the Chancellor of Justice[45];
(xi) the supervision effected by the Parliamentary Ombudsman[46];
(xii) the supervision effected by the Parliamentary Committee on Justice.[47]

[36] See, KLASS *v.* GERMANY, 2 E.H.R.R. 214, paras. 49–50.
[37] See para. 26 *supra.*
[38] See paras. 18–20, 28 and 30 *supra.*
[39] See para. 27 *supra.*
[40] See para. 29 *supra.*
[41] See para. 31 *supra.*
[42] See para. 34 *supra.*
[43] See para. 16 *supra.*
[44] See para. 35 *supra.*
[45] See paras. 36–37 *supra.*
[46] See paras. 38–39 *supra.*
[47] See para. 40 *supra.*

63. The Court first points out that some of these safeguards are irrelevant in the present case, since, for example, there was never any appealable appointment decision.[48]

64. The Personnel Control Ordinance contains a number of provisions designed to reduce the effects of the personnel control procedure to an unavoidable minimum.[49] Furthermore, the use of the information on the secret police register in areas outside personnel control is limited, as a matter of practice, to cases of public prosecution and cases concerning the obtaining of Swedish citizenship.[50]

The supervision of the proper implementation of the system is, leaving aside the controls exercised by the Government itself, entrusted both to Parliament and to independent institutions.[51]

65. The Court attaches particular importance to the presence of parliamentarians on the National Police Board and to the supervision effected by the Chancellor of Justice and the Parliamentary Ombudsman as well as the Parliamentary Committee on Justice.[52]

The parliamentary members of the Board, who include members of the Opposition,[53] participate in all decisions regarding whether or not information should be released to the requesting authority. In particular, each of them is vested with a right of veto, the exercise of which automatically prevents the Board from releasing the information. In such a case, a decision to release can be taken only by the Government itself and then only if the matter has been referred to it by the National Police Commissioner or at the request of one of the parliamentarians.[54] This direct and regular control over the most important aspect of the register—the release of information—provides a major safeguard against abuse.

In addition, a scrutiny is effected by the Parliamentary Committee on Justice.[55]

The supervision carried out by the Parliamentary Ombudsman constitutes a further significant guarantee against abuse, especially in cases where individuals feel that their rights and freedoms have been encroached upon.[56]

As far as the Chancellor of Justice is concerned, it may be that in some matters he is the highest legal adviser of the Government. However, it is the Swedish Parliament which has given him his mandate to supervise, amongst other things, the functioning of the personnel control system. In doing so, he acts in much the same

[48] See paras. 11 and 16 *supra*.
[49] See notably paras. 54–55 and nos. (ii)–(iv) in para. 62 *supra*.
[50] See para. 22 *supra*.
[51] See paras. 35–40 *supra*.
[52] See para. 62 *supra*, nos. (v), (x), (xi) and (xii).
[53] See para. 29 *supra*.
[54] See para. 29 *supra*.
[55] See para. 40 *supra*.
[56] See paras. 38–39 *supra*.

way as the Ombudsman and is, at least in practice, independent of the Government.[57]

66. The fact that the information released to the military authorities was not communicated to Mr. Leander cannot by itself warrant the conclusion that the interference was not 'necessary in a democratic society in the interests of national security', as it is the very absence of such communication which, at least partly, ensures the efficacy of the personnel control procedure.[58]

The Court notes, however, that various authorities consulted before the issue of the Ordinance of 1969, including the Chancellor of Justice and the Parliamentary Ombudsman, considered it desirable that the rule of communication to the person concerned, as contained in section 13 of the Ordinance, should be effectively applied in so far as it did not jeopardise the purpose of the control.[59]

67. The Court, like the Commission, thus reaches the conclusion that the safeguards contained in the Swedish personnel control system meet the requirements of paragraph 2 of Article 8. Having regard to the wide margin of appreciation available to it, the respondent State was entitled to consider that in the present case the interests of national security prevailed over the individual interests of the applicant.[60] The interference to which Mr. Leander was subjected cannot therefore be said to have been disproportionate to the legitimate aim pursued.

4. *Conclusion*

68. Accordingly, there has been no breach of Article 8.

II. *Alleged violation of Article 10*

69. The applicant further maintained that the same facts as constituted the alleged violation of Article 8 also gave rise to a breach of Article 10, which reads:

> 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 responsibilities, 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.

[57] See paras. 36–37 *supra*.
[58] See, *mutatis mutandis*, KLASS *v.* GERMANY, 2 E.H.R.R. 214, para. 58.
[59] See para. 31 *supra*.
[60] See para. 59 *supra*.

70. The Commission found that the applicant's claims did not raise any separate issues under Article 10 in so far as either freedom to express opinions or freedom to receive information was concerned. The Government agreed with this conclusion.

A. *Freedom to express opinions*

71. The right of recruitment to the public service is not in itself recognised by the Convention, but it does not follow that in other respects civil servants, including probationary civil servants, fall outside the scope of the Convention and notably of the protection afforded by Article 10.[61]

72. It has first to be determined whether or not the personnel control procedure to which the applicant was subjected amounted to an interference with the exercise of freedom of expression—in the form, for example, of a 'formality, condition, restriction or penalty'—or whether the disputed measures lay within the sphere of the right of access to the public service. In order to answer this question, the scope of the measures must be determined by putting them in the context of the facts of the case and the relevant legislation.[62]

It appears clearly from the provisions of the Ordinance that its purpose is to ensure that persons holding posts of importance for national security have the necessary personal qualifications.[63] This being so, access to the public service lies at the heart of the issue submitted to the Court: in declaring that the applicant could not be accepted for reasons of national security for appointment to the post in question, the Supreme Commander of the Armed Forces and the Commander-in-Chief of the Navy took into account the relevant information merely in order to satisfy themselves as to whether or not Mr. Leander possessed one of the necessary personal qualifications for this post.

73. Accordingly, there has been no interference with Mr. Leander's freedom to express opinions, as protected by Article 10.

B. *Freedom to receive information*

74. The Court observes that the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual.

[61] See GLASENAPP *v.* GERMANY (1987) 9 E.H.R.R. 25, paras. 49–50 and KOSIEK *v.* GERMANY (1987) 9 E.H.R.R. 328, paras. 35–36.
[62] *Ibid.*
[63] See para. 24 *supra*.

75. There has thus been no interference with Mr. Leander's freedom to receive information, as protected by Article 10.

III. *Alleged violation of Article 13*

76. The applicant finally alleged a breach of Article 13, which reads:

> 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.

Firstly, he complained of the fact that neither he nor his lawyer had been given the right to receive and to comment upon the complete material on which the appointing authority based its decision.[64] He also objected that he had not had any right to appeal to an independent authority with power to render a binding decision in regard to the correctness and release of information kept on him.[65]

Both the Government and the Commission disagreed with these contentions.

77. For the interpretation of Article 13, the following general principles are of relevance:

(a) where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress[66];

(b) the authority referred to in Article 13 need not be a judicial authority but, if it is not, the powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective[67];

(c) although no single remedy may itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so[68];

(d) Article 13 does not guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention or equivalent domestic norms.[69]

78. The Court has held that Article 8 did not in the circumstances require the communication to Mr. Leander of the information on him released by the National Police Board.[70] The Convention is to be read as a whole and therefore, as the Commission recalled in its report, any interpretation of Article 13 must be in harmony with

[64] See para. 62, no. (vi) *supra.*
[65] See para. 42 *supra.*
[66] See, *inter alia*, SILVER *v.* UNITED KINGDOM (1983) 5 E.H.R.R. 347, para. 113.
[67] *Ibid.*
[68] *Ibid.*
[69] See JAMES *v.* UNITED KINGDOM (1986) 8 E.H.R.R. 123.
[70] See para. 66 *supra.*

the logic of the Convention. Consequently, the Court, consistently with its conclusion concerning Article 8, holds that the lack of communication of this information does not, of itself and in the circumstances of the case, entail a breach of Article 13.[71]

For the purposes of the present proceedings, an 'effective remedy' under Article 13 must mean a remedy that is as effective as can be having regard to the restricted scope for recourse inherent in any system of secret checks on candidates for employment in posts of importance from a national security point of view. It therefore remains to examine the various remedies available to the applicant under Swedish law in order to see whether they were 'effective' in this limited sense.[72]

79. There can be no doubt that the applicant's complaints have raised arguable claims under the Convention at least in so far as Article 8 is concerned and that, accordingly, he was entitled to an effective remedy in order to enforce his rights under that Article as they were protected under Swedish law.[73]

The Court has found the Swedish personnel control system as such to be compatible with Article 8. In such a situation, the requirements of Article 13 will be satisfied if there exists domestic machinery whereby, subject to the inherent limitations of the context, the individual can secure compliance with the relevant laws.[74]

80. The Government argued that Swedish law offered sufficient remedies for the purposes of Article 13, namely

(i) a formal application for the post, and, if unsuccessful, an appeal to the Government;

(ii) a request to the National Police Board for access to the secret police-register on the basis of the Freedom of the Press Act, and, if refused, an appeal to the administrative courts;

(iii) a complaint to the Chancellor of Justice;

(iv) a complaint to the Parliamentary Ombudsman.

The majority of the Commission found that these four remedies, taken in the aggregate, met the requirements of Article 13, although none of them did so taken alone.

81. The Court notes first that both the Chancellor of Justice and the Parliamentary Ombudsman have the competence to receive individual complaints and that they have the duty to investigate such complaints in order to ensure that the relevant laws have been properly applied by the National Police Board.[75] In the performance of these duties, both officials have access to all the

[71] See, *mutatis mutandis*, KLASS *v.* UNITED KINGDOM, 2 E.H.R.R. 214, para. 68.
[72] KLASS *v.* GERMANY, 2 E.H.R.R. 214, para. 69.
[73] See JAMES *v.* UNITED KINGDOM (1986) 8 E.H.R.R. 123, para. 84, and also, LITHGOW *v.* UNITED KINGDOM (1986) 8 E.H.R.R. 329.
[74] JAMES *v.* UNITED KINGDOM (1986) 8 E.H.R.R. 123, para. 86.
[75] See paras. 36 and 38 *supra*.

information contained in the secret police register.[76] Several decisions from the Parliamentary Ombudsman evidence that these powers are also used in relation to complaints regarding the operation of the personnel control system.[77] Furthermore, both officials must, in the present context, be considered independent of the Government. This is quite clear in respect of the Parliamentary Ombudsman. As far as the Chancellor of Justice is concerned, he may likewise be regarded as being, at least in practice, independent of the Government when performing his supervisory functions in relation to the working of the personnel control system.[78]

82. The main weakness in the control afforded by the Ombudsman and the Chancellor of Justice is that both officials, apart from their competence to institute criminal and disciplinary proceedings,[79] lack the power to render a legally binding decision. On this point, the Court, however, recalls the necessarily limited effectiveness that can be required of any remedy available to the individual concerned in a system of secret security checks. The opinions of the Parliamentary Ombudsman and the Chancellor of Justice command by tradition great respect in Swedish society and in practice are usually followed.[80] It is also material—although this does not constitute a remedy that the individual can exercise of his own accord—that a special feature of the Swedish personnel control system is the substantial parliamentary supervision to which it is subject, in particular through the parliamentarians on the National Police Board who consider each case where release of information is requested.[81]

83. To these remedies, which were never exercised by Mr. Leander, must be added the remedy to which he actually had recourse when he complained, in a letter of 5 February 1980 to the Government, that the National Police Board, contrary to the provisions of section 13 of the Personnel Control Ordinance, had omitted to invite him to comment, in writing or orally, on the information contained in the register.[82] The Government requested the opinion of the Board in this connection; whereupon Mr. Leander was given the opportunity to reply, which he did in a letter of 11 March 1980. In its decision of 14 May 1980, which also covered Mr. Leander's complaints of 22 October and 4 December 1979, the Government, that is the entire Cabinet, dismissed Mr. Leander's various complaints.[83]

The Court recalls that the authority referred to in Article 13 need not necessarily be a judicial authority in the strict sense, but

[76] See para. 41 *supra*.
[77] See para. 39 *supra*.
[78] See para. 37 *supra*.
[79] See paras. 36–38 *supra*.
[80] See paras. 37–38 *supra*.
[81] See para. 29 *supra*.
[82] See para. 15 *supra*.
[83] See paras. 14 and 16 *supra*.

that the powers and procedural guarantees an authority possesses are relevant in determining whether the remedy is effective. There can be no question about the power of the Government to deliver a decision binding on the Board.[84]

84. It should also be borne in mind that for the purposes of the present proceedings, an effective remedy under Article 13 must mean a remedy that is as effective as can be, having regard to the restricted scope for recourse inherent in any system of secret surveillance for the protection of national security.[85]

Even if, taken on its own, the complaint to the Government were not considered sufficient to ensure compliance with Article 13, the Court finds that the aggregate of the remedies set out above[86] satisfies the conditions of Article 13 in the particular circumstances of the instant case.[87]

Accordingly, the Court concludes that there was no violation of Article 13.

For these reasons, THE COURT

1. *Holds* unanimously that there has been no breach of Article 8 or Article 10;

2. *Holds* by four votes to three that there has been no breach of Article 13.

Partly Dissenting Opinion of Judge Ryssdal

1. I subscribe to the finding that no breach of Article 8 or Article 10 has been established.

2. As the Court has held that Article 8 did not in the circumstances require the communication to the applicant of the relevant information on him released to the military authorities, I also concur that the lack of communication of this information cannot entail a breach of Article 13. In that respect, Article 13 must be interpreted and applied so as not to nullify the conclusion already reached under Article 8.

3. However, by virtue of Article 13, the applicant should have had available to him 'an effective remedy before a national authority'; and I do not agree with the majority of the Court 'that the aggregate of the remedies' set out in paragraphs 81 to 83 of the judgment 'satisfies the conditions of Article 13 in the particular circumstances of the instant case'.

4. It is convenient first to identify the alleged breach of the Convention in respect of which Mr. Leander was entitled to an effective domestic remedy by virtue of Article 13. His basic grievance under Article 8 is described in the judgment[88] as being

[84] See para. 77 *supra*.
[85] See paras. 78–79 *supra*.
[86] See paras. 81–83 *supra*.
[87] See, *mutatis mutandis*, KLASS *v.* GERMANY, 2 E.H.R.R. 214, para. 72.
[88] At para. 47.

'that nothing in his personal or political background . . . could be regarded as of such a nature as to make it necessary in a democratic society to register him in the Security Department's register, to classify him as a "security risk" and accordingly to exclude him from the employment in question'.

5. I concur with the Court that 'for the purposes of the present proceedings, an effective remedy under Article 13 must mean a remedy that is as effective as can be, having regard to the restricted scope for recourse inherent in any system of secret surveillance for the protection of national security.'[89]

On the other hand, precisely because the inherent secrecy of the control system renders the citizens' right to respect for private life especially vulnerable, it is essential that any complaint alleging violation of that right should be examined by a 'national authority' which is completely independent of the executive and invested with effective powers of investigation. The 'national authority' should thus have both the competence in law and the capability in practice to inquire closely into the operation of the personnel control system, and in particular to verify that no mistake has been made as to the scope and manner of exercise of the discretionary power conferred on the police and the National Police Board to collect, store and release information. Such an independent power of inquiry is all the more necessary as some of the Government's instructions regarding the storing of information in the police register are themselves secret, a fact which, to my mind, of itself constitutes a considerable source of concern.

In so far as the 'national authority' ascertains that a mistake has been made, the citizen affected should also, by virtue of Article 13, have the possibility—if need be by bringing separate proceedings before the courts—either of contesting the validity of the outcome of the secret personnel control, that is the decision not to employ him (or her), or of obtaining compensation or some other form of relief.

6. The majority of the Court[90] includes in the aggregate of relevant remedies Mr. Leander's complaint to the Government that the National Police Board had, contrary to the provisions of the Personnel Control Ordinance, omitted to invite him to comment on the information contained in the register, which complaint was rejected by the Government in its decision of 14 May 1980. In my opinion, this avenue of recourse is not capable of being decisive for the purposes of Article 13, whether taken on its own or in conjunction with the other remedies relied on by the majority of the Court, namely complaint to the Parliamentary Ombudsman and the Chancellor of Justice. This is because, leaving aside the question of independence, it did not address Mr. Leander's basic

[89] See para. 84 of the judgment.
[90] At para. 83 of the judgment.

grievance under the Convention. Even if the requirement of secrecy did not permit Mr. Leander himself to be given the opportunity of commenting on the adverse material kept on him in the register, Article 13 guaranteed him a right of access to a 'national authority' having competence to examine whether his Convention grievance was justified or not.

Consequently, of the aggregate of relevant remedies, there remains for consideration the possibility of applying either to the Parliamentary Ombudsman or to the Chancellor of Justice.

7. The Parliamentary Ombudsman and the Chancellor of Justice exercise general supervision over the activities of the executive branch of government; they do not have specific responsibility for inquiry into the operation of the personnel control system. I recognise that, by tradition in Sweden, the opinions of the Parliamentary Ombudsman and the Chancellor of Justice command great respect. However, the Parliamentary Ombudsman and the Chancellor of Justice have no power to render legally binding decisions; and it is not clearly established that, if in the opinion of the Ombudsman or the Chancellor a mistake has been made, the individual affected would have available to him an effective means to contest the validity of the employment decision or to obtain some other form of relief.

8. I consequently conclude that there has been a breach of Article 13.

Partially Dissenting Opinion of Judges Pettiti and Russo
(Provisional translation)

We voted with the majority in finding that there has been no breach of Articles 8 and 10 but we hold that there has been a breach of Article 13.

We consider that a complaint to the Chancellor of Justice would have resulted only in an opinion being given and was not an effective remedy; the same is true of the Ombudsman. These two remedies taken together, then, do not satisfy the requirements of Article 13.

Individuals are not regarded as being parties to the release procedure before the Board.[91] No appeal lies to the Government or to the administrative courts against the Board's decision as such to supply information to the requesting authority, nor was Mr. Leander involved in criminal proceedings such as would have entitled him to require the document to be released.

In the case specifically of registers which, being secret, make it impossible for a citizen to avail himself of the laws and regulations entitling him to have access to administrative documents, it is all the more necessary that there should be an effective remedy before

[91] See the Supreme Administrative Court's decision of 20 June 1984.

an independent authority, even if that authority is not a judicial body.

The doctrine of act of State may be envoked by the Government improperly. The police authorities may even have committed a flagrantly unlawful act (*voie de fait*).

It should also be noted that the Swedish Ombudsman's decisions are effective only in relation to civil servants and not as regards the applicant concerned.

Furthermore, even when combined, ineffective remedies cannot amount to an effective remedy where, as in the instant case, their respective shortcomings do not cancel each other out but are cumulative.

The *six* members of the Commission who held in their dissenting opinion that there had been a breach of Article 13, rightly commented on the lack of any effective remedy. In our view, it is not essential to make it a mandatory requirement that the authority responsible for hearing appeals should be able to award damages, but it is absolutely essential that an independent authority should be able to determine the merits of an entry in the register and even whether there has been a straightforward clerical error or mistake of identity—in which case the national security argument would fall to the ground.

Consideration also needs to be given to the dangers of electronic links between the police registers and other States' registers or Interpol's register. The individual must have a right of appeal against an entry resulting from a fundamental mistake, even if the source of the information is kept secret and is known only to the independent authority that has jurisdiction to determine the applicant's appeal.

A supervisory system such as is provided by the Supreme Administrative Courts (in Belgium, France and Italy) ought to afford an effective remedy, which is lacking at present in our view.

The State cannot be sole judge in its own cause in this sensitive area of human rights protection.

We consequently hold that there has been a breach of Article 13.

1989

Gaskin v. *United Kingdom*

European Court of Human Rights

GASKIN *v.* UNITED KINGDOM
(Access to Personal Files)

BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

(*The President*, Judge Ryssdal; *Judges* Cremona, Thór Vilhjálmsson, Bindschedler-Robert, Gölcüklü, Matscher, Pettiti, Walsh, Sir Vincent Evans, Macdonald, Russo, Bernhardt, Spielmann, De Meyer, Carrillo Salcedo, Valticos, Martens)

Series A, No. 160
Application No. 10454/83
7 July 1989

The applicant was taken into the care of Liverpool City Council in December 1959, and remained in its care until December 1977 when he attained the age of majority. During the major part of this period he was boarded out with various foster parents. Under the relevant regulations the local authority was under a duty to keep certain confidential records concerning him and his care. The applicant contended that he was ill-treated in care, and since his majority has tried to obtain details of the information on these records. After protracted litigation, Liverpool City Council resolved, on 9 November 1983, that the information in the applicant's file should be made available to him subject to the consent of the contributors to the file. Out of 46 contributors 19 gave their consent and 65 out of a total of 352 documents were released to the applicant. He claimed that the refusal of access to all his case records held by Liverpool City Council was in breach of his right to respect for his private and family life under Article 8 of the Convention and his right to receive information under Article 10 of the Convention.

Held, by the Court,

(1) by 11 votes to six, that there had been a violation of Article 8.
(2) unanimously, that there had been no violation of Article 10.
(3) by nine votes to eight, that the United Kingdom should pay the applicant non-pecuniary damages and legal fees and expenses.

Private and family life, access to personal files, positive obligations, consent of contributors, proportionality. (Art. 8)

(a) The records contained information concerning highly personal aspects of the applicant's childhood, development and history. Without expressing an opinion on whether general rights of access to personal data and information may be derived from Article 8(1), the Court held that the records in this case did relate to the applicant's 'private and family' life in such a way that the question of his access thereto fell within the ambit of Article 8. [34]–[37]

(b) Although the essential object of Article 8 was to protect an individual against arbitrary interference by public authorities, there may in addition be positive obligations inherent in an effective 'respect' for family life. [38]

(c) By refusing the applicant complete access to his case records, the United Kingdom could not be said to have 'interfered' with his private or family life. The substance of the applicant's complaint was not that the State had acted but that it had failed to act. Therefore, positive obligations of the State under Article 8 were in issue. [39]–[41]

(d) In determining whether or not such a positive obligation existed, the Court would have regard to the fair balance that had to be struck between the general interest of the community and the interests of the individual. In striking this balance the aims mentioned in Article 8(2) may be of a certain relevance, although this provision was concerned with the negative obligations flowing therefrom. [42]

(e) Confidentiality of public records was of importance for receiving objective and reliable information. Such confidentiality could also be necessary for the protection of third persons. A system which made access to records dependent on the consent of the contributor could in principle be considered to be compatible with the obligations under Article 8, taking into account the State's margin of appreciation. However, it would only comply with the principle of proportionality if there was an independent authority to decide whether access had to be granted if a contributor failed to answer or withheld consent. No such procedure was available in the present case. Therefore there had been a breach of Article 8. [43]–[49]

2. Freedom of expression: access to information. (Art. 10)

The right to freedom to receive information basically prohibited a Government from restricting a person from receiving information that others wished or might be willing to impart to him. It did not, in the present case, embody an obligation on the State concerned to impart to the applicant information held by the local authority against its will. [50]–[53]

3. Just satisfaction, non-pecuniary damage, value added tax. (Art. 50)

The Court acknowledged that the applicant might have suffered some emotional distress and anxiety by reason of the absence of any independent procedure to review the question of access to his personal files. It awarded the applicant £5,000 for non-pecuniary injury, together with legal fees and expenses in the sum of £11,000 less 8,295 FF already paid in legal aid, to be converted into pounds sterling at the rate applicable on the date of judgment, plus value added tax on the balance. Other claims for just satisfaction were rejected. [54]–[62]

Mr. I. D. Hendry, Legal Adviser, Foreign and Commonwealth Office (Agent), *Mr. N. Bratza, Q.C.* (Counsel), *Mr. E. R. Moutrie*, Solicitor, Department of Health and Social Security, *Mrs. A. Whittle*, Department of Health and Social Security, *Mr. R. Langham*, Department of Health and Social Security, *Miss T. Fuller*, City Solicitor's Department, Liverpool City Council, and *Mr. A. James*, Liverpool City Council (Advisers), for the Government.
Mrs. G. H. Thune (Delegate), for the Commission.
Mr. R. Makin, Solicitor of the Supreme Court (Counsel), for the Applicant.

The following cases are cited in the judgment:

1. AIREY *v.* IRELAND 2 E.H.R.R. 305.
2. B. *v.* UNITED KINGDOM, Series A, No. 136–D.
3. BELILOS *v.* SWITZERLAND (1988) 10 E.H.R.R. 466.
4. JOHNSTON *v.* IRELAND (1987) 9 E.H.R.R. 203.
5. LEANDER *v.* SWEDEN (1987) 9 E.H.R.R. 433.
6. RE D. (INFANTS) [1970] 1 All E.R. 1088, [1970] 1 W.L.R. 599 (C.A.).
7. REES *v.* UNITED KINGDOM (1987) 9 E.H.R.R. 56.

The following additional case is cited in the Joint Dissenting Opinion of Judges Ryssdal, Cremona, Gölcüklü, Matscher and Sir Vincent Evans:

8. ABDULAZIZ, CABALES AND BALKANDALI *v.* UNITED KINGDOM (1985) 7 E.H.R.R. 471.

The Facts

10. The applicant is a British citizen and was born on 2 December 1959. Following the death of his mother, he was taken into care by Liverpool City Council under section 1 of the Children Act 1948 ('the 1948 Act') on 1 September 1960. Save for five periods varying between one week and five months when he was discharged into the care of his father, the applicant remained in voluntary care until 18 June 1974. On that date the applicant appeared before Liverpool Juvenile Court and pleaded guilty to a number of offences including burglary and theft. The court made a care order in respect of him under section 7 of the Children and Young Persons Act 1969. The applicant ceased to be in the care of Liverpool City Council on attaining the age of majority (18) on 2 December 1977.

During the major part of the period he was in care the applicant was boarded out with various foster parents, subject to the provisions of the Boarding-Out of Children Regulations 1955 ('the 1955 Regulations'). Under the terms of those regulations the local authority was under a duty to keep certain confidential records concerning him and his care.[1]

11. The applicant contends that he was ill-treated in care, and since his majority has tried to obtain details of where he was kept and by whom and in what conditions in order to be able to help him to overcome his problems and learn about his past.

12. On 9 October 1978, the applicant was permitted by a social worker in the employ of Liverpool City Council to see his case records kept by the Social Services Department of the Council in accordance with its statutory duty. He removed those records without the Council's consent, retaining them in his possession until he returned them to the Social Services Department on 12 October 1978.

[1] See para. 13 below.

I. *The applicant's case records and the application for discovery thereof*

13. It is the practice of the local authorities to keep a case record in respect of every child in care. As regards children boarded out they were and are under a statutory duty to keep case records by virtue of the 1955 Regulations, which were made under section 14 of the 1948 Act. Regulation 10 of the 1955 Regulations, so far as relevant, provides that:

> '10.—(1) A local authority shall compile a case record in respect of—
> (a) every child boarded out by them;
> (b) . . .
> (c) . . .
> and the said records shall be kept up-to-date.
> (2) .....
> (3) Every case record compiled under this Regulation or a microfilm recording thereof shall be preserved for at least three years after the child to whom it relates has attained the age of eighteen years or has died before attaining that age, and such microfilm recording or, where there is none, such case record shall be open to inspection at all reasonable times by any person duly authorised in that behalf by the Secretary of State.'

14. In 1979 the applicant, wishing to bring proceedings against the local authority for damages for negligence, made an application under section 31 of the Administration of Justice Act 1970 ('the 1970 Act') for discovery of the local authority's case records made during his time in care. Section 31 of the 1970 Act provides, *inter alia*, that the High Court shall have power to order such disclosure to a person who is likely to be a party to legal proceedings for personal injuries.

15. The application was heard by the High Court on 22 February 1980. The local authority objected to the grant of discovery of the records on the ground that disclosure and production would be contrary to the public interest. The principal contributors to those case records were medical practitioners, schoolteachers, police and probation officers, social workers, health visitors, foster parents and residential school staff. Their contributions to the case records were treated in the strictest confidence and it was in the interest of the effective conduct of the care system that such records should be as full and frank as possible. If discovery were ordered, the public interest in the proper operation of the child care service would be jeopardised since the contributors to the records would be reluctant to be frank in their reports in the future.

16. The applicant contended that the case records held by the local authority should be made available to him on the general principles of discovery, for the purpose of his proposed proceedings for personal injuries against the local authority. He further argued that it was also in the public interest that some measure of review of the standard of care provided by a local authority to a child in care be available.

17. The judge did not read the records in question, but balanced the public interest in maintaining an efficient child care system with

the applicant's private interest in receiving access to his case records for the purpose of the proposed litigation. After referring to RE D (INFANTS),[2] in which Lord Denning, Master of the Rolls, held that case records compiled pursuant to Regulation 10 of the 1955 Regulations were regarded as private and confidential, he concluded:

> 'I am left in no doubt that it is necessary for the proper functioning of the child care service that the confidentiality of the relevant documents should be preserved. This is a very important service to which the interests—also very important—of the individual must, in my judgment, bow. I have no doubt that the public interest will be better served by refusing discovery and this I do.'

18. The applicant appealed this judgment to the Court of Appeal, which on 27 June 1980 unanimously dismissed the appeal. In the Court of Appeal's view, the High Court in its judgment had correctly balanced the competing interests. It added that the inspection of a document is a course which it is proper for a court to take in certain cases, for example where grave doubt arises and the court cannot properly decide upon which side the balance of public and private interests falls without itself inspecting the documents. However, this was not a case in which such doubt arose as would make it proper for the court itself to inspect the documents. The High Court's judgment was accordingly upheld and leave to appeal to the House of Lords was refused.[3]

II. *Resolutions of Liverpool City Council relating to access to personal files*

19. On 21 October 1980, Liverpool City Council set up the Child Care Records Sub-Committee ('the Sub-Committee') to make recommendations on access to personal social services files and to investigate the allegations relating to the applicant.

20. On 17 June 1982, the Sub-Committee recommended making available case records to ex-clients of the social services, subject to certain safeguards and restrictions relating in particular to medical and police information. As to the applicant, the Sub-Committee viewed with concern the number of placements which he had had while in care, and which it recognised could be detrimental to a young person's development, but found no evidence to suggest that 'the officers carried out their duties in other than a caring manner.' The applicant was to be allowed access to, and to make photocopies of, his case records, subject however to the exclusion of medical and police information.

21. On 30 June 1982, the Sub-Committee's recommendations, subject to an amendment which would require the consent of members of the medical profession and police services to be sought to the disclosure of information which they had contributed, were embodied

[2] [1970] 1 W.L.R. 599.
[3] GASKIN *v.* LIVERPOOL CITY COUNCIL [1980] 1 W.L.R. 1549.

in a resolution of the Social Services Committee. However, Mr. Lea, a dissenting member of the Sub-Committee, brought an action challenging the resolution and obtained an interlocutory court order preventing the City Council from implementing it until the trial of the action or until further order.

22. On 26 January 1983, Liverpool City Council passed a further resolution. As regards future records this reiterated the general terms of the resolution of 30 June 1982 and added certain further restrictions to protect information given in confidence and to provide for the non-disclosure of the whole or part of the personal record in particular cases, but as regards information obtained and compiled before 1 March 1983 it was resolved that this should be disclosed only with the consent of its suppliers. Pursuant to this policy the resolution went on to instruct the Council's officers immediately to contact the various suppliers of information to the Gaskin file with a view to disclosure. The local authority's officers were, however, ordered not to implement this resolution pending the outcome of the legal action brought by Mr. Lea. This action was discontinued on 13 May 1983 and on 29 June the local authority confirmed a further resolution to the effect that the resolution of 26 January would be implemented as from 1 September 1983.

23. On 24 August 1983 the Department of Health and Social Security issued Circular LAC (Local Authority Circular) (83)14 to local authorities and health authorities pursuant to section 7 of the Local Authority Social Services Act 1970 setting out the principles governing the disclosure of information in social services case records to persons who were the subject of the records. The general policy laid down in paragraph 3 of the circular was that persons receiving personal social services should, subject to adequate safeguards, be able to discover what is said about them in social services records and, with certain exceptions, should be allowed to have access thereto. Paragraph 5 set out under five headings the reasons for withholding information. These included the protection of third parties who contributed information in confidence, protecting sources of information, and protecting social service department staffs' confidential judgements. Paragraphs 6 to 9 set out in more specific terms the policy governing client access to case records. Paragraph 7 in particular defined the considerations to be weighed on the other side of the balance whenever an application was made for access, the most relevant for the purposes of the present case being that 'information shall not be disclosed to the client if derived in confidence from a third party without the consent of the third party.' However, it was then provided in paragraph 9 that since existing records had been compiled on the basis that their contents would never be disclosed, material entered in the records prior to the introduction of the new policy should in no event be disclosed without the permission of the contributor of the information.

24. On 31 August 1983, the High Court granted the Attorney General leave to apply for judicial review of the resolution of 26 January 1983 as amended by that of 29 June 1983 on the ground that it went beyond what were considered to be the proper limits and, in particular, omitted certain important safeguards which were contained in Circular LAC(83)14. Pending the trial of the action an injunction was granted restraining the local authority from implementing the resolution of 26 January 1983.

25. On 9 November 1983, Liverpool City Council confirmed a further resolution of its Social Services Committee of 18 October 1983 setting out certain additional grounds on which information should be withheld. The resolution provided that the information in the applicant's file should be made available to him if the contributors to the file (or as regards some information the Director of Social Services) consented and that the various contributors of the information contained in the file should be contacted for their permission before the release of that information. Following the passing of this resolution, which was in line with Government Circular LAC(83)14,[4] the Attorney General withdrew his application for judicial review.

26. The applicant's case record consisted of some 352 documents contributed by 46 persons. On 23 May 1986 copies of 65 documents supplied by 19 persons were sent to the applicant's solicitors. These were documents whose authors had consented to disclosure to the applicant. The size of each contribution disclosed varied from one letter to numerous letters and reports.

27. Those contributors who refused to waive confidentiality, although not asked to give reasons, stated, *inter alia*, that third party interests could be harmed; that the contribution would be of no value if taken out of context; that professional confidence was involved; that it was not the practice to disclose reports to clients; and that too great a period of time had elapsed for a letter or report still to be in the contributor's recollection.

Furthermore, in June 1986, one contributor refused his consent to disclosure on the ground that it would be detrimental to the applicant's interests.

28. In a letter of 15 July 1986, the Director of Social Services of Liverpool City Council wrote to the applicant's solicitors in the following terms:

> 'I refer to your letter dated 11 June 1986.
>
> I would wish to be as helpful as possible to you, but at the end of the day suspect that we may have genuine differences of opinion. At least I take that to be the implication of the questions you asked.
>
> I do not think therefore, that we can take this correspondence further in a profitable way because, as I have said, it is, in the last analysis, for the provider of information, retrospectively collected, to release or refuse to release, in their absolute discretion, the information supplied from the "confidential" embargo originally accorded to it. The reasons

[4] See para. 23 above.

for releasing or not releasing are irrelevant whether they are good, bad or indifferent.

I regret I do not feel able to help you further.'

III. *Subsequent legislative developments*

29. On 1 April 1989 the Access to Personal Files (Social Services) Regulations 1989 came into force. These regulations, made under the Access to Personal Files Act 1987 and further explained in Local Authority Circular LAC(89)2, impose upon social services departments a duty to give to any individual access to personal information held concerning him, except for personal health information which originated from a health professional and subject to the exceptions in Regulation 9. This latter provision exempts from the obligation of disclosure, *inter alia*, any information from which the identity of another individual (other than a social service employee), who has not consented to the disclosure of the information, would be likely to be disclosed or deduced by the individual who is the subject of the information or any other person who is likely to obtain access to it.

According to the Government, the effect of Regulation 9(3) is that, in future, case records will be compiled on the basis that the information contained therein is liable to be disclosed, except in so far as disclosure would be likely to reveal the identity of the informant or another third party. However, by virtue of section 2(4) of the Access to Personal Files Act 1987, the 1989 Regulations apply only to information recorded after the Regulations came into force, that is, after 1 April 1989. As in the case of Circular LAC(83)14, which governed the adoption of the resolution mentioned in paragraph 25 above and the subsequent partial release of documents to Mr. Gaskin, the Access to Personal Files (Social Services) Regulations 1989 do not have retrospective effect.

PROCEEDINGS BEFORE THE COMMISSION

30. The applicant applied to the Commission (application no. 10454/83) on 17 February 1983. He claimed that the refusal of access to all his case records held by Liverpool City Council was in breach of his right to respect for his private and family life under Article 8 of the Convention and his right to receive information under Article 10 of the Convention. He also invoked Articles 3 and 13 of the Convention and Article 2 of Protocol No. 1.

31. On 23 January 1986, the Commission declared admissible the applicant's complaint concerning the continuing refusal of Liverpool City Council to give him access to his case records but declared the remainder of the application inadmissible.

In its report of 13 November 1987 (Article 31), the Commission concluded, by six votes to six, with a casting vote by the acting President, that there had been a violation of Article 8 of the Convention by the procedures and decisions which resulted in the

refusal to allow the applicant access to the file. It further concluded, by 11 votes to none with one abstention, that there had been no violation of Article 10 of the Convention.

The text of the Commission's opinion and of the partly dissenting opinions was summarised at (1989) 11 E.H.R.R. 402.

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

32. At the public hearing on 28 March 1989, the Government maintained the concluding submissions set out in its memorial, whereby it requested the Court to decide and declare:

(i) that the facts disclose no breach of the applicant's rights guaranteed by Article 8 of the Convention;

(ii) that the facts disclose no breach of the applicant's rights guaranteed by Article 10 of the Convention.

JUDGMENT

I. *Scope of the case before the Court*

33. The sole complaint declared admissible by the Commission was that of the applicant's continuing lack of access to the whole of his case file held by Liverpool City Council.[5] Although the question of access to the file was first posed in the context of Mr. Gaskin's application for discovery of documents with a view to bringing legal proceedings against the local authority,[6] the only issues before the Court are those arising under Articles 8 and 10 in relation to the procedures and decisions pursuant to which the applicant was refused access to the file subsequently to the termination of the proceedings for discovery.[7]

II. *Alleged breach of Article 8*

A. *Applicability*

34. The applicant alleges a breach of Article 8 of the Convention, which is worded as follows:

> '1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

35. Before the Commission, the Government claimed that the file as such, being information compiled for and by the local authority,

[5] See para. 31 above.
[6] See paras. 14–18 above.
[7] See paras. 93 and 104 of the Commission's report.

did not form a part of the applicant's private life. Accordingly, in its submission, neither its compilation nor the question of access thereto falls within the scope of Article 8.

In the proceedings before the Court the Government did not revert specifically to this contention but rather concentrated on the questions whether there was any relevant interference with the applicant's right to respect for private life or alternatively whether there was any failure to comply with such positive obligations as are inherent in Article 8 to secure through its legal and administrative system respect for private life.

36. In the opinion of the Commission 'the file provided a substitute record for the memories and experience of the parents of the child who is not in care.' It no doubt contained information concerning highly personal aspects of the applicant's childhood, development and history and thus could constitute his principal source of information about his past and formative years. Consequently lack of access thereto did raise issues under Article 8.

37. The Court agrees with the Commission. The records contained in the file undoubtedly do relate to Mr. Gaskin's 'private and family life' in such a way that the question of his access thereto falls within the ambit of Article 8.

This finding is reached without expressing any opinion on whether general rights of access to personal data and information may be derived from Article 8(1) of the Convention. The Court is not called upon to decide *in abstracto* on questions of general principle in this field but rather has to deal with the concrete case of Mr. Gaskin's application.

B. *Approach to Article 8 in the present case*

38. As the Court held in JOHNSTON *v.* IRELAND, 'although the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective "respect" for family life.'[8]

39. The Commission considered that 'respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that in principle they should not be obstructed by the authorities from obtaining such very basic information without specific justification.'

In its report, reference was made to LEANDER *v.* SWEDEN, in which it was held that:

> 'Both the storing and the release of . . . information, which were coupled with a refusal to allow Mr. Leander an opportunity to refute it, amounted to an interference with his right to respect for private life as guaranteed by Article 8(1).'[9]

[8] (1987) 9 E.H.R.R. 203, para. 55.
[9] (1987) 9 E.H.R.R. 433, para. 48.

The Commission noted that Mr. Gaskin sought access to a file of a different nature from that in the LEANDER CASE. Nevertheless, since the information compiled and maintained by the local authority related to the applicant's basic identity, and indeed provided the only coherent record of his early childhood and formative years, it found the refusal to allow him access to the file to be an interference with his right to respect for his private life falling to be justified under Article 8(2).

40. The Government contended that, contrary to the LEANDER CASE, which was concerned with the negative obligations flowing from Article 8, namely the guarantee against arbitrary interference by public authorities, the present case involved essentially the positive obligations of the State under that Article.

In its view, the applicant was complaining not about direct interference by a public authority with the rights guaranteed by Article 8, but of a failure by the State to secure through its legal or administrative system the right to respect for private and family life. In this connection, the Government conceded that neither the legal nor the administrative system in the United Kingdom provided an absolute and unfettered right of access to case records to a person in the applicant's situation. However, the existence of such positive obligations entailed a wide margin of appreciation for the State. The question in each case was whether, regard being had to that margin of appreciation, a fair balance was struck between the competing interests, namely the public interest in this case in the efficient functioning of the child care system on the one hand, and the applicant's interest in having access to a coherent record of his personal history on the other.

41. The Court agrees with the Government that the circumstances of this case differ from those of the LEANDER CASE in which the respondent State was found to have interfered with Article 8 rights by compiling, storing, using and disclosing private information about the applicant in that case. Nevertheless, as in the LEANDER CASE, there is a file in this case concerning details of Mr. Gaskin's personal history which he had no opportunity of examining in its entirety.

However, it is common ground that Mr. Gaskin neither challenges the fact that information was compiled and stored about him nor alleges that any use was made of it to his detriment. In fact, the information compiled about Mr. Gaskin served wholly different purposes from those which were relevant in the LEANDER CASE. He challenges rather the failure to grant him unimpeded access to that information. Indeed, by refusing him complete access to his case records, the United Kingdom cannot be said to have 'interfered' with Mr. Gaskin's private or family life. As regards such refusal, 'the substance of [the applicant's] complaint is not that the State has acted but that it has failed to act.'[10]

[10] AIREY *v.* IRELAND 2 E.H.R.R. 305, para. 32.

The Court will therefore examine whether the United Kingdom, in handling the applicant's requests for access to his case records, was in breach of a positive obligation flowing from Article 8 of the Convention.

C. *Compliance with Article 8*

42. In accordance with its established case law, the Court, in determining whether or not such a positive obligation exists, will have regard to the 'fair balance that has to be struck between the general interest of the community and the interests of the individual . . . In striking this balance the aims mentioned in the second paragraph of Article 8 may be of a certain relevance, although this provision refers in terms only to "interferences" with the right protected by the first paragraph—in other words is concerned with the negative obligations flowing therefrom . . .'[11]

43. Like the Commission, the Court considers that the confidentiality of the contents of the file contributed to the effective operation of the child care system and, to that extent, served a legitimate aim, by protecting not only the rights of contributors but also of the children in need of care.

44. As to the general policy in relation to the disclosure of information contained in case records, the Government relied on Local Authority Circular (83)14 dated 24 August 1983.[12] The Government drew attention to paragraph 3 thereof, according to which, subject to certain exceptions, clients who wish to have access to child care records should be allowed to do so. The terms of the Circular were substantially followed in the resolution of Liverpool City Council's Social Services Committee of 18 October 1983.[13]

The Government argued that both circular and resolution acknowledged the importance of access to the child care records for those who are the subject of those records, and at the same time the importance of respecting the confidentiality of those who contributed to the records. That was not merely to protect the private interests of individual contributors but involved a much wider public interest. The proper operation of the child care service depended on the ability of those responsible for the service to obtain information not only from professional persons and bodies, such as doctors, psychiatrists, teachers and the like, but also from private individuals—foster parents, friends, neighbours and so on. The Government argued that, if the confidentiality of these contributors were not respected, their co-operation would be lost and the flow of information seriously reduced. This would have a serious effect on the operation of the child care service.

In this connection, the Government attached particular importance to paragraph 5 of the Circular, which contained an express recognition

[11] REES *v.* UNITED KINGDOM (1987) 9 E.H.R.R. 56, para. 37.
[12] See para. 23 above.
[13] See para. 25 above.

of the rights of persons who had provided information on the clear understanding that it would not be revealed, and to paragraph 7, pursuant to which 'information should not be disclosed to the client if derived in confidence from a third party without the consent of the third party.' It also drew attention to paragraph 9 which stated that records existing prior to the introduction of the new policy had in general been prepared on the basis that their content would never be disclosed to clients and therefore should not be disclosed without the contributor's permission.

In this respect, the balance struck by both the circular and the resolution between the interests of the individual seeking access to the records on the one hand and, on the other hand, the interests of those who have supplied information in confidence and the wider public interest in the maintenance of full and candid records, was said by the Government to be proper, rational, reasonable and consistent with its obligations under Article 8. There was thus no failure on the part of the United Kingdom to secure the applicant's right to respect for private life guaranteed by that provision.

45. The applicant, however, contested this. He emphasised the fundamental change which, according to him, has occurred in the Government's position since the issue in August 1983 of Circular LAC(83)14. He pointed to that Circular as evidence as an 'increasingly held view' that persons receiving personal social services should be able to discover what is said about them in case records. The Access to Personal Files Act 1987, and the Access to Personal Files (Social Services) Regulations 1989 made thereunder, illustrated the extent to which information of the kind sought by Mr. Gaskin would in the future be made available by public authorities in the United Kingdom.[14]

By way of example, Mr. Gaskin explained in some detail that he wished to establish his medical condition, which was not possible without sight of all the records and expert advice.

46. As to the alleged confidentiality of the records, the applicant submitted that it was not clear precisely how or why the contributors to his case records contended that their contributions were made in confidence; whether a condition of confidence had been made a prerequisite of the contribution; and whether confidentiality was clearly expressed at the time of the contribution or had been implied *ex post facto*.

The Government explained to the Court, in reply to its question on this point, that all information contributed to a case record kept under the 1955 Regulations[15] was treated as supplied on the understanding that it was to be kept confidential, unless the contrary was clear either from the nature of the information supplied or from the fact that the contributor had waived confidentiality. The basis for

[14] See para. 29 above.
[15] See para. 13 above.

this principle of confidentiality was to be found in Regulation 10 which provides that the case record shall be open to inspection by any person duly authorised in that behalf by the Secretary of State. As the Court of Appeal held in RE D (INFANTS),[16] in which that provision was applied in the context of wardship proceedings, 'that shows that the case record is regarded as private and confidential.'[17]

47. It should be noted that, in seeking in this context to reconcile the competing interests with which it was faced, Liverpool City Council contacted the various suppliers of information with a view to obtaining waivers of confidentiality. Out of 46 contributors 19 gave their consent and 65 out of 352 documents were released. Mr. Gaskin wishes however to have access to his entire file.[18]

The Commission observed that the applicant had not had the benefit of any 'independent procedure to enable his request to be tested in respect of each of the various entries in the file where consent is not forthcoming.' It concluded that the 'absence of any procedure to balance the applicant's interest in access to the file against the claim to confidentiality by certain contributors, and the consequential automatic preference given to the contributors' interests over those of the applicant' was disproportionate to the aim pursued and could not be said to be necessary in a democratic society.

48. In this connection, the Government maintained that the United Kingdom was not alone amongst European states in having no general independent procedure for weighing the competing interests. As in other member states, such procedure as does exist was confined to cases where legal proceedings are subsisting or in contemplation. Moreover, a balance between the competing interests was already provided for in Circular LAC(83)14. There was no blanket refusal of access to care records. Access was given to information which was not provided in confidence and access was given even to confidential information in so far as the consent of the contributor could be obtained by the Local Authority concerned. As regards the alleged giving of 'automatic preference to the contributors' interest over those of the applicant,' it would, in the Government's view, be unreasonable and arbitrary to assume the right to dispense with a contributor's consent or to determine that a confidence should be overridden. The Government further relied on the statement contained in the partly dissenting opinion of one member of the Commission that to do so would amount to a violation of a moral obligation on its part and would place at risk the effective operation of the child care system.

For his part, the applicant pointed out that, under the procedure of obtaining the consent of contributors adopted by the Circular, there were always likely to be certain contributors whom it is impracticable to ask for consent, as it might not be possible to identify

[16] [1970] 1 All E.R. 1088 at 1089.
[17] See para. 17 above.
[18] See para. 26 above.

or trace them. In that case, there would always be an element of the documents which might never be released to someone in his situation. The example was also given of jointly prepared reports where one of the authors consents to disclosure but the other does not.

49. In the Court's opinion, persons in the situation of the applicant have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development. On the other hand, it must be borne in mind that confidentiality of public records is of importance for receiving objective and reliable information, and that such confidentiality can also be necessary for the protection of third persons. Under the latter aspect, a system like the British one, which makes access to records dependent on the consent of the contributor, can in principle be considered to be compatible with the obligations under Article 8, taking into account the State's margin of appreciation. The Court considers, however, that under such a system the interests of the individual seeking access to records relating to his private and family life must be secured when a contributor to the records either is not available or improperly refuses consent. Such a system is only in conformity with the principle of proportionality if it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent. No such procedure was available to the applicant in the present case.

Accordingly, the procedures followed failed to secure respect for Mr. Gaskin's private and family life as required by Article 8 of the Convention. There has therefore been a breach of that provision.

III. *Alleged violation of Article 10*

50. The applicant further maintained that the same facts as constituted a violation of Article 8 also gave rise to a breach of Article 10, which reads:

> '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 responsibilities, 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.'

51. The Commission found that Article 10 did not, in the circumstances of the case, give the applicant a right to obtain, against the will of the local authority, access to the file held by that authority. The Government agreed.

52. The Court holds, as it did in LEANDER *v.* SWEDEN, that 'the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him.'[19] Also in the circumstances of this case, Article 10 does not embody an obligation on the State concerned to impart the information in question to the individual.

53. There has thus been no interference with Mr. Gaskin's right to receive information as protected by Article 10.

IV. *Application of Article 50*

54. Mr. Gaskin claimed just satisfaction under Article 50, which reads:

> 'If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the . . . Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.'

A. *Pecuniary damage*

55. First of all, Mr. Gaskin claimed amounts in respect of past and future loss of earnings totalling in excess of £380,000. He alleged that his employment prospects had been injured, owing to the loss of opportunities sustained by him.

The Government contended that no causal link had been shown to exist between the losses said to have been suffered and the alleged violations of the Convention.

56. The Court notes that, even if a procedure as described in paragraph 49 above had existed in Mr. Gaskin's case, there is no evidence to show that the documents withheld would have been released and, if so, that this would have had a favourable effect on his future earnings. The claim for damages under this head should therefore be rejected.

B. *Non-pecuniary injury*

57. The applicant also sought compensation for non-pecuniary injury in respect of distress, humiliation and anxiety suffered by him. By reason of the failings in his upbringing, Mr. Gaskin's status and dignity had been irreversibly injured.

The Government contended that it could not be assumed that the applicant had sustained a real loss of opportunities such as to justify an award of just satisfaction in respect of non-pecuniary injury. Even if some loss of opportunities had been suffered, the applicant had not established any causal link between the damage claimed and any violation of the Convention found.

[19] (1987) 9 E.H.R.R. 433, para. 74.

58. The Court acknowledges that Mr. Gaskin may have suffered some emotional distress and anxiety by reason of the absence of any independent procedure such as that mentioned in paragraph 49 above.

Making a determination on an equitable basis, the Court awards Mr. Gaskin under this head the amount of £5,000.

C. *Costs and expenses*

59. The applicant claimed legal costs and expenses. His claim was calculated on the basis of 650 hours' work by his solicitor at the rate of £60 per hour, increased by a multiplier of 200 per cent. in order to reflect the importance and complexity of the case, whereby a total amount claimed of £117,000 was arrived at.

The Court will deal with this claim in accordance with the criteria it has established.[20]

1. *Costs incurred at domestic level*

60. According to the Government, the costs arising at the domestic level were not incurred in order to remedy a breach of the Convention: it was solely in connection with a prospective claim for damages that the applicant had brought proceedings before the domestic courts for the discovery of his case records.

The Court agrees that only costs incurred subsequently to the termination of the domestic proceedings may be considered.[21] It is therefore appropriate to include this aspect of the claim in the examination conducted in paragraphs 61 to 62 below.

2. *Costs incurred in the European proceedings*

61. The Government contested the amount claimed. It considered the number of hours stated to be excessive. In addition, according to it, appropriate hourly rates ranged between £36 and £60. In this connection, it also relied on paragraph 15(d) of B. *v.* UNITED KINGDOM,[22] which however indicated that an upper figure of £70 might be reasonable, depending on the nature of the case.

The Government did not dispute that the applicant had incurred liability to pay sums additional to those covered by the legal aid which he had received from the Council of Europe. If the Court were to make an award, it should not be greater than that awarded in comparable cases.

62. The Court is of the opinion that the total amount claimed is not reasonable as to quantum. Taking into account all the circumstances and making an equitable assessment, the Court considers that Mr. Gaskin is entitled to be reimbursed, for legal fees and expenses, the sum of £11,000 less 8,295 FF already paid in legal aid.

[20] BELILOS *v.* SWITZERLAND (1988) 10 E.H.R.R. 466, para. 79.
[21] See para. 33 above.
[22] Series A, No. 136-D.

For these reasons, THE COURT

1. *Holds* by 11 votes to six that there has been a violation of Article 8;
2. *Holds* unanimously that there has been no violation of Article 10;
3. *Holds* by nine votes to eight that the United Kingdom is to pay to the applicant, for non-pecuniary injury, £5,000 and, for legal fees and expenses, £11,000 less 8,295 FF to be converted into pounds sterling at the rate applicable on the date of this judgment, plus value added tax on the balance.
4. *Rejects* the remainder of the claims for just satisfaction.

Joint Dissenting Opinion of Judges Ryssdal, Cremona, Gölcüklü, Matscher and Sir Vincent Evans

1. We accept the finding of the majority of the Court that the records contained in the local authority's file relate to Mr. Gaskin's private and family life in such a way that the question of his access thereto raises an issue under Article 8 of the Convention. We do not, however, agree that a violation of Article 8 has been established in this case.

2. The confidential nature of the case records compiled under Regulation 10 of the Boarding-Out of Children Regulations 1955 at the time when Mr. Gaskin was in care has been clearly affirmed by the English courts, particularly in the case of IN RE D (INFANTS),[23] which was followed by the judgments of the High Court and the Court of Appeal in refusing Mr. Gaskin's application for discovery of documents in 1980.[24] Boreham J. in the High Court, whose finding on this point was accepted by the Court of Appeal, said that he was 'left in no doubt that it is necessary for the proper functioning of the child care service that the confidentiality of the relevant documents should be preserved.'

3. As both the Commission and the Court have recognised, the confidentiality of the contents of the file had a legitimate aim—or aims. It not only protected the rights of those who had provided information on a confidential basis, but by contributing to the efficient operation of the child care system it also served to protect the rights of children in need of care.

4. Admittedly a more open policy as regards access to personal files has been followed in other Contracting States and this is now the approach adopted in Great Britain in the Access to Personal Files Act 1987 and regulations made under it as to information recorded in the future. In our opinion, however, it would be wrong to alter retrospectively the basis on which existing case records have

[23] [1970] 1 W.L.R. 599.
[24] See paras. 14–18 of the Court's judgment.

been compiled. The question of access to them, including access to Mr. Gaskin's file, must be considered with proper regard to the conditions of confidentiality under which information was contributed to them.

5. Mr. Gaskin claims that his right to respect for his private and family life under Article 8 entitles him to access to the whole of his case file. In determining whether the respondent Government is under a positive obligation to grant him access, the Court, in accordance with its established case law, has had regard to the 'fair balance that has to be struck between the general interest of the community and the interests of the individual.'[25] The Court has also pointed out in ABDULAZIZ, CABALES AND BALKANDALI *v.* UNITED KINGDOM[26] that the notion of 'respect' is not clear-cut especially as far as positive obligations inherent in Article 8 are concerned and accordingly that this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals.

6. It is implicit in the Court's judgment in this case that it does not accept that the applicant should have access to his entire file irrespective of the confidentiality attaching to its contents, but that access can only be given on a selective basis.

7. The Government maintains that, by writing a letter to each of the contributors to the file seeking his permission to disclose the information that he had contributed and then making available to the applicant documents supplied by persons who gave their consent, the authorities in the United Kingdom have gone as far as they properly could to meet the applicant's request for access. It is the Government's view that it would be entirely improper and a breach of good faith to disclose information supplied in confidence without the consent of the supplier.

8. The Court has taken the view that the final decision whether access should be granted in cases where a contributor fails to answer or withholds consent should be taken by an independent authority.[27] Inasmuch as such a system envisages the disclosure of information received in confidence without the contributor's consent, we consider that it is open to serious objection as not fairly and adequately respecting and protecting his position.

9. In our opinion the procedure that has been followed by the United Kingdom authorities for determining what parts of Mr. Gaskin's file could be made available to him should be accepted as representing a fair balance of interests in the circumstances.

10. Finally, we do not agree that the payment of non-pecuniary damages is justified in this case. The stress and anxiety which the applicant has no doubt suffered have been occasioned by the refusal

[25] See para. 42 of the judgment.
[26] (1985) 7 E.H.R.R. 471, para. 67.
[27] See para. 49 of the judgment.

to grant him access to his case file and not to the lack of any review procedure, which may or may not result in the release of further documents to him. This therefore is, in our opinion, a case in which the finding of a breach of Article 8 constitutes adequate just satisfaction for the purpose of Article 50.

Dissenting Opinion of Judge Walsh

1. In my opinion Article 8 of the Convention is not applicable in the present case. The information sought by the applicant was for the purpose of furthering his legal action for damages against Liverpool City Council. It was not sought in defence of or to further his right to respect for his private and family life. Furthermore the present application is, in effect, an appeal against the orders of the English courts which decided on the merits of the case not to permit the revelation of information imparted and received in confidence.

2. In my opinion Article 10 of the Convention is applicable. *Prima facie* the applicant's right to receive the information sought from the public authority falls within the guarantee contained in Article 10(1) of the Convention. The information sought was relevant to his legal proceedings. The willingness of Liverpool City Council to furnish the information was curbed by the English courts on the grounds that to do so would be to breach the undisputed confidentiality which covered the documents in question. In my view that fell within the qualification permitted by Article 10(2) of the Convention. In fact 19 of the 46 informants agreed to waive confidentiality and the relevant documents were furnished to the applicant. The applicant's freedom to pursue his legal proceedings is not impaired and he is free to exercise his rights guaranteed by Article 6(1) of the Convention. He can furnish first-hand evidence of the alleged personal injuries suffered by him and examine and cross-examine witnesses in accordance with the rules of English procedural law. The fact that the English courts in their discretion might have given the applicant access to the documents sought does not affect the construction of Article 10(2) of the Convention. The matter was decided in accordance with English law on grounds which, in my view, can in the circumstances of the case be justified as being necessary in a democratic society for preventing the disclosure of information received in confidence relating to a very sensitive area of social welfare.

3. In my opinion it has not been shown that there has been any breach of the Convention.

Intelligence Services Act 1994

CHAPTER 13

ARRANGEMENT OF SECTIONS

Intelligence Services Act 1994

1994 CHAPTER 13

An Act to make provision about the Secret Intelligence Service and the Government Communications Headquarters, including provision for the issue of warrants and authorisations enabling certain actions to be taken and for the issue of such warrants and authorisations to be kept under review; to make further provision about warrants issued on applications by the Security Service; to establish a procedure for the investigation of complaints about the Secret Intelligence Service and the Government Communications Headquarters; to make provision for the establishment of an Intelligence and Security Committee to scrutinise all three of those bodies; and for connected purposes. [26th May 1994]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

The Secret Intelligence Service

The Secret Intelligence Service.

1.—(1) There shall continue to be a Secret Intelligence Service (in this Act referred to as "the Intelligence Service") under the authority of the Secretary of State; and, subject to subsection (2) below, its functions shall be—

(a) to obtain and provide information relating to the actions or intentions of persons outside the British Islands; and

(b) to perform other tasks relating to the actions or intentions of such persons.

(2) The functions of the Intelligence Service shall be exercisable only—

(a) in the interests of national security, with particular reference to the defence and foreign policies of Her Majesty's Government in the United Kingdom; or

(b) in the interests of the economic well-being of the United Kingdom; or

(c) in support of the prevention or detection of serious crime.

The Chief of the Intelligence Service.

2.—(1) The operations of the Intelligence Service shall continue to be under the control of a Chief of that Service appointed by the Secretary of State.

(2) The Chief of the Intelligence Service shall be responsible for the efficiency of that Service and it shall be his duty to ensure—

(a) that there are arrangements for securing that no information is obtained by the Intelligence Service except so far as necessary for the proper discharge of its functions and that no information is disclosed by it except so far as necessary—

(i) for that purpose;

(ii) in the interests of national security;

(iii) for the purpose of the prevention or detection of serious crime; or

(iv) for the purpose of any criminal proceedings; and

(b) that the Intelligence Service does not take any action to further the interests of any United Kingdom political party.

(3) Without prejudice to the generality of subsection (2)(a) above, the disclosure of information shall be regarded as necessary for the proper discharge of the functions of the Intelligence Service if it consists of—

(a) the disclosure of records subject to and in accordance with the Public Records Act 1958; or

1958 c. 51.

(b) the disclosure, subject to and in accordance with arrangements approved by the Secretary of State, of information to the Comptroller and Auditor General for the purposes of his functions.

(4) The Chief of the Intelligence Service shall make an annual report on the work of the Intelligence Service to the Prime Minister and the Secretary of State and may at any time report to either of them on any matter relating to its work.

GCHQ

The Government Communications Headquarters.

3.—(1) There shall continue to be a Government Communications Headquarters under the authority of the Secretary of State; and, subject to subsection (2) below, its functions shall be—

(a) to monitor or interfere with electromagnetic, acoustic and other emissions and any equipment producing such emissions and to obtain and provide information derived from or related to such emissions or equipment and from encrypted material; and

(b) to provide advice and assistance about—

(i) languages, including terminology used for technical matters, and

(ii) cryptography and other matters relating to the protection of information and other material,

to the armed forces of the Crown, to Her Majesty's Government in the United Kingdom or to a Northern Ireland Department or to any other organisation which is determined for the purposes of this section in such manner as may be specified by the Prime Minister.

(2) The functions referred to in subsection (1)(a) above shall be exercisable only—

(a) in the interests of national security, with particular reference to the defence and foreign policies of Her Majesty's Government in the United Kingdom; or

(b) in the interests of the economic well-being of the United Kingdom in relation to the actions or intentions of persons outside the British Islands; or

(c) in support of the prevention or detection of serious crime.

(3) In this Act the expression "GCHQ" refers to the Government Communications Headquarters and to any unit or part of a unit of the armed forces of the Crown which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions.

The Director of GCHQ.

4.—(1) The operations of GCHQ shall continue to be under the control of a Director appointed by the Secretary of State.

(2) The Director shall be responsible for the efficiency of GCHQ and it shall be his duty to ensure—

(a) that there are arrangements for securing that no information is obtained by GCHQ except so far as necessary for the proper discharge of its functions and that no information is disclosed by it except so far as necessary for that purpose or for the purpose of any criminal proceedings; and

(b) that GCHQ does not take any action to further the interests of any United Kingdom political party.

(3) Without prejudice to the generality of subsection (2)(a) above, the disclosure of information shall be regarded as necessary for the proper discharge of the functions of GCHQ if it consists of—

(a) the disclosure of records subject to and in accordance with the Public Records Act 1958; or 1958 c. 51.

(b) the disclosure, subject to and in accordance with arrangements approved by the Secretary of State, of information to the Comptroller and Auditor General for the purposes of his functions.

(4) The Director shall make an annual report on the work of GCHQ to the Prime Minister and the Secretary of State and may at any time report to either of them on any matter relating to its work.

Authorisation of certain actions

Warrants: general.

5.—(1) No entry on or interference with property or with wireless telegraphy shall be unlawful if it is authorised by a warrant issued by the Secretary of State under this section.

(2) The Secretary of State may, on an application made by the Security Service, the Intelligence Service or GCHQ, issue a warrant under this section authorising the taking, subject to subsection (3) below, of such action as is specified in the warrant in respect of any property so specified or in respect of wireless telegraphy so specified if the Secretary of State—

(a) thinks it necessary for the action to be taken on the ground that it is likely to be of substantial value in assisting, as the case may be,—

(i) the Security Service in carrying out any of its functions under the 1989 Act; or

(ii) the Intelligence Service in carrying out any of its functions under section 1 above; or

(iii) GCHQ in carrying out any function which falls within section 3(1)(a) above; and

(b) is satisfied that what the action seeks to achieve cannot reasonably be achieved by other means; and

(c) is satisfied that satisfactory arrangements are in force under section 2(2)(a) of the 1989 Act (duties of the Director-General of the Security Service), section 2(2)(a) above or section 4(2)(a) above with respect to the disclosure of information obtained by virtue of this section and that any information obtained under the warrant will be subject to those arrangements.

(3) A warrant authorising the taking of action in support of the prevention or detection of serious crime may not relate to property in the British Islands.

(4) Subject to subsection (5) below, the Security Service may make an application under subsection (2) above for a warrant to be issued authorising that Service (or a person acting on its behalf) to take such action as is specified in the warrant on behalf of the Intelligence Service or GCHQ and, where such a warrant is issued, the functions of the Security Service shall include the carrying out of the action so specified, whether or not it would otherwise be within its functions.

(5) The Security Service may not make an application for a warrant by virtue of subsection (4) above except where the action proposed to be authorised by the warrant—

(a) is action in respect of which the Intelligence Service or, as the case may be, GCHQ could make such an application; and

(b) is to be taken otherwise than in support of the prevention or detection of serious crime.

Warrants: procedure and duration, etc.

6.—(1) A warrant shall not be issued except—

(a) under the hand of the Secretary of State; or

(b) in an urgent case where the Secretary of State has expressly authorised its issue and a statement of that fact is endorsed on it, under the hand of a senior official of his department.

(2) A warrant shall, unless renewed under subsection (3) below, cease to have effect—

(a) if the warrant was under the hand of the Secretary of State, at the end of the period of six months beginning with the day on which it was issued; and

(b) in any other case, at the end of the period ending with the second working day following that day.

(3) If at any time before the day on which a warrant would cease to have effect the Secretary of State considers it necessary for the warrant to continue to have effect for the purpose for which it was issued, he may by an instrument under his hand renew it for a period of six months beginning with that day.

(4) The Secretary of State shall cancel a warrant if he is satisfied that the action authorised by it is no longer necessary.

(5) In the preceding provisions of this section "warrant" means a warrant under section 5 above.

(6) As regards the Security Service, this section and section 5 above have effect in place of section 3 (property warrants) of the 1989 Act, and accordingly—

(a) a warrant issued under that section of the 1989 Act and current when this section and section 5 above come into force shall be treated as a warrant under section 5 above, but without any change in the date on which the warrant was in fact issued or last renewed; and

(b) section 3 of the 1989 Act shall cease to have effect.

Authorisation of acts outside the British Islands.

7.—(1) If, apart from this section, a person would be liable in the United Kingdom for any act done outside the British Islands, he shall not be so liable if the act is one which is authorised to be done by virtue of an authorisation given by the Secretary of State under this section.

(2) In subsection (1) above "liable in the United Kingdom" means liable under the criminal or civil law of any part of the United Kingdom.

(3) The Secretary of State shall not give an authorisation under this section unless he is satisfied—

(a) that any acts which may be done in reliance on the authorisation or, as the case may be, the operation in the course of which the acts may be done will be necessary for the proper discharge of a function of the Intelligence Service; and

(b) that there are satisfactory arrangements in force to secure—

(i) that nothing will be done in reliance on the authorisation beyond what is necessary for the proper discharge of a function of the Intelligence Service; and

(ii) that, in so far as any acts may be done in reliance on the authorisation, their nature and likely consequences will be reasonable, having regard to the purposes for which they are carried out; and

(c) that there are satisfactory arrangements in force under section 2(2)(a) above with respect to the disclosure of information obtained by virtue of this section and that any information obtained by virtue of anything done in reliance on the authorisation will be subject to those arrangements.

(4) Without prejudice to the generality of the power of the Secretary of State to give an authorisation under this section, such an authorisation—

(a) may relate to a particular act or acts, to acts of a description specified in the authorisation or to acts undertaken in the course of an operation so specified;

(b) may be limited to a particular person or persons of a description so specified; and

(c) may be subject to conditions so specified.

(5) An authorisation shall not be given under this section except—

(a) under the hand of the Secretary of State; or

(b) in an urgent case where the Secretary of State has expressly authorised it to be given and a statement of that fact is endorsed on it, under the hand of a senior official of his department.

(6) An authorisation shall, unless renewed under subsection (7) below, cease to have effect—

(a) if the authorisation was given under the hand of the Secretary of State, at the end of the period of six months beginning with the day on which it was given;

(b) in any other case, at the end of the period ending with the second working day following the day on which it was given.

(7) If at any time before the day on which an authorisation would cease to have effect the Secretary of State considers it necessary for the authorisation to continue to have effect for the purpose for which it was given, he may by an instrument under his hand renew it for a period of six months beginning with that day.

(8) The Secretary of State shall cancel an authorisation if he is satisfied that any act authorised by it is no longer necessary.

The Commissioner, the Tribunal and the investigation of complaints

The Commissioner. 1876 c. 59.

8.—(1) The Prime Minister shall appoint as a Commissioner for the purposes of this Act a person who holds or has held high judicial office within the meaning of the Appellate Jurisdiction Act 1876.

(2) The Commissioner shall hold office in accordance with the terms of his appointment and there shall be paid to him by the Secretary of State such allowances as the Treasury may determine.

(3) In addition to his functions under the subsequent provisions of this Act, the Commissioner shall keep under review the exercise by the Secretary of State of his powers under sections 5 to 7 above, except in so far as the powers under sections 5 and 6 above relate to the Security Service.

(4) It shall be the duty of—

(a) every member of the Intelligence Service,

(b) every member of GCHQ, and

(c) every official of the department of the Secretary of State,

to disclose or give to the Commissioner such documents or information as he may require for the purpose of enabling him to discharge his functions.

(5) The Commissioner shall make an annual report on the discharge of his functions to the Prime Minister and may at any time report to him on any matter relating to his discharge of those functions.

(6) The Prime Minister shall lay before each House of Parliament a copy of each annual report made by the Commissioner under subsection (5) above together with a statement as to whether any matter has been excluded from that copy in pursuance of subsection (7) below.

(7) If it appears to the Prime Minister, after consultation with the Commissioner, that the publication of any matter in a report would be prejudicial to the continued discharge of the functions of the Intelligence Service or, as the case may be, GCHQ, the Prime Minister may exclude that matter from the copy of the report as laid before each House of Parliament.

(8) The Secretary of State may, after consultation with the Commissioner and with the approval of the Treasury as to numbers, provide the Commissioner with such staff as the Secretary of State thinks necessary for the discharge of his functions.

Investigation of complaints.

9.—(1) There shall be a Tribunal for the purpose of investigating complaints about the Intelligence Service or GCHQ in the manner specified in Schedule 1 to this Act.

(2) The Commissioner shall have the functions conferred on him by Schedule 1 to this Act and give the Tribunal all such assistance in discharging their functions under that Schedule as they may require.

(3) Schedule 2 to this Act shall have effect with respect to the constitution, procedure and other matters relating to the Tribunal.

(4) The decisions of the Tribunal and the Commissioner under Schedule 1 to this Act (including decisions as to their jurisdictions) shall not be subject to appeal or liable to be questioned in any court.

The Intelligence and Security Committee

The Intelligence and Security Committee.

10.—(1) There shall be a Committee, to be known as the Intelligence and Security Committee and in this section referred to as "the Committee", to examine the expenditure, administration and policy of—

(a) the Security Service;

(b) the Intelligence Service; and

(c) GCHQ.

(2) The Committee shall consist of nine members—

(a) who shall be drawn both from the members of the House of Commons and from the members of the House of Lords; and

(b) none of whom shall be a Minister of the Crown.

(3) The members of the Committee shall be appointed by the Prime Minister after consultation with the Leader of the Opposition, within the meaning of the Ministerial and other Salaries Act 1975; and one of those members shall be so appointed as Chairman of the Committee.

1975 c. 27.

(4) Schedule 3 to this Act shall have effect with respect to the tenure of office of members of, the procedure of and other matters relating to, the Committee; and in that Schedule "the Committee" has the same meaning as in this section.

(5) The Committee shall make an annual report on the discharge of their functions to the Prime Minister and may at any time report to him on any matter relating to the discharge of those functions.

(6) The Prime Minister shall lay before each House of Parliament a copy of each annual report made by the Committee under subsection (5) above together with a statement as to whether any matter has been excluded from that copy in pursuance of subsection (7) below.

(7) If it appears to the Prime Minister, after consultation with the Committee, that the publication of any matter in a report would be prejudicial to the continued discharge of the functions of either of the Services or, as the case may be, GCHQ, the Prime Minister may exclude that matter from the copy of the report as laid before each House of Parliament.

Supplementary

Interpretation and consequential amendments.

11.—(1) In this Act—

(a) "the 1989 Act" means the Security Service Act 1989;

1989 c. 5.

(b) "the Commissioner" means the Commissioner appointed under section 8 above;

(c) "Minister of the Crown" has the same meaning as in the Ministers of the Crown Act 1975;

1975 c. 26.

(d) "senior official" in relation to a department is a reference to an officer of or above Grade 3 or, as the case may require, Diplomatic Service Senior Grade;

1949 c. 54.

(e) "wireless telegraphy" has the same meaning as in the Wireless Telegraphy Act 1949 and, in relation to wireless telegraphy, "interfere" has the same meaning as in that Act;

(f) "working day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

1971 c. 80.

(2) In consequence of the preceding provisions of this Act, the 1989 Act, the Official Secrets Act 1989 and the Official Secrets Act 1989 (Prescription) Order 1990 shall have effect subject to the amendments in Schedule 4 to this Act.

1989 c. 6.
S.I. 1990/200.

Short title, commencement and extent.

12.—(1) This Act may be cited as the Intelligence Services Act 1994.

(2) This Act shall come into force on such day as the Secretary of State may by an order made by statutory instrument appoint, and different days may be so appointed for different provisions or different purposes.

(3) This Act extends to Northern Ireland.

(4) Her Majesty may by Order in Council direct that any of the provisions of this Act specified in the Order shall extend, with such exceptions, adaptations and modifications as appear to Her to be necessary or expedient, to the Isle of Man, any of the Channel Islands or any colony.

SCHEDULES

SCHEDULE 1

Section 9.

INVESTIGATION OF COMPLAINTS

Preliminary

1. Any person may complain to the Tribunal if he is aggrieved by anything which he believes the Intelligence Service or GCHQ has done in relation to him or to any property of his; and, unless the Tribunal consider that the complaint is frivolous or vexatious, they shall deal with it in accordance with this Schedule.

References and investigations by the Tribunal

2. If and so far as the complaint alleges that anything has been done in relation to any property of the complainant, the Tribunal shall refer the complaint to the Commissioner.

3. Subject to paragraph 2 above and paragraph 4 below, the Tribunal shall investigate—

(a) whether the Intelligence Service or, as the case may be, GCHQ has obtained or provided information or performed any other tasks in relation to the actions or intentions of the complainant; and

(b) if so, whether, applying the principles applied by a court on an application for judicial review, the Intelligence Service or GCHQ had reasonable grounds for doing what it did.

4. If, in the course of the investigation of a complaint by the Tribunal, the Tribunal consider that it is necessary to establish whether an authorisation was given under section 7 of this Act to the doing of any act, they shall refer so much of the complaint as relates to the doing of that act to the Commissioner.

Functions of the Commissioner in relation to complaints

5.—(1) Where a reference is made to the Commissioner under paragraph 2 or paragraph 4 above, the Commissioner shall investigate, as the case may require,—

(a) whether a warrant was issued under section 5 of this Act in relation to the property concerned; or

(b) whether an authorisation was given under section 7 of this Act to the doing of the act in question.

(2) If the Commissioner finds that a warrant was issued or an authorisation was given, he shall, applying the principles applied by a court on an application for judicial review, determine whether the Secretary of State was acting properly in issuing or renewing the warrant or, as the case may be, in giving or renewing the authorisation.

(3) The Commissioner shall inform the Tribunal of his conclusion on any reference made to him under paragraph 2 or paragraph 4 above.

Report of conclusions

6.—(1) Where the Tribunal determine under paragraph 3 above that the Intelligence Service or, as the case may be, GCHQ did not have reasonable grounds for doing what it did, they shall—

(a) give notice to the complainant that they have made a determination in his favour; and

(b) make a report of their findings to the Secretary of State and to the Commissioner.

(2) The Tribunal shall also give notice to the complainant of any determination in his favour by the Commissioner under paragraph 5 above.

(3) Where in the case of any complaint no such determination as is mentioned in sub-paragraph (1) or sub-paragraph (2) above is made by the Tribunal or the Commissioner, the Tribunal shall give notice to the complainant that no determination in his favour has been made on his complaint.

Special references by Tribunal to Commissioner

7.—(1) If in any case investigated by the Tribunal—

(a) the Tribunal's conclusions on the matters which they are required to investigate are such that no determination is made by them in favour of the complainant; but

(b) it appears to the Tribunal from the allegations made by the complainant that it is appropriate for there to be an investigation into whether the Intelligence Service or GCHQ has in any other respect acted unreasonably in relation to the complainant or his property,

they shall refer that matter to the Commissioner.

(2) The Commissioner may report any matter referred to him under sub-paragraph (1) above to the Secretary of State.

Remedies

8.—(1) Where the Tribunal give a complainant notice of such a determination as is mentioned in paragraph 6(1) above, the Tribunal may do either or both of the following, namely,—

(a) direct that the obtaining and provision of information in relation to the complainant or, as the case may be, the conduct of other activities in relation to him or to any property of his shall cease and that any records relating to such information so obtained or provided or such other activities shall be destroyed;

(b) direct the Secretary of State to pay to the complainant such sum by way of compensation as may be specified by the Tribunal.

(2) Where the Tribunal give a complainant notice of such a determination as is mentioned in paragraph 6(2) above, the Tribunal may do either or both of the following, namely,—

(a) quash any warrant or authorisation which the Commissioner has found to have been improperly issued, renewed or given and which he considers should be quashed;

(b) direct the Secretary of State to pay to the complainant such sum by way of compensation as may be specified by the Commissioner.

(3) Where the Secretary of State receives a report under paragraph 7(2) above, he may take such action in the light of the report as he thinks fit, including any action which the Tribunal have power to take or direct under the preceding provisions of this paragraph.

Supplementary

9. The persons who may complain to the Tribunal under this Schedule include any organisation and any association or combination of persons.

10.—(1) No complaint shall be entertained under this Schedule if and so far as it relates to anything done before the date on which this Schedule comes into force.

(2) Where any activities in relation to any person or his property were instituted before that date and no decision had been taken before that date to discontinue them, paragraphs 2 and 3 above shall have effect as if they had been instituted on that date.

11. Any reference in this Schedule to a complainant's property includes—

(a) a reference to any wireless telegraphy transmission originated or received or intended to be received by him; and

(b) a reference to any place where the complainant resides or works.

SCHEDULE 2

Section 9.

THE TRIBUNAL

Constitution of the Tribunal

1.—(1) The Tribunal shall consist of not less than three or more than five members each of whom shall be—

(a) a person who has a 10 year general qualification within the meaning of section 71 of the Courts and Legal Services Act 1990; 1990 c. 41.

(b) an advocate or solicitor in Scotland of at least ten years' standing; or

(c) a member of the Bar of Northern Ireland or solicitor of the Supreme Court of Northern Ireland of at least 10 years' standing.

(2) The members of the Tribunal shall be appointed by Her Majesty by Royal Warrant.

(3) A member of the Tribunal shall vacate office at the end of the period of five years beginning with the day of his appointment but shall be eligible for re-appointment.

(4) A member of the Tribunal may be relieved of office by Her Majesty at his own request.

(5) A member of the Tribunal may be removed from office by Her Majesty on an Address presented to Her by both Houses of Parliament.

President and Vice-President

2.—(1) Her Majesty may by Royal Warrant appoint as President or Vice-President of the Tribunal a person who is, or by virtue of that Warrant will be, a member of the Tribunal.

(2) If at any time the President of the Tribunal is temporarily unable to carry out the functions of the President under this Schedule, the Vice-President shall carry out those functions.

(3) A person shall cease to be President or Vice-President of the Tribunal if he ceases to be a member of the Tribunal.

Procedure

3. The functions of the Tribunal in relation to any complaint shall be capable of being carried out, in any place in the United Kingdom, by any two or more members of the Tribunal designated for the purpose by their President; and different members of the Tribunal may carry out functions in relation to different complaints at the same time.

SCH. 2

4.—(1) It shall be the duty of every member of the Intelligence Service or, as the case may be, GCHQ to disclose or give to the Tribunal such documents or information as they may require for the purpose of enabling them to carry out their functions under this Act.

(2) Subject to paragraph 6(2) below, the Tribunal shall carry out their functions under this Act in such a way as to secure that no document or information disclosed or given to the Tribunal by any person is disclosed without his consent to any complainant, to any person (other than the Commissioner) holding office under the Crown or to any other person; and accordingly the Tribunal shall not, except in reports under paragraph 6(1)(b) of Schedule 1 to this Act, give any reasons for a determination notified by them to a complainant.

(3) Subject to sub-paragraph (2) above, the Tribunal may determine their own procedure.

Salaries and expenses

5.—(1) The Secretary of State shall pay to the members of the Tribunal such remuneration and allowances as he may with the approval of the Treasury determine.

(2) The Secretary of State shall defray such expenses of the Tribunal as he may with the approval of the Treasury determine.

Staff

6.—(1) The Secretary of State may, after consultation with the Tribunal and with the approval of the Treasury as to numbers, provide the Tribunal with such staff as he thinks necessary for the proper discharge of their functions.

(2) The Tribunal may authorise any member of their staff to obtain any documents or information on the Tribunal's behalf.

Parliamentary disqualification

1975 c. 24.

7.—(1) In Part II of Schedule 1 to the House of Commons Disqualification Act 1975 (bodies whose members are disqualified) there shall be inserted at the appropriate place—

"The Tribunal established under section 9 of the Intelligence Services Act 1994".

1975 c. 25.

(2) The same amendment shall be made in Part II of Schedule 1 to the Northern Ireland Assembly Disqualification Act 1975.

Section 10(4).

SCHEDULE 3

THE INTELLIGENCE AND SECURITY COMMITTEE

Tenure of office

1.—(1) Subject to the provisions of this paragraph, a member of the Committee shall hold office for the duration of the Parliament in which he is appointed.

(2) A member of the Committee shall vacate office—

(a) if he ceases to be a member of the House of Commons;

(b) if he ceases to be a member of the House of Lords;

(c) if he becomes a Minister of the Crown; or

(d) if he is required to do so by the Prime Minister on the appointment, in accordance with section 10(3) of this Act, of another person as a member in his place.

(3) A member of the Committee may resign at any time by notice to the Prime Minister.

(4) Past service is no bar to appointment as a member of the Committee.

Procedure

2.—(1) Subject to the following provisions of this Schedule, the Committee may determine their own procedure.

(2) If on any matter there is an equality of voting among the members of the Committee, the Chairman shall have a second or casting vote.

(3) The Chairman may appoint one of the members of the Committee to act, in his absence, as chairman at any meeting of the Committee, but sub-paragraph (2) above shall not apply to a chairman appointed under this sub-paragraph.

(4) The quorum of the Committee shall be three.

Access to information

3.—(1) If the Director-General of the Security Service, the Chief of the Intelligence Service or the Director of GCHQ is asked by the Committee to disclose any information, then, as to the whole or any part of the information which is sought, he shall either—

(a) arrange for it to be made available to the Committee subject to and in accordance with arrangements approved by the Secretary of State; or

(b) inform the Committee that it cannot be disclosed either—

(i) because it is sensitive information (as defined in paragraph 4 below) which, in his opinion, should not be made available under paragraph (a) above; or

(ii) because the Secretary of State has determined that it should not be disclosed.

( ) The fact that any particular information is sensitive information shall not pr ent its disclosure under sub-paragraph (1)(a) above if the Director-General, th Chief or the Director (as the case may require) considers it safe to disclose it.

) Information which has not been disclosed to the Committee on the ground s cified in sub-paragraph (1)(b)(i) above shall be disclosed to them if the S retary of State considers it desirable in the public interest.

(4) The Secretary of State shall not make a determination under sub-ragraph (1)(b)(ii) above with respect to any information on the grounds of tional security alone and, subject to that, he shall not make such a termination unless the information appears to him to be of such a nature that, he were requested to produce it before a Departmental Select Committee of the louse of Commons, he would think it proper not to do so.

(5) The disclosure of information to the Committee in accordance with the preceding provisions of this paragraph shall be regarded for the purposes of the 1989 Act or, as the case may be, this Act as necessary for the proper discharge of the functions of the Security Service, the Intelligence Service or, as the case may require, GCHQ.

SCH. 3

Sensitive information

4. The following information is sensitive information for the purposes of paragraph 3 above—

(a) information which might lead to the identification of, or provide details of, sources of information, other assistance or operational methods available to the Security Service, the Intelligence Service or GCHQ;

(b) information about particular operations which have been, are being or are proposed to be undertaken in pursuance of any of the functions of those bodies; and

(c) information provided by, or by an agency of, the Government of a territory outside the United Kingdom where that Government does not consent to the disclosure of the information.

Section 11(2).

SCHEDULE 4

CONSEQUENTIAL AMENDMENTS

The Security Service Act 1989

1989 c. 5.

1.—(1) In section 2 of the Security Service Act 1989 (duties of the Director-General of the Security Service) in subsection (2) after the words "serious crime" there shall be inserted "or for the purpose of any criminal proceedings".

(2) After subsection (3) of that section there shall be inserted the following subsection—

"(3A) Without prejudice to the generality of subsection (2)(a) above, the disclosure of information shall be regarded as necessary for the proper discharge of the functions of the Security Service if it consists of—

(a) the disclosure of records subject to and in accordance with the Public Records Act 1958; or

(b) the disclosure, subject to and in accordance with arrangements approved by the Secretary of State, of information to the Comptroller and Auditor General for the purposes of his functions."

2. In section 4(3) of that Act (Security Service Commissioner to review exercise of powers by Secretary of State), for the words "powers under section 3 above" there shall be substituted "powers, so far as they relate to applications made by the Service, under sections 5 and 6 of the Intelligence Services Act 1994."

3. In paragraph 4(1) of Schedule 1 to that Act (Security Service Commissioner to investigate whether the Secretary of State acted properly in issuing or renewing warrant), after the words "section 3 of this Act" there shall be inserted "or section 5 of the Intelligence Services Act 1994".

The Official Secrets Act 1989

1989 c. 6.

4. In section 4 of the Official Secrets Act 1989 (disclosure of information which results in commission of an offence etc.) in subsection (3)(b) after the words "under section 3 of the Security Service Act 1989" there shall be inserted "or under section 5 of the Intelligence Services Act 1994 or by an authorisation given under section 7 of that Act".

SCH. 4

The Official Secrets Act 1989 (Prescription) Order 1990

5. At the end of Schedule 3 to the Official Secrets Act 1989 (Prescription) Order 1990 (bodies giving official authorisations etc.) there shall be added the following entry— S.I. 1990/200.

"The Tribunal established under section 9 of the Intelligence Services Act 1994.	Section 7(5)".

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Vereinigung Demokratischer Soldaten Österreichs and Gubi
v.
Austria

—

European Court of Human Rights

VEREINIGUNG DEMOKRATISCHER SOLDATEN ÖSTERREICHS AND GUBI *v.* AUSTRIA

(Prohibition on distribution of military magazine)

BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

(*The President*, Judge Bernhardt; *Judges* Thór Vilhjálmsson, Matscher, Russo, Spielmann, Martens, Palm, Foighel, Wildhaber)

Series A, No. 302
Application No. 15153/89
19 December 1994

The first applicant published a magazine (*der Igel*) aimed at soldiers serving in the Austrian army. It often contained material which was critical of military life. Whereas other military journals were distributed by the army at its own expense, the Ministry of Defence refused to authorise distribution of *der Igel* in the barracks and the second applicant (a soldier) was ordered to stop distributing it. The applicants alleged violations of Articles 10 and 13 of the Convention and of Article 14 taken in conjunction with Article 10. They also claimed compensation for damage and reimbursement of costs and expenses under Article 50.

Held:

(1) by six votes to three that there had been a breach of Article 10 of the Convention in respect of the first applicant;
(2) by eight votes to one that there had been a breach of Article 10 of the Convention in respect of the second applicant;
(3) by six votes to three that there had been a breach of Article 13 of the Convention in respect of the first applicant;
(4) unanimously that there had been no breach of Article 13 of the Convention in respect of the second applicant;
(5) unanimously that it was unnecessary to consider whether there had been a breach of Article 14 of the Convention taken in conjunction with Article 10;
(6) unanimously that the present judgment constituted in itself sufficient just satisfaction for the alleged non-pecuniary damage;
(7) unanimously that the respondent State should pay the applicants, within three months, 180,000 sch for costs and expenses;
(8) unanimously that the remainder of the claim for just satisfaction should be dismissed.

1. Freedom of expression: interference by public authority (Art. 10(2)).

(a) The responsibility of a Contracting State is engaged if a violation of one of the rights and freedoms defined in the Convention is the result of non-observance by that State of its obligations under Article 1 to secure those rights and freedoms in its domestic law to everyone within its jurisdiction. In the present case, the authorities effected themselves and at their own expense the distribution on a regular basis of military periodicals published by various associations, by sending them out with their official publications.

Whatever the legal status of this arrangement, such a practice was bound to have an influence on the level of information imparted to members of the armed forces and, accordingly, engaged the responsibility of the respondent State under Article 10. Freedom of expression applies to servicemen just as it does to other persons within the jurisdiction of the Contracting States. Of all the periodicals for servicemen, only *der Igel* was denied access to this type of distribution. The *VDSÖ* could therefore reasonably claim that this situation should be remedied. It follows that the Minister for Defence's rejection of its request was an interference with the exercise of its right to impart information and ideas. [27]

(b) The interference in issue infringed Article 10 if it was not "prescribed by law", if it did not pursue one or more of the legitimate aims referred to in Article 10(2) or if it was not "necessary in a democratic society" in order to attain such aims. [28], [43]

2. Freedom of expression: interference; "prescribed by law"; legitimate aim; "necessary in a democratic society" (Art. 10(2)).

(a) Although the provisions of military law on which the Minister for Defence relied were formulated in general terms, it should be recalled that the level of precision required of domestic legislation—which cannot in any case provide for every eventuality—depends to a considerable degree on the content of the instrument considered, the field it is designed to cover and the number and status of those to whom it is addressed. As far as military discipline is concerned, it would scarcely be possible to draw up rules describing different types of conduct in detail. It may therefore be necessary for the authorities to formulate such rules more broadly. The relevant provisions must, however, afford sufficient protection against arbitrariness and make it possible to foresee the consequences of their application. In the present case, the provisions in question provided sufficient legal basis for the refusal of the *VDSÖ*'s request. The first applicant had among its members servicemen who had access to these rules and it could therefore have been expected to be aware of the possibility that the minister might regard himself as bound to refer to them in relation to it. In conclusion, the interference was "prescribed by law". [31], [46]

(b) The impugned decision was evidently taken with a view to preserving order in the armed forces, a legitimate aim for the purposes of Article 10(2). [32], [47]

(c) Freedom of expression is also applicable to "information" or "ideas" that offend, shock or disturb the State or any section of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". The same is true when the persons concerned are servicemen, because Article 10 applies to them just as it does to other persons within the jurisdiction of the Contracting States. However, the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline. [36]

(d) At the material time, the army distributed free of charge in all the country's barracks its own publications and those of private associations of soldiers. It appears that only *der Igel* was denied this facility, which undoubtedly reduced considerably its chances of

increasing its membership among service personnel. The fact that the *VDSÖ* retained the possibility of sending its journal to subscribers could not offset such a handicap. It could therefore only have been justified by imperative necessities since exceptions to the freedom of expression must be interpreted narrowly. [37]

(e) The Government's objection that the magazine represented a threat to discipline and to the effectiveness of the army must be illustrated and substantiated by specific examples. None of the issues of *der Igel* submitted in evidence recommend disobedience or violence, or even question the usefulness of the army. Despite its often polemical tenor, the magazine does not appear to have overstepped the bounds of what is permissible in the context of a mere discussion of ideas, which must be tolerated in the army of a democratic State just as it must be in the society that such an army serves. [38]

(f) The issue of *der Igel* distributed by the second applicant was essentially devoted to articles on the conditions of national service. These articles were written in a critical or even satirical style, yet they did not call into question the duty of obedience or the purpose of service in the armed forces. Accordingly the magazine could scarcely be seen as a serious threat to military discipline. It follows that the measure in question (the order to cease distribution) was disproportionate to the aim pursued and infringed Article 10. [49]

(g) Friction in a single barracks, for which the Government claimed the publications of the *VDSÖ* and the second applicant's activities were essentially responsible, was not sufficiently serious to justify a decision whose effects extended to all the military premises on the national territory. In conclusion, the refusal to include *der Igel* among the magazines distributed by the army was disproportionate to the legitimate aim pursued. [39]–[40]

3. Effective domestic remedy: arguable case (Art. 13).

(a) In the light of the Court's finding that the refusal to distribute the magazine was disproportionate to the legitimate aim pursued, the requirement that the complaint be "arguable" is satisfied. As regards the possible remedies cited by the respondent Government, they have not put forward any example showing their application in a case similar to the present one and have therefore failed to show that such remedies would have been effective. [53]

(b) The Constitutional Court is competent to hear complaints of servicemen alleging a violation of their right to freedom of expression. Although in this instance it declined to entertain the second applicant's complaint, the effectiveness of a remedy for the purposes of Article 13 does not depend on the certainty of a favourable outcome. The second applicant consequently had available to him a remedy satisfying the requirements of that provision. [55]

4. Discrimination (Art. 14).

Having regard to its conclusions concerning Article 10, the Court does not consider it necessary to rule on the complaint of a breach of Article 14 taken in conjunction with Article 10. [56]

5. Just satisfaction: damage, costs and expenses (Art. 50).

(a) Since the violation of Article 10 derives not from the Ministry's failure to pay the *VDSÖ* what it would have had to pay if it had

decided to buy and distribute *der Igel* from the date of the association's request but solely from the refusal of the military authorities to distribute the magazine, the claim for pecuniary damage is unfounded. [58]–[59]

(b) Since *der Igel* ceased publication in 1988, the present judgment affords the applicants sufficient just satisfaction for any non-pecuniary damage that they may have suffered. [62]

(c) Costs and expenses were assessed on an equitable basis. [64]

Mr *F. Cede*, Head of the International Law Department, Federal Ministry of Foreign Affairs (Agent), Mr *S. Rosenmayr*, Constitutional Department, Federal Chancellery (Adviser), Mrs *E. Bertagnoli*, International Law Department, Federal Ministry of Foreign Affairs (Adviser), Mr *G. Keller*, Colonel, Federal Ministry of Defence (Adviser) for the Government.
Mr *S. Trechsel* (Delegate) for the Commission.
Mr *G. Lansky*, Rechtsanwalt, (Counsel) for the applicants.

The following cases are referred to in the judgment:

1. COSTELLO-ROBERTS *v.* UNITED KINGDOM (A/247–C): (1995) E.H.R.R. 112.
2. HADJIANASTASSIOU *v.* GREECE (A/252–A): (1993) 16 E.H.R.R. 219.
3. CHORHERR *v.* AUSTRIA (A/266–B): (1994) 17 E.H.R.R. 358.
4. ENGEL AND OTHERS *v.* NETHERLANDS (No. 1) (A/22): 1 E.H.R.R. 647.
5. THE OBSERVER AND THE GUARDIAN *v.* UNITED KINGDOM (A/216): (1992) 14 E.H.R.R. 153.
6. CASTELLS *v.* SPAIN (A/236): (1992) 14 E.H.R.R. 445.
7. THE SUNDAY TIMES *v.* UNITED KINGDOM (No. 1) (A/30): 2 E.H.R.R. 245.
8. OPEN DOOR COUNSELLING AND DUBLIN WELL WOMAN *v.* IRELAND (A/246–A): (1993) 15 E.H.R.R. 244.
9. BOYLE AND RICE *v.* UNITED KINGDOM (A/131): (1988) 10 E.H.R.R. 425.

The following additional cases are referred to in the Report of the Commission:

10. Apps. Nos. 6780/74 & 6950/75, CYPRUS *v.* TURKEY, Dec. 26.5.75, D.R. 2, p. 125.
11. STOCKÉ *v.* GERMANY (A/199): (1991) 13 E.H.R.R. 839.
12. SWEDISH ENGINE DRIVERS' UNION *v.* SWEDEN (A/20): 1 E.H.R.R. 617.
13. SCHMIDT AND DAHLSTRÖM *v.* SWEDEN (A/21): 1 E.H.R.R. 632.
14. App. No. 8010/77, X. *v.* UNITED KINGDOM, Dec. 1.3.79, D.R. 16, p. 101.
15. BARTHOLD *v.* GERMANY (A/90): (1985) 7 E.H.R.R. 383.
16. MÜLLER *v.* SWITZERLAND (A/133): (1991) 13 E.H.R.R. 212.
17. KRUSLIN *v.* FRANCE (A/176–A): (1990) 12 E.H.R.R. 547.
18. HUVIG *v.* FRANCE (A/176–B): (1990) 12 E.H.R.R. 528.
19. MARKT INTERN AND BEERMAN *v.* GERMANY (A/165): (1990) 12 E.H.R.R. 161.
20. HERCZEGFALVY *v.* AUSTRIA (A/244): (1993) 15 E.H.R.R. 437.
21. SILVER *v.* UNITED KINGDOM (A/61): (1983) 5 E.H.R.R. 347.
22. THE SUNDAY TIMES *v.* UNITED KINGDOM (No. 2) (A/217): (1992) 14 E.H.R.R. 229.
23. THORGEIRSON *v.* ICELAND (A/239): (1992) 14 E.H.R.R. 843.
24. App. No. 12573/86, M. & E.F. *v.* SWITZERLAND, Dec. 6.3.87, D.R. 51, p. 283.
25. VILVARAJAH AND OTHERS *v.* UNITED KINGDOM (A/215): (1992) 14 E.H.R.R. 248.

The Facts

I. *The circumstances of the case*

A. *The first applicant*

7. The first applicant, a Vienna-based association, published a monthly magazine aimed at the soldiers serving in the Austrian army and entitled *der Igel* ("The Hedgehog"). It contained information and articles—often of a critical nature—on military life.

8. On 27 July 1987 the association requested the Federal Minister for Defence (*Bundesminister für Landesverteidigung*) to have *der Igel* distributed in the barracks in the same way as the only other two military magazines published by private associations, *Miliz-Impuls* and *Visier*. The army had adopted the practice of sending these magazines out, alternately and at its own expense, with the official information bulletin distributed to all conscripts (*Miliz-Information*).

The minister did not reply to this request. When questioned by Members of Parliament, he stated in a letter of 10 May 1989 that he would not authorise the distribution of *der Igel* in barracks. In his view, section 46(3) of the Armed Forces Act (*Wehrgesetz*)[1] conferred on all armed forces personnel the right to receive without any restriction, through sources accessible to the public, information on political events. However, on military premises the only publications that could be supplied were those which identified at least to some extent with the constitutional duties of the army, did not damage its reputation and did not lend column space to political parties. Even critical magazines such as the journal *Hallo* of the trade union youth organisation would not be banned if they respected these conditions. *Der Igel*, on the other hand, did not comply with them. The minister derived authority for his decision in this matter from Article 79 of the Constitution (*Bundes-Verfassungsgesetz*) and sections 44(1) and 46 of the Armed Forces Act, Article 116 of the Criminal Code (*Strafgesetzbuch*) and Regulation 3(1) of the General Army Regulations (*Allgemeine Dienstvorschriften für das Bundesheer*).[2]

B. *The second applicant*

9. The second applicant, a member of the *VDSÖ*, began his national service on 1 July 1987 at the Schwarzenberg barracks in Salzbourg. On 29 July, on the occasion of his taking the oath, he made a protest directed against the President of the Republic. Over the following months, he lodged several complaints, published with 21 of his fellow conscripts an open letter criticising the number of fatigue duties to which he was assigned and circulated a petition in support of a conscientious objector.

[1] See para. 18 below.
[2] See paras. 17–20 below.

On 1, 9 and 22 July he was personally informed of the content of the military law applicable to his situation.

10. On 29 December 1987, while distributing issue no. 3/87 of *der Igel* in the barracks, he was ordered by an officer to cease.

In its editorial, the issue in question mentioned, as being one of the aims of the *VDSÖ*, co-operation between conscripts and the cadres on the basis of their joint interests and of mutual respect. Some articles adopted a critical stance; they dealt with, among other things, military training, the proceedings resulting from a complaint lodged by Mr Gubi and the principles governing national service. The other articles discussed various contributions that had appeared in the press, the congress of the trade union youth movement, the aims and the activities of the *VDSÖ* and the complaint of a conscript whose pay had been reduced following alleged loss of equipment.

11. On 12 January 1988 another officer informed Mr Gubi of the content of the circulars of 1975 and 1987 and of the regulations of the Schwarzenberg barracks, as amended on 4 January 1988, which prohibited any distribution or despatching within the barracks of publications without the authorisation of the commanding officer.[3]

12. On 22 January 1988 Mr Gubi complained about this ban and about the order of 29 December 1987[4] to the military complaints board (*Beschwerdekommission in militärischen Angelegenheiten*) at the Federal Ministry of Defence.

On 7 April the complaints division (*Beschwerdeabteilung*) at the ministry rejected the applicant's complaint, in accordance with the complaints board's recommendation. In its view, the contested order was validly based on a 1987 circular of the Second Army Corps, containing instructions regarding the distribution of printed matter, which were themselves based on Article 5 of the 1867 Basic Law (*Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger*), Regulation 19 of the General Army Regulations and section 13 of the Armed Forces Act.[5] The first of those provisions affords the same protection to the property of public-law legal persons as that guaranteed to the property of private individuals; accordingly, the Schwarzenberg barracks were to be regarded as the property of the Federal State, whose rights were exercised by the commanding officer.

The freedom of expression secured under Article 13 of the 1867 Basic Law was subject to "statutory limits" (*gesetzliche Schranken*) such as those which stemmed from the duty of discretion and obedience laid down in sections 17 and 44 of the Armed Forces Act and derived from the very nature of this special relationship of subordination (*besonderes Gewaltverhältnis*). The contested measures had therefore in no way interfered with the freedom in question.

13. Mr Gubi then applied to the Constitutional Court

[3] See para. 20 below.
[4] See para. 10 above.
[5] See paras. 15 and 18–20 below.

(*Verfassungsgerichtshof*). On 26 September it declined to entertain his appeal on the ground that it did not raise genuine constitutional issues and had insufficient prospects of success.

14. The same day, however, the Constitutional Court quashed the decision of 15 February 1988 whereby the commanding officer of battalion no. 3 had confirmed the three days' custody imposed on the applicant as a disciplinary penalty for having distributed *der Igel* in the barracks. It found that the provisions which Mr Gubi was accused of infringing, the 1975 and 1987 circulars,[6] were not binding on him but on the military authorities. This was not the case in regard to the relevant provisions of the Schwarzenberg barracks regulations, but these rules had been introduced on 4 January 1988 and were therefore not yet in force at the material time.

II. *The relevant domestic law*

A. *The rights under the Basic Law*

15. Article 5 of the Basic Law of 21 December 1867 on the general rights of citizens, protects property.

16. Article 13 provides as follows:

> Subject to statutory limits, everyone has the right to express freely his opinion orally, in writing, in the printed word or through graphic expression. The Press may not be censored or restricted by a system of licences. ...

B. *Military law*

17. Article 79 of the Federal Constitution describes the general duties of the Austrian armed forces.

18. At the material time the rights and obligations of military personnel were governed by sections 44 to 46 of the 1978 Armed Forces Act. According to this statute, soldiers are under a duty to support the army in the performance of its tasks and to refrain from doing anything which could damage its reputation.[7] They have the right to submit requests and complaints and to file appeals.[8] They enjoy the same political rights as civilians.[9] However, the army must not be involved in any political activity and may not be used for political ends.[10] Consequently, such activities while on duty and on military premises are prohibited, with the exception of those which consist in obtaining information as an individual on political events through sources accessible to the public.[11]

19. The General Army Regulations, issued by the Federal Ministry of Defence, set out the obligations attaching to national service. They

[6] See para. 20 below.
[7] s.44(1)
[8] s.44(4).
[9] s.46(2).
[10] s.46(1).
[11] s.46(3).

provide, *inter alia*, that servicemen must always be ready to fulfil their duties in the best possible way and must refrain from doing anything which could damage the reputation of the army and undermine the confidence of the population in the defence of the country.[12] Servicemen have a special relationship of subordination in regard to the Austrian Republic. That relationship requires of them, in addition to the defence of the democratic institutions, discipline, comradeship, obedience, vigilance, courage and discretion.[13] Under Regulation 19(2) barracks' commanders are bound to take all the measures necessary to maintain order and military security in the premises in question; to this end they are under a duty to issue rules (*Kasernordnung*) governing *inter alia* access to the barracks.[14]

20. By a circular of the Federal Ministry of Defence of 14 March 1975 the army general staff (*Armeekommando*) instructed commanding officers to take preventive measures in respect of publications denigrating the army (*negatives wehrpolitisches Gedankengut*). They were, among other things, to ban their distribution and posting up in military areas.

A circular from the general staff of the Second Army Corps (*Korpskommando II*) of 17 December 1987 instructed the same officers to insert in the barracks rules a prohibition on the distribution or posting up without the commanding officer's authorisation of any non-official publication. The Schwarzenberg barracks rules were amended accordingly on 4 January 1988.

C. *The proceedings in the Constitutional Court*

21. The Constitutional Court examines, on an application (*Beschwerde*), whether an administrative measure (*Bescheid*) has infringed a right guaranteed to the applicant by the Constitution, or whether it has applied a decree (*Verordnung*) that is contrary to the law, an Act contrary to the Constitution or an international treaty incompatible with Austrian law.[15]

PROCEEDINGS BEFORE THE COMMISSION

22. The *VDSÖ* and Mr Gubi applied to the Commission on 12 June 1989. Relying on Article 10 of the Convention, they complained of the prohibition imposed in respect of the magazine *der Igel* in Austrian barracks and, the second applicant, of the order of 29 December 1987 requiring him to cease distributing issue no. 3/87 in the Schwarzenberg barracks. They also maintained that they had not had an effective remedy within the meaning of Article 13 and that they had been victims of discrimination on political grounds in breach of Article 14 read in conjunction with Article 10.

[12] Regulation 3(1).
[13] Regulation 3(2).
[14] Regulation 19(3).
[15] Art. 144(1) of the Federal Constitution.

23. The Commission declared the application[16] admissible on 6 July 1992. In its report of 30 June 1993[17] it expressed the following opinion:

(a) as regards the first applicant:
(i) that there had been a violation of Articles 10 and 13[18];
(ii) that no separate question arose under Article 14 read in conjunction with Article 10[19];
(b) as regards the second applicant:
(i) that there had been a violation of Article 10[20] but not of Article 13[21];
(ii) that no separate question arose under Article 14 read in conjunction with Article 10.[22]

The full text of the Commission's opinion and of the three dissenting opinions contained in the report follows.

Opinion

A. *Complaints declared admissible*

40.* The following complaints were declared admissible:

— the first applicant's complaint that the prohibition on the distribution of its military journal *Igel* in the area of Austrian military barracks, in particular the failure of the Federal Ministry of Justice to grant its request for permission to distribute its military journal in this area, violated its freedom of expression;
— the first applicant's complaint that it did not have an effective remedy under Austrian law to complain about the failure of the Federal Ministry of Defence to decide upon the above request;
— the first applicant's complaint that the practice of the Federal Ministry of Defence as regards the grant of permission for distribution and the financial support of some military journals discriminated against the first applicant for political reasons;
— the second applicant's complaint that the order of 29 December 1987 to stop the distribution of the journal *Igel* in the area of the Schwarzenberg Barracks on the subsequent warning, referring to the prohibition on unauthorised distribution of publications under the Barracks Regulations, violated his right to freedom of expression;
— the second applicant's complaint that he did not have an effective

[16] App. No. 12235/86.
[17] Made under Art. 31.
[18] Twelve votes to nine.
[19] Unanimously.
[20] Twelve votes to nine.
[21] Unanimously.
[22] Unanimously.

* The paragraph numbering from here to para. 130 in bold is the original numbering of the Commission's Opinion. Then we revert to the numbering of the Court's judgment.—Ed.

remedy under Austrian law to complain about the above order and instruction;
— the second applicant's complaint about discrimination for political reasons.

B. *Points at issue*

41. Accordingly, the issues to be determined are:

— whether, with regard to the first applicant, there has been a violation of Article 10 of the Convention;
— whether, with regard to the first applicant, there has been a violation of Article 13, in conjunction with Article 10, of the Convention;
— whether, with regard to the first applicant, there has been a violation of Article 14, in conjunction with Article 10, of the Convention;
— whether, with regard to the second applicant, there has been a violation of Article 10 of the Convention;
— whether, with regard to the second applicant, there has been a violation of Article 13, in conjunction with Article 10, of the Convention;
— whether, with regard to the second applicant, there has been a violation of Article 14, in conjunction with Article 10, of the Convention.

C. *The alleged violation of the first applicant's Convention rights*

I. *Article 10 of the Convention*

42. Article 10 of the Convention provides, so far as relevant:

> 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. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, for the prevention of disorder and crime, ... for the protection of the reputation or rights of others, ...

a. *Interference*

43. The respondent Government maintain that the prohibition on the distribution of the journal *Igel* in the area of Austrian military barracks does not interfere with the first applicant's right to freedom of expression under Article 10. They consider that the State, in this respect, exercises private property rights as the owner of the estates where the barracks are situated.

44. The Commission recalls that, according to Article 1 of the Convention, the High Contracting Parties shall secure to everyone

within their jurisdiction the rights and freedoms defined in the Convention. This undertaking extends to all persons under their actual authority and responsibility.[23]

45. The Convention thus applies in principle also to the armed forces, even though the particular characteristics of military life and its effects on the situation of individual members have to be taken into account.[24]

46. Furthermore, the Convention does not operate any distinction between the functions of a Contracting State as holder of public power and its responsibilities in private law relations with individuals. The Court thus found Article 11 binding upon the "State as employer", whether the latter's relations with its employees were governed by public or private law.[25]

47. The Commission considers that a Contracting State, in the area of its real estate, remains bound by its undertaking to secure the rights and freedoms guaranteed in the Convention,[26] in particular where such property is used for public purposes, as in the present case.

48. Article 10 guarantees the right to freedom of expression including, *inter alia*, the freedom to impart information and ideas without interference by public authority. Any interferences—formalities, conditions, restrictions or penalties—contravene Article 10 of the Convention, if they are not justified under Article 10 para. 2, as being prescribed by law, pursuing a legitimate aim and being necessary in a democratic society for the said aim.

49. In the present case, the Austrian rules on the distribution of non-official publications in the area of military barracks, the corresponding army circulars and barracks regulations prohibited the first applicant from distributing its military journal *Igel* in the area of Austrian military barracks. The Federal Ministry of Defence did not grant the first applicant's request of 27 July 1987 for a special permission in this respect.

50. The Commission notes that no restrictions were placed upon the distribution of the military journal *Igel* outside the area of Austrian military barracks where members of the armed forces could buy it, and have it delivered by mail. However, the first applicant edited a periodical with a special range of subjects addressing the members of the Austrian armed forces. The above prohibition restricted the first applicant's sphere of action and impeded its access to the target group of the information and opinions published in its journal.

51. In these circumstances, the Commission finds that the above prohibition constitutes an interference with the first applicant's right,

[23] *cf.* Apps. Nos. 6780/74 & 6950/75, CYPRUS *v.* TURKEY, Dec. 26.5.75, D.R. 2, p. 125; STOCKE *v.* GERMANY (A/199): (1991) 13 E.H.R.R. 839, Comm. Rep. 12.10.89, para. 166.

[24] *cf.* ENGEL AND OTHERS *v.* NETHERLANDS (No. 1) (A/22): 1 E.H.R.R. 647, para. 54.

[25] SWEDISH ENGINE DRIVERS' UNION *v.* SWEDEN (A/20): 1 E.H.R.R. 617, paras. 36–37; SCHMIDT AND DAHLSTRÖM *v.* SWEDEN (A/21): 1 E.H.R.R. 632, paras. 32–33.

[26] App. No. 8010/77, X. *v.* UNITED KINGDOM, Dec. 1.3.79, D.R. 16, p. 101 as regards school premises.

as guaranteed under Article 10(1). The Commission must, therefore, examine whether this interference is justified under Article 10(2).

b. *Justification*

aa. Was the interference "prescribed by law"?

52. The first applicant maintains that the prohibition on the distribution of its journal was not prescribed by law. According to the first applicant, the Military Act did not cover the prohibition on the distribution of the journal *Igel* which did not pursue party-political aims. The barracks regulations were not published in the Official Gazette and could not be regarded as law.

53. The Government submit that the prohibition on distribution of periodicals, including the journal edited by the first applicant, in the area of Austrian military barracks was based on the Schwarzenberg barracks regulations, which were issued in accordance with section 19(2) of the Service Regulations. They also refer to section 44(1) and section 46 of the Military Act (in the version in force at the time in question). Furthermore they state that section 116 of the Penal Code extends to defamation or insult regarding the armed forces.

54. The Government further contend that, according to the practice of the Ministry of Defence, applying these rules, no distribution of such periodicals could be permitted, if their contents partly or as a whole were directed against the aims of military defence, or hindered the armed forces in the execution of their tasks, or contained attacks against the armed forces or publicly insulted them. They consider that the contents of the military journal edited by the first applicant were such as to lower the armed forces in public esteem and to undermine military discipline.

55. The Commission recalls that the interference with the right protected by Article 10(1) must have some basis in domestic law, which itself must be accessible to the person concerned and be formulated with sufficient precision to enable the individual to foresee its consequences for him.[27]

56. The Commission notes that the barracks regulations of the Schwarzenberg military barracks, as amended in January 1988, prohibited the distribution and posting of publications in the area of military barracks without permission of the commander.

57. However, the Commission is not called upon to determine whether barracks regulations constitute "law" within the meaning of Article 10(2) as the amendment at issue was passed only six months after the first applicant's request to the Federal Ministry of Defence in July 1988.

[27] THE SUNDAY TIMES *v.* UNITED KINGDOM (No. 1) (A/30): 2 E.H.R.R. 245, paras. 47 and 49; BARTHOLD *v.* GERMANY (A/90): (1985) 7 E.H.R.R. 383, para. 45; MÜLLER *v.* SWITZERLAND (A/133): (1991) 13 E.H.R.R. 212, para. 29; *mutatis mutandis*, KRUSLIN *v.* FRANCE (A/176–A): (1990) 12 E.H.R.R. 547, para. 27; HUVIG *v.* FRANCE (A/176–B): (1990) 12 E.H.R.R. 528, para. 26.

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Vereinigung Demokratischer Soldaten Österreichs and Gubi v. *Austria*

European Commission of Human Rights

Opinion

58. In this period, the prohibition on the distribution of periodicals in the area of military barracks and the practice of the Federal Ministry of Defence governing the granting of a permission for the distribution of particular periodicals could only be based on section 44(1) and section 46 of the Military Act.

59. The Commission considers that these provisions contain general rules on the duties of soldiers and in particular the prohibition of party-political activities during the service and in the military area, which do not directly regulate the distribution of periodicals in the area of military barracks. Nevertheless, taken together with the powers conferred upon the commanders of military barracks under section 19(2) of the Service Regulations, namely to take the necessary measures to ensure military order and security, they could be regarded as a legal basis for the prohibition and the corresponding practice of the Federal Ministry of Defence, as superior authority, to grant permissions in particular cases only.[28]

60. As regards the second requirement, the accessibility of the relevant provisions, the Commission notes that the Military Act and the Service Regulations were published in the Austrian National Gazette. The first applicant, an association of soldiers, could, in these circumstances, adequately acquaint itself with the rules applicable in this field.

61. The Commission, turning to the third requirement, the law's foreseeability, recalls that frequently laws, particularly in fields in which the situation changes according to the prevailing views of society, are framed in a manner that is not absolutely precise. Their interpretation and application are questions of practice.[29] Military rules may be considered as falling within this category.

62. However, compatibility with the rule of law implies that there must be a measure of legal protection in domestic law against arbitrariness. If a law confers discretion on a public authority, it must indicate the scope of that discretion, although the degree of precision required will depend upon the particular subject matter.[30]

63. The Commission finds that neither of the provisions of the Military Act and the Service Regulations contain clear principles on the practice of the Federal Ministry of Defence relating to permissions to distribute particular periodicals within the area of military barracks. The army circulars of 1975 and 1987, which refer to publications with negative ideas about the military service or unjustified attacks on the Austrian armed forces, though they do not themselves have the force of law, could, in principle, be taken into account.[31] However, the terms used in these circulars are in themselves vague.

[28] *cf.*, *mutatis mutandis*, KRUSLIN *v.* FRANCE, *loc. cit.*, para. 29; HUVIG *v.* FRANCE, *loc. cit.*, para. 28.

[29] BARTHOLD *v.* GERMANY, *loc. cit.*; MÜLLER *v.* SWITZERLAND, *loc. cit.*; MARKT INTERN AND BEERMAN *v.* GERMANY (A/165): (1990) 12 E.H.R.R. 161, para. 30.

[30] *cf.* HERCZEGFALVY *v.* AUSTRIA (A/244): (1993) 15 E.H.R.R. 437, para. 89.

[31] SILVER *v.* UNITED KINGDOM (A/61): (1983) 5 E.H.R.R. 347, para. 88.

64. The respondent Government have not drawn the Commission's attention to any established Austrian case law on the principles concerning exceptions to the general prohibition on the distribution of periodicals in the area of Austrian military barracks.

65. Furthermore, it does not appear that the Federal Ministry of Defence has adopted a procedure in such cases, which could effectively limit this discretion, and provide for safeguards against arbitrariness.

66. In these circumstances it remains doubtful whether the legal provisions referred to by the Government are sufficiently clear and precise to be accepted as "law".

67. However, the Commission does not find it necessary to decide this question, since even assuming compliance with this condition, the interference with the first applicant's right was not justified under Article 10(2) for the reasons set out hereafter.

bb. Did the interference have a legitimate aim or aims?

68. The Government submit that the interference complained of served the purpose of the prevention of disorder. The first applicant does not agree.

69. The Commission recalls that the concept of "order" as envisaged by Article 10(2) refers not only to public order or "ordre public" within the meaning of Article 6(1) and Article 9(2) of the Convention and Article 2(3) of Protocol No. 4; it also covers the order that must prevail within the confines of a specific social group, such as the armed forces.[32]

70. The Commission considers that the Austrian regulations underlying the prohibition on the distribution of periodicals in the area of military barracks aim at ensuring the military order and security, an aim stated in section 19 of the Service Regulations. The interference with the first applicant's right under Article 10(1) thus had the aim of prevention of disorder, which is in itself legitimate under Article 10(2) of the Convention.

cc. Could the interference be regarded as "necessary in a democratic society"?

71. It remains to be determined whether the interference complained of could be regarded as necessary in a democratic society in order to accomplish this aim.

72. The Government, referring to the Court's ENGEL AND OTHERS judgment,[33] contend that the prohibition on the distribution of the journal was necessary in a democratic society for the prevention of disorder in the area of military barracks. The military journal *Igel* did not meet the conditions applied by the Federal Ministry of Justice in

[32] ENGEL AND OTHERS *v.* NETHERLANDS (No. 1), *loc. cit.*, para. 98.
[33] *Loc. cit.*

granting permission for distribution in the area of military barracks. Rather, its contents were likely to disparage the Federal Army and to undermine military discipline.

73. The first applicant criticises that the respondent Government make such a general statement without entering into the details of the publication concerned.

74. The Commission recalls that the adjective "necessary" within the meaning of Article 10(2) implies the existence of a "pressing social need". The Contracting States enjoy a margin of appreciation in determining whether such a need exists, but this goes hand in hand with a European supervision which is more or less extensive depending upon the circumstances. The review under the Convention is confined to the question whether the measures taken on the national level are, in the light of the case as a whole, justifiable in principle and proportionate.[34] In matters coming within the sphere of the armed forces, the particular characteristics of military life must not be disregarded.[35]

75. In exercising its supervisory function, the Commission has to bear in mind that freedom of expression constitutes one of the essential foundations of a democratic society; subject to Article 10(2), it applies not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. These principles are of particular importance in respect of the press which has to play the important role of purveyor of information and public watchdog.[36]

76. The Court, in the ENGEL AND OTHERS judgment, found that having regard to a somewhat strained atmosphere in the barracks concerned and the contents of the publication in question, the competent national court might have had well-founded reasons for considering that Mr Dona and Mr Schul had attempted to undermine military discipline and that it was necessary for the prevention of disorder to impose the penalty inflicted in respect of an abusive exercise of their freedom of expression.[37]

77. In the present case, in July 1987, the first applicant requested the Federal Ministry of Defence for permission to distribute its military journal *Igel* in the area of military barracks, in exception to the general prohibition on the distribution of periodicals. The Federal Ministry of Defence abstained from formally deciding upon this request. However, as transpired from information given in Parliament in June 1988 and May 1989, the Federal Ministry of Defence did not intend to grant the said request, as the journal *Igel* was not regarded as being in

[34] *cf.* MARKT INTERN AND BEERMAN *v.* GERMANY, *loc. cit.*, para. 33; THE SUNDAY TIMES *v.* UNITED KINGDOM (No. 2) (A/217): (1992) 14 E.H.R.R. 229, para. 50.

[35] ENGEL AND OTHERS *v.* NETHERLANDS (No. 1), *loc. cit.*, para. 100.

[36] THE SUNDAY TIMES *v.* UNITED KINGDOM (No. 2), *loc. cit.*, para. 50; THORGEIRSON *v.* ICELAND (A/239): (1992) 14 E.H.R.R. 843, para. 63.

[37] ENGEL AND OTHERS *v.* NETHERLANDS (No. 1), *loc. cit.*, para. 101.

line with the interests of military defence. In particular, only distribution of those publications could be supported which showed a minimum of identification with the constitutional duties of the Army, were free from party-political contents and were favourable to, or at least did not harm, the reputation of the Army.

78. The Commission observes that, at the domestic level, there is no decision or statement of the Austrian authorities, in particular the Federal Ministry of Defence, entering into the nature and contents of the military journal *Igel*. The respondent Government did not indicate any reason to support its contention that this journal was likely to disparage the Federal Army and to undermine military discipline.

79. The Commission, having examined several copies of the military journal *Igel*, in particular the issue 3/87 distributed by the second applicant in January 1988 in the area of the Schwarzenberg military barracks, notes that the journal addressed soldiers as a circle of readers, and accordingly touched particularly on questions relating to the armed forces, the military service and the military life. The articles and reports reflect a critical approach to military matters, their presentation tends to be of a satirical nature. However, its contents do not appear to be hostile to the Austrian Army, or of a party-political nature. In particular, there is no indication that the journal aims at undermining military discipline.

80. In this context, the Commission has considered whether distribution of the journal *Igel* in the area of military barracks was likely to cause any organisational problems. It notes in this respect that two military journals were alternatively joined with an official information bulletin and distributed to all soldiers by the Federal Ministry of Defence. The Ministry did not exclude, as a matter of principle, the distribution of any publications in the area of military barracks.

81. The purpose of the prohibition on the distribution of periodicals within the area of military barracks, as indicated in the circulars of the Federal Ministry of Defence, Vienna Army Headquarters of 14 March 1975, and of the Army Corps II Headquarters of 17 December 1987, was to allow for a control in respect of publications with negative ideas concerning the military service or unjustified attacks on the Austrian armed forces. This control is exercised on a discretionary basis by the Federal Ministry of Defence, so far as general permissions for distribution of periodicals are concerned.

82. The respondent Government compared the present case to the circumstances prevailing in the ENGEL AND OTHERS judgment[38] but have not made the Commission aware of any particular disturbances or tensions within the Austrian Army in general, or the Schwarzenberg barracks in particular, calling for a prohibition on the distribution of the journal edited by the first applicant.

[38] *Loc. cit.*

83. The Commission finds that, while the first applicant is not prevented from trading its journal outside the area of military barracks or sending it to soldiers on the basis of individual subscriptions, its interest in addressing its specific circle of readers in the area of military barracks is not negligible.

84. The Commission considers that the reasons advanced by the Government, especially the objective to prevent, in the area of military barracks, distribution of publications which might harm the reputation of the Federal Army, did not justify the prohibition on the distribution of the military journal *Igel*. The exercise of such wide discretionary powers by the Federal Ministry of Defence is not consonant with freedom of expression in a democratic society.

85. In these circumstances, the Commission finds that the interference with the first applicant's right to freedom of expression was not necessary in a democratic society for the legitimate aim pursued.

Conclusion

86. The Commission concludes by 12 votes to nine that there has been a violation of Article 10 in respect of the first applicant.

II. *Article 13, in conjunction with Article 10, of the Convention*

87. The first applicant submits that in the absence of any formal decision by the Federal Ministry of Defence upon its request of July 1987 there was no effective remedy, within the meaning of Article 13, to complain about the violation of its right to freedom of expression as guaranteed by Article 10.

88. The Government limit their submissions on this point to the contention that the first applicant has no arguable claim to complain about a violation of Article 13, in conjunction with Article 10.

89. Article 13 of the Convention provides as follows:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

90. In view of the Commission's considerations regarding Article 10 of the Convention, the first applicant's claim under that Article must be regarded as arguable on its merits.[39]

91. Article 13 guarantees the availability of a remedy at the national level to enforce the substance of the Convention rights and freedoms.[40]

92. In the present case, the Government have not suggested any

[39] BOYLE AND RICE *v.* UNITED KINGDOM (A/131): (1988) 10 E.H.R.R. 425, para. 52.
[40] BOYLE AND RICE *v.* UNITED KINGDOM, *loc. cit.*

remedy available to the first applicant to complain about the prohibition on the distribution of its journal, in the absence of a decision by the Federal Ministry of Defence upon its request of July 1987.

93. In these circumstances, the Commission finds that there was no effective remedy as regards the first applicant's complaint under Article 10(1).

Conclusion

94. The Commission concludes by 12 votes to nine that there has been a violation of Article 13, in conjunction with Article 10, of the Convention in respect of the first applicant.

III. *Article 14, in conjunction with Article 10, of the Convention*

95. The first applicant, referring to permissions granted regarding the distribution of other periodicals, alleges that the prohibition on the distribution of its military journal amounts to discrimination against them for political reasons. The Government do not agree.

96. Article 14 of the Convention states:

> 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 Commission has considered the fact that there have been exceptions to the general prohibition on the distribution of periodicals in the area of military barracks in the context of the first applicant's claim under Article 10. The Commission does not find it necessary to consider the issue also under Article 14.

Conclusion

98. The Commission concludes unanimously that no separate issue arises under Article 14, in conjunction with Article 10, of the Convention in respect of the first applicant.

D. *The alleged violation of the second applicant's Convention rights*

I. *Article 10 of the Convention*

a. *Interference*

99. The Commission finds that the order to stop the distribution of the journal *Igel* on 29 December 1987 and the subsequent instruction constituted interferences with the second applicant's right to freedom

of expression as guaranteed by Article 10(1) of the Convention. The Commission must, therefore, examine whether this interference is justified under Article 10(2).

b. *Justification*

aa. Was the interference "prescibed by law"?

100. The parties refer to their above submissions on the question whether the prohibition on the distribution of the military journal *Igel* was prescribed by law.[41]

101. The Commission recalls that the interference with the first applicant's right under Article 10(1) was found to have some basis in Austrian law, namely section 44(1) and section 46 of the Military Act.[42]

102. The Commission considers that these rules were adequately accessible.

103. The Commission recalls that, when examining the justification of the interference with the first applicant's right under Article 10(1), doubts remained as to whether the rules referred to by the Government were sufficiently clear and precise to be accepted as "law". It left this question open, since even assuming compliance with the condition of lawfulness, the interference was not justified under Article 10(2).[43] The Commission takes the same approach as regards the second applicant's complaint under Article 10.

bb. Did the interference have a legitimate aim or aims?

104. The interference with the second applicant's right under Article 10(1) had the aim of prevention of disorder, which is in itself legitimate under Article 10(2) of the Convention.

cc. Could the interference be regarded as necessary in a democratic society?

105. It remains to be determined whether the interference complained of was necessary in a democratic society in order to accomplish this aim.

106. The Commission, having regard to the above-mentioned case law on the test of necessity,[44] notes that on 29 December 1987 the second applicant was ordered by one of his military superiors to stop the distribution of copies of the journal *Igel* issue 3/87, in the area of the Schwarzenberg military barracks. On 12 January 1988 he was instructed by another superior on the new rules governing the distribution of publications in the area of military barracks.

[41] See above paras. 52–54.
[42] See above paras. 58–59.
[43] See above paras. 61–67.
[44] See above paras. 74–76.

107. The Commission observes that, at that time, the first applicant had addressed a request to the Federal Ministry of Defence for a general permission regarding its journal, which was not formally decided. Subsequently it became known that the Federal Ministry of Defence did not intend to grant the said request, as the journal *Igel* was not regarded as being in line with the interests of military defence.

108. The Commission, having examined several copies of the military journal *Igel*, in particular the issue 3/87 distributed by the second applicant, found that the articles and reports reflected a critical approach to military matters and that their presentation had a tendency to be of a satirical nature. However, on the whole, its contents did not appear to be hostile to the Austrian Army, or of a party-political nature. In particular, there was no indication that the journal aimed at undermining military discipline. In this context, the Commission noted that there was no decision at the domestic level analysing thoroughly the nature and contents of the military journal *Igel*. Furthermore, the Government failed to indicate any reason to support its contention that this journal was likely to disparage the Federal Army and to undermine military discipline.

109. It does not appear that distribution of the journal *Igel* would substantially affect military routine in the Schwarzenberg barracks.

110. The Commission recalls that, in respect of the general prohibition on the distribution of the journal edited by the first applicant, it was of the opinion that the exercise of wide discretionary powers by the Federal Ministry of Defence to prevent distribution, in the area of military barracks, of any publications regarded as unfavourable to the reputation of the Federal Army is not consonant with freedom of expression in a democratic society.

111. The Commission, considering the second applicant's interest in imparting the information and ideas contained in the journal *Igel* to the other soldiers serving with him at the Schwarzenberg military barracks, finds that the reasons adduced by the Government do not suffice to justify the prohibition complained of.

112. In these circumstances, the Commission finds that the interference with the second applicant's right to freedom of expression was not necessary in a democratic society for the legitimate aim pursued.

Conclusion

113. The Commission concludes by 12 votes to nine that there has been a violation of Article 10 in respect of the second applicant.

II. *Article 13, in conjunction with Article 10, of the Convention*

114. The second applicant submits that the Complaints Board is an organisational entity of the Federal Ministry of Defence and as such

not an independent body. The Constitutional Court did not examine the substance of his complaints.

115. The Government contend that the second applicant's right to lodge complaints with the Military Complaints Board and the Complaints Division of the Federal Ministry of Defence, as well as subsequently with the Constitutional Court, constituted an effective remedy within the meaning of Article 13.

116. The Commission notes that the applicant's complaint to the Military Complaints Board was based on section 44(4) of the Military Act according to which every soldier is entitled to put forward wishes, raise objections and complain about unlawful acts. The Complaints Board only has the power to give a recommendation in accordance with section 6(4) of the Military Act. The complaint is decided upon by the Federal Ministry of Defence. According to the case law of the Austrian Administrative Court, the Federal Ministry of Defence, in rejecting an appeal, does not take a formal decision against which an appeal lies.

117. The Commission leaves open the question whether the complaint to the Military Complaints Board and the Federal Ministry of Defence, *i.e.* organs within the organisational framework of the armed forces, could be regarded as an effective remedy within the meaning of Article 13.[45]

118. The Commission notes that, pursuant to section 144 of the Constitution, the Constitutional Court can examine complaints about alleged violations of the right to freedom of expression in the context of the military services and find violations in this respect.

119. The Commission recalls that the effectiveness of a remedy for the purposes of Article 13 does not depend on the certainty of a favourable outcome for the applicant.[46]

120. The Commission considers that, though in the second applicant's case, the Constitutional Court actually refused to admit the complaint on the ground that it did not raise any particular issue under constitutional law, the complaint proceedings constituted in principle an effective remedy.

121. In these circumstances, the Commission finds that there was an effective remedy as regards the second applicant's complaint under Article 10(1).

Conclusion

122. The Commission concludes unanimously that there has been no violation of Article 13, in conjunction with Article 10, of the Convention in respect of the second applicant.

[45] *cf.* SILVER *v.* UNITED KINGDOM, *loc. cit.*, paras. 113, 115 and 116; App. No. 12573/86, M. & E.F. *v.* SWITZERLAND, Dec. 6.3.87, D.R. 51, p. 283.

[46] VILVARAJAH AND OTHERS *v.* UNITED KINGDOM (A/215): (1992) 14 E.H.R.R. 248, para. 122.

III. *Article 14, in conjunction with Article 10, of the Convention*

123. The Commission, considering its findings under Article 10 of the Convention, does not find it necessary to examine separately the issue of alleged discrimination against the second applicant on political grounds.

Conclusion

124. The Commission concludes unanimously that no separate issue arises under Article 14, in conjunction with Article 10, of the Convention in respect of the second applicant.

E. *Recapitulation*

125. The Commission concludes by 12 votes to nine that there has been a violation of Article 10 in respect of the first applicant[47];

126. The Commission concludes by 12 votes to nine that there has been a violation of Article 13, in conjunction with Article 10, of the Convention in respect of the first applicant[48];

127. The Commission concludes unanimously that no separate issue arises under Article 14, in conjunction with Article 10, of the Convention in respect of the first applicant[49];

128. The Commission concludes by 12 votes to nine that there has been a violation of Article 10 in respect of the second applicant[50];

129. The Commission concludes unanimously that there has been no violation of Article 13, in conjunction with Article 10, of the Convention in respect of the second applicant[51];

130. The Commission concludes unanimously that no separate issue arises under Article 14, in conjunction with Article 10, of the Convention in respect of the second applicant.[52]

Dissenting Opinion of Sir Basil Hall, joined by MM. G. Jörundsson, A.S. Gözübüyük and B. Marxer

1. I do not share the view of the majority of the Commission that there was a violation of Article 10 of the Convention in this case.

2. In the first place, I have considerable doubt whether the right to impart information without interference by public authorities is to be interpreted as including a right to distribute written material on premises belonging to a public authority without permission first having been obtained. Even if it did, I would not consider there to have been a violation of Article 10 for the reasons given below.

3. Assuming that the withholding of permission to distribute the

[47] Para. 86
[48] Para. 94.
[49] Para. 98.
[50] Para. 113.
[51] Para. 122.
[52] Para. 124.

military journal *Igel* (in the second applicant's case taking the form of an order to cease distribution) constituted a restriction on the applicants' rights, it was, I consider, justified under paragraph 2 of Article 10.

4. The restriction was prescribed by law—the Military Act of 1978 and the Service Regulations of the Federal Army of 1979 made under it.

5. The restriction was, as the Government contends, for the prevention of disorder. The maintenance of order is particularly important for armed forces.

6. The withholding of permission to distribute the journal *Igel* was "necessary in a democratic society". Contracting States enjoy a wide margin of appreciation in assessing the need to regulate the distribution of periodicals in the area of military barracks and thereby to maintain military discipline and prevent disorder. In this sphere, the Commission cannot undertake a re-examination of facts and, more particularly, substitute its own evaluation as to the contents of a periodical and its likely impact on military order and discipline for that of the national military authorities.

7. Bearing in mind that the first applicant is not prevented from distributing its journal outside the area of military barracks or from sending it to soldiers on the basis of individual subscriptions, I find that the prohibition on distribution in the area of military barracks does not go beyond this margin left to the national authorities.

8. I therefore conclude that there was no violation of either applicant's rights under Article 10.

9. As to the complaints of violation of Article 14 in conjunction with Article 10, neither applicant has shown that permission was given for another publication with similar contents to be distributed. There was therefore no violation of Article 14 for either applicant.

10. I do not consider that the first applicant has an arguable case that the association has a right to distribute its journal on military premises. The second applicant had a remedy for his complaint which he used. That he was unsuccessful is irrelevant. There was no violation of Article 13.

Dissenting Opinion of Mr Martinez, joined by Mr Reffi

To my great regret, I do not share the opinion of the Commission.

1. I do not find that the prohibition, within the interior of the barracks, of a publication which challenges the established principles of the Austrian army, constitutes an interference with the applicants' freedom of expression.

The applicants are free to distribute the publication in the street or in other public places, even in the neighbourhood or the entrance to the barracks, but not inside the barracks. In these circumstances, where the interior of the barracks is not a public place, there is no interference with the freedoms recognised by Article 10 of the Convention.

2. Even supposing that there was an interference, it would still in my opinion be justified by reference to the second paragraph of Article 10. Effectively, prohibiting the distribution, within the barracks, of a journal which criticises military organisation and discipline is justified in the interests of the prevention of public disorder, and that prohibition is by no means disproportionate to this ultimate goal.

3. Freedom of expression is not an absolute right. It cannot be enforced in places which are not public, least of all where it undermines the values which are specific to those particular places. For example, the distribution, inside a church, of a pamphlet which criticises the Christian religion, can never be claimed as a right guaranteed by Article 10 of the Convention.

For these reasons, I find myself drawn to the conclusion that in the case in point, there was no violation of Article 10 of the Convention.

Dissenting Opinion of Mr J.-C. Soyer and Mr H. G. Schermers

I do not agree with the majority of the Commission for the reasons set out by both Mr Martinez and by Sir Basil Hall.

JUDGMENT

I. *Alleged Violation of Article 10 of the Convention*

A. *The first applicant*

24. The first applicant complained of the Minister for Defence's refusal to add *der Igel* to the list of periodicals distributed by the Austrian army. It considered that this constituted a breach of Article 10 of the Convention, according to which:

> 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 responsibilities, 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.

25. It was the Government's contention that the *VDSÖ* was in no way to be confused with those of its members who were serving in the armed forces at the material time. The minister had therefore been justified in regarding it as a third party and in exercising one of the rights that the Civil Code conferred on the Federal State as the proprietor of the barracks, namely that of deciding freely the nature of

the services to be provided on those premises and of choosing which providers of such services should be solicited in that connection, without having to furnish an explanation to the latter.

The applicant association had asked that its magazine should be distributed by the army in the same way as two other non-official periodicals. In fact the service that it was requesting was based exclusively on private law arrangements, arrangements which could in any event not be demanded as of right by the publishers concerned. The army authorities could not be expected to help distribute all the magazines that were submitted to them. In short, the minister had exercised a discretionary power and had not infringed a right, no such right being vested in the applicant association.

26. In the light of the different arguments adduced, the Court must first consider whether there was an interference with the exercise by the *VDSÖ* of its rights to impart information and ideas.

1. *Whether there was an interference*

27. As the Court has consistently held, the responsibility of a Contracting State is engaged if a violation of one of the rights and freedoms defined in the Convention is the result of non-observance by that State of its obligation under Article 1 to secure those rights and freedoms in its domestic law to everyone within its jurisdiction.[53]

In the present case the authorities effected themselves and at their own expense the distribution on a regular basis of military periodicals published by various associations, by sending them out with their official publications. Whatever the legal status of this arrangement, such a practice was bound to have an influence on the level of information imparted to the members of the armed forces and, accordingly, engaged the responsibility of the respondent State under Article 10. Freedom of expression applies to servicemen just as it does to other persons within the jurisdiction of the Contracting States.[54]

The Court notes further that, according to the case file, of all the periodicals for servicemen, only *der Igel* was not allowed access to this type of distribution.[55] The *VDSÖ* could therefore reasonably claim that this situation should be remedied. It follows that the Minister for Defence's rejection of its request was an interference with the exercise of its right to impart information and ideas.

2. *Whether the interference was justified*

28. The interference in issue infringed Article 10 if it was not "prescribed by law", if it did not pursue one or more of the legitimate

[53] See, as the most recent authority, COSTELLO-ROBERTS *v.* UNITED KINGDOM (A/247–C): (1995) 19 E.H.R.R. 112, para. 26.

[54] See, as the most recent authority, HADJIANASTASSIOU *v.* GREECE (A/252–A): (1993) 16 E.H.R.R. 219, para. 39.

[55] See para. 8 above.

aims referred to in paragraph 2 of that Article or if it was not "necessary in a democratic society" in order to attain such aims.

(a) *Was the interference "prescribed by law"?*

29. According to the applicant association, none of the provisions of military law on which the Minister for Defence might have relied could be regarded as "law" within the meaning of the Convention. This was true in the first place of sections 44 to 46 of the Armed Forces Act and Regulation 3 of the General Army Regulations, the very vague wording of which opened the way to arbitrariness. This was also the case in regard to the 1975 and the 1987 circulars, which had not, moreover, been accessible to the *VDSÖ*.

30. The Government pointed out that, far from having adopted an administrative measure, the minister had merely refused to give a favourable reply to the applicant association's request. In so far as was necessary, sufficient basis for his decision was to be found in the Civil Code and that basis satisfied Article 10 in this respect. The provisions of military law cited, in particular the 1975 circular, had at most served as a guide for the minister's decision.

31. The Court observes that although those provisions could not strictly constitute the legal basis of the minister's action, as the minister did not take a formal decision, he nevertheless followed them in this instance. This is clear in particular from his reply to a parliamentary question.[56] It is accordingly necessary to ascertain whether they qualified as "law".

The Court acknowledges that the provisions in question were formulated in general terms. It should however be recalled that the level of precision required of domestic legislation—which cannot in any case provide for every eventuality—depends to a considerable degree on the content of the instrument considered, the field it is designed to cover and the number and status of those to whom it is addressed.[57]

As far as military discipline is concerned, it would scarcely be possible to draw up rules describing different types of conduct in detail. It may therefore be necessary for the authorities to formulate such rules more broadly. The relevant provisions must, however, afford sufficient protection against arbitrariness and make it possible to foresee the consequences of their application.

In the Court's view, the provisions in question, in particular the circular of 14 March 1975, provided sufficient legal basis for the refusal of the *VDSÖ*'s request. The first applicant had among its members servicemen who had access to these rules and it could therefore have

[56] *ibid.*

[57] See, as the most recent authority, CHORHERR *v.* AUSTRIA (A/266–B): (1994) 17 E.H.R.R. 358, para. 25.

been expected to be aware of the possibility that the minister might regard himself as bound to refer to them in relation to it. In conclusion, the interference in issue was "prescribed by law".

(b) *Did the interference pursue a legitimate aim?*

32. The impugned decision was evidently taken with a view to preserving order in the armed forces, a legitimate aim for the purposes of Article 10(2).[58]

(c) *Was the interference "necessary in a democratic society"?*

33. The *VDSÖ* denied that the refusal of its request had been necessary. It had been motivated solely by the desire to prevent a current of opinion regarded by the authorities as hostile to the army from being spread among the troops by the distribution of *der Igel*. Yet, the applicant association maintained, the Government was gradually implementing most of the reforms proposed by the magazine, such as the reduction of curfew restrictions, the introduction of a five-day week, pay increases and free public transport. The journal could not therefore be seen as a genuine threat.

34. The Commission in substance accepted the first applicant's view. It noted that *der Igel* contained no incitement to violence, to disobedience or to break the rules; at the very most it provided information on complaints and appeals procedures.

35. According to the Government, the magazine sought to undermine the effectiveness of the army and of the country's system of defence. Its distribution had been particularly undesirable because at the material time, when the cold war had still been in progress, there had been a certain amount of friction in the Schwarzenberg barracks. This situation, which was comparable to that found to exist in the case of ENGEL AND OTHERS,[59] had arisen because of unrest among the servicemen as a result of various deliberately provocative actions,[60] carried out by Mr Gubi, an active member of the *VDSÖ*.

Confronted with this situation, the Minister for Defence had even shown restraint as he had merely refused to allow the army to assist in the distribution of *der Igel*. This measure had been necessary in order to maintain discipline, but it had not prevented the applicant association from making the publication available to the soldiers through any other means. They could, for instance, receive it through the post and no restrictions were placed on their freedom to read it in the barracks. In short, the authorities had not overstepped their margin of appreciation, which was necessarily wider in this area because they alone were in a position to assess with full knowledge of all the

[58] ENGEL AND OTHERS *v.* NETHERLANDS (No. 1), *loc. cit.*, para. 98.
[59] *Loc. cit.*, para. 101.
[60] See para. 9 above.

circumstances, in a given situation, the specific duties and responsibilities of members of the armed forces.

36. The Court reiterates that freedom of expression is also applicable to "information" or "ideas" that offend, shock or disturb the State or any section of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".[61]

The same is true when the persons concerned are servicemen, because Article 10 applies to them just as it does to other persons within the jurisdiction of the Contracting States. However, the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline, for example by writings.[62]

37. The Court observes that at the material time the army distributed free of charge in all the country's barracks its own publications and those of private associations of soldiers. It appears that only *der Igel* was denied this facility, which undoubtedly reduced considerably its chances of increasing its readership among service personnel. The fact that the *VDSÖ* retained the possibility of sending its journal to subscribers could not offset such a handicap. It could therefore only have been justified by imperative necessities since exceptions to the freedom of expression must be interpreted narrowly.[63]

38. The Government sought support for their argument from the content of *der Igel*. The periodical, which was critical and satirical, had represented a threat to discipline and to the effectiveness of the army.

It is the Court's opinion that such an assertion must be illustrated and substantiated by specific examples. None of the issues of *der Igel* submitted in evidence recommend disobedience or violence, or even question the usefulness of the army. Admittedly, most of the issues set out complaints, put forward proposals for reforms or encourage the readers to institute legal complaints or appeals proceedings. However, despite their often polemical tenor, it does not appear that they overstepped the bounds of what is permissible in the context of a mere discussion of ideas, which must be tolerated in the army of a democratic State just as it must be in the society that such an army serves.

39. The Government also cited friction in the Schwarzenberg barracks, for which, they claimed, the publications of the applicant association and Mr Gubi's activities were essentially responsible.[64] This situation had led to a large number of complaints from the conscripts.

[61] See, *inter alia*, THE OBSERVER AND THE GUARDIAN *v.* UNITED KINGDOM (A/216): (1992) 14 E.H.R.R. 153, para. 59, and CASTELLS *v.* SPAIN (A/236): (1992) 14 E.H.R.R. 445, para. 42.

[62] ENGEL AND OTHERS *v.* NETHERLANDS (No. 1), *loc. cit.*, para. 100, and HADJIANASTASSIOU *v.* GREECE, *loc. cit.*, para. 39.

[63] THE SUNDAY TIMES *v.* UNITED KINGDOM (No. 1), *loc. cit.*, para. 65.

[64] See para. 9 above.

In the Court's view, this situation, peculiar to a single barracks, was not sufficiently serious to justify a decision whose effects extended to all the military premises on the national territory. On this point the facts may be distinguished from the ENGEL AND OTHERS case. In that case the banned journal had been distributed solely in the place where the unrest cited by the authorities had occurred.[65]

40. In conclusion, the refusal by the Minister of Defence to include *der Igel* among the magazines distributed by the army was disproportionate to the legitimate aim pursued. It follows that the first applicant was the victim of a violation of Article 10.

B. *The second applicant*

41. Mr Gubi likewise claimed to have been the victim of a breach of Article 10 inasmuch as he had been prohibited from distributing issue no. 3/87 of *der Igel*.[66]

1. *Whether there was an interference*

42. It is not in dispute that there was an interference with the exercise by Mr Gubi of his right to impart information and ideas.

2. *Whether the interference was justified*

43. It must therefore be determined whether the interference was "prescribed by law", whether it pursued one or more of the legitimate aims referred to in paragraph 2 of Article 10 and whether it was "necessary in a democratic society" in order to attain such aims.

(a) *Was the interference "prescribed by law"?*

44. The applicant complained that there had been no legal basis for the order of 29 December 1987 requiring him to cease distributing *der Igel*. Neither the 1975 and 1987 circulars nor the regulations of the Schwarzenberg barracks could be regarded as "law" within the meaning of the Convention; they had not been published in the Official Gazette and their wording lacked sufficient precision. Only the barracks regulations contained a relevant provision, but it had been inserted with effect from 4 January 1988, in other words after the events giving rise to this case.

45. The Government contended that the impugned measure had been based on sections 44(1) and 46 of the Armed Forces Act, the requirements of which were set out in greater detail in Regulations 3 and 19 of the General Army Regulations and in the different barracks regulations. Indeed, Mr Gubi had been personally informed of their content and how they applied in practice on 1, 9 and 22 July 1987.[67]

[65] *Loc. cit.*, para. 43.
[66] See para. 10 above.
[67] See para. 9 above.

46. On the question of the wording of these provisions, the Court refers to its reasoning in paragraph 31 above. Having regard in particular to the information given on the rules in force,[68] the Court takes the view that, if need be, having sought appropriate advice, the applicant was in a position to foresee, to a degree that was reasonable in the circumstances, the possibility of such a ban being imposed on him.[69]

(b) *Did the interference pursue a legitimate aim?*

47. The Court considers that the contested measure served, like the refusal complained of by the first applicant, to maintain order in the armed forces.[70]

(c) *Was the interference "necessary in a democratic society"?*

48. The Government explained the order in issue by referring to Mr Gubi's conduct. Not only had he, when taking the oath, made a protest directed at the President of the Republic, he had also lodged several complaints and circulated a petition and an open letter.[71] The applicant had thus borne a large share of the responsibility for the friction existing at the time in his barracks. He was in addition a member of the Austrian communist party, whose manifesto called for the abolition of the army. By ordering him to cease distributing *der Igel*, the officer in question had sought to prevent him from destabilising his fellow soldiers even further.

49. The Court refers in the first instance to its reasoning at paragraphs 36 and 37 above. It shares the Government's opinion that the particular incident must be viewed in its general context. This approach does not, however, remove the necessity of first examining the content of the publication in issue. Like the Commission, the Court notes that issue no. 3/87 of *der Igel* was essentially devoted to articles on the conditions of national service.[72] These articles were written in a critical or even satirical style and were quick to make demands or put forward proposals for reform, yet they did not call into question the duty of obedience or the purpose of service in the armed forces. Accordingly the magazine could scarcely be seen as a serious threat to military discipline. It follows that the measure in question was disproportionate to the aim pursued and infringed Article 10.

[68] *ibid.*
[69] See, *mutatis mutandis*, THE SUNDAY TIMES *v.* UNITED KINGDOM (No. 1), *loc. cit.*, para. 49, and OPEN DOOR COUNSELLING AND DUBLIN WELL WOMAN *v.* IRELAND (A/246–A): (1993) 15 E.H.R.R. 244, para. 60.
[70] See para. 32 above.
[71] See para. 9 above.
[72] See para. 10 above.

II. *Alleged Violation of Article 13 of the Convention*

A. *The first applicant*

50. The *VDSÖ* complained in addition that no effective remedy had been available to it in Austria in respect of its grievance under Article 10. It relied on Article 13 of the Convention, which 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.

51. The Commission in substance subscribed to this view.

52. The Government denied in the first place that the applicant association's complaints were "arguable" for the purposes of the Convention. In the alternative, they contended that the association could have submitted its request to have *der Igel* distributed to the civil courts by means of an action for performance (*Leistungsklage*), an action for an order requiring the defendant to permit something to be done (*Duldungsklage*), or even an action for a declaration (*Feststellungsklage*).

53. In the light of the conclusion at paragraph 40 above, the requirement that the complaint be "arguable" is satisfied in respect of the submission in question.[73]

As regards the possible remedies cited by the Government, they have not put forward any example showing their application in a case similar to the present one. They have therefore failed to show that such remedies would have been effective.

It follows that the first applicant has been the victim of a violation of Article 13.

B. *The second applicant*

54. Mr Gubi likewise complained of a breach of Article 13. In the circumstances of the present case, neither the complaints division nor the Constitutional Court could be regarded as a "national authority" within the meaning of that provision. The complaints division was under the authority of the Ministry of Defence and did not therefore afford the necessary guarantees of independence; the Constitutional Court had not examined the merits of the applicant's complaint.

55. Like the Commission and the Government, the Court notes that, under Article 144 of the Constitution, the Constitutional Court is competent to hear complaints of servicemen alleging a violation of their right to freedom of expression.[74]

It is true that in this instance the Constitutional Court declined to entertain Mr Gubi's complaint.[75] However, the effectiveness of a

[73] See, *inter alia*, BOYLE AND RICE *v.* UNITED KINGDOM, *loc. cit.*, para. 52.
[74] See para. 21 above.
[75] See para. 13 above.

remedy for the purposes of Article 13 does not depend on the certainty of a favourable outcome.[76] The second applicant consequently had available to him a remedy satisfying the requirements of that provision.

It is not therefore necessary for the Court to consider whether the complaints division constitutes a "national authority" within the meaning of Article 13.

III. *Alleged Violation of Article 14 of the Convention taken in conjunction with Article 10*

56. The applicants complained finally that they had each been the victim of a breach of Article 14 of the Convention taken in conjunction with Article 10. The violation of their right to freedom of expression amounted to discrimination on political grounds.

Having regard to its conclusions concerning Article 10, the Court does not consider it necessary to rule on this complaint.

IV. *Application of Article 50 of the Convention*

57. Under Article 50 of the Convention,

> If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

A. *Damage*

1. *Pecuniary damage*

58. The *VDSÖ* claimed 14,800,000 sch for pecuniary damage. This sum represented the amount that the Ministry of Defence would have had to pay the association if it had decided to buy and distribute *der Igel* from 27 July 1987, the date of the association's request.[77]

59. The Court agrees with the Delegate of the Commission that the violation of Article 10 derives not from the failure to pay the *VDSÖ* but solely from the refusal of the military authorities to distribute *der Igel*. The claim is accordingly unfounded.

2. *Non-pecuniary damage*

60. The *VDSÖ* and Mr Gubi claimed in addition compensation for non-pecuniary damage in an amount which they left to the discretion of the Court.

61. The Delegate of the Commission supported this claim.

[76] See, among other authorities, COSTELLO-ROBERTS *v.* UNITED KINGDOM, *loc. cit.*, para. 40.

[77] See para. 8 above.

62. Like the Government, who pointed out that *der Igel* ceased publication in 1988, the Court considers that the present judgment affords the applicants sufficient just satisfaction for any non-pecuniary damage that they may have suffered.

B. *Costs and expenses*

63. The applicants claimed a total of 360,952.34 sch for costs and expenses: 113,267.56 sch for the proceedings before the national authorities and 247,684.78 sch for those before the Convention institutions.

64. The Government agreed to pay 110,000 sch.

65. Having regard to the criteria laid down in its case law and making an assessment on an equitable basis, the Court awards the applicants 180,000 sch in respect of all their costs and expenses.

For these reasons, THE COURT

1. *Holds* by six votes to three that there has been a breach of Article 10 of the Convention in respect of the first applicant;
2. *Holds* by eight votes to one that there has been a breach of Article 10 of the Convention in respect of the second applicant;
3. *Holds* by six votes to three that there has been a breach of Article 13 of the Convention in respect of the first applicant;
4. *Holds* unanimously that there has been no breach of Article 13 of the Convention in respect of the second applicant;
5. *Holds* unanimously that it is not necessary to consider whether there has been a breach of Article 14 of the Convention taken in conjunction with Article 10;
6. *Holds* unanimously that the present judgment constitutes in itself sufficient just satisfaction for the alleged non-pecuniary damage;
7. *Holds* unanimously that the respondent State is to pay the applicants, within three months, 180,000 (one hundred and eighty thousand) sch for costs and expenses;
8. *Dismisses* unanimously the remainder of the claim for just satisfaction.

In accordance with Article 51(2) of the Convention and Rule 53(2) of the Rules of Court, the dissenting opinion of Thór Vilhjálmsson and the partly dissenting opinion of Mr Matscher, joined by Mr Bernhardt are annexed to this judgment.

Dissenting Opinion of Mr Thór Vilhjálmsson

In this case I have not found a violation of Article 10 of the Convention, or of Article 13.

With regard to the first applicant, I agree with the opinion of Mr Matscher joined by Mr Bernhardt.

In respect of the second applicant, Mr Gubi, I would make the following remarks:

In Paragraph 35 of the judgment the Court makes, what appears to me, to be the obvious point that "the proper functioning of the army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline ...". Certain restrictions were undoubtedly imposed on Mr Gubi when he was ordered by an officer to stop distributing the magazine *der Igel* in his barracks. However, these restrictions were limited to his conduct within the barracks. They did not affect the distribution of this publication in any other way. Applying the principle of proportionality, I have, unlike the Court, found that the Austrian officer acted within the permissible boundaries of Article 10 in issuing the said order to Mr Gubi.

Partly Dissenting Opinion of Judge Matscher, joined by Mr Bernhardt

(provisional translation)

I agree with the finding of a violation as regards the second applicant but not as regards the first applicant.

The latter complained that there had been a violation of Article 10 of the Convention on account of the refusal of the Minister for Defence to include the magazine *der Igel* in the list of periodicals distributed by the army. Article 10 protects the freedom of expression and information but does not guarantee publications a right to be distributed by the public authorities. The "official" distribution of the journal in question would have amounted in a way to identifying at least implicitly with the content of the magazine, which, in my view, the relevant military authorities could not be expected to do.

It was, moreover, entirely open to the conscripts who were interested in reading the magazine to subscribe to it, to have it mailed to them privately or to buy it when they went outside the barracks, which they did virtually every day, and bring it back to the barracks. In addition, the first applicant could send the magazine free of charge to the conscripts either at the barracks or at their private address. The requirements of Article 10 were in this manner fully complied with in relation to the applicant association.

In these circumstances, as regards the first applicant there was no interference with the right protected under Article 10; it follows that there could likewise be no breach of Article 13 in relation to it.

GUERRA AND OTHERS *v.* ITALY
(Failure of State to inform residents of hazards posed by chemicals factory)

BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

(*The President*, Judge Bernhardt; *Judges* Thór Vilhjálmsson, Gölcüklü, Matscher, Walsh, Macdonald, Russo, Spielmann, Palm, Loizou, Sir John Freeland, Lopes Rocha, Mifsud Bonnici, Makarczyk, Repik, Jambrek, Kuris, Levits, Casadevall, Van Dijk)

Application No. 14967/89
19 February 1998

The 40 applicants lived in the town of Manfredonia, approximately 1km from a chemical factory which produced fertilisers and other chemicals. In 1988, the factory was classified as "high risk" according to criteria set out by Presidential Decree. Emissions from the factory were often channelled towards Manfredonia. The applicants complained that the authorities had not taken appropriate action to reduce the risk of pollution by the factory and to prevent the risk of accident. This, they argued, infringed their rights to life and physical integrity under Article 2 of the Convention. They also complained that the State had failed to take steps to provide information about the risks and how to proceed in the event of an accident. They argued that this involved a breach of their right to freedom of information under Article 10 of the Convention. The Commission declared the case admissible only in relation to the complaint under Article 10. Before the Court, the applicants relied not only on Article 10, but also Article 2. In addition, they complained before the Court that their right to respect for family life under Article 8 of the Convention had been infringed, as a result of the authorities' failure to provide them with the relevant information.

Held:

(1) by 19 votes to 1, dismissed the Government's preliminary objection;
(2) by 18 votes to 2 that Article 10 of the Convention is not applicable in the instant case;
(3) unanimously that Article 8 of the Convention is applicable and has been infringed;
(4) unanimously that it is unnecessary to consider the case under Article 2 of the Convention also;
(5) unanimously:
(a) that the respondent State is to pay each of the applicants, within three months, 10,000,000 lire in respect of non-pecuniary damage; and
(b) that simple interest at an annual rate of 5 per cent shall be payable on that sum from the expiry of the abovementioned three months until settlement;
(6) unanimously dismissed the remainder of the claim for just satisfaction.

1998
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Guerra and Others
v.
Italy
—
European Court of Human Rights

1. Jurisdiction of the Court *ratione materiae*.

(a) The Court observes, firstly, that its jurisdiction "extends to all cases concerning the interpretation and application of the Convention which are referred to it in accordance with Article 48 and that in the event of dispute as to whether the Court has jurisdiction, the matter is settled by the decision of the Court. [43]

(b) The Court reiterates that since it is the master of the characterisation to be given in law to the facts of the case, it does not consider itself bound by the characterisation given by an applicant, a government or the Commission. By virtue of the *jura novit curia* principle, it has, for example, considered of its own motion complaints under Articles or paragraphs not relied on by those appearing before it and even under a provision in respect of which the Commission had declared the complaint to be inadmissible while declaring it admissible under a different one. A complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on. The Court has full jurisdiction only within the scope of the "case", which is determined by the decision on the admissibility of the application. Within the compass thus delimited, the Court may deal with any issue of fact or law that arises during the proceedings before it. [44]

(c) In the instant case the grounds based on Articles 8 and 2 were not expressly set out in the application or the applicants' initial memorials lodged in the proceedings before the Commission. Clearly, however, those grounds were closely connected with the one pleaded, namely that giving information to the applicants, all of whom lived barely a kilometre from the factory, could have had a bearing on their private and family life and their physical integrity.

(d) Having regard to the foregoing and to the Commission's decision on admissibility, the Court holds that it has jurisdiction to consider the case under Articles 8 and 2 as well as under Article 10. [46]

2. Freedom of expression: the Government's preliminary objection of failure to exhaust domestic remedies (Art. 10).

(a) The Government raised a preliminary objection of failure to exhaust domestic remedies, to which there were two limbs. In the first limb the Government argued that it was possible to make an urgent application under Article 700 of the Code of Civil Procedure. The Government acknowledged its failure to provide examples of similar cases in which Article 700 had been applied, but said that, regardless of whether that provision could be used against a public body, it could certainly be used against a factory which, as in the present case, had not produced a safety report as required by Article 5 of D.P.R. 175/88. The second limb concerned the fact that the applicants had not complained to a criminal court about the lack of relevant information from, in particular, the factory, whereas such omissions constituted an offence under Article 21 of D.P.R. 175/88. [48]

(b) The Court considers that neither remedy would have enabled the applicants to acheive their aim. Even though the Government was unable to prove that an urgent application would have been effective as environmental cases had still not given rise to any authoritative judicial decision in the relevant area, Article 700 of the Code of Civil Procedure would have been a practicable remedy if the applicants' complaint had concerned a failure to take measures

designed to reduce or eliminate pollution; indeed, that was the Commission's conclusion when it ruled on the admissibility of the application. In reality, the complaint in the instant case was that information about the risks and about what to do in the event of an accident had not been provided, whereas an urgent application would probably have resulted in the factory's operation being suspended. As to instituting criminal proceedings, the safety report was submitted by the factory on 6 July 1989 and if the applicants had lodged a criminal complaint they would at most have secured the conviction of the factory's managers, but certainly not the communication of any information. The objection must therefore be dismissed. [49]

3. Freedom of expression: applicability (Art. 10).

(a) In cases concerning restrictions on freedom of the press the Court has on a number of occasions recognised that the public has a right to receive information as a corollary of the specific function of journalists, which is to impart information and ideas on matters of public interest. The facts of the present case are, however, clearly distinguishable from such instances, since the applicants complained of a failure in the system set up pursuant to D.P.R. 175/88, which had transposed into Italian law the E.C. Directive known as the "Seveso" Directive, on the major-accident hazards of certain industrial activities dangerous to the environment and the well being of the local population. Although the Prefect of Foggia prepared the emergency plan on the basis of the report submitted by the factory and the plan was sent to the Civil Defence Department on 3 August 1993, the applicants had, at the date of judgment, yet to receive the relevant information. [53]

(b) The Court reiterates that freedom to receive information, referred to in paragraph 2 of Article 10 of the Convention, "basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him". That freedom cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion. [53]

(c) In conclusion, Article 10 is not applicable in the instant case. [54]

4. Right to respect for private and family life: applicability (Art. 8).

The Court notes, firstly, that all the applicants live at Manfredonia, approximately a kilometre away from the factory, which, owing to its production of fertilisers and caprolactam, was classified as being high-risk in 1988, pursuant to the criteria laid down by Presidential Decree. In the course of its production cycle the factory released large quantities of inflammable gas and other toxic substances, including arsenic trioxide. Moreover, in 1976 following the explosion of the scrubbing tower for the ammonia synthesis gases, several tonnes of potassium carbonate and bicarbonate solution, containing arsenic trioxide, escaped and 150 people had to be hospitalised on account of acute arsenic poisoning. In addition, in its report of 8 December 1988, a committee of technical experts appointed by the Manfredonia District Council said in particular that because of the factory's geographical position, emissions from it into the atmosphere were often channelled towards Manfredonia.

The direct effect of the toxic emissions on the applicants' right to

respect for their private and family life means that Article 8 is applicable. [57]

5. Right to respect of private and family life: merits of claim (Art. 8).

(a) Italy cannot be said to have "interfered" with the applicants' private or family life; the applicants complained not of an act by the State but of its failure to act. However, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life. In the present case it need only be ascertained whether the national authorities took the necessary steps to ensure effective protection of the applicants' right to respect for their private and family life as guaranteed by Article 8. [58]

(b) On 14 September 1993, pursuant to Article 19 of D.P.R. 175/88, the Ministry for the Environment and the Ministry of Health jointly adopted conclusions on the safety report submitted by the factory in July 1989. Those conclusions prescribed improvements to be made to the installations, both in relation to current fertiliser production and in the event of resumed caprolactam production, and provided the Prefect with instructions as to the emergency plan—that he had drawn up in 1992—and the measures required for informing the local population under Article 17 of D.P.R. 175/88. In a letter of 7 December 1995 to the European Commission of Human Rights, however, the mayor of Monte Sant'Angelo indicated that the investigation for the purpose of drawing up conclusions under Article 19 was still continuing and that he had not received any documents relating to them. He pointed out that the District Council was still awaiting direction from the Civil Defence Department before deciding what safety measures should be taken and what procedures should be followed in the event of an accident and communicated to the public. He said that if the factory resumed production, the measures for informing the public would be taken as soon as the conclusions based on the investigation were available. [59]

(c) The Court reiterates that severe environmental pollution may affect individuals' well being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely. In the instant case the applicants waited, right up until the production of fertilisers ceased in 1994, for essential information that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory.

The Court holds, therefore, that the respondent State did not fulfil its obligation to secure the applicants' right to respect for their private and family life, in breach of Article 8 of the Convention. There has consequently been a violation of that provision. [60]

6. Right to life (Art. 2).

Having regard to its conclusion that there has been a violation of Article 8, the Court finds it unnecessary to consider the case under Article 2 also. [62]

7. Just satisfaction: damage; legal costs and expenses; default interest (Art. 50).

(a) The Court considers that the applicants did not show that they had sustained any pecuniary damage as a result of the lack of information of which they complained. As to the rest, it holds that the applicants undoubtedly suffered non-pecuniary damage and awards them 10,000,000 lire each. [67]

(b) The applicants were granted legal aid for the proceedings before the Court in the amount of 16,304 FF; however, at the end of the hearing their Counsel lodged an application with the registry for an additional sum in respect of her fees. Having regard to the amount already granted in legal aid and the lateness of the application, the Court dismisses the claim. [68] and [70]

(c) Lastly, the applicants sought an order from the Court requiring the respondent State to decontaminate the entire industrial estate concerned, to carry out an epidemiological study of the area and the local population and to undertake an inquiry to identify the possible serious effects on residents most exposed to substances believed to be carcinogenic. The Court notes that the Convention does not empower it to accede to such a request. It reiterates that it is for the State to choose the means to be used in its domestic legal system in order to comply with the provisions of the Convention or to redress the situation that has given rise to the violation of the Convention. [71] and [74]

(d) According to the information available to the Court, the statutory rate of interest applicable in Italy at the date of adoption of the present judgment is 5 per cent per annum. [75]

Mr *G. Raimondi*, magistrato on secondment to the Diplomatic Legal Service, Ministry of Foreign Affairs (Co-Agent), Mr *G. Sabbeone*, magistrato on secondment to the Legislative Office, Ministry of Justice (Counsel) for the Government.
Mr *I. Cabral Barreto* (Delegate) for the Commission.
Ms *N. Santilli* (Counsel) for the applicants.

The following cases are referred to in the judgment:

1. AIREY *v.* IRELAND (A/32): 2 E.H.R.R. 305.
2. DEMICOLI *v.* MALTA (A/210): (1992) 14 E.H.R.R. 47.
3. LEANDER *v.* SWEDEN (A/116): (1987) 9 E.H.R.R. 433.
4. LOPEZ OSTRA *v.* SPAIN (A/303–C): (1995) 20 E.H.R.R. 277.
5. OBSERVER AND GUARDIAN *v.* UNITED KINGDOM (A/216): (1992) 14 E.H.R.R. 153.
6. PHILIS *v.* GREECE (NO. 1) (A/209): (1991) 13 E.H.R.R. 741.
7. POWELL AND RAYNER *v.* UNITED KINGDOM (A/172): (1990) 12 E.H.R.R. 355.
8. THORGEIRSON *v.* ICELAND (A/239): (1992) 14 E.H.R.R. 843.
9. YAGCI AND SARGIN *v.* TURKEY (A/319–A): (1995) 20 E.H.R.R. 505.
10. ZANGHI *v.* ITALY (A/194–A): not yet published in E.H.R.R.

The following additional cases are referred to in the Report of the Commission:

11. BELGIAN LINGUISTICS CASE (A/6): 1 E.H.R.R. 252.
12. DE GEILLUSTREERDE PERS N.V. *v.* NETHERLANDS Comm. Rep. 6.7.76. D.R. 8.
13. FREDIN *v.* SWEDEN (A/192): (1991) 13 E.H.R.R. 784.

14. GASKIN *v.* UNITED KINGDOM (A/160): (1990) 12 E.H.R.R. 36.
15. MARCKX *v.* BELGIUM (A/31): 2 E.H.R.R. 330.

The following additional cases are referred to in the dissenting opinion of Mrs Thune and Mm Nowicki, Conforti and Bratza:

16. ABDULAZIZ, CABALES AND BALKANDALI *v.* UNITED KINGDOM (A/94): (1985) 7 E.H.R.R. 471.
17. FAYED *v.* UNITED KINGDOM (A/294–B): (1994) 18 E.H.R.R. 393.
18. REES *v.* UNITED KINGDOM (A/106): (1987) 9 E.H.R.R. 56.

The Facts

I. *The circumstances of the case*

A. *The Enichem agriculture factory*

12. The applicants all live in the town of Manfredonia (Foggia). Approximately 1km away is the Enichem agriculture company's chemical factory, which lies within the municipality of Monte Sant'Angelo.

13. In 1988 the factory, which produced fertilisers and caprolactam (a chemical compound producing, by a process of polycondensation, a polyamide used in the manufacture of synthetic fibres such as nylon), was classified as "high risk" according to the criteria set out in Presidential Decree No. 175 of 18 May 1988,[1] which transposed into Italian law Directive 82/501/EEC of the Council of the European Communities[2] on the major-accident hazards of certain industrial activities dangerous to the environment and the well being of the local population.

14. The applicants said that in the course of its production cycle the factory released large quantities of inflammable gas—a process which could have led to explosive chemical reactions, releasing highly toxic substances—and sulphur dioxide, nitric oxide, sodium, ammonia, metal hydrides, benzoic acid and, above all, arsenic trioxide. These assertions have not been disputed by the Government.

15. Accidents due to malfunctioning have already occurred in the past, the most serious one on 26 September 1976 when the scrubbing tower for the ammonia synthesis gases exploded, allowing several tonnes of potassium carbonate and bicarbonate solution, containing arsenic trioxide, to escape. One-hundred-and-fifty people were admitted to hospital with acute arsenic poisoning.

16. In a report of 8 December 1988 a committee of technical experts appointed by Manfredonia District Council established that because of the factory's geographical position, emissions from it into the atmosphere were often channelled towards Manfredonia. It was noted in the report that the factory had refused to allow the committee to carry out an inspection and that the results of a study by the factory

[1] "D.P.R. 175/88".
[2] The "Seveso" Directive.

itself showed that the emission treatment equipment was inadequate and the environmental-impact assessment incomplete.

17. In 1989 the factory restricted its activity to the production of fertilisers, and it was accordingly still classified as a dangerous factory covered by D.P.R. 175/88. In 1993 the Ministry for the Environment issued an order jointly with the Ministry of Health prescribing measures to be taken by the factory to improve the safety of the ongoing fertiliser production, and of caprolactam production if that was resumed.[3]

18. In 1994 the factory permanently stopped producing fertiliser. Only a thermoelectric power station and plant for the treatment of feed and waste water continued to operate.

B. *Criminal proceedings*

1. *Before the Foggia magistrates' court*

19. On 13 November 1985, 420 residents of Manfredonia (including the applicants) applied to the Foggia magistrates' court complaining that the air had been polluted by emissions of unknown chemical composition and toxicity from the factory. Criminal proceedings were brought against seven directors of the impugned company for offences relating to pollution caused by emissions from the factory and to non-compliance with a number of environmental protection regulations.

Judgment was given on 16 July 1991. Most of the defendants escaped a prison sentence, either because the charges were covered by an amnesty or were time-barred, or because they had paid an immediate fine. Only two directors were sentenced to five months' imprisonment and a fine of 2,000,000L and ordered to pay damages to the civil parties, for having had waste dumps built without prior permission, contrary to the relevant provisions of D.P.R. 915/82 on waste disposal.

2. *In the Bari Court of Appeal*

20. On appeals by the two directors who had been convicted and by the Public Electricity Company (*ENEL*) and Manfredonia District Council, which had both joined the proceedings as civil parties claiming damages, the Bari Court of Appeal acquitted the directors on 29 April 1992 on the ground that the offence had not been made out but upheld the remainder of the impugned decision. The Court held that the errors which the directors were alleged to have made in the management of the waste were in fact attributable to delays and uncertainties in the adoption and interpretation, particularly by the Region of Apulia, of regulations implementing D.P.R. 915/82. Consequently, there was no damage that gave rise to a claim for compensation.

[3] See para. 27 below.

C. *The approach of the authorities concerned*

21. A joint committee of representatives from the State and the Region of Apulia was set up within the Italian Ministry for the Environment to implement the Seveso Directive.

The committee ordered a technical survey, which was carried out by a panel established by an order of the Minister for the Environment of 19 June 1989. The panel had the following remit:

> (a) to report on whether the factory conformed to environmental regulations as regards discharge of waste water, treatment of liquid and solid waste, emissions of gases, and noise pollution; to report on safety aspects; and to check what authorisations had been granted to the factory to those ends;
> (b) to report on whether the factory site was compatible with its environment, having particular regard to the problems of protecting the health of the local population and the fauna and flora and of making appropriate use of the land;
> (c) to suggest what action should be taken to obtain any missing data required to complete the reports under (a) and (b) above and to identify measures to be taken to protect the environment.

22. On 6 July 1989 the factory submitted the safety report required by Article 5 of D.P.R. 175/88.

23. On 24 July 1989 the panel presented its report, which was sent to the State/Regional Joint Committee. The latter published its conclusions on 6 July 1990 and fixed 30 December 1990 as the date on which the report required by Article 18 of D.P.R. 175/88 on the risk of major accidents should be submitted to the Minister for the Environment. It also recommended:

> (a) commissioning studies of the factory's safety and compatibility with its environment, additional analysis of disaster scenarios and of the preparation and implementation of emergency procedures;
> (b) introducing a number of changes designed to reduce the atmospheric emissions drastically and to improve the treatment of waste water, making radical alterations to the production cycles for urea and nitrogen and carrying out studies on the pollution of the subsoil and on the hydrogeological structure of the factory site. These steps were to be taken within three years. The panel also referred to the need to solve the problems of liquid combustion and the reuse of sodium salts.

The panel further called for a public industrial-pollution monitoring centre, to be set up by 30 December 1990, to carry out periodic checks on the factory's practices in relation to public health and environmental protection and to act as an epidemiological observatory.

24. On 20 June 1989 the problems relating to the operation of the factory were raised in a parliamentary question to the Minister for the Environment. On 7 November 1989, in the European Parliament, a question on the same point was put to the Commission of the European Communities. Replying to the latter question, the relevant Commissioner stated that (1) Enichem had sent the Italian Government the safety report requested pursuant to Article 5 of

D.P.R. 175/88; (2) on the basis of that report the Government had opened an investigation, as required by Article 18 of D.P.R. 175/88, to check safety at the factory and, if appropriate, to identify any further safety measures needed; and (3) so far as the application of the Seveso Directive was concerned, the Government had taken the requisite measures with regard to the factory.

D. *Steps taken to inform the local population*

25. Articles 11 and 17 of D.P.R. 175/88 require the relevant mayor and prefect to inform local inhabitants of the hazards of the industrial activity concerned, the safety measures taken, the plans made for emergencies and the procedure to be followed in the event of an accident.

26. On 2 October 1992 the Co-ordinating Committee for Industrial Safety Measures gave its opinion on the emergency plan that had been drawn up by the Prefect of Foggia, in accordance with Article 17(1) of D.P.R. 175/88. On 3 August 1993 the plan was sent to the relevant committee of the Civil Defence Department. In a letter of 12 August 1993 the under-secretary of the Civil Defence Department assured the Prefect of Foggia that the plan would be submitted promptly to the Co-ordinating Committee for its opinion and expressed the hope that it could be put into effect as quickly as possible, given the sensitive issues raised by planning for emergencies.

27. On 14 September 1993 the Ministry for the Environment and the Ministry for Health jointly adopted conclusions on the factory's safety report of July 1989, as required by Article 19 of D.P.R. 175/88. Those conclusions prescribed a number of improvements to be made to the installations, both in relation to fertiliser production and in the event of resumed caprolactam production (see paragraph 17 above) and provided the Prefect with instructions as to the emergency plan for which he was responsible and the measures required for informing the local population under Article 17 of D.P.R. 175/88.

In a letter of 7 December 1995 to the European Commission of Human Rights, however, the mayor of Monte Sant'Angelo indicated that the investigation for the purpose of drawing up conclusions under Article 19 was still continuing and that he had not received any documents relating to them. He pointed out that the District Council was still awaiting direction from the Civil Defence Department before deciding what safety measures should be taken and what procedures should be followed in the event of an accident and communicated to the public. He said that if the factory resumed production, the measures for informing the public would be taken as soon as the conclusions based on the investigation were available.

II. *Relevant domestic law*

28. As regards the obligation to inform the public on matters of environmental and public safety, Article 5 of D.P.R. 175/88 provides

that any undertaking carrying on dangerous activities must submit a report to the Ministry for the Environment and the Ministry of Health giving details of, among other things, its activities, emergency procedures in the event of a major accident, the persons responsible for carrying these procedures out, and the measures taken by the undertaking to reduce the risks to the environment and public health. Article 21 of D.P.R. 175/88 provides that anyone in charge of an undertaking who fails to submit the report required by Article 5 may be sentenced to up to one year's imprisonment.

29. At the material time Article 11(3) of D.P.R. 175/88 provided that mayors were under a duty to inform the public of:

(a) the nature of the production process;
(i) the nature and quantities of the substances involved;
(ii) the potential risks to employees and workers in the factory, members of the public and the environment;
(iii) the conclusions on the safety reports submitted by the factory pursuant to Article 5 and on any additional measures referred to in Article 19; and
(iv) the safety measures and procedures to be followed in the event of an accident.

Article 11(2) provided that, in order to protect industrial secrets, any person responsible for examining reports or information from the undertakings concerned was forbidden to disclose any information that he had thereby obtained.

30. Article 11(1) provided that data and information on industrial activities obtained pursuant to D.P.R. 175/88 could be used only for the purposes for which they had been requested.

That provision was partly amended by Legislative Decree No. 461 of 8 November 1995. Paragraph 2 of that decree provides for an exception to the ban on disclosure of industrial secrets in the case of certain information, namely that contained in an information sheet which the undertaking must complete and send to the Ministry for the Environment and the regional or inter-regional technical committee. Mayors' duties with regard to informing the public are unchanged and now appear in paragraph 4.

31. Article 17 of D.P.R. 175/88 also lays certain obligations on the Prefect in the matter of providing information. In particular, paragraph 1 of that provision[4] requires the Prefect to draw up an emergency plan based on the information supplied by the factory and the Co-ordinating Committee for Industrial Safety Measures. That plan must be sent to the Ministry for the Interior and the Civil Defence Department. Paragraph 2 goes on to provide that, after drawing up the emergency plan, the Prefect must adequately inform the population concerned of the hazards of the activities, the safety measures taken to

[4] Now para. 1 *bis*.

prvent a major accident, the emergency procedures planned for the area outside the factory should a major accident occur and the procedures to be followed in the event of an accident. The amendments made to this Article in the aforementioned legislative decree include a new paragraph 1, to the effect that the Civil Defence Department must establish reference criteria for emergency planning and the adoption of measures for the supply of information to the public by the Prefect, and repeal of paragraph 3, which provided that the information referred to in paragraph 2 had to be sent to the Ministry of the Environment, the Ministry of Health and the regional authorities concerned.

32. Section 14(3) of Law No. 349 of 8 July 1986, by which the Ministry for the Environment in Italy was created and the first legal provisions on environmental damage introduced, provides that everyone has a right of access to the information on the state of the environment which is, in accordance with the law, available at the offices of the administrative authorities and may obtain a copy on defrayment of the authorities' costs.

33. In a judgment[5] of 21 November 1991 the Council of Administrative Law for Sicily[6] held that the concept of "information on the state of the environment" included any information about human beings' physical surroundings and concerning matters of some interest to the community. On the basis of those criteria, the Council of Administrative Law held that a district council was not justified in refusing to allow a private individual to obtain a copy of analyses of the fitness of water in the district in question for use as drinking water.

III. *Work by the Council of Europe*

34. Of particular relevance among the various Council of Europe documents in the field under consideration in the present case is Parliamentary Assembly Resolution 1087 (1996) on the consequences of the Chernobyl disaster, which was adopted on 26 April 1996 (at the 16th Sitting). Referring not only to the risks associated with the production and use of nuclear energy in the civil sector but also to other matters, it states "public access to clear and full information ... must be viewed as a basic human right".

PROCEEDINGS BEFORE THE COMMISSION

35. The applicants applied to the Commission on 18 October 1988. Relying on Article 2 of the Convention, they submitted that the lack of practical measures, in particular to reduce pollution levels and major-accident hazards arising out of the factory's operation, infringed their right to respect for their lives and physical integrity. They also

[5] No. 476.

[6] *Consiglio di Giustizia amministrativa per la Regione siciliana*—which in Sicily replaces the Supreme Administrative Court.

complained that the relevant authorities' failure to inform the public about the hazards and about the procedures to be followed in the event of a major accident, as required in particular by Article 11(3) and Article 17(2) of Presidential Decree No. 175/88, infringed their right to freedom of information as guaranteed by Article 10.

36. On 6 July 1995 the Commission declared the application[7] admissible as to the complaint under article 10 and inadmissible as to the remainder. In its report of 29 June 1996,[8] it expressed the opinion by 21 votes to 8 that there had been a breach of that Article. The full text of the Commission's Opinion and of the three dissenting opinions contained in the report follows.

OPINION

A. *Complaint declared admissible*

34.* The Commission has declared admissible the applicants' complaint that the relevant authorities' failure to take steps to inform the public about the hazards of the activity carried on by the factory in question and the correct behaviour to adopt in the event of a major accident, in breach of their obligations under Articles 11(3) and 17(2) of D.P.R. 175 of 17 May 1988, constitutes a violation of their right to freedom of information.

B. *Point at issue*

35. Accordingly, the Commission must determine whether the omissions of which the applicants accuse the Italian authorities constitute a violation of the freedom to receive information within the meaning of Article 10(1) of the Convention.

C. *As regards Article 10 of the Convention*

36. The applicants complain that the relevant authorities' failure to take the public information measures prescribed by Articles 11(3) and 17(2) of D.P.R. 175/88 constitutes a violation of their freedom to receive information and thus of Article 10(1) of the Convention.

Article 10 of the Convention provides:

> 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. ...
> 2. The exercise of these freedoms, since it carries with it duties and

[7] App. No. 14967/89.
[8] Made under Art. 31.
* The paragraph numbering from here to para. 52 in bold is the original numbering of the Commission's Opinion. Then we revert to the numbering of the Court's judgment.—Ed.

responsibilities, 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.

37. The respondent Government claims, first, that the applicants failed to use the mechanism provided under section 14(3) of Law No. 349 of 1986 which would have given them access to the very information which they complain was not disseminated. In this regard, the Government emphasises that the Council of Administrative Law for Sicily has interpreted the scope of this provision very widely.

As to the merits, the Government considers that Article 10 of the Convention cannot be applied to the present case. While the Commission has not, in its previous case law, ruled out the existence of positive obligations in the field of freedom to receive information or ideas, as seen in the case of DE GEILLUSTREERDE PERS N.V. *v.* NETHERLANDS,[9] such obligations are, according to the Government, conceivable only with regard to information designed for publication, and not for information gathered by the State authorities in the course of performing their functions, or in their possession, as in the present case. Moreover, the Government concludes, as case law has established, the search for information is not covered by the Convention.

38. The applicants oppose this argument and emphasise that the information measures required by the relevant provisions of D.P.R. 175/88 have never been taken.

39. The Commission considers that it must first decide whether the applicants could have used the mechanism under section 14(3) of Law No. 349 of 1986. In this regard, it notes, first, that, from a drafting point of view, that provision refers to the environmental information *available*, whereas the information sought by the applicants was not "available", since it had first to be gathered and processed by the competent authorities. Secondly, it is difficult to see how the said mechanism could have been used by the applicants given that, at the material time, D.P.R. 175/88 contained a clause (Article 11(2)) which, for the purposes of protecting industrial secrets, prohibited the relevant authorities from divulging the information in their possession. In other words, it appears that the only possibility of making the information in question known to the public was through the procedures set up specifically for that purpose, precisely because of the need to protect industrial secrets. Moreover, this appears to be confirmed by the safeguard clause contained in Article 11(1), which was drafted in even more general terms, and by the fact that it was later

[9] DE GEILLUSTREERDE PERS N.V. *v.* NETHERLANDS Comm. Rep. 6.7.76. D.R. 8, p. 5.

necessary to amend this provision in order to provide for the possibility of lifting the "industrial secrets" prohibition, but only for certain types of information.[10]

For this reason, the right of access to available environmental information introduced by Law No. 349 of 1986 does not seem to apply to the present case, since at the material time the public could be informed only if the competent authorities took positive steps in accordance with the procedures required for this very purpose. Even after the D.P.R. in question was amended in November 1995, public access is today still limited to certain types of information which, in any event, do not include information on the hazards of the activity in issue, the safety measures or procedures to follow in the event of an accident. This latter kind of information requires now, and required at the material time, positive action on the part of the public authorities to collect, process and publish information.

40. The Commission then notes that the factory in question was declared "high risk" by the State authorities themselves. Having regard to this essential fact, there is, therefore, reason to presume that the Enichem factory was dangerous up until the contentious production process was stopped in 1994—that is, dangerous both to the environment and to the well being of inhabitants of the area liable to be affected. It transpires, *inter alia*, from the report of the Technical Commission appointed by Manfredonia District Council,[11] that this area principally comprised Manfredonia. It follows that the applicants can justifiably claim to be amongst the persons affected by the factory's operations.

Given that section 14(3) of Law No. 349 of 1986 does not apply to the situation in the present case, the question is whether Article 10 of the Convention gave the applicants a right to receive information and obliged the public authorities to take positive steps to inform the public, having regard to the fact that the applicants came from communities directly affected by the Enichem factory's operations, and to the context of the present case.

41. The Commission recalls that "freedom to receive information ... basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him".[12]

42. According to the Convention organs' case law, Article 10 of the Convention imposes on the States, first, a negative obligation of non-interference in the free exchange of information. However, the existence, in certain circumstances, of positive obligations on the States to ensure a right to receive information cannot be excluded in principle. Indeed, the word "basically" used by the Court in the two

[10] See para. 30 above.
[11] See para. 17 above, third sub-paragraph.
[12] See LEANDER *v.* SWEDEN (A/116): (1987) 9 E.H.R.R. 433, para. 74; and GASKIN *v.* UNITED KINGDOM (A/160): (1990) 12 E.H.R.R. 36, para. 52.

cases cited above leaves open the possibility of extending the scope of this provision in this way, by analogy with the interpretation which the Convention organs have developed in the field of Article 8 of the Convention.[13]

43. The current state of European law, of which the European Community and Italian provisions at issue in the present case constitute a significant example, confirms that public information is now an essential tool for protecting public well being and health in situations of danger to the environment. Similar provisions deal, basically, with two types of information:

(a) information on preventative safety measures and the procedures to be followed in the event of an accident. This category of information clearly relates directly to protecting the health, or even the lives, of the persons concerned; and

(b) information on certain features of the industrial or other activity in issue, together with an assessment of the potential risks for employees and workers at the relevant factory, as well as for local residents and the environment. This second category is designed to enable persons affected to satisfy themselves that, in non-emergency situations, the activity in question is being carried out in conformity with the technical rules designed to ensure its compatibility with the protection of the environment and of the local population. The purpose is not merely to enable people to take any initiatives which may be necessary to prevent accidents, but also to enable them to intervene where they are exposed to a level of pollution which is harmful to their well being and health, but does not necessarily reach the level at which it can be described as an accident.

Therefore, the importance of the role which public information now plays in the interdependent fields of environmental protection and of the protection of the health and well being of persons, cannot be overlooked. In this regard, the Commission recalls that "the Convention must be interpreted in the light of present-day conditions ... and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals".[14] Further, "preserving nature is commonly recognised in all Contracting States as being of great importance in present-day society".[15]

44. Moreover, the Commission considers it useful to quote, in this regard, Resolution 1087 (1996) of the Parliamentary Assembly of the Council of Europe referred to above.[16] Referring not merely to the

[13] In this regard, see, among many other authorities, *mutatis mutandis*, BELGIAN LINGUISTICS CASE (A/6): 1 E.H.R.R. 252, para. 7.

[14] See, *mutatis mutandis*, AIREY *v.* IRELAND (A/32): 2 E.H.R.R. 305, para. 26.

[15] See FREDIN *v.* SWEDEN (A/192): (1991) 13 E.H.R.R. 784, para. 69 of the Commission's Report.

[16] See para. 33 above.

risks associated with the production and use of civil nuclear energy, but also to other matters, this resolution states that "public access to clear and full information ... must be viewed as *a basic human right*".[17]

The fact that such a principle has been set out in a resolution of the Parliamentary Assembly of the Council of Europe constitutes, in the Commission's eyes, evidence that a body of opinion is developing, at least on the European level, which seeks to obtain recognition for the existence of a fundamental right to information in the field of industrial or other activities dangerous to the environment and the well being of individuals.

45. The importance of a right to information in this field derives from its *raison d'être*, which is to protect the well being and health of the persons concerned and so, indirectly, rights which are covered by other provisions of the Convention. In this regard, the Commission recalls that "severe environmental pollution may affect individuals' well being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely".[18] Moreover, it cannot be ruled out that in extreme situations human life itself may be endangered, which could, in theory, engage the responsibility of the State under provisions of the Convention other than Article 8, which protect rights which are no less "fundamental".

46. These considerations also lead the Commission to recall that the Convention may sometimes protect the same right by different means. In the present case, what requires protection is, in the last analysis, the applicants' right to life and also (and this applies whether or not the emissions from the Manfredonia factory were dangerous), the right to respect for their private life and their home in the sense of the Court judgment in the case of LÓPEZ OSTRA *v.* SPAIN, cited above. The right to information, as invoked by the applicants, is a further development of this line of reasoning. In effect, this provision provides additional protection for the other fundamental rights referred to above. Having regard to the nature of the right to receive information in the field of environmental protection, the additional protection provided by Article 10 also, and above all, plays a preventative role *vis-à-vis* potential violations of the Convention in the event of serious environmental pollution.

47. The Commission considers, accordingly, that, in the interdependent fields of the protection of the environment, of public health and of the well being of individuals, the words, "this right shall include freedom to ... receive ... information" contained in the first paragraph of Article 10 should be interpreted as granting an actual right to receive information, in particular from the competent authorities, to persons from sections of the population which have been or which may be affected by an industrial or other activity dangerous to the environment.

[17] para. 4; emphasis added.
[18] See LOPEZ OSTRA *v.* SPAIN (A/303–C): (1995) 20 E.H.R.R. 277, para. 51.

48. A different conclusion, ruling out the existence of a right to information in such circumstances, would remove a crucial means of protecting rights covered by other Articles of the Convention, such as Article 8, and would go against the fundamental principle of Article 1 of the Convention,[19] which obliges the State to adopt all necessary measures to guarantee the *effective* enjoyment of the rights guaranteed by the Convention. This principle therefore provides a justification for finding that there is a right to information in the field of environmental protection, for the purpose of indirectly strengthening the protection of the other rights guaranteed by the Convention which such a right to information aims to protect.

Further, this right must be guaranteed in a complete and effective manner. The "fulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive and 'there is ... no room to distinguish between acts and omissions' ".[20]

49. Therefore, Article 10 of the Convention places the State under an obligation, not only to make environmental information accessible to the public[21] but also under positive obligations to collect, process and disseminate information which, by its very nature, is not directly accessible and which cannot be known to the public unless the public authorities act accordingly.

50. In the present case, none of the public information measures provided for in Articles 11 and 17 D.P.R. 175/88 were ever taken, either by the mayor or the Prefect, from the time when the D.P.R. was enacted until the controversial production process ceased in 1994. Admittedly, the Prefect did adopt an emergency plan as required by Article 17, but it does not appear from the case file that this plan was ever made operational or that the applicants were informed of it. Moreover, as of 7 December 1995, the mayor of Monte Sant'Angelo had not even been notified that on 14 September 1993—that is, more than two years earlier—the Ministries for the Environment and of Health had adopted conclusions concerning the factory's report, as required by Article 19 of D.P.R. 175/88.

51. Having regard to their positive obligations in the field of information under Article 10 of the Convention, the competent authorities should, at least between May 1988 (the date of issue of D.P.R. 175/88) and 1994 (the year in which the controversial production process ceased) have taken the necessary measures for the applicants, who were living in a high-risk area, to receive adequate information on issues concerning the protection of their environment. It is not for the Commission to dictate, or even to indicate, the nature

[19] See, in particular, the English version, in the words of which, "the High Contracting Parties *shall secure* ... the rights and freedoms"—emphasis added.

[20] See, *mutatis mutandis*, AIREY *v.* IRELAND, *loc. cit.*, para. 25 and MARCKX *v.* BELGIUM (A/31): 2 E.H.R.R. 330, para. 31.

[21] A requirement which Italian law appears to fulfil by means of section 14(3) of Law No. 349 of 8 July 1986.

or scope of the measures to be taken: all that the Convention requires is that an individual should enjoy a right of effective access to the relevant information on the hazards of his environment, save where there is an overriding public interest in keeping such information confidential.[22]

Conclusion

52. The Commission concludes, by 21 votes to 8, that there has been a violation of Article 10 of the Convention.

Dissenting Opinion of Mr H. Danelius, joined by Mr P. Lorenzen

In my opinion, Article 10 of the Convention grants everyone (subject to the exceptions set out in the second paragraph of that Article) the right to receive information which others are willing to impart to him. On the other hand, the right laid down in Article 10 does not comprise a right to obtain information which the person holding it—whether a public body or a private person—does not wish to provide. This interpretation appears to be in conformity with the Court's conclusion in the cases of LEANDER and GASKIN.[23]

It follows, in my view, that there has been no violation of Article 10 of the Convention in the present case.

I wish to add that the question whether, on the facts, the applicants' right to respect for their private life, as protected by Article 8 of the Convention, could arise[24] is not in issue at the present stage of the proceedings, given that the Commission, in its decision on admissibility, has already rejected that part of the application for non-exhaustion of domestic remedies.

Dissenting Opinion of Mr H. G. Schermers

I disagree with the majority of the Commission, but not as regards the Italian Government's obligation to inform the applicants of any risk known to the Government liable to affect the health of those who live near a dangerous factory. Rather, I disagree with the finding that Article 10 is applicable.

In my opinion the objections expressed by Mr Danelius in his Dissenting Opinion, albeit certainly valid, are not decisive. Following the majority's reasoning I could accept a wide interpretation in a situation such as the one here, concerning the issue of information.

However, a Government's duty is, above all, a duty to regulate rather than to inform. The aim of such an obligation is not to provide information to those who live near dangerous factories, but to protect their private lives. The Government's principal task is to monitor

[22] See, *mutatis mutandis*, AIREY *v.* IRELAND, *loc. cit.*, para. 26.

[23] LEANDER *v.* SWEDEN, *loc. cit.*, para. 74 and GASKIN *v.* UNITED KINGDOM, *loc. cit.*, para. 52.

[24] See LEANDER *v.* SWEDEN, *loc. cit.* and GASKIN *v.* UNITED KINGDOM, *loc. cit.*

industry. Without monitoring, no information will emerge, and an obligation to provide information makes no sense without an obligation to obtain this information.

That is why I fear that the Commission was wrong to deal with this case under Article 10. This approach places too much emphasis on one element of the Government's obligations, and one which is not the most important.

The nub of the case is the need to protect the private lives of the applicants under Article 8.

In its decision on admissibility, the Commission concluded that the non-exhaustion argument did not apply to the Government's failure to inform the applicants. If that is true for Article 10, it is also true for Article 8. In the present case, the obligation to respect the applicants' private lives includes an obligation to regulate dangerous factories and to give all possible assistance to the local residents. The obligation to inform is but one aspect of such assistance—an aspect which cannot be separated out by reference to an Article other than Article 8.

In my opinion, the Commission should have found a violation of Article 8 and not of Article 10.

Dissenting Opinion of Mrs G. H. Thune, Mm M. A. Nowicki, B. Conforti and N. Bratza

We regret that we are unable to agree with the majority of the Commission and have voted against a finding of a violation of Article 10 of the Convention, preferring a different approach to the issues raised by the present case.

Two separate complaints were raised by the applicants. In the first place, it was argued that, having regard to the seriousness of the risks resulting from the normal operation of the Enichem plant to the health and safety of the inhabitants of Manfredonia, the lack of concrete measures to reduce the pollution from the plant and the risk of major accidents gave rise to an unjustified interference with the applicants' right to respect for life and physical integrity guaranteed by Article 2 of the Convention. In its decision on admissibility the Commission chose to examine this complaint under Article 8 of the Convention and declared the complaint inadmissible on the grounds that the applicants had failed to exhaust domestic remedies by omitting to commence proceedings with a view to suspending or prohibiting the operation of the plant or to requiring the adoption of the technical measures necessary to eliminate the risks to which the applicants were currently exposed.

The applicants' second complaint, while related, is a separate and distinct complaint made for the first time in a letter of 31 December 1992: the applicants there alleged that the failure of the competent national authorities to adopt measures designed to inform the public about the risks posed by the plant or the precautions to be followed in

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the event of a major accident, as required by the provisions, *inter alia*, of the 1988 Presidential Decree (D.P.R. 175/88) amounted to an interference with the applicants' right to freedom of information. The applicants alleged in this regard a violation of Article 10 of the Convention, arguing that the Article, by providing for the "freedom ... to receive ... information", guaranteed the right to obtain or be provided with information which was essential for the protection of the health and safety of the population. In its decision on admissibility the Commission declared this complaint admissible. While the preliminary investigation of the claim in the Commission's decision was specifically related to Article 10 of the Convention, the complaint declared admissible was general in nature: *"la non-adoption par les autorités compétents des mesures d'information sur les risques encourus et les mesures à adopter en cas d'accident majeur, prévues par les articles 11 par. 3 et 17 par. 2 du D.P.R. No. 175 du 17 mai 1988"*.

The fact that the applicants related this complaint to their rights under Article 10 of the Convention and that the Commission chose to examine the complaint under that Article at the admissibility stage does not in our view preclude the Commission from treating the facts underlying the complaints which were declared admissible as raising issues under other Articles of the Convention.[25]

The majority of the Commission have continued to interpret the complaint as raising issues under Article 10 of the Convention and have concluded that the Article imposes on the Contracting States not only an obligation to afford the public access to information concerned with environmental matters but a positive obligation to collect, collate and disseminate information which would otherwise not be directly accessible to the public or brought to the public's attention.

In our view this is to stretch the meaning of Article 10 too far. While it is true that the right guaranteed by the Article is expressed to include the freedom to receive information and while we accept that the Article may impose on Member States certain positive obligations to secure the right to freedom of expression, we are unable to accept that the Article can be interpreted as obliging a State to assemble, collate and disseminate information, even in a case when such measures may be required as a matter of domestic law. Such an interpretation of the article in our view not only distorts the natural meaning of the words of the article but is inconsistent with the established case law of the Court which is to the effect that "the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others could or may be willing to impart to him".[26] It follows from these judgments in our view that Article 10 cannot be interpreted as imposing an obligation on the holder of information, whether a public authority or a private individual, to

[25] See FAYED *v.* UNITED KINGDOM (A/294–B): (1994) 18 E.H.R.R. 393, para. 67.

[26] See LEANDER *v.* SWEDEN, *loc. cit.*, para. 74 and GASKIN *v.* UNITED KINGDOM, *loc. cit.*, para. 52.

impart such information, still less to assemble and prepare information for communication to another.

On the other hand, we find, like the majority, that the Italian authorities failed to make available to the applicants information which was essential to the proper protection of their health and physical integrity. This in our view raises issues not under Article 10 but again under Article 8 of the Convention. As the Court has consistently held, although the essential object of Article 8 is to protect the individual against arbitrary interference by public authorities, there may in addition be positive obligations inherent in an effective respect for private life, albeit subject to the State's margin of appreciation and to the requirement that a fair balance be struck between the competing interests of the individual and of the community as a whole.[27] As the Court has further held, this positive obligation may extend to requiring a State to take reasonable and appropriate measures to protect an applicant from severe environmental pollution which may affect individuals' well being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, even in a case where health is not seriously endangered.[28]

In our view where, as in the present case, the health and safety of individuals are directly at stake there is a positive obligation on national authorities under Article 8 to provide relevant information so as to minimise the risk posed to the inhabitants by the Enichem plant.

For substantially the reasons given by the majority of the Commission for finding that the Italian authorities did not comply with their obligations under Article 10, we consider that there was a failure on the part of the authorities to ensure a fair balance and to secure the applicants' rights under Article 8 of the Convention.

JUDGMENT

I. *Scope of the case*

39. Before the Commission the applicants made two complaints. First, the authorities had not taken appropriate action to reduce the risk of pollution by the Enichem agriculture chemical factory at Manfredonia ("the factory") and to avoid the risk of major accidents; that situation, they asserted, infringed their right to life and physical integrity as guaranteed by Article 2 of the Convention. Secondly, the Italian State had failed to take steps to provide information about the risks and how to proceed in the event of a major accident, as they were required to do by Articles 11(3) and 17(2) of Presidential Decree No.

[27] See ABDULAZIZ, CABALES AND BALKANDALI *v.* UNITED KINGDOM (A/94): (1985) 7 E.H.R.R. 471, para. 67 and REES *v.* UNITED KINGDOM (A/106): (1987) 9 E.H.R.R. 56, para. 35.

[28] See LOPEZ OSTRA *v.* SPAIN, *loc. cit.*, para. 51.

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175/88; as a result the applicants considered that there had been a breach of their right to freedom of information laid down in Article 10 of the Convention.

40. On 6 July 1995 the Commission, by a majority vote, upheld the Government's preliminary objection that domestic remedies had not been exhausted in respect of the first issue and declared the remainder of the application admissible, "without prejudging the merits".

In its report of 25 June 1996 it considered the case under Article 10 of the Convention and decided that that provision was applicable and had been breached since, at least during the period between the issue of D.P.R. 175/88 in May 1988 and the cessation of fertiliser production in 1994, the relevant authorities were under an obligation to take the necessary steps so that the applicants, who were living in a high-risk area, could "receive adequate information on issues concerning the protection of their environment". Eight members of the Commission expressed their disagreement in three dissenting opinions, two of which pointed to the possibility of a different approach to the case, on the basis that Article 8 of the Convention was applicable to the complaint declared admissible.

41. In their memorial to the Court and at the hearing the applicants relied also on Articles 8 and 2 of the Convention, contending that the failure to provide them with the relevant information had infringed their right to respect for their private and family life and their right to life.

42. Before the Court the Delegate of the Commission merely reiterated the conclusion set out in the report,[29] whereas the Government argued that the complaints under Articles 8 and 2 fell outside the compass of the case as delimited by the decision on admissibility.

It is therefore necessary to determine as a preliminary issue the extent of the Court's jurisdiction *ratione materiae*.

43. The Court observes, first, that its jurisdiction "extend[s] to all cases concerning the interpretation and application of [the] Convention which are referred to it in accordance with Article 48"[30] and that "in the event of dispute as to whether the Court has jurisdiction, the matter [is] settled by the decision of the Court".[31]

44. Secondly, it reiterates that since the Court is master of the characterisation to be given in law to the facts of the case, it does not consider itself bound by the characterisation given by an applicant, a government or the Commission. By virtue of the *jura novit curia* principle, it has, for example, considered of its own motion complaints under Articles or paragraphs not relied on by those appearing before it and even under a provision in respect of which the Commission had declared the complaint to be inadmissible while declaring it admissible

[29] That there had been a violation of Art. 10.
[30] See Art. 45 of the Convention, as amended by Protocol No. 9.
[31] Art. 49.

under a different one. A complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on.[32]

The Court has full jurisdiction only within the scope of the "case", which is determined by the decision on the admissibility of the application. Within the compass thus delimited, the Court may deal with any issue of fact or law that arises during the proceedings before it.[33]

45. In the instant case the grounds based on Articles 8 and 2 were not expressly set out in the application or the applicants' initial memorials lodged in the proceedings before the Commission. Clearly, however, those grounds were closely connected with the one pleaded, namely that giving information to the applicants, all of whom lived barely a kilometre from the factory, could have had a bearing on their private and family life and their physical integrity.

46. Having regard to the foregoing and to the Commission's decision on admissibility, the Court holds that it has jurisdiction to consider the case under Articles 8 and 2 as well as under Article 10.

II. *Alleged violation of Article 10 of the Convention*

47. The applicants alleged that they were the victims of a violation of Article 10 of the Convention, which provides:

> 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 intereference 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 responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are presecribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The alleged breach resulted from the authorities' failure to take steps to ensure that the public were informed of the risks and of what was to be done in the event of an accident connected with the factory's operation.

A. *The Government's preliminary objection*

48. As they had done before the Commission, the Government raised a preliminary objection of failure to exhaust domestic remedies, to which there were two limbs.

[32] See POWELL AND RAYNER *v.* UNITED KINGDOM (A/172): (1990) 12 E.H.R.R. 355, para. 29.

[33] See, among many other authorities, PHILIS *v.* GREECE (NO. 1) (A/209): (1991) 13 E.H.R.R. 741, para. 56.

In the first limb the Government argued that it was possible to make an urgent application under Article 700 of the Code of Civil Procedure. If the applicants had feared imminent danger in connection with the operation of the factory, they could and should have sought a court order affording them instant protection of their rights. The Government acknowledged their failure to provide examples of similar cases in which Article 700 had been applied but said that, regardless of whether that provision could be used against a public body, it could certainly be used against a factory which, as in the present case, had not produced a safety report as required by Article 5 of D.P.R. 175/88.[34]

The second limb concerned the fact that the applicants had not complained to a criminal court about the lack of relevant information from, in particular, the factory, whereas such omissions constituted an offence under Article 21 of D.P.R. 175/88.

49. The Court considers that neither remedy would have enabled the applicants to achieve their aim.

Even though the Government was unable to prove that an urgent application would have been effective as environmental cases had still not given rise to any authoritative judicial decision in the relevant area, Article 700 of the Code of Civil Procedure would have been a practicable remedy if the applicants' complaint had concerned a failure to take measures designed to reduce or eliminate pollution; indeed, that was the Commission's conclusion when it ruled on the admissibility of the application.[35] In reality, the complaint in the instant case was that information about the risks and about what to do in the event of an accident had not been provided, whereas an urgent application would probably have resulted in the factory's operation being suspended.

As to instituting criminal proceedings, the safety report was submitted by the factory on 6 July 1989[36] and if the applicants had lodged a criminal complaint they would at most have secured the conviction of the factory's managers, but certainly not the communication of any information.

The objection must therefore be dismissed.

B. *Merits of the complaint*

50. It remains to be determined whether Article 10 of the Convention is applicable and, if so, whether it has been infringed.

51. In the Government's submission, that provision merely guaranteed freedom to receive information without hindrance by States; it did not impose any positive obligation. That was shown by the fact that Resolution 1087 of the Council of Europe's Parliamentary

[34] See para. 28 above.
[35] See para. 40 above.
[36] See para. 22 above.

Assembly and Directive 90/313/EEC of the Council of the European Communities on freedom of access to information on the environment spoke merely of access, not a right, to information. If a positive obligation to provide information existed, it would be "extremely difficult to implement" because of the need to determine how and when the information was to be disclosed, which authorities were responsible for disclosing it and who was to receive it.

52. Like the applicants, the Commission was of the Opinion that the provision of information to the public was now one of the essential means of protecting the well being and health of the population in situations in which the environment was at risk. Consequently the words, "This right shall include freedom ... to receive information ..." in paragraph 1 of Article 10 had to be construed as conferring an actual right to receive information, in particular from the relevant authorities, on members of local populations who had been or might be affected by an industrial or other activity representing a threat to the environment.

Article 10 imposed on States not just a duty to make available information to the public on environmental matters, a requirement with which Italian law already appeared to comply, by virtue of section 14(3) of Law No. 349 in particular, but also a positive obligation to collect, process and disseminate such information, which by its nature could not otherwise come to the knowledge of the public. The protection afforded by Article 10 therefore had a preventive function with respect to potential violations of the Convention in the event of serious damage to the environment and Article 10 came into play even before any direct infringement of other fundamental rights, such as the right to life or to respect for private and family life, occurred.

53. The Court does not subscribe to that view. In cases concerning restrictions on freedom of the press it has on a number of occasions recognised that the public has a right to receive information as a corollary of the specific function of journalists, which is to impart information and ideas on matters of public interest.[37] The facts of the present case are, however, clearly distinguishable from those of the aforementioned cases since the applicants complained of a failure in the system set up pursuant to D.P.R. 175/88, which had transposed into Italian law Directive 82/501/EEC of the Council of the European Communities[38] on the major-accident hazards of certain industrial activities dangerous to the environment and the well being of the local population. Although the Prefect of Foggia prepared the emergency plan on the basis of the report submitted by the factory and the plan was sent to the Civil Defence Department on 3 August 1993, the applicants have yet to receive the relevant information.[39]

[37] See, among other authorities, OBSERVER AND GUARDIAN *v.* UNITED KINGDOM (A/216): (1992) 14 E.H.R.R. 153, para. 59(b) and THORGEIRSON *v.* ICELAND (A/239): (1992) 14 E.H.R.R. 843, para. 63.

[38] See the Seveso Directive.

[39] See paras 26 and 27 above.

The Court reiterates that freedom to receive information, referred to in paragraph 2 of Article 10 of the Convention, "basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him".[40] That freedom cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion.

54. In conclusion, Article 10 is not applicable in the instant case.

55. In the light of what was said in paragraph 45 above, the case falls to be considered under Article 8 of the Convention.

III. *Alleged violation of Article 8 of the Convention*

56. The applicants, relying on the same facts, maintained before the Court that they had been the victims of a violation of Article 8 of the Convention, which provides:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

57. The Court's task is to determine whether Article 8 is applicable and, if so, whether it has been infringed.

The Court notes, first, that all the applicants live at Manfredonia, approximately a kilometre away from the factory, which, owing to its production of fertilisers and caprolactam, was classifed as being high-risk in 1988, pursuant to the criteria laid down in D.P.R. 175/88.

In the course of its production cycle the factory released large quantities of inflammable gas and other toxic substances, including arsenic trioxide. Moreover, in 1976, following the explosion of the scrubbing tower for the ammonia synthesis gases, several tonnes of potassium carbonate and bicarbonate solution, containing arsenic trioxide, escaped and 150 people had to be hospitalised on account of acute arsenic poisoning.

In addition, in its report of 8 December 1988, a committee of technical experts appointed by the Manfredonia District Council said in particular that because of the factory's geographical position, emissions from it into the atmosphere were often channelled towards Manfredonia.[41]

The direct effect of the toxic emissions on the applicants' right to respect for their private and family life means that Article 8 is applicable.

58. The Court considers that Italy cannot be said to have

[40] See LEANDER *v.* SWEDEN, *loc. cit.*, para. 74.
[41] See paras 14–16 above.

"interfered" with the applicants' private or family life; they complained not of an act by the State but of its failure to act. However, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life.[42]

In the present case it need only be ascertained whether the national authorities took the necessary steps to ensure effective protection of the applicants' right to respect for their private and family life as guaranteed by Article 8.[43]

59. On 14 September 1993, pursuant to Article 19 of D.P.R. 175/88, the Ministry for the Environment and the Ministry of Health jointly adopted conclusions on the safety report submitted by the factory in July 1989. Those conclusions prescribed improvements to be made to the installations, both in relation to current fertiliser production and in the event of resumed caprolactam production, and provided the Prefect with instructions as to the emergency plan—that he had drawn up in 1992—and the measures required for informing the local population under Article 17 of D.P.R. 175/88.

In a letter of 7 December 1995 to the European Commission of Human Rights, however, the mayor of Monte Sant'Angelo indicated that the investigation for the purpose of drawing up conclusions under Article 19 was still continuing and that he had not received any documents relating to them. He pointed out that the District Council was still awaiting direction from the Civil Defence Department before deciding what safety measures should be taken and what procedures should be followed in the event of an accident and communciated to the public. He said that if the factory resumed production, the measures for informing the public would be taken as soon as the conclusions based on the investigation were available.[44]

60. The Court reiterates that severe environmental pollution may affect individuals' well being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely.[45] In the instant case the applicants waited, right up until the production of fertilisers ceased in 1994, for essential information that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory.

The Court holds, therefore, that the respondent State did not fulfil its obligation to secure the applicants' right to respect for their private and family life, in breach of Article 8 of the Convention.

There has consequently been a violation of that provision.

[42] See AIREY *v.* IRELAND, *loc. cit.*, para. 32.
[43] See LOPEZ OSTRA *v.* SPAIN, *loc. cit.*, para. 55.
[44] See para. 27 above.
[45] See, *mutatis mutandis*, LOPEZ OSTRA *v.* SPAIN, *loc. cit.*, para. 51.

IV. *Alleged violation of Article 2 of the Convention*

61. Referring to the fact that workers from the factory had died of cancer, the applicants also argued that the failure to provide the information in issue had infringed their right to life as guaranteed by Article 2 of the Convention, which provides:

> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
> (a) in defence of any person from unlawful violence;
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

62. Having regard to its conclusion that there has been a violation of Article 8, the Court finds it unnecessary to consider the case under Article 2 also.

V. *Application of Article 50 of the Convention*

63. Article 50 of the Convention provides:

> If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

A. *Damage*

64. The applicants sought compensation for "biological" damage; they claimed 20,000,000,000 lire.

65. In the Government's submission, the applicants had not shown that they had sustained any damage and had not even described it in detail. If the Court were to hold that there had been non-pecuniary damage, a finding of a violation would constitute sufficient just satisfaction for it.

66. The Delegate of the Commission invited the Court to award the applicants compensation that was adequate and proportionate to the considerable damage they had suffered. He suggested a sum of 100,000,000 lire for each applicant.

67. The Court considers that the applicants did not show that they had sustained any pecuniary damage as a result of the lack of information of which they complained. As to the rest, it holds that the applicants undoubtedly suffered non-pecuniary damage and awards them 10,000,000 lire each.

B. *Costs and expenses*

68. The applicants were granted legal aid for the proceedings before the Court in the amount of 16,304 FF; however, at the end of the hearing their Counsel lodged an application with the registry for an additional sum in respect of her fees.

69. Neither the Government nor the Delegate of the Commission expressed a view on the matter.

70. Having regard to the amount already granted in legal aid and the lateness of the application,[46] the Court dismisses the claim.

C. *Other claims*

71. Lastly, the applicants sought an order from the Court requiring the respondent State to decontaminate the entire industrial estate concerned, to carry out an epidemiological study of the area and the local population and to undertake an inquiry to identify the possible serious effects on residents most exposed to substances believed to be carcinogenic.

72. The Government submitted that those claims were inadmissible.

73. The Delegate of the Commission expressed the view that a thorough and efficient inquiry by the national authorities together with the publication and communication to the applicants of a full, accurate report on all the relevant aspects of the factory's operation over the period in question, including the harm actually caused to the environment and people's health, in addition to the payment of just satisfaction, would meet the obligation laid down in Article 53 of the Convention.

74. The Court notes that the Convention does not empower it to accede to such a request. It reiterates that it is for the State to choose the means to be used in its domestic legal system in order to comply with the provisions of the Convention or to redress the situation that has given rise to the violation of the Convention.[47]

D. *Default interest*

75. According to the information available to the Court, the statutory rate of interest applicable in Italy at the date of adoption of the present judgment is 5 per cent per annum.

For these reasons, THE COURT

1. *Dismisses* by 19 votes to 1 the Government's preliminary objection;
2. *Holds* by 18 votes to 2 that Article 10 of the Convention is not applicable in the instant case;

[46] See Rules 39(1) and 52(1) of the Rules of the Court B.

[47] See, *mutatis mutandis*, ZANGHI *v.* ITALY (A/194–A): not published in E.H.R.R., para. 26; DEMICOLI *v.* MALTA (A/210): (1992) 14 E.H.R.R. 47, para. 45; and YAGCI AND SARGIN *v.* TURKEY (A/319–A): (1995) 20 E.H.R.R. 505, para. 81.

3. *Holds* unanimously that Article 8 of the Convention is applicable and has been infringed;
4. *Holds* unanimously that it is unnecessary to consider the case under Article 2 of the Convention also;
5. *Holds* unanimously:
   (a) that the respondent State is to pay each of the applicants, within three months, 10,000,000 (ten million) lire in respect of non-pecuniary damage; and
   (b) that simple interest at an annual rate of 5 per cent shall be payable on that sum from the expiry of the abovementioned three months until settlement;
6. *Dismisses* unanimously the remainder of the claim for just satisfaction.

In accordance with Article 51(2) of the Convention and Rule 55(2) of Rules of Court B, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mr Walsh;
(b) concurring opinion of Mrs Palm joined by Mr Bernhardt, Mr Russo, Mr Macdonald, Mr Makarczyk and Mr Van Dijk;
(c) concurring opinion of Mr Jambrek;
(d) partly concurring opinion and partly dissenting opinion of Mr Thór Vilhjálmsson;
(e) partly dissenting opinion and partly concurring opinion of Mr Mifsud Bonnici.

Concurring Opinion of Judge Walsh

While bearing in mind that a breach of the Convention can frequently have implications for Articles other than the Article claimed to have been violated, I am fully in agreement that on the particular facts of this case Article 8 is the more appropriate article to examine than Article 10. The Convention and its Articles must be construed harmoniously. While the Court in its judgment has briefly mentioned Article 2, but has not ruled on it, I am of the opinion that this provision has also been violated.

In my view Article 2 also guarantees the protection of the bodily integrity of the applicants. The wording of Article 3 also clearly indicates that the Convention extends to the protection of bodily integrity. In my opinion there was a violation of Article 2 in the present case and in the circumstances it is not necessary to go beyond this provision in finding a violation.

Concurring Opinion of Mrs Palm, joined by Mr R. Bernhardt, Mr Russo, Mr Macdonald, Mr Makarczyk and Mr Van Dijk

I have voted with the majority in favour of holding that Article 10 of the Convention is not applicable in the present case. In doing so I have

put strong emphasis on the factual situation at hand not excluding that under different circumstances the State may have a positive obligation to make available information to the public and to disseminate such information which by its nature could not otherwise come to the knowledge of the public. This view is not inconsistent with what is stated in paragraph 53 of the judgment.

Concurring Opinion of Judge Jambrek

In their memorial the applicants also expressly complained of a violation of Article 2 of the Convention. The Court held that it was not necessary to consider the case under that Article given that it had found a violation of Article 8. I wish, nevertheless, to make some observations on the possible applicability of Article 2 in this case.

Article 2 states that "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save ...". The protection of health and physical integrity is, in my view, as closely associated with the "right to life" as with the "respect for private and family life". An analogy may be made with the Court's case law on Article 3 concerning the existence of "foreseeable consequences"; where—*mutatis mutandis*—substantial grounds can be shown for believing that the person(s) concerned face a real risk of being subjected to circumstances which endanger their health and physical integrity, and thereby put at serious risk their right to life, protected by law. If information is withheld by a government about circumstances which foreseeably, and on substantial grounds, present a real risk of danger to health and physical integrity, then such a situation may also be protected by Article 2 of the Convention: "No one shall be deprived of his life intentionally."

It may therefore be time for the Court's case law on Article 2 (the right to life) to start evolving, to develop the respective implied rights, articulate situations of real and serious risk to life, or different aspects of the right to life. Article 2 also appears relevant and applicable to the facts of the instant case, in that 150 people were taken to hospital with severe arsenic poisoning. Through the release of harmful substances into the atmosphere, the activity carried on at the factory thus constituted a "major-accident hazard dangerous to the environment".

As to the applicability of Article 10, I am of the opinion that it could be considered applicable in the present case subject to a specific condition. This Article stipulates that "Everyone has the right ... to receive ... information and ideas without interference by public authority ... The exercise of [this right] ... may be subject to [certain] restrictions ...". In my view, the wording of Article 10, and the natural meaning of the words used, does not allow the inference to be drawn that a State has positive obligations to provide information, save when a person of his/her own will demands/requests information which is at the disposal of the Government at the material time.

I am therefore of the opinion that such a positive obligation should be considered as dependent upon the following condition: that those who are potential victims of the industrial hazard have requested that specific information, evidence, tests, etc., be made public and be communciated to them by a specific government agency. If a government did not comply with such a request, and gave no good reasons for not complying, then such a failure should be considered equivalent to an act of intereference by the government, proscribed by Article 10 of the Convention.

Partly Concurring Opinion and Partly Dissenting Opinion of Mr Thór Vilhjámsson

In principle, I agree with the conclusion and the arguments of the majority of the Commission in this case. The Court is of another opinion. Even though I would have preferred the case to be dealt with under Article 10 of the Convention, it is also possible for the Court to approach the questions raised by applying Article 8. I therefore voted with the majority as concerns that Article as well as Article 2 and Article 50.

Dissenting and Partly Concurring Opinion of Judge Mifsud Bonnici

1. In paragraph 49 of the judgment the Court rejects the Government's preliminary plea that the appicants had not exhausted the domestic remedies at their disposal, as they were obliged to do by Article 26 of the Convention.

2. The first subparagraph of that paragraph of the judgment contains the following passage:

> In reality the complaint in the instant case was that information about the risks and about what to do in the event of an accident had not been provided, and an urgent application would probably have resulted in the factory's operation being suspended. (Emphasis supplied)

3. Since the probable result of recourse to this domestic remedy would have been the suspension of the factory's operation, I cannot envisage a more effectual remedy for the violations which the applicants claimed to have suffered; inasmuch as the lack of information by the authorities would have resulted in the suspension of the factory's operation. During the trial all the necessary information would have had to be supplied in court and, of course, the violations of Article 8 would also have been remedied.

4. As to the criminal action, this too, if successful, coud have led to a civil action for damages which the Italian legal order places at the disposal of every person who has been a victim of an offence of any shape or form.

5. It is clear therefore not only that the applicants had at their disposal a number of actions at law according to the Italian legal order but also that, unfortunately, they did not have recourse to any of those

actions. I am therefore of the opinion that the Government's preliminary objection should have been allowed.

6. Since the great majority of my colleagues held otherwise, I had no option but to join them in the other operative parts of the judgment.

CEYLAN *v.* TURKEY
(Conviction following publication of political article)

BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

(*The President*, Judge Wildhaber; *Judges* Palm, Pastor Ridruejo, Bonello, Makarczyk, Kuris, Costa, Tulkens, Stráznická, Fischbach, Butkevych, Casadevall, Greve, Baka, Maruste, Traja, Gölcüklü)

Application No. 23556/94
8 July 1999

The applicant, a trade union leader, was convicted of incitement to hatred and hostility and sentenced to imprisonment and a fine because of an article he wrote. Relying on Article 10 of the Convention and on Article 14 in conjunction with Article 10, he complained that his conviction violated his right to freedom of expression and that he had been discriminated against on the grounds of his political opinions. He also claimed just satisfaction under Article 41.

Held:

(1) by 16 votes to one that there had been a breach of Article 10 of the Convention;

(2) unanimously that no separate issue arose under Article 10 of the Convention read in conjunction with Article 14;

(3) unanimously that the applicant was estopped from bringing a complaint under Article 6(1) of the Convention;

(4) by 16 votes to one:

(a) that the respondent Government pay the applicant, within three months, the following sums, to be converted into Turkish liras at the rate applicable on the date of settlement:

(i) 40,000 FF for non-pecuniary damage;

(ii) 15,000 FF in respect of costs and expenses;

(b) that simple interest at an annual rate of 3.74 per cent be payable from the expiry of the above-mentioned three months until settlement;

(5) unanimously that the remainder of the applicant's claims for just satisfaction be dismissed.

1. Freedom of expression: interference; "prescribed by law"; legitimate aims; "necessary in a democratic society" (Art. 10).

(a) In his application the applicant submitted that his conviction had infringed Articles 9 and 10 of the Convention. At the hearing before the Court, however, he did not object to his complaint being examined under Article 10 alone, as the Government and the Commission had proposed. [23]

(b) All those appearing before the Court agreed that the applicant's conviction as a result of the publication of his article amounted to an "interference" with the exercise of his right to freedom of expression. Such an interference is in breach of Article 10 unless it satisfies the requirements laid down in Article 10(2). The Court

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must therefore determine whether it was "prescribed by law", was motivated by one or more of the legitimate aims set out in that paragraph and was "necessary in a democratic society" for achieving such aim or aims. [24]

(c) It was not disputed that the applicant's conviction was based on Article 312(2) and (3) of the Turkish Criminal Code and it must therefore be regarded as "prescribed by law" for the purposes of the second paragraph of Article 10. [25]

(d) Article 312 of the Criminal Code makes it a punishable offence to incite others to hatred or hostility on the basis of a distinction between social classes, races, religions, denominations or regions. It provides that the penalty shall be increased where such incitement endangers public safety. Having regard to the sensitivity of the security situation in south-east Turkey, and to the need for the authorities to be alert to acts capable of fuelling additional violence, the Court accepts that the applicant's conviction can be said to have been in furtherance of the aims cited by the Government. This is certainly true where, as in south-east Turkey at the time of the circumstances of this case, there was a separatist movement having recourse to methods relying on the use of violence. [28]

(e) The Court reiterates the fundamental principles underlying its judgments relating to Article 10, as set out in, for example, in ZANA *v.* TURKEY and FRESSOZ AND ROIRE *v.* FRANCE:

(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to Article 10(2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.

(ii) The adjective "necessary", within the meaning of Article 10(2), implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10.

(iii) In exercising its supervisory jurisdiction, the Court must look at the interference in the light of the case as a whole, including the content of the impugned statements and the context in which they were made. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national autorities to justify it are "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts. [32]

(f) The article in issue took the form of a political speech, both in its content and in the kind of terms employed. Using words with Marxist connotations, the applicant offers an explanation of the renewal of violence in Eastern and South-Eastern Anatolia over the previous few years. The core of his argument appears to be that the Kurdish movement is part of—or at least should be part of—a general struggle for freedom and democracy being waged by "the Turkish working class and its economic and democratic organisations". The article's message is that, "[d]espite all the hurdles erected by the law, we must unite in action with the democratic mass organisations, political parties and every individual or body with which it is possible to work", for the purposes of opposing the "bloody massacres" and "State terrorism", "using all our powers of organisation and co-ordination". The style is virulent and the criticism of the Turkish authorities' actions in the relevant part of the country acerbic, as demonstrated by the use of the words "State terrorism" and "genocide". [33]

(g) The Court recalls, however, that there is little scope under Article 10(2) of the Convention for restrictions on political speech or on debate on matters of public interest. Furthermore, the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries. Nevertheless, it certainly remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal law nature, intended to react appropriately and without excess to such remarks. Finally, where such remarks incite to violence against an individual, a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression. [34]

(h) The Court takes into account the background to cases submitted to it, particularly problems linked to the prevention of terrorism. It takes note of the Turkish authorities' concern about the dissemination of views which they consider might exacerbate the serious disturbances which have been going on in Turkey for some 15 years. In this regard, it should be noted that the article in issue was published shortly after the Gulf War, at a time when a large number of persons of Kurdish origin, fleeing repression in Iraq, were thronging at the Turkish border. [35]

(i) The Court observes, however, that the applicant was writing in his capacity as a trade-union leader, a leader on the Turkish political scene, and that the article in question, despite its virulence, does not encourage the use of violence or armed resistance or insurrection. In the Court's view, this is a factor which it is essential to take into consideration. [36]

(j) The Court also notes the severity of the penalty imposed on the applicant—one year and eight months' imprisonment plus a fine of 100,000 Turkish lira. It is mindful, further, of the fact that, as a result of his conviction, the applicant lost his office as president of the

petroleum workers' union as well as a number of political and civil rights. In this connection, the Court points out that the nature and severity of the penalty imposed are factors to be taken into account when assessing the proportionality of the interference. [37]

(k) In conclusion, the applicant's conviction was disproportionate to the aims pursued and accordingly not "necessary in a democratic society". There has therefore been a violation of Article 10 of the Convention. [38]

3. Prohibition of discrimination (Art. 14).

Having regard to its conclusion that there has been a violation of Article 10 taken alone, the Court does not consider it necessary to examine the complaint under Article 14. [42]

4. Right to a fair trial (Art. 6(1)).

Before the Court, the applicant also complained that Article 6(1) of the Convention had been violated. The Court finds, however, that since he did not take the opportunity to raise this issue when the Commission was examining the admissibility of his application, he is now estopped from doing so. [43]

5. Just satisfaction: damage; costs and expenses; default interest (Art. 41).

(a) With regard to the claim for pecuniary damage, no causal relationship has been satisfactorily established between the applicant's alleged loss of earnings and the violation of Article 10. Moreover, the loss which the applicant claims to have suffered has not been sufficiently proven. Accordingly, the Court dismisses this part of the claim. [47]

(b) As for non-pecuniary damage, the Court considers that the applicant must have suffered a certain amount of distress in the circumstances of the case and awards his compensation under that head on an equitable basis. [50]

(c) The Court will examine the applicant's claim in respect of the costs and expenses incurred by him in the domestic courts together with those incurred in the proceedings before the Strasbourg institutions. [47]

(d) Costs and expenses are awarded on an equitable basis, having regard to the fact that the applicant's lawyer has been associated with the preparation of other cases before the Court concerning complaints under Articles 6 and 10 of the Convention based on similar facts. [53]

(e) The Court deems it appropriate to apply the statutory rate of interest applicable in France at the date of adoption of the present judgment which, according to the information available to it, is 3.47 per cent per annum. [54]

Mr *D. Tezcan*, Mr *M. Özmen* (Co-Agents), Mr *B. Çaliskan*, Miss *G. Akyüz*, Miss *A. Günyakti*, Mr *F. Polat*, Miss *A. Emüler*, Mrs *I. Batmaz Keremoglu*, Mr *B. Yildiz*, Mr *Y. Özbek* (Advisers) for the Government.
Mr *H. Danelius* (Delegate) for the Commission.
Mr *H. Kaplan*, of the Istanbul bar (Counsel), for the applicant.

The following cases are referred to in the judgment of the Court:

1. FRESSOZ AND ROIRE *v.* FRANCE: 21 January 1999, not yet reported.
2. INCAL *v.* TURKEY: 9 June 1998, not yet reported.

3. NIKOLOVA *v.* BULGARIA: 25 March 1999, not yet reported.
4. WINGROVE *v.* UNITED KINGDOM: (1997) 24 E.H.R.R. 1.
5. ZANA *v.* TURKEY: (1999) 27 E.H.R.R. 667.

The following additional case is referred to in the joint concurring opinion of Judges Palm, Tulkens, Fischbach, Casadevall and Greve:

6. SÜREK *v.* TURKEY (No.1): 8 July 1999, not yet reported.

The following additional cases are referred to in the concurring opinion of Judge Bonello:

7. ABRAHAMS *v.* UNITED STATES: 250 U.S. 616 (1919).
8. BRANDENBURG *v.* OHIO: 395 U.S. 444 (1969).
9. SCHENK *v.* UNITED STATES: 294 U.S. 47 (1919).
10. WHITNEY *v.* CALIFORNIA: 274 U.S. 357 (1927).

The following additional case is referred to in the dissenting opinion of Judge Gölcüklü:

11. GERGER *v.* TURKEY: 8 July 1999, not yet reported.

The following additional cases are referred to in the opinion of the Commission:

12. JERSILD *v.* DENMARK (A/298): (1995) 19 E.H.R.R. 1.
13. LINGENS *v.* AUSTRIA (A/103): (1986) 8 E.H.R.R. 103.
14. THE OBSERVER AND THE GUARDIAN *v.* UNITED KINGDOM (A/216): (1992) 14 E.H.R.R. 153.

The Facts

I. *The circumstances of the case*

A. *The article in the weekly newspaper Yeni Üke*

8. The applicant, who was at the time the president of the petroleum workers' union, wrote an article entitled "The time has come for the workers to speak out—tomorrow it will be too late" in the 21–28 July 1991 issue of *Yeni Üke* ("New Land"), a weekly newspaper published in Istanbul. The article read,

> The steadily intensifying State terrorism in Eastern and South-Eastern Anatolia is nothing other than a perfect reflection of the imperialist-controlled policies being applied to the Kurdish people on the international plane.
> In order to destroy the Kurdish movement in Iraq, US imperialism first stirred up the Kurds against Saddam's regime and then set that regime on them, having left it strong enough to crush their movement.
> As a result, the whole world has been confronted with the heartbreaking sight of tens of thousands of Kurds dying of hunger, exposure and epidemics, tens of thousands more wiped out by the Iraqi army and hundreds of thousands forced to leave their homes and their country.
> After shedding crocodile tears over these scenes, which it itself had created, the imperalists are now sitting back with their arms folded, for the whole world to see, as genocide in Turkey continues to intensify.
> The constant increase in the south-east in the numbers of persons executed without trial, of mass arrests and of persons disappearing while

in detention, particularly since the passing of the new Prevention of Terrorism Act, is a harbinger of difficult times ahead.
The recent murder in police custody of the chairman of the Diyarbakir of branch of the *HEP* "People's Labour Party", probably by anti-guerrilla forces, and the further killings (three according to the police, ten according to local people) at his funeral (the police opened fire on the crowd, injuring hundreds, and took over a thousand people into custody) are the latest examples of State terrorism.
Anyone who examines the Prevention of Terrorism Act closely can easily see that it is aimed at crushing not only the struggle of the Kurdish people, but the struggle of the whole working class and proletariat for subsistence, for freedom and for democracy.
Consequently, not only the Kurdish people but the whole of our proletariat must stand up against these laws and the "State terrorism" currently being practised.
From the trade union point of view, too, the problem is too important and too vital to be dealt with simply in a few interviews and declarations.
The political authorities and the forces of monopolistic capital use a few vague concepts to enable every action to be presented as a terrorist offence and every organisation as a terrorist group. When they feel the time is right, they will not hesitate to turn that weapon against the working class.
As we have always said, the Turkish working class and its economic and democratic organisations must bring not only their economic, but also their political and democratic demands to the fore and play an effective role in this struggle.
Despite all the hurdles erected by the law, we must unite in action with the democratic mass organisations, political parties and every individual or body with which it is possible to work; we must oppose the bloody massacres and State terrorism, using all our powers of organisation and co-ordination.
If we fail to do so, the circles of monopolistic capital, which, under imperialist orders, aim to gag and suffocate the Kurdish people, will inevitably turn on the working class and proletariat.
In saying "tomorrow it will be too late", we are calling on all our people and all the forces of democracy to take an active part in this struggle.

B. *The proceedings against the applicant*

1. *The charges against the applicant*

9. On 16 September 1991, the Public Prosecutor at the Istanbul National Security Court indicted the applicant on charges of non-public incitement to hatred and hostility contrary to Article 312(1) and (2) of the Turkish Criminal Code.[1]

2. *The proceedings in the Istanbul National Security Court*

10. In the proceedings in the Istanbul National Security Court, the applicant denied the charges. He submitted that the article was about human rights violations in the south-east of Turkey and maintained that he had not intended to promote separatism or to sow discord or strife amongst the population. According to him, in a democratic

[1] See paras 15–16 below.

society, any subject should be able to be discussed without restriction. He also argued that it was his responsibility as a trade-union leader to express his opinion on the problem of democracy in south-eastern Turkey.

11. In a judgment of 3 May 1993, the National Security Court found the applicant guilty of an offence under Article 312(2) and (3) of the Turkish Criminal Code and sentenced him to one year and eight months' imprisonment, plus a fine of 100,000 Turkish liras.

The court held that in his article the applicant had alleged that the Kurdish people were being oppressed, massacred and silenced in Turkey. In particular, the court interpreted parts of the fourth and thirteenth sentences of the article as meaning, respectively, that "... genocide [was] being carried out against the Kurds in Turkey ..." and that an attempt [was] being made to "... gag and suffocate the Kurdish people".

It reached the conclusion that the applicant had incited the population to hatred and hostility by making distinctions based on ethnic or regional origin or social class.

3. *The Court of Cassation proceedings*

12. The applicant appealed to the Court of Cassation, contesting, *inter alia*, the National Security Court's interpretation of his article and arguing that it should have obtained an expert opinion as to its meaning. He also submitted that he should have been given only a suspended sentence.

13. On 14 December 1993 the Court of Cassation dismissed the appeal, upholding the National Security Court's assessment of the evidence and its reasons for rejecting the applicant's defence.

14. The applicant served his sentence in full. As a consequence of his conviction, he also lost his office as president of the petrol workers' union as well as certain political and civil rights.[2]

II. *Relevant domestic law and practice*

A. *Criminal law*

15. Article 312 of the Criminal Code provides:

> Non-public incitement to commit an offence
> A person who expressly praises or condones an act punishable by law as an offence or incites the population to break the law shall, on conviction, be liable to between six months' and two years' imprisonment and a heavy fine of from 6,000 to 30,000 Turkish lira.
> A person who incites the people to hatred or hostility on the basis of a distinction between social classes, races, religions, denominations or regions, shall, on conviction, be liable to between one and three years' imprisonment and a fine of from 9,000 to 36,000 Turkish lira. If this incitement endangers public safety, the sentence shall be increased by one third to one half.

[2] See para. 17 below.

> The penalties to be imposed on those who have committed the offences defined in the previous paragraph shall be doubled when they have done so by the means listed in Article 311(2).

16. Article 311(2) of the Criminal Code provides:

> Public incitement to commit an offence
> ...
> Where incitement to commit an offence is done by means of mass communication, of whatever type—whether by tape recordings, gramophone records, newspapers, press publications or other published material—by the circulation or distribution of printed papers or by the placing of posters in public places, the terms of imprisonment to which convicted persons are liable shall be doubled ....

17. The conviction of a person pursuant to Article 312(2) entails further consequences, particularly with regard to the exercise of certain activities governed by special legislation. For example, persons convicted of an offence under that Article may not found associations[3] or trade unions, nor may they be members of the executive committee of a trade union.[4] They are also forbidden to found or join political parties[5] and may not stand for election to parliament.[6]

B. *Criminal case law submitted by the Government*

18. The Government supplied copies of six decisions given by the prosecutor attached to the Istanbul National Security Court withdrawing charges. One of the cases concerned a person suspected of non-public incitement, contrary to Article 312 of the Criminal Code, to hatred or hostility based in particular on a distinction between religions. The other five concerned persons suspected of making separatist propaganda aimed at undermining the indivisible unity of the State contrary to section 8 of the Prevention of Terrorism Act.[7] In three of those cases, in which the offences had been committed by means of publications, one of the reasons given for the prosecutor's decision was that some of the elements of the offence could not be made out.

Furthermore, the Government submitted a number of National Security Court judgments as examples of cases in which defendants accused of the offences referred to above had been found not guilty. The judgments in question are: for 1996, No. 428 of 19 November and No. 519 of 27 December; for 1997, No. 33 of 6 March, No. 102 of 3 June, No. 527 of 17 October, No. 541 of 24 October and No. 606 of 23 December; and for 1998, No. 8 of 21 January, No. 14 of 3 February, No. 56 of 19 March, No. 87 of 21 April and No. 133 of 17 June. The

[3] Law No. 2908, s. 4(2)(b).
[4] Law No. 2929, s. 5.
[5] Law No. 2820, s. 11(5).
[6] Law No. 2839, s. 11(f3).
[7] Law No. 3713.

judgments acquitting authors of works dealing with the Kurdish problem were based, *inter alia*, on the absence of "propaganda", one element of the offence.

PROCEEDINGS BEFORE THE COMMISSION

19. Mr Ceylan applied to the Commission on 10 February 1994. He alleged that his conviction amounted to a breach of Articles 9 and 10 of the Convention, which guarantee the right to freedom of thought and of expression. He also claimed to have been discriminated against on the grounds of his political opinions, contrary to Article 14 read in conjunction with Article 10.

20. The Commission declared the application[8] admissible on 15 April 1996. In its report of 11 December 1997,[9] it examined the first complaint under Article 10 alone. It expressed the opinion that there had been a violation of that provision and that no separate issue arose under it read in conjunction with Article 14.[10] The full text of the Commission's opinion and of the dissenting opinion contained in the report follows.

Opinion

A. *Complaints declared admissible*

28.* The Commission has declared admissible:

— the applicant's complaint that his conviction for publishing his article constituted an unjustified interference with his freedom of thought and freedom of expression, in particular, with his right to receive and impart information and ideas;
— the applicant's complaint that his conviction for expressing his political opinion constituted discrimination on the ground of political opinion.

B. *Points at issue*

29. The points at issue in the present case are as follows:

— whether the applicant's conviction for publishing the article in question infringed his freedom of thought and of expression as guaranteed by Articles 9 and 10 of the Convention.
— whether the applicant's conviction for publishing the article in question constituted discrimination on the ground of political opinion, contrary to Article 14 in conjunction with Article 10 of the Convention.

[8] App. No. 23556/94.
[9] Made under former Art. 31.
[10] 30 votes to two.
* The paragraph numbering from here to para. 54 in bold is the original numbering of the opinion of the Commission. Then we revert to the numbering of the Court's judgment.—Ed.

C. *As regards Articles 9 and 10 of the Convention*

30. The applicant complains that his freedom of thought and freedom of expression have been infringed, contrary to Articles 9 and 10 of the Convention, in that he was convicted for publishing an article.

31. The Commission considers that the applicant's complaint essentially concerns an alleged violation of his freedom of expression. The Commission will therefore examine this complaint under Article 10 of the Convention, which states:

> 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 responsibilities, 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.

32. The applicant submits that he was convicted for expressing his political views concerning, *inter alia*, the Kurdish problem in Turkey.

33. The respondent Government submits that, according to the assessment of the case by the State Security Court, the applicant abused his freedom of expression and freedom of thought. In particular, it refers to the findings of the State Security Court, according to which the applicant, in his article, asserted that "... a genocide is carried out against the Kurds in Turkey ..." and that "... the outcry of the Kurdish people is being violently oppressed ...". The State Security Court evaluated such expressions as incitement to hatred and enmity based on race, class and religion.

34. The Government maintains that the restrictions, imposed by Article 312 of the Turkish Criminal Code, should be acceptable as within the margin of appreciation of the respondent State, since its only aim is to protect the public from enmity and vengeance based on race, class or region.

35. The Commission is of the opinion that the penalty imposed on the applicant constituted an "interference" in the exercise of his freedom of expression as guaranteed by Article 10(1) of the Convention. This point has not been in dispute between the parties.

36. Therefore, the question is whether this interference was prescribed by law, pursued a legitimate aim under Article 10(2) and was "necessary in a democratic society" in order to realise that legitimate aim.

37. The Commission notes that the applicant's conviction was based

on Article 312 of the Turkish Criminal Code and therefore considers that the interference was prescribed by law.

38. As regards the aims of the interference, the Commission notes that the applicant's conviction was part of the efforts of the authorities to combat illegal terrorist activities and to maintain national security and public safety, which are legitimate aims under Article 10(2) of the Convention.

39. The remaining issue is whether the interference was "necessary in a democratic society". In this respect the Commission recalls the following principles adopted by the Court.[11]

(i) Freedom of expression, as enshrined in paragraph 1 of Article 10 constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress. It is applicable not only to "information" or "ideas" that are favourably received or are regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broad-mindedness without which there is no "democratic society".

(ii) The adjective "necessary", within the meaning of Article 10(2) implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court.

(iii) In exercising its supervisory jurisdiction, the organs of the Convention must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which he made them. In particular, they must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".

40. The Commission further notes that, while freedom of political debate is at the very core of the concept of a democratic society,[12] that freedom is not absolute. A Contracting State is entitled to subject it to certain "restrictions" or "penalties", but the Convention organs are empowered to give the final ruling on whether they are reconcilable with freedom of expression as protected by Article 10.[13] In doing so, the Convention organs must satisfy themselves that the national authorities did apply standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.[14]

[11] See, as the latest authority, ZANA *v.* TURKEY: (1999) 27 E.H.R.R. 667, para. 51.
[12] LINGENS *v.* AUSTRIA (A/103): (1986) 8 E.H.R.R. 103, para. 42.
[13] THE OBSERVER AND THE GUARDIAN *v.* UNITED KINGDOM (A/216): (1992) 14 E.H.R.R. 153, para. 59(c).
[14] JERSILD *v.* DENMARK (A/298): (1995) 19 E.H.R.R. 1, para. 31.

41. Even where, as in the present case, an interference with freedom of expression is based on considerations of national security and public safety and is part of a State's fight against terrorism, the interference can be regarded as necessary only if it is proportionate to the aims pursued. Consequently, the Commission must, with due regard to the circumstances of each case and the State's margin of appreciation, ascertain whether a fair balance has been struck between the individual's fundamental right to freedom of expression and a democratic society's legitimate right to protect itself against the activities of terrorist organisations.[15]

42. The Commission observes in this connection that Article 10(2) also refers to "duties and responsibilities" which the exercise of the freedom of expression carries with it. Thus, it is important for persons addressing the public on sensitive political issues to take care that they do not support unlawful political violence. On the other hand, freedom of expression must be considered to include the right openly to discuss difficult problems such as those facing Turkey in connection with the prevailing unrest in part of its territory in order, for instance, to analyse the background causes of the situation or to express opinions on the solutions to those problems.

43. The Commission notes that the applicant's article attempts to give a political explanation for the resumption of violence over recent years in Eastern and south-eastern Anatolia. In this respect, the applicant's main concept appears to be that the Kurdish movement is or, at least, should be a part of the general struggle of the Turkish "working class and its economic and democratic organisations" for freedom and democracy. He suggests that, "despite all the hindrance contained in the laws, united action must ... be achieved ... to oppose ... massacres and bloodshed".

44. The State Security Court held that the applicant, in his article, had asserted that "... a genocide is carried out against the Kurds in Turkey ..." and that "... the outcry of the Kurdish people is being violently oppressed ...". The State Security Court evaluated such expressions as incitement to hatred and enmity based on race, class and region.

45. The Commission, having regard to the verbatim meaning of the applicant's sentences, is not convinced that the State Security Court's interpretation of the article is necessarily correct. It is true that the applicant portrayed the actions of the State in Eastern and south-eastern Anatolia as a symptom of the co-ordinated efforts carried out by international imperialism to oppress the working class, including Kurdish people, and that he urged united action to stop bloodshed. However, the Commission considers that the applicant expressed his ideas in relatively moderate terms, did not associate himself with the

[15] *cf.* ZANA *v.* TURKEY, *loc. cit.*, para. 55.

use of violence in any context and did not call upon people to resort to illegal action.

46. The Commission finds that the applicant's conviction amounted to a kind of censure, which was likely to discourage him or others from publishing ideas of a similar kind again in the future. In the context of political debate such a sentence is likely to deter citizens from contributing to public discussion of important political issues.[16]

47. Consequently, the Commission, even taking into account the margin of appreciation of the national authorities in this context, finds that the interference with the applicant's freedom was not proportionate to the legitimate aims pursued and could, therefore, not be regarded as necessary in a democratic society to achieve the aims of national security and public safety.

48. The Commission concludes, by 30 votes to two, that there has been a violation of Article 10 of the Convention.

D. *As regards Article 14 of the Convention*

49. Article 14 of the Convention provides as follows:

> 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.

50. The applicant maintains that his conviction for expressing his views in an article constituted discrimination on the ground of political opinion.

51. Having found that Article 10 of the Convention has been violated, the Commission considers that no separate issues arises in regard to Article 14 in conjunction with Article 10 of the Convention.

52. The Commission concludes, by 30 votes to two, that no separate issues arise in regard to Article 14 in conjunction with Article 10 of the Convention.

Recapitulation

53. The Commission concludes, by 30 votes to two, that there has been a violation of Article 10 of the Convention.[17]

54. The Commission concludes, by 30 votes to two, that no separate issue arises in regard to Article 14 in conjunction with Article 10 of the Convention.[18]

Dissenting Opinion of Mr A. S. Gözübüyük

I do not find it possible to join the majority in concluding that there has been a breach of Article 10 of the Convention. In my opinion, there

[16] *cf.* LINGENS *v.* AUSTRIA, *loc. cit.*, para. 44.
[17] See para. 48 above.
[18] See para. 52 above.

are no solid grounds for concluding that, in this case, the interference was not necessary in a democratic society and, in particular, not proportionate to the aim of maintaining national security and public safety.

In order to assess whether Mr Ceylan's conviction and sentence answered a "pressing social need" and whether they were "proportionate to the legitimate aims pursued", it is important to analyse the content of the applicant's remarks in the light of the situation prevailing in south-east Turkey at the time. In so doing, the Commission, taking account of the margin of appreciation left to the Government, should have confined itself to the question whether the judicial authorities had good reasons to believe that there was a pressing social need for such a measure, based on an acceptable assessment of the relevant facts.

I note in this regard that, according to the national courts, the applicant's article exceeded the limits of mere criticism and amounted to incitement of the people of Kurdish origin to hatred and enmity based on race, class and region. In particular, the applicant had asserted in his article that "... a genocide is carried out against the Kurds in Turkey .." and that "... the outcry of the Kurdish people is being violently oppressed ...". I find that certain indissociable sections of the applicant's article are in fact of an inflammatory nature and could, therefore, be deemed dangerous propaganda. In these circumstances, the applicant's conviction and the penalty imposed on him on account of the publication of his article could reasonably be said to arise out of a pressing social need.

In the light of these considerations and having regard to the State's margin of appreciation in this area, I am of the opinion that the restriction placed on the applicant's freedom of expression was proportionate to the legitimate aims pursued and that, therefore, it could reasonably be regarded as necessary in a democratic society to achieve those aims.

JUDGMENT

I. *Alleged violation of Articles 9 and 10 of the Convention*

23. In his application, Mr Ceylan submitted that his conviction under Article 312 of the Criminal Code had infringed Articles 9 and 10 of the Convention. At the hearing before the Court, however, he did not object to his complaint being examined under Article 10 alone, as the Government and the Commission had proposed[19] Article 10 provides:

> 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.

[19] See, among other authorities, INCAL *v.* TURKEY: 9 June 1998, para. 60.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, 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.

24. All those appearing before the Court agreed that the applicant's conviction as a result of the publication of his article "The time has come for the workers to speak out, tomorrow it will be too late" amounted to an "interference" with the exercise of his right to freedom of expression. Such an interference is in breach of Article 10 unless it satisfies the requirements laid down in paragraph 2 of that provision. The Court must therefore determine whether it was "prescribed by law", was motivated by one or more of the legitimate aims set out in that paragraph and was "necessary in a democratic society" for achieving such aim or aims.

1. *"Prescribed by law"*

25. It was not disputed that the applicant's conviction was based on Article 312(2) and (3) of the Turkish Criminal Code and it must therefore be regarded as "prescribed by law" for the purposes of the second paragraph of Article 10.

2. *Legitimate aim*

26. The applicant did not make any submissions on this point.

27. The Government maintained that the aim of the interference in question had been not only to maintain "national security" and "prevent disorder" (as the Commission had found), but also to preserve "territorial integrity".

28. Article 312 of the Criminal Code makes it a punishable offence to incite others to hatred or hostility on the basis of a distinction between social classes, races, religions, denominations or regions. It provides that the penalty should be increased where such incitement endangers public safety.[20]

Having regard to the sensitivity of the security situation in south-east Turkey,[21] and to the need for the authorities to be alert to acts capable of fuelling additional violence, the Court accepts that the applicant's conviction can be said to have been in furtherance of the aims cited by the Government. This is certainly true where, as in south-east Turkey at the time of the circumstances of this case, there was a separatist movement having recourse to methods relying on the use of violence.

[20] See para. 15 above.
[21] See ZANA *v.* TURKEY, *loc. cit.*, para. 10.

3. *"Necessary in a democratic society"*

(a) *Arguments of those appearing before the Court*

(i) *The applicant*

29. The applicant stated that his article did not contain any call for violence, did not refer to any illegal organisation and did not promote secessionism. According to him, the Turkish authorities abused Article 312 of the Turkish Code, which was in itself already contrary to the freedoms of thought and expression.

(ii) *The Government*

30. The Government submitted that offences similar to that set out in Article 312 of the Turkish Criminal Code were to be found in the legislation of other member States of the Council of Europe, citing, by way of example, Article 130 of the German Criminal Code. It argued that such provisions helped to preserve those States as democracies. Lastly, it submitted that it was not for the Strasbourg institutions to substitute their view for that of the Turkish courts as to whether there has been a "danger" capable of justifying the application of Article 312.

(iii) *The Commission*

31. The Commission recalled the reference to "duties and responsibilities" in Article 10(2) inferring this to mean that it was important for persons expressing themselves in public on sensitive political issues to take care not to condone "unlawful political violence". Freedom of expression did, however, comprise the right to engage in open discussion of difficult problems such as those facing Turkey, in order—for example—to analyse the root causes of a situation or to express opinions on possible solutions.

The Commission noted that the article had aimed to provide a political explanation for the recrudescence of violence over the previous few years, and that, in it, the applicant had expressed his ideas in relatively moderate terms, not associating himself with recourse to violence or inciting the population to use illegal means. In its view, the applicant's conviction constituted a form of censorship which was incompatible with the requirements of Article 10.

(b) *The Court's assessment*

32. The Court reiterates the fundamental principles underlying its judgments relating to Article 10, as set out in, for example, in the ZANA *v.* TURKEY judgment[22] and the FRESSOZ AND ROIRE *v.* FRANCE judgment of 21 January 1999.[23]

[22] *Loc. cit.*, para. 51.
[23] Para. 45.

(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.

(ii) The adjective "necessary", within the meaning of Article 10(2), implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10.

(iii) In exercising its supervisory jurisdiction, the Court must look at the interference in the light of the case as a whole, including the content of the impugned statements and the context in which they were made. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.

33. The article in issue took the form of a political speech, both in its content and in the kind of terms employed.

Using words with Marxist connotations, the applicant offers an explanation of the renewal of violence in eastern and south-eastern Anatolia over the previous few years. The core of his argument appears to be that the Kurdish movement is part of—or at least should be part of—a general struggle for freedom and democracy being waged by "the Turkish working class and its economic and democratic organisations". The article's message is that,

> [d]espite all the hurdles erected by the law, we must unite in action with the democratic mass organisations, political parties and every individual or body with which it is possible to work,

for the purposes of opposing the "bloody massacres" and "State terrorism", "using all our powers of organisation and co-ordination".

The style is virulent and the criticism of the Turkish authorities'

actions in the relevant part of the country acerbic, as demonstrated by the use of the words "State terrorism" and "genocide".[24]

34. The Court recalls, however, that there is little scope under Article 10(2) of the Convention for restrictions on political speech or on debate on matters of public interest.[25] Furthermore, the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries. Nevertheless, it certainly remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal law nature, intended to react appropriately and without excess to such remarks.[26] Finally, where such remarks incite to violence against an individual, a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.

35. The Court takes into account the background to cases submitted to it, particularly problems linked to the prevention of terrorism.[27] It takes note of the Turkish authorities' concern about the dissemination of views which they consider might exacerbate the serious disturbances which have been going on in Turkey for some 15 years.[28] In this regard, it should be noted that the article in issue was published shortly after the Gulf War, at a time when a large number of persons of Kurdish origin, fleeing repression in Iraq, were thronging at the Turkish border.

36. The Court observes, however, that the applicant was writing in his capacity as a trade-union leader, a player on the Turkish political scene, and that the article in question, despite its virulence, does not encourage the use of violence or armed resistance or insurrection. In the Court's view, this is a factor which it is essential to take into consideration.

37. The Court also notes the severity of the penalty imposed on the applicant—one year and eight months' imprisonment plus a fine of 100,000 Turkish lira.[29] It is mindful, further, of the fact that, as a result of his conviction, the applicant lost his office as president of the petroleum workers' union as well as a number of political and civil rights.[30]

[24] See para. 8 above.
[25] See WINGROVE *v.* UNITED KINGDOM (1997) 24 E.H.R.R. 1, para. 58.
[26] See INCAL *v.* TURKEY, *loc. cit.*, para. 54.
[27] See INCAL *v.* TURKEY, *loc. cit.*, para. 58.
[28] See para. 28 above.
[29] See para. 11 above.
[30] See paras 14 and 17 above.

In this connection, the Court points out that the nature and severity of the penalty imposed are factors to be taken into account when assessing the proportionality of the interference.

38. In conclusion, Mr Ceylan's conviction was disproportionate to the aims pursued and accordingly not "necessary in a democratic society". There has therefore been a violation of Article 10 of the Convention.

II. *Alleged violation of Article 14 of the Convention read in conjunction with Article 10*

39. The applicant submitted that he had been prosecuted on account of his article merely because it was the work of a person of Kurdish origin and concerned the Kurdish question. He argued that he was therefore a victim of discrimination contrary to Article 14 of the Convention read in conjunction with Article 10. Article 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, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

40. The Government did not submit any arguments on this issue.

41. The Commission expressed the opinion that no separate issue arose under to Article 14 of the Convention read in conjunction with Article 10.

42. Having regard to its conclusion that there has been a violation of Article 10 taken alone,[31] the Court does not consider it necessary to examine the complaint under Article 14.

III. *Alleged violation of Article 6(1) of the Convention*

43. Before the Court, the applicant also complained that Article 6(1) of the Convention had been violated.[32] The Court finds, however, that since Mr Ceylan did not take the opportunity to raise this issue when the Commission was examining the admissibility of his application, he is now estopped from doing so.

IV. *Application of Article 41 of the Convention*

44. The application sought just satisfaction under Article 41 of the Convention, which 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

[31] See para. 38 above.
[32] See para. 21 above.

concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

A. *Damage*

1. *Pecuniary damage*

45. The applicant claimed the sum of 850,000 FF by way of compensation for pecuniary damage comprising loss of earnings as a result of his imprisonment and his legal costs and disbursements in the domestic proceedings. In support of his claims he provided a certificate signed by the General Secretary of the Petrol-Is trade union showing that his gross annual salary had been 189,927.25 FF in 1994 and 145,500.36 FF in 1998.

46. The Government argued that there was no causal relationship between the alleged violation of the Convention and the pecuniary damage claimed. In any event, it submitted, Mr Ceylan had not substantiated his alleged earnings and expenses.

47. The Court finds that no causal relationship has been satisfactorily established between the applicant's alleged loss of earnings and the violation of Article 10. Moreover, the loss which the applicant claims to have suffered has not been sufficiently proven. Accordingly, the Court dismisses this part of the claim.

The Court will examine the applicant's claim in respect of the costs and expenses incurred by him in the domestic courts together with those incurred in the proceedings before the Strasbourg institutions.

2. *Non-pecuniary damage*

48. Mr Ceylan claimed 150,000 FF in respect of non-pecuniary damage.

49. The Government asked the Court to hold that the finding of violation constituted in itself sufficient just satisfaction.

50. The Court considers that the applicant must have suffered a certain amount of distress in the circumstances of the case. Deciding on an equitable basis, it awards him the sum of 40,000 FF under this head.

B. *Costs and expenses*

51. The applicant claimed 120,000 FF in respect of his legal costs and expenses before the Strasbourg institutions, comprising 45,000 FF for translation, fax, telephone and stationery expenditure and 75,000 FF in lawyer's fees. He supplied a number of documents in support of his claims.

52. The Government submitted that the sums claimed were excessive. In particular, it maintained that the receipts furnished by the applicant did not support the precise amounts claimed and that they concerned expenses unrelated to these proceedings. It also argued that the sums claimed in respect of translation costs and legal fees were exaggerated by normal Turkish standards.

53. The Court notes that the applicant's lawyer has been associated with the preparation of other cases before the Court concerning complaints under Articles 6 and 10 of the Convention based on similar facts. Deciding on an equitable basis and according to the criteria laid down in its case law,[33] the Court awards the applicant a total sum of 15,000 FF.

C. *Default interest*

54. The Court deems it appropriate to apply the statutory rate of interest applicable in France at the date of adoption of the present judgment which, according to the information available to it, is 3.47 per cent per annum.

For these reasons, THE COURT

1. *Holds* by 16 votes to one that there has been a breach of Article 10 of the Convention;
2. *Holds* unanimously that no separate issue arises under Article 10 of the Convention read in conjunction with Article 14;
3. *Holds* unanimously that the applicant is estopped from bringing a complaint under Article 6(1) of the Convention;
4. *Holds* by 16 votes to one
   (a) that the respondent Government is to pay the applicant, within three months, the following sums, to be converted into Turkish liras at the rate applicable on the date of settlement;
      (i) 40,000 FF for non-pecuniary damage;
      (ii) 15,000 FF in respect of costs and expenses;
   (b) that simple interest at an annual rate of 3.74 per cent shall be payable from the expiry of the above-mentioned three months until settlement;
5. *Dismisses* unanimously the remainder of the applicant's claims for just satisfaction.

Joint Concurring Opinion of Judges Palm, Tulkens, Fischbach, Casadevall and Greve

We share the Court's conclusion that there has been a violation of Article 10 in the present case although we have reached the same result by a route which employs the more contextual approach as set out in Judge Palm's partly dissenting opinion in the case of SÜREK *v.* TURKEY (No. 1).[34]

In our opinion the majority assessment of the Article 10 issue in this line of cases against the respondent State attaches too much weight to the form of words used in the publication and insufficient attention to the general context in which the words were used and their likely

[33] See, among many authorities, NIKOLOVA *v.* BULGARIA: 25 March 1999, para. 79.
[34] Judgment of 8 July 1999.

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Turkey
—
European
Court of
Human
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Concerning
Opinion
(Judge
Bonello)

impact. Undoubtedly the language in question may be intemperate or even violent. But in a democracy, as our Court has emphasised, even "fighting" words may be protected by Article 10.

An approach which is more in keeping with the wide protection afforded to political speech in the Court's case law is to focus less on the inflammatory nature of the words employed and more on the different elements of the contextual setting in which the speech was uttered. Was the language intended to inflame or incite to violence? Was there a real and genuine risk that it might actually do so? The answer to these questions in turn requires a measured assessment of the many different layers that compose the general context in the circumstances of each case. Other questions must be asked. Did the author of the offending text occupy a position of influence in society of a sort likely to amplify the impact of his words? Was the publication given a degree of prominence either in an important newspaper or through another medium which was likely to enhance the influence of the impugned speech? Were the words far away from the centre of violence or on its doorstep?

It is only by a careful examination of the context in which the offending words appear that one can draw a meaningful distinction between language which is shocking and offensive—which is protected by Article 10—and that which forfeits its right to tolerance in a democratic society.

Concurring Opinion of Judge Bonello

I voted with the majority to find a violation of Article 10, but I do not endorse the primary test applied by the Court to determine whether the interference by the domestic authorities with the applicants' freedom of expression was justifiable in a democratic society.

Throughout these, and previous Turkish freedom of expression cases in which incitement to violence was an issue, the common test employed by the Court seems to have been this: if the writings published by the applicants supported or instigated the use of violence, then their conviction by the national courts was justifiable in a democratic society. I discard this yardstick as insufficient.

I believe that punishment by the national authorities of those encouraging violence would be justifiable in a democratic society only if the incitement were such as to create "a clear and present danger". When the invitation to the use of force is intellectualised, abstract, and removed in time and space from the foci of actual or impending violence, then the fundamental right to freedom of expression should generally prevail.

I borrow what one of the mightiest constitutional jurists of all time had to say about words which tend to destabilise law and order:

> We should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interferences with the lawful and

> pressing purposes of the law that an immediate check is required to save the country.[35]

The guarantee of freedom of expression does not permit a state to forbid or proscribe advocacy of the use of force except when such advocacy is directed to inciting or producing imminent lawlessness and is likely to incite or produce such action.[36] It is a question of proximity and degree.[37] In order to support a finding of clear and present danger which justifies restricting freedom of expression, it must be shown either that immediate serious violence was expected or was advocated, or that the past conduct of the applicant furnished reason to believe that his advocacy of violence would produce immediate and grievous action.[38]

It is not manifest to me that any of the words with which the applicants were charged, however pregnant with mortality that may appear to some, had the potential of imminently threatening dire effects on the national order. Nor is it manifest to me that instant suppression of those expressions was indispensable for the salvation of Turkey. They created no peril, let alone a clear and present one. Short of that, the Court would be subsidising the subversion of freedom of expression were it to condone the convictions of the applicants by the criminal courts.

In summary

> no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose, through discussion, the falsehood and the fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence.[39]

Dissenting Opinion of Judge Gölcüklü

To my great regret, I cannot agree with the majority of the Court that there has been a violation of Article 10 of the Convention. In my opinion, there is no valid reason to find that the interference in this case was not necessary in a democratic society and, in particular, not proportionate to the aim of preserving national security.

The general principles which emerge from the judgment of 25 November 1995 in the case of ZANA *v.* TURKEY and which I recall in my dissenting opinion annexed to the GERGER *v.* TURKEY judgment[40] are relevant to, and hold good in, the instant case. To avoid repetition, I refer the reader to paragraphs 1–9 of that dissenting opinion.

The case of CEYLAN *v.* TURKEY cannot be distinguished from either

[35] Justice Oliver Wendell Holmes in ABRAHAMS *v.* UNITED STATES: 250 U.S. 616 (1919) at 630.
[36] BRANDENBURG *v.* OHIO: 395 U.S. 444 (1969) at 447.
[37] SCHENK *v.* UNITED STATES: 294 U.S. 47 (1919) at 52.
[38] WHITNEY *v.* CALIFORNIA: 274 U.S. 357 (1927) at 376.
[39] Justice Louis D. Brandeis in WHITNEY *v.* CALIFORNIA, *loc. cit.*, at 377.
[40] Of 8 July 1999.

1999
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Ceylan
v.
Turkey
—
European Court of Human Rights
—
Dissenting Opinion (Judge Gölcüklü)

the ZANA case or the cases of GERGER, SÜREK, etc. In his article, the applicant writes of "genocide ... intensify[ing]" in Turkey; of a

> constant increase in the numbers of persons executed without trial, ... and ... disappearing while in detention, particularly since the passing of the new Prevention of Terrorism Act;

of the,

> murder ... of the chairman of the Diyarbakir branch of the *HEP* ["People's Labour Party"], probably by anti-guerrilla forces

and of the crushing

> not only [of] the struggle of the Kurdish people but the struggle of the whole working class and proletariat ....

"Consequently", says the applicant,

> not only the Kurdish peole but the whole of our proletariat must stand up against these laws and the State terrorism currently being practised.

And in conclusion, the applicant calls on all his fellow-citizens and all democratic forces to "take an active part in this struggle" before it is too late. In my view, the quoted passages can in all good faith be construed as an incitement to hatred and extreme violence. Taking into account the margin of appreciation which must be left to the national authorities, I therefore conclude that the interference in issue cannot be described as disproportionate, with the result that it can be regarded as having been necessary in a democratic society.

Freedom of Information Act 2000 c. 36

This version in force from: **November 30, 2000** to **present**

(version 1 of 1)

An Act to make provision for the disclosure of information held by public authorities or by persons providing services for them and to amend the Data Protection Act 1998 and the Public Records Act 1958; and for connected purposes.

[30th November 2000]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Modifications

Whole Document	Modified in relation to the property, rights and liabilities transferred by SI 2012/147 art.4 by Commission for Architecture and the Built Environment (Dissolution) Order 2012/147, art. 7(4)
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Subject: Administrative law

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Part I ACCESS TO INFORMATION HELD BY PUBLIC AUTHORITIES

Right to information

This version in force from: **January 1, 2005** to **present**

(version 1 of 1)

1.— General right of access to information held by public authorities.

(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

(3) Where a public authority—

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

(4) The information—

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.

(5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).

(6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as *"the duty to confirm or deny"*.

Modifications

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Subject: Administrative law

Keywords: Access to information; Duty to confirm or deny; Provision of information; Public authorities; Requests for information

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Part I ACCESS TO INFORMATION HELD BY PUBLIC AUTHORITIES

Right to information

This version in force from: **January 19, 2011** to **present**

(version 2 of 2)

2.— Effect of the exemptions in Part II.

(1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either—

(a) the provision confers absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,

section 1(1)(a) does not apply.

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption—

(a) section 21,

(b) section 23,

(c) section 32,

(d) section 34,

(e) section 36 so far as relating to information held by the House of Commons or the House of Lords,

[

(ea) in section 37, paragraphs (a) to (ab) of subsection (1), and subsection (2) so far as relating to those paragraphs,

] [1]

(f) in section 40—

(i) subsection (1), and

(ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,

(g) section 41, and

(h) section 44.

Notes

1. Added by Constitutional Reform and Governance Act 2010 c. 25 Sch.7 para.2 (January 19, 2011: insertion has effect subject to savings specified in SI 2011/46 art.4)

Modifications

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Pt I s. 2(3)	Modified in relation to information held by the Northern Ireland Assembly, a Northern Ireland department, or a Northern Ireland public authority by Freedom of Information Act 2000 c. 36, Pt VIII s. 80A(3)

Subject: Administrative law

Keywords: Duty to confirm or deny; Exempt information; Provision of information

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Part I ACCESS TO INFORMATION HELD BY PUBLIC AUTHORITIES

Right to information

This version in force from: **November 30, 2000** to **present**

(version 1 of 1)

3.— Public authorities.

(1) In this Act *"public authority"* means—

(a) subject to section 4(4), any body which, any other person who, or the holder of any office which—

(i) is listed in Schedule 1, or

(ii) is designated by order under section 5, or

(b) a publicly-owned company as defined by section 6.

(2) For the purposes of this Act, information is held by a public authority if—

(a) it is held by the authority, otherwise than on behalf of another person, or

(b) it is held by another person on behalf of the authority.

Modifications

Whole Document	Modified in relation to the property, rights and liabilities transferred by SI 2012/147 art.4 by Commission for Architecture and the Built Environment (Dissolution) Order 2012/147, art. 7(4)
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	Enactments) Regulations 2012/2734, reg. 6

Subject: Administrative law

Keywords: Access to information; Public authorities; Statutory definition

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Part I ACCESS TO INFORMATION HELD BY PUBLIC AUTHORITIES

Right to information

This version in force from: **May 25, 2007** to **present**

(version 4 of 4)

4.— Amendment of Schedule 1.

(1) The [Secretary of State] [1] may by order amend Schedule 1 by adding to that Schedule a reference to any body or the holder of any office which (in either case) is not for the time being listed in that Schedule but as respects which both the first and the second conditions below are satisfied.

(2) The first condition is that the body or office—

(a) is established by virtue of Her Majesty's prerogative or by an enactment or by subordinate legislation, or

(b) is established in any other way by a Minister of the Crown in his capacity as Minister, by a government department or by [the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh Assembly Government] [2] .

(3) The second condition is—

(a) in the case of a body, that the body is wholly or partly constituted by appointment made by the Crown, by a Minister of the Crown, by a government department or by [the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh Assembly Government] [3] , or

(b) in the case of an office, that appointments to the office are made by the Crown, by a Minister of the Crown, by a government department or by [the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh Assembly Government] [3] .

(4) If either the first or the second condition above ceases to be satisfied as respects any body or office which is listed in Part VI or VII of Schedule 1, that body or the holder of that office shall cease to be a public authority by virtue of the entry in question.

(5) The [Secretary of State] [1] may by order amend Schedule 1 by removing from Part VI or VII of that Schedule an entry relating to any body or office—

(a) which has ceased to exist, or

(b) as respects which either the first or the second condition above has ceased to be satisfied.

(6) An order under subsection (1) may relate to a specified person or office or to persons or

offices falling within a specified description.

(7) Before making an order under subsection (1), the [Secretary of State] [1] shall—

(a) if the order adds to Part II, III, IV or VI of Schedule 1 a reference to—

(i) a body whose functions are exercisable only or mainly in or as regards Wales, or

(ii) the holder of an office whose functions are exercisable only or mainly in or as regards Wales,

consult [the Welsh Ministers] [4] , and

(b) if the order relates to a body which, or the holder of any office who, if the order were made, would be a Northern Ireland public authority, consult the First Minister and deputy First Minister in Northern Ireland.

(8) This section has effect subject to section 80.

(9) In this section *"Minister of the Crown"* includes a Northern Ireland Minister.

Notes

1. Words substituted by Secretary of State for Constitutional Affairs Order 2003/1887 Sch.2 para.12(1)(a) (August 19, 2003)

2. Words substituted by Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007/1388 Sch.1 para.78(2) (May 25, 2007 immediately after the end of the initial period as specified in 2006 c.32 s.161(5))

3. Words substituted by Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007/1388 Sch.1 para.78(3) (May 25, 2007 immediately after the end of the initial period as specified in 2006 c.32 s.161(5))

4. Words substituted by Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007/1388 Sch.1 para.78(4) (May 25, 2007 immediately after the end of the initial period as specified in 2006 c.32 s.161(5))

Modifications

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Subject: Administrative law

Keywords: Access to information; Ministers' powers and duties; Provision of information; Public authorities

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Part I ACCESS TO INFORMATION HELD BY PUBLIC AUTHORITIES

Right to information

This version in force from: **January 1, 2005** to **present**

(version 1 of 1)

16.— Duty to provide advice and assistance.

(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.

Modifications

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Subject: Administrative law

Keywords: Duty to advise and assist; Public authorities; Requests for information

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Part II EXEMPT INFORMATION

This version in force from: **June 25, 2013** to **present**

(version 4 of 4)

23.— Information supplied by, or relating to, bodies dealing with security matters.

(1) Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).

(2) A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of that fact.

(3) The bodies referred to in subsections (1) and (2) are—

(a) the Security Service,

(b) the Secret Intelligence Service,

(c) the Government Communications Headquarters,

(d) the special forces,

(e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,

(f) the Tribunal established under section 7 of the Interception of Communications Act 1985,

(g) the Tribunal established under section 5 of the Security Service Act 1989,

(h) the Tribunal established under section 9 of the Intelligence Services Act 1994,

(i) the Security Vetting Appeals Panel,

(j) the Security Commission,

(k) the National Criminal Intelligence Service, [...] [1]

(l) the Service Authority for the National Criminal Intelligence Service [, [...] [2]] [1]

[

(m) the Serious Organised Crime Agency [, [...] [3]] [2]

] [1]

[

(n) the National Crime Agency [, and] [3]

] [2]

[

(o) the Intelligence and Security Committee of Parliament.

] [3]

(4) In subsection (3)(c) *"the Government Communications Headquarters"*includes any unit or part of a unit of the armed forces of the Crown which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions.

(5) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).

Notes

1. Added by Serious Organised Crime and Police Act 2005 c. 15 Sch.4 para.159 (April 1, 2006)

2. Added by Crime and Courts Act 2013 c. 22 Sch.8(2) para.102 (May 27, 2013: insertion has effect as SI 2013/1042 subject to savings and transitional provisions specified in 2013 c.22 s.15 and Sch.8)

3. Added by Justice and Security Act 2013 c. 18 Sch.2(1) para.5(2) (June 25, 2013: insertion has effect subject to transitional and savings provisions specified in 2013 c.18 s.19(1) and Sch.3 para.1 and in SI 2013/1482 arts 3 and 4)

Modifications

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Subject: Administrative law

Keywords: Exempt information; Ministerial certificates; National security

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Part II EXEMPT INFORMATION

This version in force from: **January 1, 2005** to **present**

(version 1 of 1)

24.— National security.

(1) Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.

(2) The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.

(3) A certificate signed by a Minister of the Crown certifying that exemption from section 1(1)(b), or from section 1(1)(a) and (b), is, or at any time was, required for the purpose of safeguarding national security shall, subject to section 60, be conclusive evidence of that fact.

(4) A certificate under subsection (3) may identify the information to which it applies by means of a general description and may be expressed to have prospective effect.

Modifications

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Subject: Administrative law

Keywords: Exempt information; Ministerial certificates; National security

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Part II EXEMPT INFORMATION

This version in force from: **January 1, 2005** to **present**

(version 1 of 1)

25.— Certificates under ss. 23 and 24: supplementary provisions.

(1) A document purporting to be a certificate under section 23(2) or 24(3) shall be received in evidence and deemed to be such a certificate unless the contrary is proved.

(2) A document which purports to be certified by or on behalf of a Minister of the Crown as a true copy of a certificate issued by that Minister under section 23(2) or 24(3) shall in any legal proceedings be evidence (or, in Scotland, sufficient evidence) of that certificate.

(3) The power conferred by section 23(2) or 24(3) on a Minister of the Crown shall not be exercisable except by a Minister who is a member of the Cabinet or by the Attorney General, the Advocate General for Scotland or the Attorney General for Northern Ireland.

Modifications

Whole Document	Modified in relation to the property, rights and liabilities transferred by SI 2012/147 art.4 by Commission for Architecture and the Built Environment (Dissolution) Order 2012/147, art. 7(4)
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Subject: Administrative law

Keywords: Civil evidence; Criminal evidence; Exempt information; Ministerial certificates

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Part II EXEMPT INFORMATION

This version in force from: **January 1, 2005** to **present**

(version 1 of 1)

26.— Defence.

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(a) the defence of the British Islands or of any colony, or

(b) the capability, effectiveness or security of any relevant forces.

(2) In subsection (1)(b) *"relevant forces"* means —

(a) the armed forces of the Crown, and

(b) any forces co-operating with those forces,

or any part of any of those forces.

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

Modifications

Whole Document	Modified in relation to the property, rights and liabilities transferred by SI 2012/147 art.4 by Commission for Architecture and the Built Environment (Dissolution) Order 2012/147, art. 7(4)
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Subject: Administrative law **Other related subjects:** Armed forces

Keywords: Armed forces; Defence policy; Exempt information

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Part II EXEMPT INFORMATION

This version in force from: **January 1, 2005** to **present**

(version 1 of 1)

27.— International relations.

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(a) relations between the United Kingdom and any other State,

(b) relations between the United Kingdom and any international organisation or international court,

(c) the interests of the United Kingdom abroad, or

(d) the promotion or protection by the United Kingdom of its interests abroad.

(2) Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.

(3) For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.

(4) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a)—

(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1), or

(b) would involve the disclosure of any information (whether or not already recorded) which is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.

(5) In this section—

"international court" means any international court which is not an international organisation and which is established—

(a) by a resolution of an international organisation of which the United Kingdom is a member, or

(b) by an international agreement to which the United Kingdom is a party;

"international organisation" means any international organisation whose members include any two or more States, or any organ of such an organisation;

"State" includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to any territory outside the United Kingdom.

Modifications

Whole Document	Modified in relation to the property, rights and liabilities transferred by SI 2012/147 art.4 by Commission for Architecture and the Built Environment (Dissolution) Order 2012/147, art. 7(4)
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Subject: Administrative law **Other related subjects:** International law

Keywords: Confidential information; Exempt information; International relations; Interpretation

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Part II EXEMPT INFORMATION

This version in force from: **May 25, 2007** to **present**

(version 2 of 2)

28.— Relations within the United Kingdom.

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice relations between any administration in the United Kingdom and any other such administration.

(2) In subsection (1) *"administration in the United Kingdom"* means—

(a) the government of the United Kingdom,

(b) the Scottish Administration,

(c) the Executive Committee of the Northern Ireland Assembly, or

[

(d) the Welsh Assembly Government.

] [1]

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

Notes

1. Substituted by Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007/1388 Sch.1 para.80 (May 25, 2007 immediately after the end of the initial period as specified in 2006 c.32 s.161(5))

Modifications

Whole Document	Modified in relation to the property, rights and liabilities transferred by SI 2012/147 art.4 by Commission for Architecture and the Built Environment (Dissolution) Order 2012/147, art. 7(4)
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Subject: Administrative law

Keywords: Exempt information; Internal relations

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Part II EXEMPT INFORMATION

This version in force from: **January 1, 2005** to **present**

(version 1 of 1)

29.— The economy.

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(a) the economic interests of the United Kingdom or of any part of the United Kingdom, or

(b) the financial interests of any administration in the United Kingdom, as defined by section 28(2).

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

Modifications

Whole Document	Modified in relation to the property, rights and liabilities transferred by SI 2012/147 art.4 by Commission for Architecture and the Built Environment (Dissolution) Order 2012/147, art. 7(4)
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Subject: Administrative law

Keywords: Economic interests; Exempt information

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Part II EXEMPT INFORMATION

This version in force from: **October 31, 2009** to **present**

(version 3 of 3)

30.— Investigations and proceedings conducted by public authorities.

(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of—

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained—

(i) whether a person should be charged with an offence, or

(ii) whether a person charged with an offence is guilty of it,

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or

(c) any criminal proceedings which the authority has power to conduct.

(2) Information held by a public authority is exempt information if—

(a) it was obtained or recorded by the authority for the purposes of its functions relating to—

(i) investigations falling within subsection (1)(a) or (b),

(ii) criminal proceedings which the authority has power to conduct,

(iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or

(iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and

(b) it relates to the obtaining of information from confidential sources.

(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) or (2).

(4) In relation to the institution or conduct of criminal proceedings or the power to conduct

them, references in subsection (1)(b) or (c) and subsection (2)(a) to the public authority include references—

(a) to any officer of the authority,

(b) in the case of a government department other than a Northern Ireland department, to the Minister of the Crown in charge of the department, and

(c) in the case of a Northern Ireland department, to the Northern Ireland Minister in charge of the department.

[

(5) In this section–

"criminal proceedings" includes service law proceedings (as defined by section 324(5) of the Armed Forces Act 2006);

"offence" includes a service offence (as defined by section 50 of that Act).

] [1]

(6) In the application of this section to Scotland—

(a) in subsection (1)(b), for the words from "a decision" to the end there is substituted "a decision by the authority to make a report to the procurator fiscal for the purpose of enabling him to determine whether criminal proceedings should be instituted",

(b) in subsections (1)(c) and (2)(a)(ii) for "which the authority has power to conduct" there is substituted "which have been instituted in consequence of a report made by the authority to the procurator fiscal", and

(c) for any reference to a person being charged with an offence there is substituted a reference to the person being prosecuted for the offence.

Notes

1. Substituted by Armed Forces Act 2006 c. 52 Sch.16 para.176 (October 31, 2009)

Modifications

Whole Document	Modified in relation to the property, rights and liabilities transferred by SI 2012/147 art.4 by Commission for Architecture and the Built Environment (Dissolution) Order 2012/147, art. 7(4)
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Pt II s. 30	Modified in relation to purposes specified in SI 2009/1059 Sch.1 para.46 by Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059, Sch. 1 para. 46, Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059, Sch. 1 para. 46

Subject: Administrative law

Keywords: Criminal proceedings; Exempt information; Interpretation; Investigations; Public authorities

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Part II EXEMPT INFORMATION

This version in force from: **January 1, 2005** to **present**

(version 1 of 1)

31.— Law enforcement.

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(a) the prevention or detection of crime,

(b) the apprehension or prosecution of offenders,

(c) the administration of justice,

(d) the assessment or collection of any tax or duty or of any imposition of a similar nature,

(e) the operation of the immigration controls,

(f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),

(h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or

(i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.

(2) The purposes referred to in subsection (1)(g) to (i) are—

(a) the purpose of ascertaining whether any person has failed to comply with the law,

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,

(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,

(d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,

(e) the purpose of ascertaining the cause of an accident,

(f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,

(g) the purpose of protecting the property of charities from loss or misapplication,

(h) the purpose of recovering the property of charities,

(i) the purpose of securing the health, safety and welfare of persons at work, and

(j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

Modifications

Whole Document	Modified in relation to the property, rights and liabilities transferred by SI 2012/147 art.4 by Commission for Architecture and the Built Environment (Dissolution) Order 2012/147, art. 7(4)
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Subject: Administrative law

Keywords: Exempt information; Law enforcement

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Part II EXEMPT INFORMATION

This version in force from: **July 25, 2013** to **present**

(version 2 of 2)

32.— Court records, etc.

(1) Information held by a public authority is exempt information if it is held only by virtue of being contained in—

(a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,

(b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or

(c) any document created by—

(i) a court, or

(ii) a member of the administrative staff of a court,

for the purposes of proceedings in a particular cause or matter.

(2) Information held by a public authority is exempt information if it is held only by virtue of being contained in—

(a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration, or

(b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.

(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of this section.

(4) In this section—

(a) *"court"* includes any tribunal or body exercising the judicial power of the State,

(b) *"proceedings in a particular cause or matter"* includes [any investigation under Part 1 of the Coroners and Justice Act 2009, any inquest under the Coroners Act (Northern Ireland) 1959 and any] [1] post-mortem examination ,

(c) *"inquiry"* means any inquiry or hearing held under any provision contained in, or made under, an enactment, and

(d) except in relation to Scotland, *"arbitration"* means any arbitration to which Part I of the Arbitration Act 1996 applies.

Notes

1. Words substituted by Coroners and Justice Act 2009 c. 25 Sch.21(1) para.44 (July 25, 2013)

Modifications

Whole Document	Modified in relation to the property, rights and liabilities transferred by SI 2012/147 art.4 by Commission for Architecture and the Built Environment (Dissolution) Order 2012/147, art. 7(4)
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Subject: Administrative law

Keywords: Arbitration claims; Court documents; Exempt information; Inquiries; Public authorities

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Part II EXEMPT INFORMATION

This version in force from: **January 1, 2005** to **present**

(version 1 of 1)

33.— Audit functions.

(1) This section applies to any public authority which has functions in relation to—

(a) the audit of the accounts of other public authorities, or

(b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.

(2) Information held by a public authority to which this section applies is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1).

(3) The duty to confirm or deny does not arise in relation to a public authority to which this section applies if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1).

Modifications

Whole Document	Modified in relation to the property, rights and liabilities transferred by SI 2012/147 art.4 by Commission for Architecture and the Built Environment (Dissolution) Order 2012/147, art. 7(4)
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Subject: Administrative law

Keywords: Audits; Exempt information; Public authorities

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Part II EXEMPT INFORMATION

This version in force from: **January 1, 2005** to **present**

(version 1 of 1)

34.— Parliamentary privilege.

(1) Information is exempt information if exemption from section 1(1)(b) is required for the purpose of avoiding an infringement of the privileges of either House of Parliament.

(2) The duty to confirm or deny does not apply if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of avoiding an infringement of the privileges of either House of Parliament.

(3) A certificate signed by the appropriate authority certifying that exemption from section 1(1)(b), or from section 1(1)(a) and (b), is, or at any time was, required for the purpose of avoiding an infringement of the privileges of either House of Parliament shall be conclusive evidence of that fact.

(4) In subsection (3) *"the appropriate authority"* means—

(a) in relation to the House of Commons, the Speaker of that House, and

(b) in relation to the House of Lords, the Clerk of the Parliaments.

Modifications

Whole Document	Modified in relation to the property, rights and liabilities transferred by SI 2012/147 art.4 by Commission for Architecture and the Built Environment (Dissolution) Order 2012/147, art. 7(4)
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Subject: Administrative law

Keywords: Certificates; Exempt information; Parliamentary privilege

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Part II EXEMPT INFORMATION

This version in force from: **May 25, 2007** to **present**

(version 2 of 2)

35.— Formulation of government policy, etc.

(1) Information held by a government department or by [the Welsh Assembly Government] [1] is exempt information if it relates to—

(a) the formulation or development of government policy,

(b) Ministerial communications,

(c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or

(d) the operation of any Ministerial private office.

(2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded—

(a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or

(b) for the purposes of subsection (1)(b), as relating to Ministerial communications.

(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).

(4) In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.

(5) In this section—

"government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of [the Welsh Assembly Government] [2];

"the Law Officers" means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland [, the Counsel General to the Welsh Assembly Government] [3] and the Attorney General for Northern Ireland ;

"Ministerial communications" means any communications—

(a) between Ministers of the Crown,

(b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or

[

(c) between members of the Welsh Assembly Government,

] [4] and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of [the Cabinet or any committee of the Cabinet of the Welsh Assembly Government] [5];

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or [any part of the administration of the Welsh Assembly Government providing personal administrative support to the members of the Welsh Assembly Government] [6];

"Northern Ireland junior Minister" means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998.

Notes

1. Words substituted by Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007/1388 Sch.1 para.81(2) (May 25, 2007 immediately after the end of the initial period as specified in 2006 c.32 s.161(5))

2. Words substituted by Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007/1388 Sch.1 para.81(3)(a) (May 25, 2007 immediately after the end of the initial period as specified in 2006 c.32 s.161(5))

3. Words inserted by Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007/1388 Sch.1 para.81(3)(b) (May 25, 2007 immediately after the end of the initial period as specified in 2006 c.32 s.161(5))

4. Substituted by Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007/1388 Sch.1 para.81(3)(c)(i) (May 25, 2007 immediately after the end of the initial period as specified in 2006 c.32 s.161(5))

5. Words substituted by Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007/1388 Sch.1 para.81(3)(c)(ii) (May 25, 2007 immediately after the end of the initial period as specified in 2006 c.32 s.161(5))

6. Words substituted by Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007/1388 Sch.1 para.81(3)(d) (May 25, 2007 immediately after the end of the initial period as specified in 2006 c.32 s.161(5))

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	Regulations 2012/2734, reg. 6, Police and Crime Panels (Application of Local Authority Enactments) Regulations 2012/2734, reg. 6, Police and Crime Panels (Application of Local Authority Enactments) Regulations 2012/2734, reg. 6, Police and Crime Panels (Application of Local Authority Enactments) Regulations 2012/2734, reg. 6, Police and Crime Panels (Application of Local Authority Enactments) Regulations 2012/2734, reg. 6

Subject: Administrative law

Keywords: Exempt information; Public policy

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Part II EXEMPT INFORMATION

This version in force from: **April 1, 2014** to **present**

(version 4 of 4)

36.— Prejudice to effective conduct of public affairs.

(1) This section applies to—

(a) information which is held by a government department or by [the Welsh Assembly Government] [1] and is not exempt information by virtue of section 35, and

(b) information which is held by any other public authority.

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

(a) would, or would be likely to, prejudice—

(i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or

(ii) the work of the Executive Committee of the Northern Ireland Assembly, or

[

(iii) the work of the Cabinet of the Welsh Assembly Government,

] [2]

(b) would, or would be likely to, inhibit—

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

(3) The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).

(4) In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words “in the reasonable opinion of a qualified person”.

(5) In subsections (2) and (3) *"qualified person"*—

(a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,

(b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,

(c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,

(d) in relation to information held by the House of Commons, means the Speaker of that House,

(e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,

(f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,

[

(g) in relation to information held by the Welsh Assembly Government, means the Welsh Ministers or the Counsel General to the Welsh Assembly Government,

(ga) in relation to information held by the National Assembly for Wales, means the Presiding Officer of the National Assembly for Wales,

(gb) in relation to information held by any Welsh public authority (other than one referred to in section 83(1)(b)(ii) (subsidiary of the Assembly Commission), the Auditor General for Wales [, the Wales Audit Office] [4] or the Public Services Ombudsman for Wales), means—

(i) the public authority, or

(ii) any officer or employee of the authority authorised by the Welsh Ministers or the Counsel General to the Welsh Assembly Government,

(gc) in relation to information held by a Welsh public authority referred to in section 83(1)(b)(ii), means—

(i) the public authority, or

(ii) any officer or employee of the authority authorised by the Presiding Officer of the National Assembly for Wales,

] [3]

(i) in relation to information held by the National Audit Office [or the Comptroller and Auditor General] [5] , means the Comptroller and Auditor General,

(j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,

(k) in relation to information held by the Auditor General for Wales [or the Wales Audit Office] [4] , means the Auditor General for Wales,

[

(ka) in relation to information held by the Public Services Ombudsman for Wales, means the Public Services Ombudsman for Wales,

] [6]

(l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means—

(i) the public authority, or

(ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,

(m) in relation to information held by the Greater London Authority, means the Mayor of London,

(n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and

(o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means—

(i) a Minister of the Crown,

(ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or

(iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.

(6) Any authorisation for the purposes of this section—

(a) may relate to a specified person or to persons falling within a specified class,

(b) may be general or limited to particular classes of case, and

(c) may be granted subject to conditions.

(7) A certificate signed by the qualified person referred to in subsection (5)(d)or (e) above certifying that in his reasonable opinion—

(a) disclosure of information held by either House of Parliament, or

(b) compliance with section 1(1)(a) by either House,

would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.

Notes

1. Words substituted by Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007/1388 Sch.1 para.82(2) (May 25, 2007 immediately after the end of the initial period as specified in 2006 c.32 s.161(5))

2. Substituted by Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007/1388 Sch.1 para.82(3) (May 25, 2007 immediately after the end of the initial period as specified in 2006 c.32 s.161(5))

3. S.36(5)(g)-(gc) substituted for s.36(5)(g) and (h) by Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007/1388 Sch.1 para.82(4)(a) (May 25, 2007 immediately after the end of the initial period as specified in 2006 c.32 s.161(5))

4. Amended by Public Audit (Wales) Act 2013 anaw. 3 Sch.4 para.18 (April 1, 2014)

5. Words inserted by Budget Responsibility and National Audit Act 2011 c. 4 Sch.5(2) para.22(1) (April 1, 2012)

6. Added by Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007/1388 Sch.1 para.82(4)(b) (May 25, 2007 immediately after the end of the initial period as specified in 2006 c.32 s.161(5))

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Pt II s. 36(5)(i)	Modified in relation to NAO by Budget Responsibility and National Audit Act 2011 c. 4, Sch. 5(2) para. 22(2), Budget Responsibility and National Audit Act 2011 c. 4, Sch. 5(2) para. 22(2)

Subject: Administrative law

Keywords: Certificates; Exempt information; Government departments; Prejudice; Public authorities

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Part II EXEMPT INFORMATION

This version in force from: **January 19, 2011** to **present**

(version 2 of 2)

37.— Communications with Her Majesty, etc. and honours.

(1) Information is exempt information if it relates to—

[

(a) communications with the Sovereign,

(aa) communications with the heir to, or the person who is for the time being second in line of succession to, the Throne,

(ab) communications with a person who has subsequently acceded to the Throne or become heir to, or second in line to, the Throne,

(ac) communications with other members of the Royal Family (other than communications which fall within any of paragraphs (a) to (ab) because they are made or received on behalf of a person falling within any of those paragraphs), and

(ad) communications with the Royal Household (other than communications which fall within any of paragraphs (a) to (ac) because they are made or received on behalf of a person falling within any of those paragraphs), or

] [1]

(b) the conferring by the Crown of any honour or dignity.

(2) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).

Notes

1. S.37(1)(a)-(ad) substituted for s.37(1)(a) by Constitutional Reform and Governance Act 2010 c. 25 Sch.7 para.3 (January 19, 2011: substitution has effect subject to savings specified in SI 2011/46 art.4)

Modifications

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Pt II s. 37(1)	Modified in relation to information held by the Northern Ireland Assembly, a Northern Ireland department, or a Northern Ireland public authority by Freedom of Information Act 2000 c. 36, Pt VIII s. 80A(4)

Subject: Administrative law

Keywords: Exempt information; Peerages and dignities; Royal Family

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Part II EXEMPT INFORMATION

This version in force from: **January 1, 2005** to **present**

(version 1 of 1)

38.— Health and safety.

(1) Information is exempt information if its disclosure under this Act would, or would be likely to—

(a) endanger the physical or mental health of any individual, or

(b) endanger the safety of any individual.

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, have either of the effects mentioned in subsection (1).

Modifications

Whole Document	Modified in relation to the property, rights and liabilities transferred by SI 2012/147 art.4 by Commission for Architecture and the Built Environment (Dissolution) Order 2012/147, art. 7(4)
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Subject: Administrative law

Keywords: Exempt information; Health; Personal records; Safety

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Part II EXEMPT INFORMATION

This version in force from: **April 22, 2011** to **present**

(version 3 of 3)

39.— Environmental information.

(1) Information is exempt information if the public authority holding it—

(a) is obliged by [environmental information regulations] [1] to make the information available to the public in accordance with the regulations, or

(b) would be so obliged but for any exemption contained in the regulations.

[

(1A) In subsection (1) *"environmental information regulations"* means–

(a) regulations made under section 74, or

(b) regulations made under section 2(2) of the European Communities Act 1972 for the purpose of implementing any [EU] [3] obligation relating to public access to, and the dissemination of, information on the environment.

] [2]

(2) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).

(3) Subsection (1)(a) does not limit the generality of section 21(1).

Notes

1. Words substituted by Environmental Information Regulations 2004/3391 Pt 5 reg.20(2) (January 1, 2005)

2. Added by Environmental Information Regulations 2004/3391 Pt 5 reg.20(3) (January 1, 2005)

3. Word substituted by Treaty of Lisbon (Changes in Terminology) Order 2011/1043 Pt 2 art.6(1)(e) (April 22, 2011)

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Subject: Administrative law

Keywords: Environmental information; Exempt information

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Part II EXEMPT INFORMATION

This version in force from: **January 1, 2005** to **present**

(version 1 of 1)

40.— Personal information.

(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied.

(3) The first condition is—

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

(5) The duty to confirm or deny—

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either—

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998

or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

(6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

(7) In this section—

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.

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Subject: Administrative law

Keywords: Data protection principles; Data subjects; Exempt information; Personal data; Third parties

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Part II EXEMPT INFORMATION

This version in force from: **January 1, 2005** to **present**

(version 1 of 1)

41.— Information provided in confidence.

(1) Information is exempt information if—

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

(2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.

Modifications

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Subject: Administrative law

Keywords: Confidential information; Exempt information

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Part II EXEMPT INFORMATION

This version in force from: **January 1, 2005** to **present**

(version 1 of 1)

42.— Legal professional privilege.

(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.

Modifications

Whole Document	Modified in relation to the property, rights and liabilities transferred by SI 2012/147 art.4 by Commission for Architecture and the Built Environment (Dissolution) Order 2012/147, art. 7(4)
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Subject: Administrative law

Keywords: Exempt information; Legal professional privilege

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Part II EXEMPT INFORMATION

This version in force from: **January 1, 2005** to **present**

(version 1 of 1)

43.— Commercial interests.

(1) Information is exempt information if it constitutes a trade secret.

(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).

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	Modified in relation to any time before the commencement of 2000 c.36 s.18(1) by Freedom of Information Act 2000 c. 36, Sch. 2(I) para. 2(1)
	Modified in relation to any time before the commencement of 2000 c.36 s.18(2) by Freedom of Information Act 2000 c. 36, Sch. 2(I) para. 2(2)
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Subject: Administrative law

Keywords: Exempt information; Trade secrets

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Part II EXEMPT INFORMATION

This version in force from: **April 22, 2011** to **present**

(version 2 of 2)

44.— Prohibitions on disclosure.

(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it—

(a) is prohibited by or under any enactment,

(b) is incompatible with any [EU] [1] obligation, or

(c) would constitute or be punishable as a contempt of court.

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).

Notes

1. Word substituted by Treaty of Lisbon (Changes in Terminology) Order 2011/1043 Pt 2 art.6(1)(e) (April 22, 2011)

Modifications

Whole Document	Modified in relation to the property, rights and liabilities transferred by SI 2012/147 art.4 by Commission for Architecture and the Built Environment (Dissolution) Order 2012/147, art. 7(4)
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Subject: Administrative law

Keywords: Exempt information; Statutory prohibitions

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Part VIII MISCELLANEOUS AND SUPPLEMENTAL

This version in force from: **September 1, 2013** to **present**

(version 8 of 8)

84. Interpretation.

In this Act, unless the context otherwise requires—

"applicant", in relation to a request for information, means the person who made the request;

"appropriate Northern Ireland Minister" means the Northern Ireland Minister in charge of the Department of Culture, Arts and Leisure in Northern Ireland;

"appropriate records authority", in relation to a transferred public record, has the meaning given by section 15(5);

"body" includes an unincorporated association;

"the Commissioner" means the Information Commissioner;

[*"dataset"* has the meaning given by section 11(5);] [1]

"decision notice" has the meaning given by section 50;

"the duty to confirm or deny" has the meaning given by section 1(6);

"enactment" includes an enactment contained in Northern Ireland legislation;

"enforcement notice" has the meaning given by section 52;

[...] [2]

"exempt information" means information which is exempt information by virtue of any provision of Part II;

"fees notice" has the meaning given by section 9(1);

"government department" includes a Northern Ireland department [...] [3] and any other body or authority exercising statutory functions on behalf of the Crown, but does not include—

(a) any of the bodies specified in section 80(2),

(b) the Security Service, the Secret Intelligence Service or the Government Communications Headquarters, [...] [4]

[

(ba) the National Crime Agency, or

] [5] [

(c) the Welsh Assembly Government;

] [6]

"information" (subject to sections 51(8) and 75(2)) means information recorded in any form;

"information notice" has the meaning given by section 51;

"Minister of the Crown" has the same meaning as in the Ministers of the Crown Act 1975;

"Northern Ireland Minister" includes the First Minister and deputy First Minister in Northern Ireland;

"Northern Ireland public authority" means any public authority, other than the Northern Ireland Assembly or a Northern Ireland department, whose functions are exercisable only or mainly in or as regards Northern Ireland and relate only or mainly to transferred matters;

"prescribed" means prescribed by regulations made by the [Secretary of State] [7];

"public authority" has the meaning given by section 3(1);

"public record" means a public record within the meaning of the Public Records Act 1958 or a public record to which the Public Records Act (Northern Ireland) 1923 applies;

"publication scheme" has the meaning given by section 19;

"request for information" has the meaning given by section 8;

"responsible authority", in relation to a transferred public record, has the meaning given by section 15(5);

"the special forces" means those units of the armed forces of the Crown the maintenance of whose capabilities is the responsibility of the Director of Special Forces or which are for the time being subject to the operational command of that Director;

"subordinate legislation" has the meaning given by subsection (1) of section 21 of the Interpretation Act 1978, except that the definition of that term in that subsection shall have effect as if *"Act"* included Northern Ireland legislation;

"transferred matter", in relation to Northern Ireland, has the meaning given by section 4(1) of the Northern Ireland Act 1998;

"transferred public record" has the meaning given by section 15(4);

[*"the Tribunal"*, in relation to any appeal under this Act, means—

(a) the Upper Tribunal, in any case where it is determined by or under Tribunal Procedure Rules that the Upper Tribunal is to hear the appeal; or

(b) the First-tier Tribunal, in any other case;

] [8]

"Welsh public authority" has the meaning given by section 83.

Notes

1. Definition inserted by Protection of Freedoms Act 2012 c. 9 Pt 6 s.102(6) (September 1, 2013)

2. Definition repealed by Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007/1388 Sch.1 para.86(2) (May 25, 2007 immediately after the end of the initial period as specified in 2006 c.32 s.161(5))

3. Words repealed by Northern Ireland Court Service (Abolition and Transfer of Functions) Order (Northern Ireland) 2010/133 Sch.1(1) para.7 (April 12, 2010: repeal has effect subject to transitional provisions specified in SR 2010/133 arts 5-7)

4. Word repealed by Crime and Courts Act 2013 c. 22 Sch.8(2) para.103(a) (May 27, 2013: repeal has effect as SI 2013/1042 subject to savings and transitional provisions specified in 2013 c.22 s.15 and Sch.8)

5. Added by Crime and Courts Act 2013 c. 22 Sch.8(2) para.103(b) (May 27, 2013: insertion has effect as SI 2013/1042 subject to savings and transitional provisions specified in 2013 c.22 s.15 and Sch.8)

6. Substituted by Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007/1388 Sch.1 para.86(3) (May 25, 2007 immediately after the end of the initial period as specified in 2006 c.32 s.161(5))

7. Words substituted by Secretary of State for Constitutional Affairs Order 2003/1887 Sch.2 para.12(1)(c) (August 19, 2003)

8. Definition substituted by Transfer of Tribunal Functions Order 2010/22 Sch.2 para.71 (January 18, 2010)

Modifications

Whole Document	Modified in relation to the property, rights and liabilities transferred by SI 2012/147 art.4 by Commission for Architecture and the Built Environment (Dissolution) Order 2012/147, art. 7(4)
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Subject: Administrative law

Keywords: Freedom of information; Interpretation

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Schedule 1 PUBLIC AUTHORITIES

Part I GENERAL

This version in force from: **October 1, 2013** to **present**

(version 3 of 3)

1.

[
Any government department other than—

(a) the Competition and Markets Authority,

(b) the Office for Standards in Education, Children's Services and Skills.

] [1]

Notes

1. Existing text renumbered as Sch.1 para.1(b) and Sch.1 para.1(a) is inserted by Enterprise and Regulatory Reform Act 2013 c. 24 Sch.4(1) para.25(a) (October 1, 2013: substitution has effect subject to transitional provisions as specified in 2013 c.24 s.28)

Modifications

Whole Document	Modified in relation to the property, rights and liabilities transferred by SI 2012/147 art.4 by Commission for Architecture and the Built Environment (Dissolution) Order 2012/147, art. 7(4)
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Subject: Administrative law

Keywords: Freedom of information; Government departments; Public authorities

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Schedule 1 PUBLIC AUTHORITIES

Part I GENERAL

This version in force from: **October 1, 2013** to **present**

(version 1 of 1)

[

1ZA

The Competition and Markets Authority, in respect of information held otherwise than as a tribunal.

] [1]

Notes

1. Added by Enterprise and Regulatory Reform Act 2013 c. 24 Sch.4(1) para.25(b) (October 1, 2013: insertion has effect subject to transitional provisions as specified in 2013 c.24 s.28)

Modifications

Whole Document	Modified in relation to the property, rights and liabilities transferred by SI 2012/147 art.4 by Commission for Architecture and the Built Environment (Dissolution) Order 2012/147, art. 7(4)
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Subject: Administrative law

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Schedule 1 PUBLIC AUTHORITIES

Part I GENERAL

This version in force from: **April 1, 2007** to **present**

(version 1 of 1)

[

1A

The Office for Standards in Education, Children's Services and Skills, in respect of information held for purposes other than those of the functions exercisable by Her Majesty's Chief Inspector of Education, Children's Services and Skills by virtue of section 5(1)(a)(iii) of the Care Standards Act 2000.

] [1]

Notes

1. Added by Education and Inspections Act 2006 c. 40 Sch.14 para.69(2)(b) (April 1, 2007)

Modifications

Whole Document	Modified in relation to the property, rights and liabilities transferred by SI 2012/147 art.4 by Commission for Architecture and the Built Environment (Dissolution) Order 2012/147, art. 7(4)
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Subject: Administrative law

Keywords: Freedom of information; OFSTED; Public authorities

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Schedule 1 PUBLIC AUTHORITIES

Part I GENERAL

This version in force from: **June 25, 2013** to **present**

(version 3 of 3)

2.

The House of Commons [, in respect of information other than—] [1]

[

(a) information relating to any residential address of a member of either House of Parliament,

(b) information relating to travel arrangements of a member of either House of Parliament, where the arrangements relate to travel that has not yet been undertaken or is regular in nature,

(c) information relating to the identity of any person who delivers or has delivered goods, or provides or has provided services, to a member of either House of Parliament at any residence of the member,

(d) information relating to expenditure by a member of either House of Parliament on security arrangements [,] [2]

[

(e) information held by the Intelligence and Security Committee of Parliament.

] [2]

Paragraph (b) does not except information relating to the total amount of expenditure incurred on regular travel during any month.

] [1]

Notes

1. Added by Freedom of Information (Parliament and National Assembly for Wales) Order 2008/1967 art.2(2) (July 23, 2008)

2. Added by Justice and Security Act 2013 c. 18 Sch.2(1) para.5(3)(a) (June 25, 2013: insertion has effect subject to transitional and savings provisions specified in 2013 c.18 s.19(1) and Sch.3 para.1 and in SI 2013/1482 arts 3 and 4)

Modifications

Whole Document	Modified in relation to the property, rights and liabilities transferred by SI

	2012/147 art.4 by Commission for Architecture and the Built Environment (Dissolution) Order 2012/147, art. 7(4)
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Subject: Administrative law

Keywords: Freedom of information; House of Commons; Public authorities

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Schedule 1 PUBLIC AUTHORITIES

Part I GENERAL

This version in force from: **June 25, 2013** to **present**

(version 3 of 3)

3.

The House of Lords [, in respect of information other than—] [1]

[

(a) information relating to any residential address of a member of either House of Parliament,

(b) information relating to travel arrangements of a member of either House of Parliament, where the arrangements relate to travel that has not yet been undertaken or is regular in nature,

(c) information relating to the identity of any person who delivers or has delivered goods, or provides or has provided services, to a member of either House of Parliament at any residence of the member,

(d) information relating to expenditure by a member of either House of Parliament on security arrangements [,] [2]

[

(e) information held by the Intelligence and Security Committee of Parliament.

] [2]

Paragraph (b) does not except information relating to the total amount of expenditure incurred on regular travel during any month.

] [1]

Notes

1. Added by Freedom of Information (Parliament and National Assembly for Wales) Order 2008/1967 art.2(3) (July 23, 2008)

2. Added by Justice and Security Act 2013 c. 18 Sch.2(1) para.5(3)(b) (June 25, 2013: insertion has effect subject to transitional and savings provisions specified in 2013 c.18 s.19(1) and Sch.3 para.1 and in SI 2013/1482 arts 3 and 4)

Modifications

Whole Document	Modified in relation to the property, rights and liabilities transferred by SI

	2012/147 art.4 by Commission for Architecture and the Built Environment (Dissolution) Order 2012/147, art. 7(4)
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Subject: Administrative law

Keywords: Freedom of information; House of Lords; Public authorities

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Schedule 1 PUBLIC AUTHORITIES

Part I GENERAL

This version in force from: **November 30, 2000** to **present**

(version 1 of 1)

4.

The Northern Ireland Assembly.

Modifications

Whole Document	Modified in relation to the property, rights and liabilities transferred by SI 2012/147 art.4 by Commission for Architecture and the Built Environment (Dissolution) Order 2012/147, art. 7(4)
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Subject: Administrative law

Keywords: Freedom of information; Northern Ireland Assembly; Public authorities

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Schedule 1 PUBLIC AUTHORITIES

Part I GENERAL

This version in force from: **July 23, 2008** to **present**

(version 2 of 2)

5.

The National Assembly for Wales [, in respect of information other than—] [1]

[

(a) information relating to any residential address of a member of the Assembly,

(b) information relating to travel arrangements of a member of the Assembly, where the arrangements relate to travel that has not yet been undertaken or is regular in nature,

(c) information relating to the identity of any person who delivers or has delivered goods, or provides or has provided services, to a member of the Assembly at any residence of the member,

(d) information relating to expenditure by a member of the Assembly on security arrangements.

Paragraph (b) does not except information relating to the total amount of expenditure incurred on regular travel during any month.

] [1]

Notes

1. Added by Freedom of Information (Parliament and National Assembly for Wales) Order 2008/1967 art.2(4) (July 23, 2008)

Modifications

Whole Document	Modified in relation to the property, rights and liabilities transferred by SI 2012/147 art.4 by Commission for Architecture and the Built Environment (Dissolution) Order 2012/147, art. 7(4)
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Subject: Administrative law

Keywords: Freedom of information; National Assembly for Wales; Public authorities

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Schedule 1 PUBLIC AUTHORITIES

Part I GENERAL

This version in force from: **May 25, 2007** to **present**

(version 1 of 1)

[

5A

The Welsh Assembly Government.

] [1]

Notes

1. Added by Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007/1388 Sch.1 para.87 (May 25, 2007 immediately after the end of the initial period as specified in 2006 c.32 s.161(5))

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Subject: Administrative law

Keywords: Freedom of information; Public authorities; Welsh Assembly Government

Status: ✅ Law In Force

Freedom of Information Act 2000 c. 36

Schedule 1 PUBLIC AUTHORITIES

Part I GENERAL

This version in force from: **November 30, 2000** to **present**

(version 1 of 1)

6.

The armed forces of the Crown, except—

(a) the special forces, and

(b) any unit or part of a unit which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in the exercise of its functions.

Modifications

Whole Document	Modified in relation to the property, rights and liabilities transferred by SI 2012/147 art.4 by Commission for Architecture and the Built Environment (Dissolution) Order 2012/147, art. 7(4)
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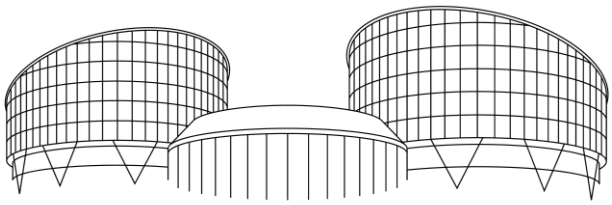
Subject: Administrative law

Keywords: Armed forces; Freedom of information; Public authorities



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

FIFTH SECTION

CASE OF SHAPOVALOV v. UKRAINE

(Application no. 45835/05)

JUDGMENT

STRASBOURG

31 July 2012

FINAL

31/10/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Shapovalov v. Ukraine,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Dean Spielmann, *President,*
Mark Villiger,
Karel Jungwiert,
Boštjan M. Zupančič,
Ann Power-Forde,
Ganna Yudkivska,
Angelika Nußberger, *judges,*
and Stephen Phillips, *Deputy Section Registrar,*

Having deliberated in private on 10 July 2012,

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

PROCEDURE

1. The case originated in an application (no. 45835/05) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr Oleksandr Volodymyrovych Shapovalov ("the applicant"), on 21 November 2005.

2. The applicant, who had been granted legal aid, was represented by Mr A. P. Bushchenko, a lawyer practising in Kharkiv, Ukraine. The Ukrainian Government ("the Government") were represented by their Agent, Mr N. Kulchytskyy, of the Ministry of Justice of Ukraine.

3. The applicant alleged, in particular, that the State authorities had hindered him in collecting various information necessary to cover the course of the presidential elections, and that he had not been able to challenge the State authorities' actions in court.

4. On 2 November 2010 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1981 and lives in Kherson, Ukraine.

6. The applicant is a journalist and human rights activist. Since April 2003 he has been a member of the Kherson Regional Branch of the Ukrainian NGO "The Committee of Voters of Ukraine" (hereinafter

"CVU") *(Херсонська обласна організація всеукраїнської громадської організації «Комітет виборців України»)* and a reporter for the regional newspaper "Vilnyy vybir" *(«Вільний вибір»),* which was founded by the Kherson Regional Branch of the CVU. Between 26 October 2004 and 10 January 2005 he was also a reporter for the CVU's newspaper "Tochka zoru" *(«Точка зору»).* The CVU's main activities include, inter alia, election monitoring and raising voters' legal awareness during election campaigns.

A. Historical background

7. The Ukrainian presidential elections in 2004 were held on two rounds, on 31 October and 21 November 2004.

8. After the end of the second-round voting of 21 November 2004 mass protests were carried out. The elections were claimed to be marked by massive corruption, voter intimidation and electoral fraud. The protests succeeded in that the results of the original run-off were annulled, and a revote was organised on 26 December 2004.

9. The protests and other political events that took place in Ukraine from late November 2004 to January 2005 were called the Orange Revolution.

B. Events of 31 October 2004 and related events

10. During the Ukrainian presidential elections in 2004 the applicant covered meetings and decisions of Territorial Election Commission no. 186 (hereinafter "the TEC") (*територіальна виборча комісія*).

11. According to the applicant, at 2 p.m. on 31 October 2004, the day of first-round voting in the presidential elections, he requested R., the TEC's secretary, and B., the TEC's Head, to provide him with a copy of the TEC's decision no. P-12-4, adopted earlier on the same day, concerning the possibility for district electoral commissions to make changes to the lists of voters without the approval of the TEC. According to the applicant, such a decision was unlawful. Later, the applicant asked for the voting results for each polling station and for copies of the minutes of the TEC's meetings of 31 October 2004.

12. As the applicant was not provided with the information requested, on the same day at 5 p.m. he submitted a written request to the Head of the TEC. In reply, he was informed that decision no. P-12-4 had been posted on the information stand and that by 4 p.m. 39.1% of voters had voted. According to the applicant, his request for the TEC meeting minutes was ignored. However, according to explanations given by R. to a prosecutor (see paragraph 20), the minutes of the TEC meetings of 31 October and 1 November 2004 had also been displayed on the information stand.

13. That same evening, at around 8 p.m., the applicant was prevented from entering the TEC building to attend its meeting. According to the applicant, he entered the TEC premises half an hour later. It is unclear whether a TEC meeting was actually held at that time and, if so, whether the applicant was finally able to attend.

14. On 5 November 2004 the applicant complained to the Head of the TEC, *inter alia*, about not letting him into the TEC's premises, and requested copies of the TEC meeting minutes of 31 October and 1 November 2004.

15. On 10 November 2004 the TEC adopted a decision to disregard the applicant's complaint.

C. Events of 21 November 2004

16. On 21 November 2004, the day of second-round voting, the applicant requested to be provided with the TEC's decision no. 1-116 of 17 November 2004 allowing the police to be present in polling stations. The applicant stated that he had been shown this decision by the police at one of the polling stations. According to the applicant, his request was ignored. No copy of such a request has been submitted by the applicant.

17. That same evening the TEC decided not to allow the applicant to attend its meetings as he interfered with its work. According to the applicant, that decision was adopted after he had asked the Head of the TEC what the legal basis for one of her decisions adopted at the meeting was. The applicant later tried to enter the TEC premises but was stopped by Z., a TEC member. This was witnessed by Bi., a journalist.

18. The applicant later requested a copy of the minutes of the TEC meeting. In reply he was told that the minutes were posted on the TEC's information stand.

D. Request to institute criminal proceedings against TEC members

19. On 15 May 2006 the Komsomolskyy District Prosecutor's Office rejected the applicant's complaint to institute criminal proceedings against TEC members for obstructing the lawful professional activities of journalists (Article 171 of the Criminal Code of Ukraine).

20. The prosecutor questioned R., the secretary of the TEC, who explained that all the material requested by the applicant on 31 October 2004 had been posted on the information stand on the TEC's premises on the same day or the next day. It was also noted that the Presidential Elections Act did not provide for the possibility of receiving information about detailed voting results for each polling station. R. also submitted that the applicant "had shouted out loud remarks about 'wrong

decisions' of the TEC and had wandered round the TEC's premises, hindering its work".

21. The Head of the TEC, B., explained that on 21 November 2004 the applicant "had behaved inappropriately and hindered the TEC in its work".

22. K., another TEC member, submitted that the applicant "had behaved inappropriately and physically hindered the TEC's work". This was also confirmed by Z., another TEC member. K. also stated that the applicant had threatened her and R. with physical reprisals and this fact had been documented.

23. Bi., a journalist, testified that she had seen the applicant being prevented from entering the TEC's premises on 22 November 2004 between 1 and 2 a.m.

24. Ko., an election observer, submitted that the applicant was requested to leave the TEC meeting after he had asked what the documents on and under the table and in the drawers in the meeting room were. It was decided to exclude him from the meeting for "making remarks from the floor".

E. Court proceedings

25. On 20 December 2004 the applicant instituted proceedings in the Suvorovskiy District Court of Kherson, challenging the TEC's refusals to give him copies of its decisions and to allow him to attend its meetings. He also complained about the failure to provide him with accurate information in a timely manner. In particular, the applicant complained that on 31 October 2004 he had not been provided with a copy of decision no. P-12-4, with written information "about voting results for each polling station in the constituency", or with the minutes of the TEC's meetings of 31 October 2004, and that he had been prevented from entering the premises of the TEC on 31 October 2004. Further, on 21 November 2004 he was not provided with the TEC's decision no. 1-116 of 17 November 2004, was not allowed to attend the TEC's meeting of 21 November 2004 and was not provided with the minutes of that meeting.

26. The applicant lodged his complaint under Chapter 31-A of the Code of Civil Procedure of Ukraine ("the CCP"), which sets out the rules for lodging complaints against decisions, acts or omissions of State bodies.

27. On 3 March 2005 the court held that the applicant's complaint should have been lodged under Chapter 30-B of the CCP and under the Presidential Elections Act 1999 ("the Act"). The court further considered that because (i) the elections had already ended, (ii) the applicant had lodged his complaint about the events of 30 October – 2 December 2004 only on 20 December 2004, and (iii) the applicant had sought the consideration of his complaint under Chapter 31-A, the proceedings should be terminated.

28. On 17 May 2005 the Kherson Regional Court of Appeal upheld the above-mentioned decision. It stated in particular that:

> "... the subject of the complaint in the present case is limited to decisions and actions of the TEC and officials during the elections between 30 October and 2 December 2004. The examination of election-related complaints is regulated by the provisions of the Presidential Elections Act, according to which a journalist cannot lodge such complaints. By the date of the court decision the elections were already over. As it was not possible to examine the applicant's complaint under Chapter 31-A of the Civil Procedure Code, the first-instance court lawfully terminated the proceedings in the case".

29. According to the applicant, he received a copy of this decision on 30 May 2005.

30. On 25 September 2006 the Higher Administrative Court of Ukraine rejected the applicant's appeal, as neither the Act nor Chapter 30-B of the CCP provided for a cassation appeal against a court decision concerning electoral matters.

F. Other events

31. According to the applicant, he received threats from unknown persons. He requested that the police protect him. On 10 January, 15 April and 16 September 2005 the Suvorovskyy District Prosecutor's Office refused to institute criminal proceedings following the applicant's allegations that he had been persecuted.

32. The applicant further complained of alleged violations of his rights to various state authorities, including the Ukrainian Parliamentary Commissioner for Human Rights. He subsequently instituted court proceedings against the Commissioner and several members of her Secretariat for failure to answer his complaints, but was unsuccessful in those proceedings.

II. RELEVANT DOMESTIC LAW

A. Code of Civil Procedure of Ukraine, 1963 (in force at the material time)

33. According to Chapter 31-A of the Code of Civil Procedure of Ukraine, it is possible to challenge the decisions, actions or omissions of any State agency or local self-government body in court, as well as those of any enterprise, establishment, association of citizens or other legal entity, or their officials or administrators.

34. According to Chapter 30-B of the Code, complaints against decisions, acts or omissions of a territorial election commission are examined by the Supreme Court of the Autonomous Republic of Crimea, by

the relevant regional court, or by the Kyiv and Sevastopol City Courts, as appropriate. Such complaints may be lodged by the candidates, their proxies, representatives of political parties or blocs, or by at least twenty voters.

B. Presidential Elections Act, 1999

35. Section 12 of the Act establishes that the subjects of elections are: (i) the voters; (ii) the election commissions formed according to the Act and the Central Election Commission Act; (iii) candidates for the post of the President of Ukraine registered in accordance with the procedure established by the Act; (iv) the parties or blocs who have nominated candidates for the post of President of Ukraine; and (v) the authorised representatives, proxies and official observers of any of the parties or blocs involved in the election process, or candidates for the post of President of Ukraine.

36. Section 104 of the Act provides that a subject of the election process shall have the right to file a complaint against the decisions, actions or inaction of an election commission or an individual member of an election commission. Complaints against the decisions, actions or inaction of territorial election commissions or their members must be filed with the Central Election Commission or with a court of appeal situated in the area covered by the relevant territorial election commission.

C. Information Act, 1992 (in force at the material time)

37. The relevant Articles of the Information Act provide as follows:

> **"Article 42. Participants in informational relationship**
>
> Participants in informational relationship are citizens, legal persons or the state who obtain the rights and obligations stipulated by law in process of information activity.
>
> Principal participants in this relationship are authors, consumers, promoters, keepers (guardians) of information
>
> **Article 43. Rights of participants of informational relationship**
>
> Participants of informational relationship have the right to receive (produce, obtain), use, disseminate and store information in any form with the use of any means, except for the cases, stipulated by the law.
>
> Every participant of informational relationship to secure his rights, freedoms and legal interests has the right to obtain information on:
>
> activity of governmental authorities;
>
> activity of people's deputies;
>
> activity of local and regional governmental authorities and local administration..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

38. The applicant complained about the refusal of the national courts to consider his complaint against the TEC. He relied on Article 6 § 1 of the Convention, which reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

1. The parties' submissions

39. The Government stated that Article 6 of the Convention was inapplicable to the proceedings in this case since the applicant's aim had been "to establish the legal liability of third parties", which was not a right guaranteed by Article 6 of the Convention, and the case had not concerned the applicant's civil rights and obligations.

40. The applicant referred to the case of *Kenedi v. Hungary* (no. 31475/05, §§ 33-34, 26 May 2009) and stated that access to relevant information fell within the right to freedom of expression, which was a "civil right" within the meaning of Article 6 § 1 of the Convention.

41. The applicant further noted that if the "real" intentions prompting a plaintiff to sue a defendant in a civil court were relevant to the nature of the dispute, the courts would have the unmanageable task of conducting large-scale investigations of "suspected" intentions before admitting civil complaints for consideration. Moreover, following the rationale behind the Government's argument, any civil dispute was inadmissible if the interest of the plaintiff went beyond pure self-interest – for example, if the plaintiff just intended to "demand justice". In addition, the applicant underlined that *restitutio in integrum* was possible only in very rare cases, whereas in some cases the establishment of the violations complained of, together with some monetary compensation, could be a sort of redress. The applicant believed that his alleged intention to use the courts' resolutions, in the event of success, for other purposes, such as shaping administrative and court practice in the sphere of access to information by various legal means, did not deprive the dispute of its "civil nature".

2. The Court's assessment

42. The Court reiterates that for Article 6 § 1, in its "civil" limb, to be applicable there must be a dispute (*contestation*) over a "right" that can be said, at least on arguable grounds, to be recognised under domestic law. The dispute must be genuine and serious. It may relate not only to the actual

existence of a right but also to its scope and the manner of its exercise. Moreover, the outcome of the proceedings must be directly decisive for the civil right in question (see *Frydlender v. France* [GC], no. 30979/96, § 27, ECHR 2000-VII).

43. The Court recalls that whether or not a right is to be regarded as a civil right within the meaning of Article 6 of the Convention is to be determined by reference to the substantive content and effects of the right. In particular, the Court has held on numerous occasions that Article 6 of the Convention covers all proceedings the result of which is decisive for private rights and obligations (see, *König v. Germany*, 28 June 1978, §§ 89-90, Series A no. 27). Consequently, if the case concerns a dispute between an individual and a public authority, whether the latter had acted as a private person or in its sovereign capacity is therefore not conclusive (see, *Ringeisen v. Austria*, 16 July 1971, § 94, Series A no. 13).

44. In its early jurisprudence the Commission noted that the wording of Article 6 § 1 of the Convention is taken over from the early drafts for Article 14 § 1, of the United Nations Covenant on Civil and Political Rights and the word "civil" was not contained in the first drafts but inserted subsequently in the drafting process (see *W., X., Y. and Z. v. the United Kingdom* (dec.), nos. 3435/67; 3436/67; 3437/67 and 3438/67, 19 July 1968). Although it made possible the discussion on whether the concept of "civil rights and obligations" within the meaning of Article 6 of the Convention could extend beyond those rights which have a private nature (see, *König v. Germany*, cited above, § 95), in its subsequent practice the Court has never considered this issue.

45. In its practice the Court has expressly recognised that the majority of the Convention rights, including those of non-pecuniary nature, are “civil rights” for the purposes of Article 6 § 1 of the Convention (see *Athanassoglou and Others v. Switzerland* [GC], no. 27644/95, § 55, ECHR 2000-IV (right to life and physical integrity); *Mustafa v. France*, no. 63056/00, § 14, 17 June 2003 (right to change name); *Fayed v. the United Kingdom*, 21 September 1994, Series A no. 294-B (right to reputation); *AB Kurt Kellermann v. Sweden* (dec.), no. 41579/98, 1 July 2003 (freedom of association)).

46. However, in cases where proceedings in question concerned freedom of expression, and, in particular, access to information, the Commission and the Court found that the right to report matters stated in open court (see *G. Hodgson, D. Woolf Productions Ltd. and National Union of Journalists v. the United Kingdom* and *Channel Four Television Co. Ltd. v. the United Kingdom*, nos. 11553/85 and 11658/85, 9 March 1987, Decisions and Reports (DR) 51, p. 136; *Andre Loersch and Nouvelle Association du Courrier v. Switzerland*, nos. 23868/94 and 23869/94, 24 February 1995, DR 80, p. 162, and *MacKay and BBC Scotland v. the United Kingdom*, no. 10734/05, § 22, 7 December 2010) or to obtain copies of various election

related documents by an election observer organisation which was not remunerated for this activity (see *Geraguyn Khorhurd Patgamavorakan Akumb v. Armenia* (dec.), no. 11721/04, 14 April 2009) could not be described as rights which are civil in nature for purposes of Article 6 § 1.

47. The Court also notes that in some related cases it has left this question open (see *Sdružení Jihočeské Matky v. the Czech Republic* (dec.), no. 19101/03, 10 July 2006, where an environment protection organisation was complaining about lack of access to particular documents on nearby nuclear station).

48. Still, in the case of *Kenedi v. Hungary*, (cited above), which concerned the inability to obtain the enforcement, within a reasonable time, of a final court decision authorising the applicant's access to archived documents, the Court noted that the domestic courts recognised the existence of the right underlying the access sought by the applicant and that the access was necessary for the applicant as a historian to accomplish the publication of a historical study which fell within the applicant's freedom of expression as guaranteed by Article 10 of the Convention. In that connection, the right to freedom of expression was recognised as a "civil right" for the purposes of Article 6 § 1 (see, *Kenedi v. Hungary*, §§ 33-34, cited above).

49. The Court notes that in the present case the applicant is a journalist and claimed the requested information to practice his profession (see, *a contrario*, *Andre Loersch and Nouvelle Association du Courrier v. Switzerland*, cited above), i.e. for elections related publications. This includes covering presidential elections, and unsuccessful performance of this undertaking could thus damage his professional reputation and career. The dispute before the domestic courts therefore appeared to be important to the applicant's personal and professional interests. Furthermore, his right, as a participant of information relationship, to obtain necessary documents is recognised under domestic law (see paragraph 37). Thus the Court considers that the right of access to particular documents, which fell within the applicant's freedom of expression, is a "civil right" for the purposes of Article 6 § 1 of the Convention.

50. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

51. The applicant insisted that he had lodged his complaint at the national level under the correct head. He disagreed with the Government that his complaint should have been lodged under Chapter 30-B of the Code and under the Act (see paragraph 59), since both of these legal acts gave an

exhaustive list of persons eligible to lodge complaints before the courts, and journalists were not included among them. This position was also confirmed by the Court of Appeal in its decision of 17 May 2005. The applicant therefore concluded that his right of access to a court had been breached.

52. The Government did not submit any observations on the merits.

53. The Court reiterates that, under its case-law, Article 6 § 1 embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only (see *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, p. 18, § 36). For the right of access to be effective, an individual must have a clear, practical opportunity to challenge an act that is an interference with his or her rights (see *Bellet v. France*, judgment of 4 December 1995, Series A no. 333-B, p. 42, § 36).

54. In the present case, the applicant's complaint about the alleged failure to allow him access to election-related information was not considered on the merits because he had allegedly lodged it under the wrong provisions of the Civil Procedure Code.

55. The Court reiterates that it is not its task to determine which legal act should have applied in the applicant's case (see, *mutatis mutandis, Tserkva Sela Sosulivka v. Ukraine*, no. 37878/02, § 51, 28 February 2008). However, it notes that the domestic authorities were not unanimous in this respect. In particular, while the Government and the first-instance court maintained that the applicant's complaint should have been lodged under Chapter 30-B of the Code and the Presidential Elections Act, the Court of Appeal expressly stated that, according to the Presidential Elections Act, a journalist cannot lodge such complaints (see paragraph 28).

56. It also appears that Chapter 30-B of the Civil Procedure Code was *lex specialis* in respect of Chapter 31-A of the Code, which set up rules for the examination of complaints lodged against State administrative bodies. However, the former provisions explicitly exclude journalists from the list of those entitled to lodge complaints in the course of elections (see paragraph 34). Therefore, in the absence of any example of national case-law, it is unclear whether the applicant's complaint could have been examined under Chapter 30-B as proposed by the Government.

57. The proceedings in the applicant's case were terminated without the case being examined on the merits. In the Court's view, that situation amounts to a denial of justice which impaired the very essence of the applicant's right of access to a court, as secured by Article 6 § 1 of the Convention. There has consequently been a violation of that provision.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

58. The applicant complained that the TEC members refused to provide him with certain information and barred him from attending the TEC meeting. He relied on Article 10 of the Convention, which reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers..."

A. Admissibility

59. The Government submitted that the applicant had failed to exhaust effective remedies in respect of his complaint under Article 10 of the Convention. In particular, he had not raised it before the national courts under Chapter 30-B of the Civil Procedure Code of Ukraine.

60. The Government further indicated that the applicant had lodged his complaint before the national courts under Chapter 31-A of the Code, which he had not considered to be an effective remedy he needed to exhaust. As a result, he had missed the six-month time-limit for lodging his complaints, which had to be calculated from the date of the decisions and/or actions of the TEC complained of.

61. The applicant contended that he had used the proper remedies and had lodged his complaint before the national courts under the correct procedure, but that the courts had failed to consider his complaint because of their erroneous interpretation of the domestic law.

62. The applicant further noted that the existence of mere doubts as to the prospects of success of a particular remedy which was not obviously futile was not a valid reason for failing to exhaust domestic remedies (see *Vorobyeva v. Ukraine* (dec.), no. 27517/02, 17 December 2002).

63. The Court reiterates its above findings under Article 6 § 1 of the Convention about the breach of the applicant's right of access to a court (see paragraphs 54-57) and notes that the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust domestic remedies (see *Van Oosterwijck v. Belgium*, 6 November 1980, § 37, Series A no. 40; *Akdivar and Others v. Turkey* [GC], 16 September 1996, § 71, *Reports of Judgments and Decisions* 1996-IV, and *Brusco v. Italy* (dec.), no. 69789/01, ECHR 2001-IX). Given the lack of clarity as to the applicable procedure at the national level, the applicant cannot be reproached for using that remedy which appeared to be least unlikely to succeed. Consequently, he did not miss the six-month time-limit for lodging his application before this Court.

64. In such circumstances, the Court finds that the Government's objections are to be dismissed.

65. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

66. The Government did not submit any observations on the merits of the applicant's complaint.

67. The applicant stated that by denying him access to the TEC's premises, and by refusing to provide him in good time with information about the progress of the electoral process, the authorities had interfered with his right to collect such information. He further submitted that this interference had not been lawful, had not pursued a legitimate aim and had not been necessary in a democratic society.

68. The Court notes that the gathering of information is an essential preparatory step in journalism and is an inherent, protected part of press freedom (see *Dammann v. Switzerland* (no. 77551/01, § 52, 25 April 2006). Obstacles created in order to hinder access to information which is of public interest may discourage those working in the media or related fields from pursuing such matters. As a result, they may no longer be able to play their vital role as "public watchdogs," and their ability to provide accurate and reliable information may be adversely affected (see *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, § 38, ECHR 2009-...).

69. In the present case the events in question happened on polling day and concerned matters capable of significantly influencing the outcome of the elections (changes in the lists of voters on election day; presence of the police in the polling stations, and so on). Therefore, it appears imperative that prompt and free access for journalists to such information might have been vital for the press coverage of the election process. This is particularly so considering that numerous irregularities in the elections, identified by the opposition, neutral observers and the press, led to the so-called "Orange Revolution" and a re-run of the second round of the presidential elections.

70. The Court observes that in the absence of observations from the Government on the merits and of any national court decisions on the matter, the available information about the events in question is limited to the applicant's submissions.

71. According to the available materials, the applicant was provided with some information (although different from what he requested) and all but one of the requested decisions were posted on the information stand on the day of the elections or later (see paragraphs 12, 16, 18 and 20).

72. Concerning the applicant being prevented from entering the premises of the TEC on 31 October 2004, the Court notes that, according to the

applicant's own submissions, he had been allowed to enter half an hour later.

73. As for the applicant's expulsion from the TEC meeting on 21 November 2004, the Court cannot conclude from the testimonies of the various witnesses present at the meeting that this decision was unlawful or disproportionate.

74. The Court lastly observes that the applicant, as a journalist, was not prevented from covering the election process and, if he considered the events in question to be unlawful or arbitrary, from reporting on them and attracting public attention to possible irregularities.

75. The Court concludes that there is no evidence that the State authorities interfered with the applicant's performance of his journalistic activity and thus breached his freedom of expression. There is accordingly no violation of Article 10 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

76. The applicant complained under Article 13 of the Convention that it had not been possible for him to challenge the refusals to provide him with certain information.

77. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

78. Having regard to the finding relating to Article 6 § 1 of the Convention (see paragraphs 54-57), the Court considers that it is not necessary to examine whether, in this case, there has been a violation of Article 13 (see, *Osman v. the United Kingdom*, 28 October 1998, § 158, *Reports of Judgments and Decisions 1998-VIII*).

IV. REMAINING COMPLAINTS

79. The applicant also complained about:

- the length of the proceedings concerning his challenge of the TEC's refusals to provide him with information;
- the authorities' refusals to institute criminal proceedings against the TEC's members and following threats made against him, relying on Article 13 of the Convention;
- a violation of Article 3 of Protocol No. 1 to the Convention;
- the failure of the Ukrainian Parliamentary Commissioner for Human Rights to protect his rights.

80. Having carefully examined the applicant's submissions, in the light of all the material in its possession and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any

appearance of a violation of the rights and freedoms set out in the Convention.

81. It follows that this part of the application must be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

82. 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

83. The applicant claimed 5,000 euros (EUR) in respect of non-pecuniary damage.

84. The Government submitted that that amount was exorbitant.

85. The Court, deciding on an equitable basis, awards the applicant EUR 3,600 in respect of non-pecuniary damage.

B. Costs and expenses

86. The applicant did not claim reimbursement of costs and expenses. The Court makes no award in this respect.

C. Default interest

87. The Court considers it appropriate that the default interest rate 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. *Declares* the complaints under Articles 6 § 1 (access to court), 10 and 13 of the Convention admissible and the remainder of the application inadmissible;

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

3. *Holds* that there has been no violation of Article 10 of the Convention;

4. *Holds* that there is no need to examine separately the complaint under Article 13 of the Convention;

5. *Holds*
(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,600 (three thousand six hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Ukrainian hryvnias at the rate applicable at the date of settlement;
(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;

6. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 31 July 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Deputy Registrar

Dean Spielmann
President

STEEL AND MORRIS v UNITED KINGDOM

BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

APPLICATION NO.68416/01

(*The President*, Judge Pellonpää; *Judges* Bratza, Stráznická, Casadevall, Maruste, Pavlovschi and Garlicki)

(2005) 41 E.H.R.R. 22

February 15, 2005

LT Equality of arms; Freedom of expression; Interference; Just satisfaction; Legal aid; Legitimate aim; Libel; Litigants in person; Margin of appreciation; Necessary in democratic society; Prescribed by law; Procedural impropriety; Proportionality; Right of access to court; Right to fair trial

H1 The applicants were associated with London Greenpeace, a group which campaigned on environmental and social issues. In 1986 a leaflet entitled "What's wrong with McDonald's?" was produced and distributed. The company issued a writ against the applicants claiming damages for libel allegedly caused by the leaflet which they were alleged to have published. The applicants contested the claim on a number of grounds. They were refused legal aid, which was not available for defamation proceedings, and although they had some help from volunteer lawyers, for the bulk of the proceedings they represented themselves. In contrast, McDonald's had the benefit of an experienced team of lawyers. At the end of the trial, which lasted 313 court days, damages were awarded against the applicants. Although the amount was reduced on appeal, it was still substantial when compared with their incomes and resources.

H2 Relying on Arts 6(1) and 10 of the Convention, the applicants complained that the defamation proceedings brought against them had violated their right to a fair trial, principally because of the denial of legal aid, and that there had been a disproportionate interference with their freedom of expression.

H3 **Held** unanimously:

(1) that there had been a violation of Art.6(1);

(2) that there had been a violation of Art.10;

(3) that the State was to pay the first applicant €20,000 and the second applicant €15,000 in respect of non-pecuniary damage, plus €47,311.17 for costs and expenses.

1. Right to a fair trial: access to a court; equality of arms; legal aid; defamation proceedings; litigants in person (Art.6(1)).

H4 (a) It was central to the concept of a fair trial that a litigant should not be denied the opportunity to present his or her case effectively and should enjoy equality of arms with the opposing side. The institution of a legal aid scheme was one way of guaranteeing those rights. [59]–[60]

H5 (b) Whether the provision of legal aid was necessary for a fair hearing had to be determined on the basis of the facts and circumstances of each case and would depend, *inter alia*, on the importance of what was at stake for the applicant, the complexity of the law and procedure, and the ability of the applicant to represent him or herself effectively. [61]

H6 (c) The right of access to a court was not absolute but any restrictions had to pursue a legitimate aim and be proportionate. It was acceptable to impose conditions on the grant of legal aid based, *inter alia*, on the financial situation of the litigant or the prospects of success. The State did not have to use public funds in order to ensure total equality of arms, as long as each side was afforded a reasonable opportunity to present its case under conditions which did not place it at a substantial disadvantage *vis-à-vis* the adversary. [62]

H7 (d) Unlike previous cases where the Court had found that legal assistance was necessary for a fair trial, the defamation proceedings were not determinative of important family rights and relationships. However, the applicants had not chosen to commence the action but had resisted the claim in order to protect their right to freedom of expression. Moreover, the financial consequences for them were significant. Although there had been no attempt to enforce the judgment, this was not an outcome which they could have foreseen or relied upon. [63]

H8 (e) The proceedings were by no means straightforward. The trial had lasted 313 court days, preceded by 28 interlocutory applications, and the appeal hearing had lasted 23 days. The factual case which the applicants had to prove had been highly complex. Certain issues were too complicated for a jury to understand and assess, and the detailed nature and complexity of the factual issues had been illustrated by the length of the judgments. Nor was the case straightforward legally. Extensive legal and procedural matters had needed to be resolved before the trial judge could decide the main issue. [64]–[66]

H9 (f) Against that background, the Court had to assess the extent to which the applicants had been able to mount an effective defence despite the absence of legal aid. They appeared to be articulate and resourceful and had succeeded in proving the truth of some statements. Furthermore, they had received some help from lawyers acting pro bono and been afforded a certain amount of latitude by the courts. In an action of this complexity, however, neither sporadic help from volunteer lawyers nor the extensive judicial assistance and latitude granted to the applicants as litigants in person was any substitute for competent and sustained representation by an experienced lawyer familiar with the case and the law of libel. The disparity between the levels of legal assistance enjoyed by the applicants and McDonald's had been so great that it must have given rise to unfairness. [67]–[69]

H10 (g) The Government's argument that even if legal aid had been available for the defence of defamation actions it might not have been granted or, if granted, might have been subject to certain conditions was not persuasive. If legal aid had been

refused or made subject to stringent financial or other conditions, substantially the same Convention issue would have arisen, namely whether the refusal of legal aid or the conditions attached to its grant imposed an unfair restriction on the applicants' ability to present an effective defence. [71]

H11 (h) The denial of legal aid to the applicants had deprived them of the opportunity to present their case effectively and contributed to an unacceptable inequality of arms with McDonald's. Accordingly, there had been a violation of Art.6(1). [72]

H12 (i) It was unnecessary to examine separately the other complaints under Art.6(1). [76]

2. Right to freedom of expression: defamation proceedings; interference; "prescribed by law"; legitimate aim; "necessary in a democratic society"; political expression; margin of appreciation; proportionality; procedural fairness (Art.10).

H13 (a) The defamation proceedings and their outcome amounted to an interference with the applicants' right to freedom of expression. [85]

H14 (b) The interference was "prescribed by law" and pursued the legitimate aim of "the protection of the reputation or rights of others". [86]

H15 (c) The central issue was whether the interference was "necessary in a democratic society". The Court reiterated the fundamental principles in this regard. It had distinguished between statements of fact and value judgments. While the existence of facts could be demonstrated, the truth of value judgments was not susceptible of proof. Where a statement constituted a value judgment, the proportionality of an interference might depend on whether there was a sufficient factual basis for the statement, since even a value judgment without any factual basis to support it might be excessive. [87]

H16 (d) The leaflet had contained very serious allegations on topics of general concern. Political expression, including expression on matters of public interest and concern, required a high level of protection under Art.10. [88]

H17 (e) Although the applicants were not journalists, in a democratic society even small and informal campaign groups had to be able to carry on their activities effectively, and there was strong public interest in enabling such groups and individuals outside the mainstream to contribute to public debate on matters of general public interest such as health and the environment. [89]

H18 (f) The protection afforded to journalists reporting on issues of general interest was subject to the proviso that they acted in good faith in order to provide accurate and reliable information. The same principle had to apply to others who engaged in public debate. Just as journalists were allowed to resort to a degree of exaggeration or even provocation, in a campaigning leaflet a certain degree of exaggeration was to be tolerated and even expected. However, the allegations contained in the leaflet were of a very serious nature and were presented as statements of fact rather than value judgments. [90]

H19 (g) The applicants' complaint that McDonald's had been able to succeed in a claim for defamation when much of the material in the leaflet was already in the public domain had been rejected by the Court of Appeal and there was no reason to reach a different conclusion [91]–[92]

H20 (h) It was not in principle incompatible with Art.10 to place on the defendant in libel proceedings the burden of proving to the civil standard the truth of defamatory statements. The fact that the claimant was a large multinational company did not deprive it of a right to defend itself against defamatory allegations or absolve the applicants from proving the truth of the statements. Although large public companies laid themselves open to close scrutiny of their acts and the limits of acceptable criticism were wider in the case of such companies, as well as the public interest in open debate about business practices there was a competing public interest in protecting the commercial success and viability of companies, not only for the benefit of shareholders and employees but also for the wider economic good. The State therefore enjoyed a margin of appreciation as to how it enabled a company to challenge the truth, and limit the damage, of allegations which risked harming its reputation. [93]–[94]

H21 (i) If a state decided to provide a remedy to a corporate body, however, it was essential to ensure a measure of procedural fairness and equality of arms. The inequality of arms and the difficulties under which the applicants had laboured were significant in assessing the proportionality of the interference under Art.10. The applicants had had the choice of withdrawing the leaflet and apologising to McDonald's or bearing the burden of proving, without legal aid, the truth of the allegations it contained. Given the enormity and complexity of that task, the balance between the competing rights and interests had not been struck correctly. The more general interest in promoting free circulation of information and ideas about the activities of powerful companies and the possible "chilling" effect on others were also important factors to be considered, bearing in mind the important role which campaign groups played in stimulating public discussion. The lack of procedural fairness and equality had given rise to a breach of Art.10. [95]

H22 (j) It appeared that the size of the award of damages had also failed to strike the correct balance. An award of damages for defamation had to bear a reasonable relationship of proportionality to the injury to reputation suffered. Although the sums eventually awarded were relatively moderate by contemporary standards, they were very substantial when compared to the applicants' modest incomes and resources. Moreover, McDonald's had not been required to establish that it had actually suffered any financial loss. Although no steps had been taken to enforce the award, it remained enforceable. Accordingly, the award of damages was disproportionate to the legitimate aim pursued. [96]–[97]

H23 (k) Given the lack of procedural fairness and the disproportionate award of damages, there had been a breach of Art.10. [98]

3. Just satisfaction: damage; cost and expenses; default interest (Art.41).

H24 (a) The applicants had not presented any evidence to suggest that the time they had spent preparing and presenting their defence had caused them any pecuniary loss, and the Court was not satisfied that the sums claimed represented losses or expenses actually incurred. Moreover, because of the time that had elapsed since the order for damages was made, McDonald's would need permission to enforce it. In these circumstances, despite the finding that the damages award violated Art.10,

at present it was not necessary to make any provision for it under Art.41. Accordingly, no award was made in respect of compensation for pecuniary damage. [104]–[106]

H25 (b) The Court's findings of violations of Arts 6(1) and 10 had been based principally on the fact that the applicants had had to perform the bulk of the legal work in the domestic proceedings in order to defend their rights to freedom of expression. They must have suffered anxiety and disruption far in excess of that suffered by a represented litigant. Compensation for non-pecuniary damage was therefore awarded. [109]

H26 (c) Only costs and expenses actually and necessarily incurred in connection with the violations found, and reasonable as to *quantum*, were recoverable under Art.41. No award could be made in respect of the hours the applicants themselves spent working on the case, as this time did not represent costs actually incurred by them. In addition, it was questionable whether the entire sum claimed for costs was necessarily incurred. [112]

H27 (d) Default interest was based on the marginal lending rate of the European Central Bank, plus 3 percentage points. [113]

H28 **The following cases are referred to in the Court's judgment:**

1. *A v United Kingdom*: (2003) 36 E.H.R.R. 51
2. *Airey v Ireland* (A/32): (1979–80) 2 E.H.R.R. 305
3. *Appleby v United Kingdom*: (2003) 37 E.H.R.R. 38
4. *Ashingdane v United Kingdom* (A/93): (1985) 7 E.H.R.R. 528
5. *Bladet Tromsø and Stensaas v Norway*: (2000) 29 E.H.R.R. 125
6. *Bowman v United Kingdom*: (1998) 26 E.H.R.R. 1
7. *De Haes and Gijsels v Belgium*: (1998) 25 E.H.R.R. 1
8. *Dudgeon v United Kingdom* (Art.50) (A/59): (1983) 5 E.H.R.R. 573
9. *Fayed v United Kingdom* (A/294-B): (1994) 18 E.H.R.R. 393
10. *Hertel v Switzerland*: (1999) 28 E.H.R.R. 534
11. *Lingens v Austria* (A/103): (1986) 8 E.H.R.R. 407
12. *McVicar v United Kingdom*: (2002) 35 E.H.R.R. 22
13. *Markt Intern Verlag GmbH and Beerman v Germany* (A/165): (1990) 12 E.H.R.R. 161
14. *P, C and S v United Kingdom*: (2002) 35 E.H.R.R. 311
15. *Präger and Oberschlick v Austria* (A/313): (1996) 21 E.H.R.R. 1
16. *Robins v United Kingdom*: (1998) 26 E.H.R.R. 527
17. *Şahin v Germany*: (2003) 36 E.H.R.R. 43
18. *Thorgeir Thorgeirson v Iceland* (A/239): (1992) 14 E.H.R.R. 843
19. *Tolstoy Miloslavsky v United Kingdom* (A/316-B): (1995) 20 E.H.R.R. 442
20. Application No.10594/83, *Munro v United Kingdom*, July 14, 1987
21. Application No.10871/84, *Winer v United Kingdom*, July 10, 1986
22. Application No.21325/93, *HS and DM v United Kingdom*, May 5, 1993
23. Application Nos 27436/95 & 28406/95, *Stewart-Brady v United Kingdom*, July 2, 1997
24. Application No.29032/95, *Feldek v Slovakia*, July 12, 2001

H29 **The following domestic cases are referred to in the Court's judgment:**
25. *British Coal Corporation v NUM (Yorkshire Area) and Capstick*, unreported, June 28, 1996
26. *Derbyshire CC v Times Newspapers Ltd* [1993] A.C. 534; [1993] 2 W.L.R. 449; [1993] 1 All E.R. 1011; 91 L.G.R. 179; (1993) 143 N.L.J. 283; (1993) 137 S.J.L.B. 52, HL
27. *Goldsmith v Bhoyrul* [1998] Q.B. 459; [1998] 2 W.L.R. 435; [1997] 4 All E.R. 268; [1997] E.M.L.R. 407; (1997) 94(28) L.S.G. 26; (1997) 141 S.J.L.B. 151, QBD
28. *National Westminster Bank plc v Powney* [1991] Ch. 339; [1990] 2 W.L.R. 1084; [1990] 2 All E.R. 416; (1990) 60 P. & C.R. 420; (1989) 86(46) L.S.G. 39; (1990) 134 S.J. 285, CA
29. *WT Lamb & Sons v Rider* [1948] 2 K.B. 331; [1948] 2 All E.R. 402; 64 T.L.R. 530; [1949] L.J.R. 258; 92 S.J. 556, CA

H30 *Mr D. Walton*, Foreign & Commonwealth Office (Agent), *Mr P. Sales* (Counsel), *Mr A. Brown*, *Mr D. Willink*, *Mr R. Wright* (Advisers) for the Government.
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THE FACTS

I. The circumstances of the case

A. The leaflet

8 The applicants, Helen Steel and David Morris, were born in 1965 and 1954 respectively and live in London.

9 During the period with which this application is concerned, Ms Steel was at times employed as a part-time bar worker, earning approximately £65 per week, and was at other times unwaged and dependent on income support. Mr Morris, a former postal worker, was unwaged and in receipt of income support. He was a single parent, responsible for the day-to-day care of his son, aged four when the trial began. At all material times the applicants were associated with London Greenpeace, a small group, unconnected with Greenpeace International, which campaigned principally on environmental and social issues.

10 In the mid-1980s London Greenpeace began an anti-McDonald's campaign. In 1986 a six-page leaflet entitled "What's wrong with McDonald's?" ("the leaflet") was produced and distributed as part of that campaign. It was last reprinted in early 1987.

11 The first page of the leaflet showed a grotesque cartoon image of a man, wearing a Stetson and with dollar signs in his eyes, hiding behind a "Ronald McDonald" clown mask. Running along the top of pages 2 to 5 was a header comprised of the McDonald's "golden arches" symbol, with the words "McDollars, McGreedy, McCancer, McMurder, McDisease . . ." and so forth superimposed on it.

12 The text of page 2 of the leaflet read as follows (extract):

"What's the connection between McDonald's and starvation in the 'Third World'?

THERE's no point feeling *guilty* about eating while watching starving African children on TV. If you do send money to Band Aid, or shop at Oxfam, etc. that's morally good but politically useless. It shifts the blame from governments and does nothing to challenge the power of multinational corporations.

Hungry for Dollars

McDonald's is one of several giant corporations with investments in vast tracts of land in poor countries, sold to them by the dollar-hungry rulers (often military) and privileged elites, evicting the small farmers that live there growing food for their own people.

The power of the US dollar means that in order to buy technology and manufactured goods, poor countries are trapped into producing more and more food for export to the States. *Out of 40 of the world's poorest countries, 36 export food to the USA—the wealthiest*.

Economic Imperialism

Some 'Third World' countries, where most children are undernourished, are actually exporting their staple crops as animal feed—i.e. to fatten cattle for turning into burgers in the 'First World'. Millions of acres of the best farmland in poor countries are being used for *our* benefit—for tea, coffee, tobacco, etc.—while people there are *starving*. McDonald's is directly involved in this economic imperialism, which keeps most black people poor and hungry while many whites grow fat.

Gross Misuse of Resources

GRAIN is fed to cattle in South American countries to produce the meat in McDonald's hamburgers. Cattle consume 10 times the amount of grain and soy that humans do: one calorie of beef demands ten calories of grain. Of the 145 million tons of grain and soy fed to livestock, only 21 million tons of meat and by-products are used. *The waste is 124 million tons a year at a value of 20 billion US dollars*. It has been calculated that this sum would feed, clothe and house the world's entire population for one year".

The first page of the leaflet also included a photograph of a woman and child, with the caption:

"*A typical image of 'Third World' poverty—the kind often used by charities to get 'compassion money'. This diverts attention from one cause: exploitation by multinationals like McDonald's*".

The second and third pages of the leaflet contained a cartoon image of a burger, with a cow's head sticking out of one side and saying, "If the slaughterhouse

doesn't get you" and a man's head sticking out of the other, saying, "The junk food will!". Pages 3 to 5 read as follows:

"Fifty Acres Every Minute

EVERY year an area of rainforest the size of Britain is cut down or defoliated, and burnt. Globally, one billion people depend on water flowing from these forests, which soak up rain and release it gradually. The disaster in Ethiopia and Sudan is at least partly due to uncontrolled deforestation. In Amazonia—where there are now about 100,000 beef ranches—torrential rains sweep down through the treeless valleys, eroding the land and washing away the soil. The bare earth, baked by the tropical sun, becomes useless for agriculture. *It has been estimated that this destruction causes at least one species of animal, plant or insect to become extinct every few hours*.

Why is it wrong for McDonald's to destroy rainforests?

AROUND the Equator there is a lush green belt of incredibly beautiful tropical forest, untouched by human development for one hundred million years, supporting about half of the Earth's life-forms, including some 30,000 plant species, and producing a major part of the planet's crucial supply of oxygen.

Pet Food and Litter

McDonald's and Burger King are two of the many US corporations using lethal poisons to destroy vast areas of Central American rainforest to create grazing pastures for cattle to be sent back to the States as burgers and pet food, and to provide fast-food packaging materials. (Don't be fooled by McDonald's saying they use recycled paper: only a tiny per cent of it is. The truth is it takes *800 square miles* of forest just to keep them supplied with paper for one year. Tons of this end up littering the cities of 'developed' countries.)

Colonial Invasion

Not only are McDonald's and many other corporations contributing to a major ecological catastrophe, they are forcing the tribal peoples in the rainforests off their ancestral territories where they have lived peacefully, without damaging their environment, for thousands of years. This is a typical example of the arrogance and viciousness of multinational companies in their endless search for more and more profit.

It's no exaggeration to say that when you bite into a Big Mac, you're helping McDonald's empire to wreck this planet.

What's so unhealthy about McDonald's food?

McDONALD's try to show in their 'Nutrition Guide' (which is full of impressive-looking but really quite irrelevant facts & figures) that mass-produced hamburgers, chips, colas & milkshakes, etc., are a useful and nutritious part of any diet.

What they don't make clear is that a diet high in fat, sugar, animal products and salt (sodium), and low in fibre, vitamins and minerals—which describes an average McDonald's meal—is linked with cancers of the breast and bowel, and heart disease. This is accepted medical fact, not a cranky theory. Every year in Britain, heart disease alone causes about 18,000 deaths.

Fast = Junk

Even if they like eating them, most people recognise that processed burgers and synthetic chips, served up in paper and plastic containers, is junk-food. McDonald's prefer the name 'fast-food'. This is not just because it is manufactured and served up as quickly a possible—it has to be *eaten* quickly too. It's a sign of the junk-quality of Big Macs that people actually hold competitions to see who can eat one in the shortest time.

Paying for the Habit

Chewing is essential for good health, as it promotes the flow of digestive juices which break down the food and send nutrients into the blood. McDonald's food is so lacking in bulk it is hardly possible to chew it. Even their own figures show that a 'quarter-pounder' is 48% water. This sort of fake food encourages over-eating, and the high sugar and sodium content can make people develop a kind of addiction—a 'craving'. That means more profit for McDonald's, but constipation, clogged arteries and heart attacks for many customers.

Getting the Chemistry Right

McDONALD's stripy staff uniforms, flashy lighting, bright plastic décor, 'Happy Hats' and muzak, are all part of the gimmicky dressing-up of low-quality food which has been designed down to the last detail to look and feel and taste *exactly* the same in any outlet anywhere in the world. To achieve this artificial conformity, McDonald's require that their 'fresh lettuce leaf', for example, is treated with *twelve* different chemicals just to keep it the right colour at the right crispness for the right length of time. It might as well be a bit of plastic.

How do McDonald's deliberately exploit children?

NEARLY all McDonald's advertising is aimed at children. Although the Ronald McDonald 'personality' is not as popular as their market researchers expected (probably because it is totally unoriginal), thousands of young children now think of burgers and chips every time they see a clown with orange hair.

The Normality Trap

No parent needs to be told how difficult it is to distract a child from insisting on a certain type of food or treat. Advertisements portraying McDonald's as a happy, circus-like place where burgers and chips are provided for everybody

at any hour of the day (and late at night), traps children into thinking they aren't 'normal' if they don't go there too. Appetite, necessity and—above all—money, never enter into the 'innocent' world of Ronald McDonald.

Few children are slow to spot the gaudy red and yellow standardised frontages in shopping centres and high streets throughout the country. McDonald's know exactly what kind of pressure this puts on people looking after children. It's hard not to give in to this 'convenient' way of keeping children 'happy', even if you haven't got much money and you try to avoid junk-food.

Toy Food

As if to compensate for the inadequacy of their products, McDonald's promote the consumption of meals as a 'fun event'. This turns the act of eating into a performance, with the 'glamour' of being in a McDonald's ('Just like it is in the ads!) reducing the food itself to the status of a prop.

Not a lot of children are interested in nutrition, and even if they were, all the gimmicks and routines with paper hats and straws and balloons hide the fact that the food they're seduced into eating is at best mediocre, at worst poisonous—and their parents know it's not even cheap.

Ronald's Dirty Secret

ONCE told the grim story about how hamburgers are made, children are far less ready to join in Ronald McDonald's perverse antics. With the right prompting, a child's imagination can easily turn a clown into a bogeyman (a lot of children are very suspicious of clowns anyway). Children love a secret, and Ronald's is especially disgusting.

In what way are McDonald's responsible for torture and murder?

THE menu at McDonald's is based on meat. They sell millions of burgers every day in 35 countries throughout the world. This means the constant slaughter, day by day, of animals born and bred solely to be turned into McDonald's products.

Some of them—especially chickens and pigs—spend their lives in the entirely artificial conditions of huge factory farms, with no access to air or sunshine and no freedom of movement. Their deaths are bloody and barbaric.

Murdering A Big Mac

In the slaughterhouse, animals often struggle to escape. Cattle become frantic as they watch the animal before them in the killing-line being prodded, beaten, electrocuted and knifed.

A recent British government report criticised inefficient stunning methods which frequently result in animals having their throats cut while still fully conscious. McDonald's are responsible for the deaths of countless animals by this supposedly humane method.

We have the choice to eat meat or not. The *450 million* animals killed for food in Britain every year have no choice at all. It is often said that after

visiting an abattoir, people become nauseous at the thought of eating flesh. How many of us would be prepared to work in a slaughterhouse and kill the animals we eat?

What's Your Poison?

MEAT is responsible for 70% of all food-poisoning incidents, with chicken and minced meat (as used in burgers) being the worst offenders. When animals are slaughtered, meat can be contaminated with gut contents, faeces and urine, leading to bacterial infection. In an attempt to counteract infection in their animals, farmers routinely inject them with doses of antibiotics. These, in addition to growth-promoting hormone drugs and pesticide residues in their feed, build up in the animals' tissues and can further damage the health of people on a meat-based diet.

What's it like working for McDonald's?

THERE must be a serious problem: even though 80% of McDonald's workers are part-time, the annual staff turnover is 60% (in the USA it's 300%). It's not unusual for their restaurant-workers to quit after just four or five weeks. The reasons are not hard to find.

No Unions Allowed

Workers in catering do badly in terms of pay and conditions. They are at work in the evenings and at weekends, doing long shifts in hot, smelly, noisy environments. Wages are low and chances of promotion minimal.

To improve this through Trade Union negotiation is very difficult: there is no union specifically for these workers, and the ones they could join show little interest in the problems of part-timers (mostly women). A recent survey of workers in burger-restaurants found that 80% said they needed union help over pay and conditions. Another difficulty is that the 'kitchen trade' has a high proportion of workers from ethnic minority groups who, with little chance of getting work elsewhere, are wary of being sacked—as many have been—for attempting union organisation.

McDonald's have a policy of preventing unionisation by getting rid of pro-union workers. So far this has succeeded everywhere in the world except Sweden, and in Dublin after a long struggle.

Trained to Sweat

It's obvious that all large chain-stores and junk-food giants depend for their fat profits on the labour of young people. McDonald's is no exception: three-quarters of its workers are under 21. The production-line system deskills the work itself: anybody can grill a hamburger, and cleaning toilets or smiling at customers needs no training. So there is no need to employ chefs or qualified staff—just anybody prepared to work for low wages.

As there is no legally-enforced minimum wage in Britain, McDonald's can pay what they like, helping to depress wage levels in the catering trade still

> further. They say they are providing jobs for school-leavers and take them on regardless of sex or race. The truth is McDonald's are only interested in recruiting cheap labour—which always means that disadvantaged groups, women and black people especially, are even more exploited by industry than they are already".

The leaflet continued, on pages 5 to 6, with a number of proposals and suggestions for change, campaigning and activity, and information about London Greenpeace.

B. Proceedings in the High Court

13 Because London Greenpeace was not an incorporated body, no legal action could be taken directly against it. Between October 1989 and January or May 1991, UK McDonald's hired seven private investigators from two different firms to infiltrate the group with the aim of finding out who was responsible for writing, printing and distributing the leaflet and organising the anti-McDonald's campaign. The inquiry agents attended over 40 meetings of London Greenpeace, which were open to any member of the public who wished to attend, and other events such as "fayres" and public, fund raising occasions. McDonald's subsequently relied on the evidence of some of these agents at trial to establish that the applicants had attended meetings and events and been closely involved with the organisation during the period when the leaflet was being produced and distributed.

14 On September 20, 1990 McDonald's Corporation ("US McDonald's") and McDonald's Restaurants Limited ("UK McDonald's"; together referred to herein as "McDonald's") issued a writ against the applicants and three others, claiming damages of up to £100,000 for libel allegedly caused by the alleged publication by the defendants of the leaflet. McDonald's withdrew proceedings against the three other defendants, in exchange for their apology for the contents of the leaflet.

15 The applicants denied publication, denied that the words complained of had the meanings attributed to them by McDonald's and denied that all or some of the meanings were capable of being defamatory. Further, they contended, in the alternative, that the words were substantially true or else were fair comment on matters of fact.

16 The applicants applied for legal aid but were refused on June 3, 1992, because legal aid was not available for defamation proceedings in the United Kingdom. They therefore represented themselves throughout the trial and appeal. Approximately £40,000 was raised by donation to assist them (for example, to pay for transcripts),[1] and they received some help from barristers and solicitors acting pro bono: thus, their initial pleadings were drafted by lawyers, they were given some advice on an *ad hoc* basis, and they were represented during five of the pre-trial hearings and on three occasions during the trial, including the appeal to the Court of Appeal against the trial judge's grant of leave to McDonald's to amend the Statement of Claim.[2] They submitted, however, that they were severely hampered by lack of resources, not just in the way of legal advice and representation, but also when it came to administration, photocopying, note-taking, and the tracing,

[1] See [20] below.
[2] See [24] below.

preparation and payment of the costs and expenses of expert and factual witnesses. Throughout the proceedings McDonald's was represented by leading and junior Counsel, experienced in defamation law, and by one or two solicitors and other assistants.

17 In March 1994 UK McDonald's produced a press release and leaflet for distribution to their customers about the case, entitled "Why McDonald's is going to Court". In May 1994 they produced a document called "Libel Action—Background Briefing" for distribution to the media and others. These documents included, *inter alia*, the allegation that the applicants had published a leaflet which they knew to be untrue, and the applicants counterclaimed for damages for libel from UK McDonald's.

18 Before the start of the trial there were approximately 28 interim applications, involving various issues of law and fact, some lasting as long as five days. For example, on December 21, 1993 the trial judge, Bell J., ruled that the action should be tried by a judge alone rather than a judge and jury, because it would involve the prolonged examination of documents and expert witnesses, on complicated scientific matters. This ruling was upheld by the Court of Appeal on March 25, 1994, after a hearing at which the applicants were represented pro bono.

19 The trial took place before Bell J. between June 28, 1994 and December 13, 1996. It lasted for 313 court days, of which 40 were taken up with legal argument, and was the longest trial (either civil or criminal) in English legal history. Transcripts of the trial ran to approximately 20,000 pages; there were about 40,000 pages of documentary evidence; and, in addition to many written witness statements, 130 witnesses gave oral evidence: 59 for the applicants, 71 for McDonald's. Ms Steel gave evidence in person but Mr Morris chose not to.

20 The applicants were unable to pay for daily transcripts of the proceedings, which cost approximately £750 per day, or £375 if split between the two parties. McDonald's paid the fee, and initially provided the applicants with free copies of the transcripts. However, McDonald's stopped doing this on July 3, 1995, because the applicants refused to undertake to use the transcripts only for the purposes of the trial, and not to publicise what had been said in court. The trial judge refused to order McDonald's to supply the transcripts in the absence of the applicants' undertaking, and this ruling was upheld by the Court of Appeal. Thereafter, the applicants, using donations from the public, purchased transcripts at reduced cost (£25 per day), 21 days after the evidence had been given. They submit that, as a result, and without sufficient helpers to take notes in court, they were severely hampered in their ability effectively to examine and cross-examine witnesses.

21 During the trial, Mr Morris faced an unconnected action brought against him by the London Borough of Haringey relating to possession of a property. Mr Morris signed an affidavit ("the Haringey affidavit") in support of his application to have those proceedings stayed until the libel trial was over, in which he stated that the libel action had arisen "from leaflets we had produced concerning, *inter alia*, nutrition of McDonald's food …". McDonald's applied for this affidavit to be adduced as evidence in the libel trial as an admission against interest on publication by Mr Morris, and Bell J. agreed to this request. Mr Morris objected that the affidavit should have read "allegedly produced" but that there had been a mistake on the part of his solicitor. The solicitor confirmed in writing to the court that the

second applicant had instructed her to correct the affidavit, but that she had not done so because the error had not been material to the Haringey proceedings. The applicants submitted that they assumed that the solicitor's letter would be admitted in evidence, and that Bell J. did not warn them that it was inadmissible until the closure of evidence, so that they did not realise they needed to adduce further evidence to explain the mistake. The applicants' appeal to the Court of Appeal against Bell J.'s admission of the affidavit was refused on March 25, 1996.

22 On November 20, 1995, Bell J. ruled on the meaning of the paragraph in the leaflet entitled "What's so unhealthy about McDonald's food?", finding that this part of the leaflet bore the meaning:

> "... that McDonald's food is very unhealthy because it is high in fat, sugar, animal products and salt (Sodium), and low in fibre, vitamins and mineral, and because eating it may well make your diet high in fat, sugar, animal products and salt (sodium), and low in fibre, vitamins and minerals, with the very real risk that you will suffer cancer of the breast or bowel or heart disease as a result; that McDonald's know this but they do not make it clear; that they still sell the food, and they deceive customers by claiming that their food is a useful and nutritious part of any diet".

23 The applicants appealed to the Court of Appeal against this ruling, initially relying on seven grounds of appeal. However, the day before the hearing on April 2, 1996 before the Court of Appeal, Ms Steel gave notice on behalf of both applicants that they were withdrawing six of the seven grounds, and now wished solely to raise the issue whether the trial judge had been wrong in determining a meaning which was more serious than that pleaded by McDonald's in their Statement of Claim. The applicants submitted that they withdrew the other grounds of appeal relating to the meaning of this part of the leaflet because lack of time and legal advice prevented them from fully pursuing them. They mistakenly believed that it would remain open to them to raise these matters again at a full appeal after the conclusion of the trial. The Court of Appeal decided against the applicants on the remaining single ground, holding that the meaning given to this paragraph by the judge was less severe than that pleaded by McDonald's.

24 In the light of the Haringey affidavit, McDonald's sought permission from the court to amend their Statement of Claim to allege that the applicants had been involved in the production of the leaflet and to allege publication dating back to September 1987. The applicants objected that such an amendment so late in the trial would be unduly prejudicial. However, on April 26, 1996 Bell J. gave permission to McDonald's for the amendments; the applicants were allowed to amend their defence accordingly.

25 Before the trial, the applicants had sought an order that McDonald's disclose the notes made by their enquiry agents; McDonald's had responded that there were no notes. During the course of the trial, however, it emerged that the notes did exist. The applicants applied for disclosure, which was opposed by McDonald's on the ground that the notes were protected by legal professional privilege. On June 17, 1996 Bell J. ruled that the notes should be disclosed, but with those parts which did not relate to matters contained in the witness statements or oral evidence of the enquiry agents deleted.

26 When all the evidence had been adduced, Bell J. deliberated for six months before delivering his substantive 762-page judgment on June 19, 1997.

On the basis, principally, of the Haringey affidavit and the evidence of McDonald's enquiry agents, he found that the second applicant had participated in the production of the leaflet in 1986, at the start of London Greenpeace's anti-McDonald's campaign, although the precise part which he played could not be identified. Mr Morris had also taken part in its distribution. Having assessed the evidence of a number of witnesses, including Ms Steel herself, he found that her involvement had begun in early 1988 and took the form of participation in London Greenpeace's activities, sharing its anti-McDonald's aims, including distribution of the leaflet. The judge found that the applicants were responsible for the publication of "several thousand" copies of the leaflet. It was not found that this publication had any impact on the sale of McDonald's products. He also found that the London Greenpeace leaflet had been reprinted word for word in a leaflet produced in 1987 and 1988 by an organisation based in Nottingham called Veggies Ltd. McDonald's had threatened libel proceedings against Veggies Ltd, but had agreed a settlement after Veggies rewrote the section in the leaflet about the destruction of the rainforest and changed the heading "In what way are McDonald's responsible for torture and murder?" to read "In what way are McDonald's responsible for the slaughtering and butchering of animals?".

27 Bell J. summarised his findings as to the truth or otherwise of the allegations in the leaflet as follows:

> "In summary, comparing my findings with the defamatory messages in the leaflet, of which the Plaintiffs actually complained, it was and is untrue to say that either Plaintiff has been to blame for starvation in the Third World. It was and is untrue to say that they have bought vast tracts of land or any farming land in the Third World, or that they have caused the eviction of small farmers or anyone else from their land.
>
> It was and is untrue to say that either Plaintiff has been guilty of destruction of rainforest, thereby causing wanton damage to the environment.
>
> It was and is untrue to say that either of the Plaintiffs have used lethal poisons to destroy vast areas or any areas of Central American rainforest, or that they have forced tribal people in the rainforest off their ancestral territories.
>
> It was and is untrue to say that either Plaintiff has lied when it has claimed to have used recycled paper.
>
> The charge that McDonald's food is very unhealthy because it is high in fat, sugar, animal products and salt (sodium), and low in fibre, vitamins and minerals, and because eating it more than just occasionally may well make your diet high in fat, sugar, animal products and salt (sodium), and low in fibre, vitamins and minerals, with the very real, that is to say serious or substantial risk that you will suffer cancer of the breast or bowel or heart disease as a result, and that McDonald's know this but they do not make it clear, is untrue. However, various of the First and Second Plaintiffs' advertisements, promotions and booklets have pretended to a positive

nutritional benefit which McDonald's food, high in fat and saturated fat and animal products and sodium, and at one time low in fibre, did not match.

It was true to say that the Plaintiffs exploit children by using them as more susceptible subjects of advertising, to pressurise their parents into going into McDonald's. Although it was true to say that they use gimmicks and promote the consumption of meals at McDonald's as a fun event, it was not true to say that they use the gimmicks to cover up the true quality of their food or that they promote them as a fun event when they know that the contents of their meals could poison the children who eat them.

Although some of the particular allegations made about the rearing and slaughter of animals are not true, it was true to say, overall, that the Plaintiffs are culpably responsible for cruel practices in the rearing and slaughter of some of the animals which are used to produce their food.

It was and is untrue that the Plaintiffs sell meat products which, as they must know, expose their customers to a serious risk of food poisoning.

The charge that the Plaintiffs provide bad working conditions has not been justified, although some of the Plaintiffs' working conditions are unsatisfactory. The charge that the Plaintiffs are only interested in recruiting cheap labour and that they exploit disadvantaged groups, women and black people especially as a result, has not been justified. It was true to say that the Second Plaintiff [UK McDonald's] pays its workers low wages and thereby helps to depress wages for workers in the catering trade in Britain, but it has not been proved that the First Plaintiff [US McDonald's] pays its workers low wages. The overall sting of low wages for bad working conditions has not been justified.

It was and is untrue that the Plaintiffs have a policy of preventing unionisation by getting rid of pro-union workers".

28 As regards the applicants' counterclaim, Bell J. found that McDonald's allegation that the applicants had lied in the leaflet had been unjustified, although they had been justified in alleging that the applicants had wrongly sought to deny responsibility for it. He held that the unjustified remarks had not been motivated by malice, but had been made in a situation of qualified privilege because McDonald's had been responding to vigorous attacks made on them in the leaflet, and he therefore entered judgment for McDonald's on the counterclaim also.

29 The judge awarded US McDonald's £30,000 damages and UK McDonald's a further £30,000. Mr Morris was severally liable for the whole £60,000, and Mr Morris and Ms Steel were to be jointly and severally liable for a total of £55,000 (£27,500 in respect of each plaintiff). McDonald's did not ask for an order that the applicants pay their costs.

C. The substantive appeal

30 The applicants appealed to the Court of Appeal on September 3, 1997. The hearing (before Pill and May L.JJ. and Keene J.) began on January 12, 1999 and lasted 23 days, and on March 31, 1999 the court delivered its 301-page judgment.

31 The applicants challenged a number of Bell J.'s decisions on general grounds of law, and contended as follows:

"(a) [McDonald's] had no right to maintain an action for defamation because:

—[US McDonald's] is a 'multinational' and [US and UK McDonald's] are each a public corporation which has (or should have) no right at common law to bring an action for defamation on the public policy ground that in a free and democratic society such corporations must always be open to unfettered scrutiny and criticism, particularly on issues of public interest.

—the right of corporations such as [McDonald's] to maintain an action for defamation is not 'clear and certain' as the judge held .... The law is on the contrary uncertain, developing or incomplete .... Accordingly the judge should have considered and applied Article 10 of the European Convention on Human Rights ...

(b) the judge was wrong to hold that [McDonald's] need [not] prove any particular financial loss or special damage provided that damage to its good will was likely.

(c) the judge should have held that the burden was on [McDonald's] to prove that the matters complained of by them were false.

(d) the judge was wrong to hold that, to establish a defence of justification, the [applicants] had to prove that the defamatory statements were true. The rule should be disapplied in the light of Article 10 of the ECHR.

(e) it should be a defence in English law to defamation proceedings that the defendant reasonably believed that the words complained of were true.

(f) there should be a defence in English law of qualified privilege for a publication concerning issues of public importance and interest relating to public corporations such as [McDonald's].

(g) the judge should have held that the publication of the leaflet was on occasions of qualified privilege because it was a reasonable and legitimate response to an actual or perceived attack on the rights of others, in particular vulnerable sections of society who generally lack the means to defend themselves adequately (eg. children, young workers, animals and the environment) which the [applicants] had a duty to make and the public an interest to hear".

32 The Court of Appeal rejected these submissions.

On point (a), it held that commercial corporations had a clear right under English law to sue for defamation, and that there was no principled basis upon which a line might be drawn between strong corporations which should, according to the applicants, be deprived of this right, and weaker corporations which might require protection from unjustified criticism.

In dismissing ground (b), it held that, as with an individual plaintiff, there was no obligation on a company to show that it had suffered actual damage, since damage to a trading reputation might be as difficult to prove as damage to the reputation of

an individual, and might not necessarily cause immediate or quantifiable loss. A corporate plaintiff which showed that it had a reputation within the jurisdiction and that the defamatory publication was apt to damage its goodwill thus had a complete cause of action capable of leading to a substantial award of damages.

On grounds (c) and (d), the applicants' submissions were contrary to clearly established English law, which stated that a publication shown by a plaintiff to be defamatory was presumed to be false until proven otherwise, and that it was for the defendants to prove the truth of statements presented as assertions of fact. Moreover, the court found some general force in McDonald's submission that in the instant case they had in fact largely accepted the burden of proving the falsity of the parts of the leaflet on which they had succeeded.

Dismissing grounds (e) to (g), the court observed that a defence of qualified privilege did exist under English law, but only where: (i) the publisher acted under a legal, moral or social duty to communicate the information; (ii) the recipient of the information had an interest in receiving it; and (iii) the nature, status and source of the material, and the circumstances of the publication, were such that the publication should be protected in the public interest in the absence of proof of malice. The court accepted that there was a public interest in receiving information about the activities of companies and that the duty to publish was not confined to the mainstream media but could also apply to members of campaign groups, such as London Greenpeace. However, to satisfy the test, the duty to publish had to override the requirement to verify the facts. Privilege was more likely to be extended to a publication that was balanced, properly researched, in measured tones and based on reputable sources. In the instant case, the leaflet "did not demonstrate that care in preparation and research, or reference to sources of high authority or status, as would entitle its publishers to the protection of qualified privilege".

English law provided a proper balance between freedom of expression and the protection of reputation and was not inconsistent with Art.10 of the Convention. Campaign groups could perform a valuable role in public life, but they should be able to moderate their publications so as to attract a defence of fair comment without detracting from any stimulus to public discussion which the publication might give. The relaxation of the law contended for would open the way for "partisan publication of unrestrained and highly damaging untruths", and there was a pressing social need "to protect particular corporate business reputations, upon which the well-being of numerous individuals may depend, from such publications".

33 The Court of Appeal further rejected the applicants' contention that the appeal should be allowed on the basis that the action was an abuse of process or that the trial was conducted unfairly, observing as follows:

> "Litigants in person who bring or contest a High Court action are inevitably undertaking a strenuous and burdensome task. This action was complex and the legal advice available to the [applicants] was, because of lack of funds, small in extent. We accept that the work required of the [applicants] at trial was very considerable and had to be done in an environment which, at least initially, was unfamiliar to them.

As a starting point, we cannot however hold it to be an abuse of process in itself for plaintiffs with great resources to bring a complicated case against unrepresented defendants of slender means. Large corporations are entitled to bring court proceedings to assert or defend their legal rights just as individuals have the right to bring actions and defend them. . . .

Moreover the proposition that the complexity of the case may be such that a judge ought to stop the trial on that ground cannot be accepted. The rule of law requires that rights and duties under the law are determined. . . .

As to the conduct of the trial, we note that the 313 hearing days were spread over a period of two and a half years. The timetable had proper regard to the fact that the [applicants] were unrepresented and to their other difficulties. They were given considerable time to prepare their final submissions to which they understandably attached considerable importance and which were of great length. For the purpose of preparing closing submissions, the [applicants] had possession of a full transcript of the evidence given at the trial. The fact that, for a part of the trial, the [applicants] did not receive transcripts of evidence as soon as they were made does not render the trial unfair. Quite apart from the absence of an obligation to provide a transcript, there is no substantial evidence that the [applicants] were in the event prejudiced by delay in receipt of daily transcripts during a part of the trial.

On the hearing of the appeal, we have been referred to many parts of the transcripts of evidence and submissions and have looked at other parts on our own initiative. On such references, we have invariably been impressed by the care, patience and fairness shown by the judge. He was well aware of the difficulties faced by the [applicants] as litigants in person and had full regard to them in his conduct of the trial. The [applicants] conducted their case forcefully and with persistence as they have in this Court. Of course the judge listened to submissions from the very experienced leading counsel appearing for [McDonald's] but the judge applied his mind robustly and fairly to the issues raised. This emerges from the transcripts and from the judgment he subsequently handed down. The judge was not slow to criticise [McDonald's] in forthright terms when he thought their conduct deserved it. Moreover, it appears to us that the [applicants] were shown considerable latitude in the manner in which they presented their case and in particular in the extent to which they were often permitted to cross-examine witnesses as great length.

. . . [We] are quite unpersuaded that the appeal, or any part of it, should be allowed on the basis that the action was an abuse of the process of the Court or that the trial was conducted unfairly".

34 The applicants also challenged a number of Bell J.'s findings about the content of the leaflet, and the Court of Appeal found in their favour on several points, summarised as follows:

"On the topic of nutrition, the allegation that eating McDonald's food would lead to a very real risk of cancer of the breast and of the bowel was not proved. On pay and conditions we have found that the defamatory allegations in the leaflet were comment.

> In addition to the charges found to be true by the judge—the exploiting of children by advertising, the pretence by the respondents that their food had a positive nutritional benefit, and McDonald's responsibility for cruel practices in the rearing and slaughtering of some of the animals used for their products—the further allegation that, if one eats enough McDonald's food, one's diet may well become high in fat etc., with the very real risk of heart disease, was justified . . .".

35 The appeal court therefore reduced the damages payable to McDonald's, so that Ms Steel was now liable for a total of £36,000 and Mr Morris for a total of £40,000. It refused the applicants leave to appeal to the House of Lords.

36 On March 21, 2000 the Appeal Committee of the House of Lords also refused the applicants leave to appeal.

II. Relevant domestic law and practice

A. Defamation

37 Under English law the object of a libel action is to vindicate the plaintiff's reputation and to make reparation for the injury done by the wrongful publication of defamatory statements concerning him or her.

38 The plaintiff carries the burden of proving "publication". As a matter of law[3]:

> "any person who causes or procures or authorises or concurs in or approves the publication of a libel is as liable for its publication as a person who physically hands it or sends it off to another. It is not necessary to have written or printed the defamatory material. All those jointly concerned in the commission of a tort (civil wrong) are jointly and severally liable for it, and this applies to libel as it does to any other tort".

39 A defence of justification applies where the defamatory statement is substantially true. The burden is on the defendant to prove the truth of the statement on the balance of probabilities. It is no defence to a libel action to prove that the defendant acted in good faith, believing the statement to be true. English law does, however, recognise the defence of "fair comment", if it can be established that the defamatory statement is comment, and not an assertion of fact, and is based on a substratum of facts, the truth of which the defendant must prove.

40 As a general principle, a trading or non-trading corporation is entitled to sue in libel to protect as much of its corporate reputation as is capable of being damaged by a defamatory statement. There are certain exceptions to this rule: local authorities, government-owned corporations and political parties, none of which can sue in defamation, because of the public interest that a democratically elected organisation, or a body controlled by such an organisation, should be open to uninhibited public criticism.[4]

[3] *per* Bell J. at p.5 of the judgment in the applicants' case.
[4] See *Derbyshire CC v Times Newspapers Ltd* [1993] A.C. 534; *British Coal Corporation v NUM (Yorkshire Area) and Capstick*, unreported, June 28, 1996; and *Goldsmith v Bhoyrul* [1997] 4 All E.R. 268.

B. Legal aid for defamation proceedings

41 Throughout the relevant time, the allocation of civil legal aid in the United Kingdom was governed by the Legal Aid Act 1988. Under Sch.2, Pt II, para.1 of that Act, "[p]roceedings wholly or partly in respect of defamation" were excepted from the scope of the civil legal aid scheme.

42 The Access to Justice Act 1999 ("AJA 1999") came into force on April 1, 2000, after the proceedings in the present case had concluded. It sets out the current statutory framework for legal aid in England and Wales, administered by the Legal Services Commission ("the Commission"), and made a number of reforms; for example, introducing the possibility for conditional fee agreements. Under the AJA 1999 the presumption remains that civil legal aid should not be granted in respect of claims in defamation.[5] However, the Act contains a provision[6] to enable discretionary "exceptional funding" of cases which otherwise fall outside the scope of legal aid, allowing the Lord Chancellor, *inter alia*, to authorise the Commission to grant legal aid to an individual defamation litigant, following a request from the Commission.

The Lord Chancellor has issued guidance to the Commission as to the types of case he is likely to consider favourably, stressing that such cases are likely to be extremely unusual given that Parliament has already decided in the AJA 1999 that the types of case excepted from the legal aid scheme are of low priority. As well as financial eligibility for legal aid, the Commission must be satisfied either that "there is a significant wider public interest . . . in the resolution of the case and funded representation will contribute to it", or that the case "is of overwhelming importance to the client", or that "there is convincing evidence that there are other exceptional circumstances such that without public funding for representation it would be practically impossible for the client to bring or defend the proceedings, or the lack of public funding would lead to obvious unfairness in the proceedings".

43 The normal rule in civil proceedings in England and Wales, including defamation proceedings, is that the loser pays the reasonable costs of the winner. This rule applies whether either party is legally aided or not. An unsuccessful privately paying party would usually be ordered to pay the legal costs of a successful legally aided opponent. However, an unsuccessful legally aided party is usually protected from paying the costs of a successful privately paying party, because the costs order made against the loser will not usually be enforceable without further order of the court, which is likely to be granted only in the event of a major improvement in the financial circumstances of the legally aided party.

C. Mode of trial

44 The Supreme Court Act 1981 provides in s.69:

> "(1) Where, on the application of any party to an action to be tried in the Queen's Bench Division, the court is satisfied that there is in issue—
> a claim in respect of libel, slander . . .

[5] para.1(a)(f) of Schedule.
[6] s.6(8).

the action shall be tried with a jury, unless the court is of opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury".

D. Damages

45 The measure of damages for defamation is the amount that would put the plaintiff in the position he or she would have been in had the wrong-doing not been committed. The plaintiff does not have to prove that he has suffered any actual pecuniary loss: it is for the jury (or judge, if sitting alone) to award a sum of damages sufficient to vindicate the plaintiff's reputation and to compensate for injury to feelings.

46 The Civil Procedure Rules[7] provide that leave of the court is required in order to enforce a judgment after a delay of six years or more. Leave to issue execution is usually refused after the expiration of six years from the date on which the judgment became enforceable.[8]

COMPLAINTS

47 The Court declared a number of the applicants' complaints inadmissible in its partial decision of October 22, 2002. The remaining complaints are, under Art.6(1) of the Convention, that the proceedings were unfair, principally because of the denial of legal aid, and, under Art.10, that the proceedings and their outcome constituted a disproportionate interference with the applicants' right to freedom of expression.

JUDGMENT

I. Alleged violation of Article 6(1) of the Convention

48 The applicants raised a number of issues under Art.6(1), which provides:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...".

The applicants' principal complaint under this provision was that they were denied a fair trial because of the lack of legal aid. They also alleged that unfairness was caused as a result of the trial judge's ruling to admit as evidence an affidavit sworn by the second applicant, his refusal to allow adjournments on a number of occasions and his grant of permission to McDonald's to amend their pleadings at a late stage in the proceedings.

[7] RSC, Ord.46, r.21(1)(a).
[8] See *National Westminster Bank plc v Powney* [1991] Ch. 339; [1990] 2 All E.R. 416, CA; and *WT Lamb & Sons v Rider* [1948] 2 K.B. 331; [1948] 2 All E.R. 402, CA.

A. Legal aid

1. The parties' submissions

(a) The applicants

49 The applicants pointed out that this was the longest trial, either civil or criminal, in English legal history. The entire length of the proceedings, from the issue of the writ on September 20, 1990 to the refusal by the House of Lords of leave to appeal on March 21, 2000 was nine years and six months. Before the trial started there were 28 pre-trial hearings, some of which lasted up to five days. The hearing before the High Court lasted from June 28, 1994 until December 13, 1996, a period of two years and six months, of which 313 days were spent in court, together with additional days in the Court of Appeal to contest rulings made in the course of the trial. The High Court proceedings involved about 40,000 pages of documentary evidence and 130 oral witnesses. The appeal hearing lasted 23 days. Overall, the case included over 100 days of legal argument. The transcripts of the hearings exceeded 20,000 pages.

50 The adversarial system in the United Kingdom is based on the idea that justice can be achieved if the parties to a legal dispute are able to adduce their evidence and test their opponent's evidence in circumstances of reasonable equality. At the time of the proceedings in question, McDonald's economic power outstripped that of many small countries (it enjoyed worldwide sales amounting to approximately $30 billion in 1995), whereas the first applicant was a part-time bar worker earning a maximum of £65 a week and the second applicant was an unwaged single parent. The inequality of arms could not have been greater. McDonald's was represented throughout by Queen's Counsel and junior Counsel specialising in libel law, supported by a team of solicitors and administrative staff from one of the largest firms in England. The applicants were assisted by lawyers working pro bono, who drafted their defence and represented them, during the 28 pre-trial hearings and appeals which took place over 37 court days, on 8 days and in connection with 5 applications. During the main trial, submissions were made by lawyers on their behalf on only three occasions. It was difficult for sympathetic lawyers to volunteer help, because the case was too complicated for someone else just to "dip into", and moreover the offers of help usually came from inexperienced, junior solicitors and barristers, without the time and resources to be effective.

51 The applicants bore the burden of proving the truth of a large number of allegations covering a wide range of difficult issues. In addition to the more obvious disadvantages of being without experienced Counsel to argue points of law and to conduct the examination and cross-examination of witnesses in court, they had lacked sufficient funds for photocopying, purchasing the transcripts of each day's proceedings, tracing and proofing expert witnesses, paying the witnesses' costs and travelling expenses and note-taking in court. All they could hope to do was keep going: on several occasions during the trial they had to seek adjournments because of physical exhaustion.

52 They claimed that, had they been provided with legal aid with which to trace, prepare and pay the expenses of witnesses, they would have been able to prove the truth of one or more of the charges found to have been unjustified, for example, the

allegations on diet and degenerative disease, food safety, hostility to trade unionism and/or that some of McDonald's international beef supplies came from recently deforested areas. Moreover, the applicants' inexperience and lack of legal training led them to make a number of procedural mistakes. Had they been represented, it is unlikely that they would have withdrawn all but one of their grounds on the interim appeal[9] or that the Haringey affidavit would have been admitted in evidence,[10] and it was mainly on the basis of the mistake contained in that affidavit that the second applicant was found to have been involved in the publication of the leaflet.

(b) The Government

53 The Government submitted that the Court should be slow to impose a duty to provide legal aid in civil cases, in view of the deliberate omission of any such obligation from the Convention. In contrast to the position in criminal proceedings,[11] the Convention left Contracting States with a free choice of the means of ensuring effective civil access to court.[12] States did not have unlimited resources to fund legal aid systems, and it was therefore legitimate to impose restrictions on eligibility for legal aid in certain types of low-priority civil cases, provided such restrictions were not arbitrary.[13]

54 The Convention organs had considered the non-availability of legal aid in defamation cases under English law in six cases, and had never found it to be in breach of Art.6(1).[14]

55 The Court should not depart from this consistent jurisprudence in the present case, which, in the Government's submission, fell far short of the kind of exceptional circumstances where the provision of legal aid was "indispensable for effective access to court".[15]

56 First, the Government argued that the law and facts at issue in the litigation were not so difficult as to make legal aid essential. The applicants' conduct of their defence and counterclaim, and their success in proving many of the allegations made in the leaflet, demonstrated that they were capable of mastering any complexities of the law of defamation as it applied to them.

57 Furthermore, the Government contended that it was relevant that the applicants received advice and representation pro bono on a number of occasions, particularly for some of their appearances in the Court of Appeal and in drafting their pleadings. It appeared that the applicants also raised at least £40,000 to fund their defence and that they received help with note-taking and other administrative tasks from volunteers sympathetic to their cause. Both Bell J. and the Court of Appeal took into account the applicants' lack of legal training: Bell J., for example, assisted the applicants by reformulating questions for witnesses and did not insist

[9] See [23] above.
[10] See [21] above.
[11] Art.6(3)(c).
[12] The Government relied on *Airey v Ireland* (A/32): (1979–80) 2 E.H.R.R. 305 at [26].
[13] App. No.10871/84, *Winer v United Kingdom*, July 10, 1986.
[14] See *Winer*, cited above; App. No.10594/83, *Munro v United Kingdom*, July 14, 1987; App. No.21325/93, *HS and DM v United Kingdom*, May 5, 1993; App. Nos 27436/95 & 28406/95, *Stewart-Brady v United Kingdom*, July 2, 1997; *McVicar v United Kingdom*: (2002) 35 E.H.R.R. 22; and *A v United Kingdom*: (2003) 36 E.H.R.R. 51.
[15] See the *Airey* judgment at [26].

on the usual procedural formalities, such as limiting the case to that pleaded; the Court of Appeal took note in its judgment of the need to safeguard the applicants from their lack of legal skill, conducted its own research to supplement the submissions made by the applicants and allowed them to introduce the defence of fair comment at the appeal stage, even though it had not been raised at first instance. The applicants intended the case to achieve maximum publicity, which it did. The hearings before the High Court and Court of Appeal took so long because the applicants were afforded every possible latitude in the presentation of their case; their evidence and submissions took up the great bulk of the time.

58 In the Government's submission it could not be assumed, in any event, that had legal aid generally been available for the defence of defamation actions, the applicants would have been granted it. The Legal Aid Board (as it then was, now the Legal Services Commission) would have had to make a decision, as it does in civil cases where legal aid is available, based on factors such as the merits of the case and whether the costs of litigation would be justified by the likely benefit to the aided party. The applicants published defamatory material without prior justification, and the tax payer should not have been required to pay for the research the applicants should have carried out before publishing the leaflet, or to bear the burden of placing the applicants in a position of equality with McDonald's, which was estimated to have spent in excess of £10 million on legal expenses.

2. The Court's assessment

59 The Court recalls that the Convention is intended to guarantee practical and effective rights. This is particularly so of the right of access to court in view of the prominent place held in a democratic society by the right to a fair trial.[16] It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court and that he or she is able to enjoy equality of arms with the opposing side.[17]

60 Article 6(1) leaves to the state a free choice of the means to be used in guaranteeing litigants the above rights. The institution of a legal aid scheme constitutes one of those means but there are others, such as for example simplifying the applicable procedure.[18]

61 The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, *inter alia*, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively.[19]

62 The right of access to a court is not, however, absolute and may be subject to restrictions, provided that these pursue a legitimate aim and are proportionate.[20] It may therefore be acceptable to impose conditions on the grant of legal aid based,

[16] See *Airey*, cited above at [24].
[17] See, among many other examples, *De Haes and Gijsels v Belgium*: (1998) 25 E.H.R.R. 1 at [53].
[18] See *Airey*, at [26] and McVicar, at [50].
[19] *Airey*, at [26]; *McVicar*, at [48] and [50]; *P, C and S v United Kingdom*: (2002) 35 E.H.R.R. 311 at [91]; and also *Munro v United Kingdom*, cited above.
[20] See *Ashingdane v United Kingdom* (A/93): (1985) 7 E.H.R.R. 528 at [57].

inter alia, on the financial situation of the litigant or his or her prospects of success in the proceedings.[21] Moreover, it is not incumbent on the State to seek through the use of public funds to ensure total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage *vis-à-vis* the adversary.[22]

63 The Court must examine the facts of the present case with reference to the above criteria.

First, as regards what was at stake for the applicants, it is true that, in contrast to certain earlier cases where the Court has found legal assistance to have been necessary for a fair trial,[23] the proceedings at issue here were not determinative of important family rights and relationships. The Convention organs have observed in the past that the general nature of a defamation action, brought to protect an individual's reputation, is to be distinguished, for example, from an application for judicial separation, which regulates the legal relationship between two individuals and may have serious consequences for any children of the family.[24]

However, it must be recalled that the applicants did not choose to commence defamation proceedings, but acted as defendants to protect their right to freedom of expression, a right accorded considerable importance under the Convention.[25] Moreover, the financial consequences for the applicants of failing to verify each defamatory statement complained of were significant. McDonald's claimed damages up to £100,000 and the awards actually made, even after reduction by the Court of Appeal, were high when compared to the applicants' low incomes: £36,000 for the first applicant, who was, at the time of the trial, a bar worker earning approximately £60 a week, and £40,000 for the second applicant, an unwaged single parent.[26] McDonald's have not, to date, attempted to enforce payment of the awards, but this was not an outcome which the applicants could have foreseen or relied upon.

64 As for the complexity of the proceedings, the Court recalls its finding in the *McVicar* judgment[27] that the English law of defamation and rules of civil procedure applicable in that case were not sufficiently complex as to necessitate the grant of legal aid. The proceedings defended by Mr McVicar required him to prove the truth of a single, principal allegation, on the basis of witness and expert evidence, some of which was excluded as a result of his failure to comply with the rules of court. He had also to scrutinise evidence submitted on behalf of the plaintiff and to cross-examine the plaintiff's witnesses and experts, in the course of a trial which lasted just over two weeks.

65 The proceedings defended by the present applicants were of a quite different scale. The trial at first instance lasted 313 court days, preceded by 28 interlocutory applications. The appeal hearing lasted 23 days. The factual case which the

[21] See *Munro*, cited above.
[22] See *De Haes and Gijsels*, cited above at [53], and also *McVicar*, at [51] and [62].
[23] For example, *Airey* and *P, C and S*, both cited above.
[24] See *McVicar*, at [61] and *Munro*, both cited above.
[25] See [87] below.
[26] See [9], [14] and [35] above.
[27] Cited above, [55].

applicants had to prove was highly complex, involving 40,000 pages of documentary evidence and 130 oral witnesses, including a number of experts dealing with a range of scientific questions, such as nutrition, diet, degenerative disease and food safety. Certain of the issues were held by the domestic courts to be too complicated for a jury properly to understand and assess. The detailed nature and complexity of the factual issues are further illustrated by the length of the judgments of the trial court and the Court of Appeal, which ran in total to over 1,100 pages.[28]

66 Nor was the case straightforward legally. Extensive legal and procedural issues had to be resolved before the trial judge was in a position to decide the main issue, including the meanings to be attributed to the words of the leaflet, the question whether the applicants were responsible for its publication, the distinction between fact and comment, the admissibility of evidence and the amendment of the Statement of Claim. Overall, some 100 days were devoted to legal argument, resulting in 38 separate written judgments.

67 Against this background, the Court must assess the extent to which the applicants were able to bring an effective defence despite the absence of legal aid. In the above-mentioned *McVicar* case,[29] it placed weight on the facts that Mr McVicar was a well-educated and experienced journalist, and that he was represented during the pre-trial and appeal stages by a solicitor specialising in defamation law, from whom he could have sought advice on any aspects of the law or procedure of which he was unsure.

68 The present applicants appear to have been articulate and resourceful; in the words of the Court of Appeal, they conducted their case "forcefully and with persistence",[30] and they succeeded in proving the truth of a number of the statements complained of. It is not in dispute that they could not afford to pay for legal representation themselves, and that they would have fulfilled the financial criteria for the grant of legal aid. They received some help on the legal and procedural aspects of the case from barristers and solicitors acting pro bono: their initial pleadings were drafted by lawyers, they were given some advice on an *ad hoc* basis, and they were represented during five of the pre-trial hearings and on three occasions during the trial, including the appeal to the Court of Appeal against the trial judge's grant of leave to McDonald's to amend the Statement of Claim.[31] In addition, they were able to raise a certain amount of money by donation, which enabled them, for example, to buy transcripts of each day's evidence 25 days later. For the bulk of the proceedings, however, including all the hearings to determine the truth of the statements in the leaflet, they acted alone.

69 The Government has laid emphasis on the considerable latitude afforded to the applicants by the judges of the domestic courts, both at first instance and on appeal, in recognition of the handicaps under which the applicants laboured. However, the Court considers that, in an action of this complexity, neither the sporadic help given by the volunteer lawyers nor the extensive judicial assistance and latitude

[28] See, *inter alia*, [18], [19], [30] and [49] above.
[29] [53] and [60].
[30] See [33] above.
[31] See [16] above.

granted to the applicants as litigants in person, was any substitute for competent and sustained representation by an experienced lawyer familiar with the case and with the law of libel.[32] The very length of the proceedings is, to a certain extent, a testament to the applicants' lack of skill and experience. It is, moreover, possible that had the applicants been represented they would have been successful in one or more of the interlocutory matters of which they specifically complain, such as the admission in evidence of the Haringey affidavit.[33] Finally, the disparity between the respective levels of legal assistance enjoyed by the applicants and McDonald's[34] was of such a degree that it could not have failed, in this exceptionally demanding case, to have given rise to unfairness, despite the best efforts of the judges at first instance and on appeal.

70 It is true that the Commission declared inadmissible an earlier application under, *inter alia*, Art.6(1) by these same applicants,[35] observing that "they seem to be making a tenacious defence against McDonald's, despite the absence of legal aid . . .". That decision was, however, adopted over a year before the start of the trial, at a time when the length, scale and complexity of the proceedings could not reasonably have been anticipated.

71 The Government argued that, even if legal aid had been in principle available for the defence of defamation actions, it might well not have been granted in a case of this kind, or the amount awarded might have been capped or the award made subject to other conditions. The Court is not, however, persuaded by this argument. It is, in the first place, a matter of pure speculation whether, if legal aid had been available, it would have been granted in the applicants' case. More importantly, if legal aid had been refused or made subject to stringent financial or other conditions, substantially the same Convention issue would have confronted the Court, namely whether the refusal of legal aid or the conditions attached to its grant were such as to impose an unfair restriction on the applicants' ability to present an effective defence.

72 In conclusion, therefore, the Court finds that the denial of legal aid to the applicants deprived them of the opportunity to present their case effectively before the court and contributed to an unacceptable inequality of arms with McDonald's. There has, therefore, been a violation of Art.6(1).

B. Other complaints under Article 6(1)

73 The applicants also alleged that a number of specific rulings made by the judges in the proceedings caused unfairness in breach of Art.6(1). Thus, they complained that the circumstances surrounding the admission in evidence of the Haringey affidavit[36] had been unfairly prejudicial, as had Bell J.'s refusal to grant adjournments on a number of occasions and his decision to allow McDonald's to amend their Statement of Claim.[37]

74 The Government denied that any unfairness had been caused by these rulings, which had instead struck a fair balance between the opposing litigants.

[32] Compare *P, C and S*, cited above at [93]–[95] and [99].
[33] See [21] above.
[34] See [16] above.
[35] *HS and DM v United Kingdom*, cited above.
[36] See [21] above.
[37] See [24] above.

75 To the extent that these particular complaints have merit, the Court considers that they are subsumed within the principal complaint about lack of legal aid, since, even if it had not led to a different result, legal representation might have mitigated the effect on the applicants of the rulings in question.

76 In view of the above finding of a violation of Art.6(1) based on the lack of legal aid, the Court does not consider it necessary to examine separately the additional complaints.

II. Alleged violation of Article 10 of the Convention

77 The applicants also complained of a breach of Art.10 of the Convention, which provides:

> "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. . . .
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, 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".

A. The parties' submissions

1. The applicants

78 The applicants emphasised the inter-relationship between Arts 6 and 10 and claimed that the domestic proceedings and their outcome were disproportionate given, *inter alia*, that, without legal aid, they bore the burden of proving the truth of the matters set out in the leaflet.

79 This burden was contrary to Art.10. The issues raised in the leaflet were matters of public interest and it was essential in a democracy that such matters be freely and openly discussed. To require strict proof of every allegation in the leaflet was contrary to the interests of democracy and plurality because it would compel those without the means to undertake court proceedings to withdraw from public debate. The reasons under English law for permitting wider criticism of government bodies applied equally to criticism of large multinationals, particularly given that their vast economic power was coupled with a lack of accountability. In this regard, the applicants prayed in aid the principle in English law that local authorities, government-owned corporations and political parties could not sue in defamation.[38]

80 Moreover, it was significant that the applicants were not the authors of the leaflet. It was almost impossible for campaigners to prove the truth of the contents of a campaigning leaflet dealing with global issues that they were merely involved

[38] See [40] above.

in distributing. In any event, the matters contained in the leaflet were already in the public domain and had, with only minor amendments, been set out in a leaflet printed and distributed by Veggies, to which McDonald's did not object.[39] The applicants bore no malice against McDonald's and genuinely believed that the statements in the leaflet were true.

81 Finally, the applicants submitted that the damages awarded were excessive and quite beyond their means of paying. It was contrary to the freedom of expression for the law to presume damage without the need for McDonald's to show any loss of sales as a result of the publication.

2. The Government

82 The Government contended that the applicants in the present case were not responsible journalists, but participants in a campaign group carrying out a vigorous attack on McDonald's. There had been no attempt on their part to present a balanced picture, for example by giving McDonald's an opportunity to defend itself, and there was no suggestion that the applicants had carried out any research before publication. Domestic law was not arbitrary in allocating the burden of proving justification on the defendant. On the contrary, it reflected the ordinary principle that the party who asserts a particular fact should have to prove it. In many cases it would be unreasonable to expect a plaintiff to have to prove a negative, that a given allegation was untrue. Having taken it upon him or herself to publish a statement, it was not unreasonable to expect that the defendant should bear the limited burden of having to adduce evidence which showed, on the balance of probabilities, that the statement was true.

83 The Government rejected the applicants' argument that the ability of multinational corporations, such as McDonald's, to defend their reputations by bringing defamation claims amounted to a disproportionate restriction on the ability of individuals to exercise their right to freedom of expression. They denied that there was a parallel to be drawn with the position under domestic law whereby government bodies and political parties are unable to sue for defamation: this bar was justified for the protection of the democratic process, which required free, critical expression. The reputation of a large company might be vital for its commercial success; and the commercial success of companies of all sizes was important to society for a variety of reasons, such as fostering wealth creation, expanding the tax base and creating employment. Furthermore, the applicants' proposal that "multinational companies" should have no legal protection for their reputations was unworkably vague and it would be difficult to draft and operate legislation to that effect. Their alternative suggestion, that multinationals should have to prove loss, was also misconceived. The vindication of a plaintiff's reputation was a legitimate aim in itself and it would place enormous evidential burdens on both sides if economic loss were to become a material issue.

84 It was irrelevant that certain of the defamatory statements had already been published, for example in the Veggies' leaflet. A statement did not become true simply through repetition, and, even where a statement was in wide circulation and

[39] See [26] above.

had been published by a number of authors, the defamed party must be free to take proceedings against whomever he, she or it chose.

B. The Court's assessment

85 It was not disputed between the parties that the defamation proceedings and their outcome amounted to an interference, for which the State had responsibility, with the applicants' rights to freedom of expression.

86 It is further not disputed, and the Court finds, that the interference was "prescribed by law". The Court further finds that the English law of defamation, and its application in this particular case, pursued the legitimate aim of "the protection of the reputation or rights of others".

87 The central issue which falls to be determined is whether the interference was "necessary in a democratic society". The fundamental principles relating to this question are well established in the case law and have been summarised as follows[40]:

> "(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broad-mindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which—as the Court has already said above—must, however, be construed strictly, and the need for any restrictions must be established convincingly . . .
>
> (ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.
>
> (iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of

[40] See, *e.g. Hertel v Switzerland*: (1999) 28 E.H.R.R. 534 at [46].

> the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient' .... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts . . .".

In its practice, the Court has distinguished between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. Where a statement amounts to a value judgment the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive.[41]

88 The Court must weigh a number of factors in the balance when reviewing the proportionality of the measure complained of. First, it notes that the leaflet in question contained very serious allegations on topics of general concern, such as abusive and immoral farming and employment practices, deforestation, the exploitation of children and their parents through aggressive advertising and the sale of unhealthy food. The Court has long held that "political expression", including expression on matters of public interest and concern, requires a high level of protection under Art.10.[42]

89 The Government have pointed out that the applicants were not journalists, and should not therefore attract the high level of protection afforded to the press under Art.10. The Court considers, however, that in a democratic society even small and informal campaign groups, such as London Greenpeace, must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment.[43]

90 Nonetheless, the Court has held on many occasions that even the press "must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information . . .".[44] The safeguard afforded by Art.10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism,[45] and the same principle must apply to others who engage in public debate. It is true that the Court has held that journalists are allowed "recourse to a degree of exaggeration, or even provocation",[46] and it considers that in a

[41] See, *e.g.* App. No.29032/95, *Feldek v Slovakia*, July 12, 2001, at [75]–[76].
[42] See, *e.g. Thorgeir Thorgeirson v Iceland* (A/239): (1992) 14 E.H.R.R. 843, and also *Hertel v Switzerland*, cited above at [47].
[43] See, *mutatis mutandis*, *Bowman v United Kingdom*: (1998) 26 E.H.R.R. 1; and *Appleby v United Kingdom*: (2003) 37 E.H.R.R. 38.
[44] See, *e.g. Bladet Tromsø and Stensaas v Norway*: (2000) 29 E.H.R.R. 125 at [59].
[45] *Bladet Tromsø*, at [65].
[46] See, *e.g. Bladet Tromsø*, cited above at [59]; or *Präger and Oberschlick v Austria* (A/313): (1996) 21 E.H.R.R. 1 at [38].

campaigning leaflet a certain degree of hyperbole and exaggeration is to be tolerated, and even expected. In the present case, however, the allegations were of a very serious nature and were presented as statements of fact rather than value judgments.

91 The applicants deny that either was involved in the production of the leaflet (despite the High Court's finding to the contrary)[47] and stress that they genuinely believed the leaflet's content to be true.[48] They claim that it places an intolerable burden on campaigners such as themselves, and thus stifles public debate, to require those who merely distribute a leaflet to bear the burden of establishing the truth of every statement contained in it. They also argue that large multinational companies should not be entitled to sue in defamation, at least without proof of actual financial damage. Complaint is further made of the fact that under the law McDonald's were able to bring and succeed in a claim for defamation when much of the material included in the leaflet was already in the public domain.

92 As to this last argument, the Court notes that a similar contention was examined and rejected by the Court of Appeal on the ground either that the material relied on did not support the allegations in the leaflet or that the other material was itself lacking in justification. The Court finds no reason to reach a different conclusion.

93 As to the complaint about the burden of proof, the Court recalls that in its *McVicar* judgment it held that it was not in principle incompatible with Art.10 to place on a defendant in libel proceedings the onus of proving to the civil standard the truth of defamatory statements.[49] The Court there recalled its *Bladet Tromsø* judgment, in which it commented that special grounds were required before a newspaper could be dispensed from its ordinary obligation to verify factual statements.[50]

94 The Court further does not consider that the fact that the plaintiff in the present case was a large multinational company should in principle deprive it of a right to defend itself against defamatory allegations or entail that the applicants should not have been required to prove the truth of the statements made. It is true that large public companies inevitably and knowingly lay themselves open to close scrutiny of their acts and, as in the case of the businessmen and women who manage them, the limits of acceptable criticism are wider in the case of such companies.[51] However, in addition to the public interest in open debate about business practices, there is a competing interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, but also for the wider economic good. The state therefore enjoys a margin of appreciation as to the means it provides under domestic law to enable a company to challenge the truth, and limit the damage, of allegations which risk harming its reputation.[52]

95 If, however, a state decides to provide such a remedy to a corporate body, it is essential, in order to safeguard the countervailing interests in free expression and open debate, that a measure of procedural fairness and equality of arms is provided for. The Court has already found that the lack of legal aid rendered the defamation

[47] See [26] above.
[48] See the High Court's finding in [28] above.
[49] See *McVicar*, cited above at [87].
[50] *McVicar*, cited above at [84].
[51] See *Fayed v United Kingdom* (A/294-B): (1994) 18 E.H.R.R. 393 at [75].
[52] See *Markt Intern Verlag GmbH and Beerman v Germany* (A/165): (1990) 12 E.H.R.R. 161 at [33]–[38].

proceedings unfair, in breach of Art.6(1). The inequality of arms and the difficulties under which the applicants laboured are also significant in assessing the proportionality of the interference under Art.10. As a result of the law as it stood in England and Wales, the applicants had the choice either to withdraw the leaflet and apologise to McDonald's, or bear the burden of proving, without legal aid, the truth of the allegations contained in it. Given the enormity and complexity of that undertaking, the Court does not consider that the correct balance was struck between the need to protect the applicants' rights to freedom of expression and the need to protect McDonald's rights and reputation. The more general interest in promoting the free circulation of information and ideas about the activities of powerful commercial entities, and the possible "chilling" effect on others are also important factors to be considered in this context, bearing in mind the legitimate and important role that campaign groups can play in stimulating public discussion.[53] The lack of procedural fairness and equality therefore gave rise to a breach of Art.10 in the present case.

96 Moreover, the Court considers that the size of the award of damages made against the two applicants may also have failed to strike the right balance. Under the Convention, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered.[54] The Court notes on the one hand that the sums eventually awarded in the present case (£36,000 in the case of the first applicant and £40,000 in the case of the second applicant) although relatively moderate by contemporary standards in defamation cases in England and Wales, were very substantial when compared to the modest incomes and resources of the two applicants. While accepting, on the other hand, that the statements in the leaflet which were found to be untrue contained serious allegations, the Court observes that not only were the plaintiffs large and powerful corporate entities but that, in accordance with the principles of English law, they were not required to, and did not, establish that they had in fact suffered any financial loss as a result of the publication of the "several thousand" copies of the leaflets found to have been distributed by the trial judge.[55]

97 While it is true that no steps have to date been taken to enforce the damages award against either applicant, the fact remains that the substantial sums awarded against them have remained enforceable since the decision of the Court of Appeal. In these circumstances, the Court finds that the award of damages in the present case was disproportionate to the legitimate aim served.

98 In conclusion, given the lack of procedural fairness and the disproportionate award of damages, the Court finds that there has been a violation of Art.10.

III. Application of Article 41 of the Convention

99 Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the

[53] See, *e.g. Lingens v Austria* (A/103): (1986) 8 E.H.R.R. 407 at [44]; *Bladet Tromsø*, cited above at [64]; and *Thorgeir Thorgeirson*, cited above at [68].
[54] See *Tolstoy Miloslavsky v United Kingdom* (A/316-B): (1995) 20 E.H.R.R. 442 at [49].
[55] See [45] above and compare, *e.g. Hertel v Switzerland*, cited above at [49].

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. Pecuniary damage

100 The applicants claimed that, had their rights under Arts 6 and 10 been adequately protected by the Government, they would not have had to defend themselves throughout the entire defamation proceedings, which continued over nine years. They claimed payment for the legal work they had to carry out, at the rate applicable for litigants in person under the Civil Procedure Rules, namely £9.25 per hour, plus reasonable travelling expenses. Using this rate, they calculated that they should each be reimbursed £21,478.50 in respect of the 387 days each spent in court, together with £100,233.00 each for preparation. Their total, joint claim for domestic legal costs therefore came to £243,423.00, to which had to be added £31,194.84 for expenses and disbursements such as photocopying, transcripts, telephone calls and travelling.

101 The applicants also asked the Court to ensure in its judgment that if McDonald's were ever successful in enforcing the £40,000 award of damages against them, the Government should be required to reimburse the sum paid.

102 The Government commented that the amounts claimed by the applicants in respect of their court appearances and preparatory work did not reflect costs actually incurred by them or money actually lost as a result of the alleged violations of Arts 6(1) and 10. Had the applicants been awarded legal aid for their defence, the legal aid monies would have been paid to their legal representatives; on no view would legal aid have constituted financial remuneration for the applicants themselves. As for the expenses claimed by the applicants, it was a matter of pure speculation whether and to what extent, if legal aid had been available, these expenses would have been covered by public funds.

103 As for the applicants' request for a "rider" to cover their liability should McDonald's decide to enforce the claim for damages, the Government submitted that this was not a concept known to international law and that such an order would be contrary to the parties' legitimate interest in the finality of litigation.

104 The Court notes that the applicants have not presented any evidence to suggest that the time they spent preparing and presenting their defence to the defamation proceedings caused them any actual pecuniary loss; it has not been suggested, for example, that either applicant lost earnings as a result of the lack of legal aid. They have filed an itemised claim in respect of expenses and disbursements, but they do not allege that their expenses exceeded the amount which they were able to raise by voluntary donation.[56] The Court is not, therefore, satisfied that the sums claimed represented losses or expenses actually incurred.

105 It further notes that, because of the period of time that has elapsed since the order for damages was made against the applicants, McDonald's would need the leave of the court before it could proceed to enforce the award.[57] In these circumstances, despite its finding that the award of damages was disproportionate and in breach of

[56] See [16] above.
[57] See [46] above.

Art.10, the Court does not consider it necessary to make any provision in respect of it under Art.41 at the present time.

106 In conclusion, therefore, the Court makes no award in respect of compensation for pecuniary damage.

B. Non-pecuniary damage

107 The applicants claimed that during the period of over nine years they were defending the defamation action against such a powerful adversary they suffered considerable stress and anxiety. They felt a responsibility to defend the case to the utmost because of the importance of the issues raised and the necessity of public debate. In consequence, they were forced to sacrifice their health, personal and family lives. Ms Steel provided the Court with doctors' letters from March 1995 and March 1996 stating that she was suffering from stress-related illness aggravated by the proceedings. Mr Morris, a single parent, was unable to spend as much time as he would have wished with his young son. Ms Steel claimed £15,000 under this head and Mr Morris claimed £10,000.

108 The Government submitted that, in accordance with the Court's practice in the great majority of cases involving breaches of Art.10 and procedural breaches of Art.6, it was not necessary to make an award of compensation for non-pecuniary damage. There was no evidence that the applicants had suffered more stress than any individual, represented or not, involved in litigation and it was a matter of pure speculation whether and by how much the stress would have been reduced if the violations of Arts 6 and 10 had not taken place. In any event, the amounts claimed were excessive when compared with other past awards for serious violations of the Convention.

109 The Court has found violations of Arts 6(1) and 10 based, principally, on the fact that the applicants had themselves to carry out the bulk of the legal work in these exceptionally long and difficult proceedings to defend their rights to freedom of expression. In these circumstances the applicants must have suffered anxiety and disruption to their lives far in excess of that experienced by a represented litigant, and the Court also notes in this connection the medical evidence submitted by Ms Steel. It awards compensation for non-pecuniary damage of €20,000 to the first applicant and €15,000 to the second applicant.

C. Strasbourg costs and expenses

110 The applicants were represented before the Court by leading and junior Counsel and a senior and assistant solicitor.

Both Counsel claimed to have spent several hundred hours on the case, but, in order to keep costs within a reasonable limit, decided to halve their hourly rates (to £125 and £87.50 respectively) and to claim for only 115 hours' work for leading Counsel and 75 hours' work for junior Counsel. In addition, leading Counsel claimed £5,000 for preparing for and representing the applicants at the hearing on September 7, 2004, and junior Counsel claimed £2,500 for the hearing. The total fees for leading Counsel were £19,375 plus value added tax ("VAT"), and those of junior Counsel were £9,062.50 plus VAT.

Despite having invested approximately 45 hours in the case, the senior solicitor claimed for only 25 hours and halved his hourly rate to £175. He also claimed £2,000 in respect of the hearing. The assistant solicitor claimed to have spent over 145 hours on the case, but claimed for 58 hours' work, at £75 per hour, half her usual rate. She claimed £1,500 for the hearing. The senior solicitor's total costs came to £6,375 plus VAT, and those of the assistant solicitor came to £5,850 plus VAT.

In addition, the applicants made a claim under this head for some of the work they had carried out in connection with the proceedings before the Court, namely 150 hours each at £9.25 per hour: a total of £2,775.

Finally, they claimed a total of £3,330 travelling and accommodation expenses for the hearing in respect of the four lawyers and two applicants.

The total claim for costs and expenses under this heading came to £46,767.50, plus VAT.

111 The Government considered the use of four lawyers to have been unreasonable and excessive. It submitted that the costs and travelling expenses of senior Counsel and one of the solicitors should be disallowed. The applicants were not entitled to claim any costs in respect of the work they had carried out, since this part of the claim did not represent pecuniary loss actually incurred.

112 The Court recalls that only such costs and expenses as were actually and necessarily incurred in connection with the violation or violations found, and reasonable as to *quantum*, are recoverable under Art.41.[58] It follows that it cannot make an award under this head in respect of the hours the applicants themselves spent working on the case, as this time does not represent costs actually incurred by them.[59] It is clear from the length and detail of the pleadings submitted by the applicants that a great deal of work was carried out on their behalf, but in view of the relatively limited number of relevant issues, it is questionable whether the entire sum claimed for costs was necessarily incurred. In all the circumstances, the Court awards €50,000 under this head, less the €2,688.83 already paid in legal aid by the Council of Europe, together with any tax that may be payable.

D. Default interest

113 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 3 percentage points.

For these reasons, THE COURT unanimously

1. *Holds* that there has been a violation of Art.6(1) of the Convention;
2. *Holds* that there has been a violation of Art.10 of the Convention;
3. *Holds*

(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to

[58] See, *e.g. Şahin v Germany*: (2003) 36 E.H.R.R. 43 at [105].
[59] See *Dudgeon v United Kingdom* (Art.50) (A/59): (1983) 5 E.H.R.R. 573 at [22]; and *Robins v United Kingdom*: (1998) 26 E.H.R.R. 527 at [44].

Art.44(2) of the Convention, the following amounts, to be converted into pounds sterling at the rate applicable at the time of settlement:

(i) €20,000 to the first applicant and €15,000 to the second applicant in respect of non-pecuniary damage;

(ii) €47,311.17 in respect of costs and expenses;

(iii) any tax that may be chargeable on the above amounts;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus 3 percentage points;

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

ROCHE v UNITED KINGDOM

BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS (GRAND CHAMBER)

APPLICATION NO.32555/96

(*The President*, Judge Wildhaber; *Judges* Rozakis, Ress, Bratza, Caflisch, Loucaides, Cabral Barreto, Strážnická, Lorenzen, Casadevall, Zupančič, Hedigan, Thomassen, Baka, Maruste, Traja, Pavlovschi)

(2006) 42 E.H.R.R. 30

October 19, 2005

LT Access to information; Human rights; Just satisfaction; Margin of appreciation; Positive obligations; Right to fair trial; Right to respect for private and family life; Service personnel

H1 In the early 1960s, the applicant was a serviceman who participated in tests at the Porton Down barracks designed to improve the United Kingdom's defences against chemical weapons. In 1981 he was diagnosed with medical conditions which he suspected were linked to those tests, prompting him to seek access to any relevant records held by the State. The applicant's doctor obtained some records in the late 1980s, but these were not made available to the applicant until 1994. In 1995, the Government issued the applicant with a certificate entitling him to a service pension in respect of some of his medical conditions. He appealed to the Pensions Appeal Tribunal ("PAT") to get a pension in respect of his other conditions. The Government released records to the applicant on numerous occasions between 1997 and 2005. Some of those records were released in response to the applicant's lobbying, some were submitted in evidence as part of the present case, and some were released pursuant to orders made by the PAT.

H2 Relying on Art.6, the applicant complained that s.10 of the Crown Proceedings Act 1947 had the effect of depriving servicemen of their right to sue the Crown for injuries in tort law if the Government had issued a service pension certificate in connection with those injuries. He further invoked Art.1 of Protocol No.1, Art.13 and Art.14 in this respect.

H3 Relying on Art.8 and Art.10, the applicant complained that he had inadequate access to information about the tests to which he was subject.

H4 **Held:**

(1) by nine votes to eight that there had been no violation of Art.6(1).

(2) by 16 votes to 1 that there had been no violation of Art.1 of Protocol No.1.

(3) unanimously that there had been no violation of Art.14.

(4) by 16 votes to 1 that there had been no violation of Art.13.

(5) unanimously that there had been a violation of Art.8.

(6) unanimously that there had been no violation of Art.10.

(7) unanimously that the respondent State was to pay the applicant compensation for non-pecuniary damage, and a sum in respect of costs and expenses.

(8) unanimously dismissed the remainder of the applicant's claim for just satisfaction.

1. Right to trial: determination of civil rights; "procedural" and "substantive" rights; margin of appreciation (Art.6).

H5 (a) Article 6(1) secured the procedural right to have a claim relating to civil rights and obligations brought before a court, but did not guarantee any substantive content for those rights. Although the distinction might be a fine one, it would always be determinative. [116]–[119]

H6 (b) The starting-point in assessing whether any restriction was substantive or procedural was the relevant domestic law, and the Court would need strong reasons to disagree with the findings of a superior national court in this regard. [120]

H7 (c) The House of Lords had previously ruled that s.10 of the Crown Proceedings Act 1947 was a provision of substantive rather than procedural law. Its purpose was to facilitate the grant of a pension, not to prevent anyone from bringing an action against the Crown. Moreover any discretion over whether to issue a certificate was narrow. There was no reason to differ with the House of Lords' findings on this matter, and as such the applicant had no civil right to which Art.6(1) might apply. [122]–[124]

H8 (d) There was accordingly no violation of Art.6. [125]

2. Protection of property: "possession" (Art.1 of Protocol No.1).

H9 Since the applicant had never had a right to a claim in negligence, he had no "possession" within Art.1 of Protocol No.1. There was accordingly no violation of that provision. [128]–[130]

3. Prohibition of discrimination (Art.14).

H10 Since neither Art.6 nor Art.1 of Protocol No.1 were engaged, the applicant's argument that he was discriminated against in his enjoyment of those rights would also fail. [131]–[134]

4. Effective remedy (Art.13).

H11 (a) Article 13 did not allow an individual to challenge a Contracting State's primary legislation before a national authority on grounds that it was contrary to the Convention. [137]

H12 (b) There was accordingly no violation of Art.13. [138]

5. Right to private life: positive obligations; access to information (Art.8).

H13 (a) Effective respect for private life could impose positive obligations on Contracting States, having regard to the necessary balance between the interests of the community and the individual. [157]

H14 (b) The applicant suffered substantial anxiety and stress as a result of not knowing whether the tests had put him at risk. The respondent State did not assert that there was any pressing reason for withholding any records. [161]

H15 (c) There was therefore a positive obligation to provide an effective and accessible procedure enabling the applicant to access all relevant and appropriate information to assess any risk to which he had been exposed. [162]

H16 (d) The ability of the PAT to order the release of documents did not fulfil this obligation because the applicant did not originally want the records in connection with any pension application and should not be required to use that route to obtain them. [163]–[165]

H17 (e) The other methods of obtaining records also did not fulfil the obligation. The release to the applicant's doctor was incomplete, partially incorrect, and unavailable to the applicant except with his doctor's authorisation. His permission to attend Porton Down to review records in person would not lead to the provision of all relevant and appropriate information. Research that the Ministry of Defence had undertaken into the medical consequences of the tests was insufficient. [166]

H18 (f) There was accordingly a violation of Art.8. [169]

6. Freedom to receive information: positive obligations (Art.10).

H19 (a) The freedom to receive information did not impose a positive obligation on the State to disseminate information. [172]

H20 (b) There was accordingly no violation of Art.10. [173]

7. Just satisfaction: damages; costs and expenses; default interest (Art.41).

H21 (a) Deciding on an equitable basis, the Court awarded €8,000 in respect of the frustration, uncertainty and anxiety suffered by the applicant. [178]–[179]

H22 (b) The applicant was awarded costs and expenses assessed on an equitable basis. Default interest was based on the marginal lending rate of the European Central Bank plus 3 percentage points. [185]–[186]

H23 **The following cases are referred to in the Court's judgment:**

1. *A v United Kingdom*: (1999) 27 E.H.R.R. 611
2. *Al-Adsani v the United Kingdom*: (2002) 34 E.H.R.R. 11
3. *Ashingdane v United Kingdom* (A/93): (1985) 7 E.H.R.R. 528
4. *Dyer v United Kingdom* (1984) 39 D.R. 246
5. *Edwards v United Kingdom*: (2002) 35 E.H.R.R. 19
6. *Fayed v United Kingdom* (A/294-B): (1994) 18 E.H.R.R. 393
7. *Ferrazzini v Italy*: (2002) 34 E.H.R.R. 45
8. *Fogarty v United Kingdom*: (2002) 34 E.H.R.R. 12
9. *Gaskin v United Kingdom* (A/160): (1990) 12 E.H.R.R. 36
10. *Golder v United Kingdom* (A/18): (1979–80) 1 E.H.R.R. 524
11. *Guerra v Italy*: (1998) 26 E.H.R.R. 357
12. *James v United Kingdom* (A/98): (1986) 8 E.H.R.R.123
13. *Jordan v United Kingdom*: (2003) 37 E.H.R.R. 2
14. *König v Germany* (A/27): (1979–80) 2 E.H.R.R. 170
15. *Kopecký v Slovakia*: (2005) 41 E.H.R.R. 43
16. *Leander v Sweden* (A/116): (1987) 9 E.H.R.R. 433

17. *Lithgow v United Kingdom* (A/102): (1986) 8 E.H.R.R. 123
18. *McCann v United Kingdom* (A/324): (1996) 21 E.H.R.R. 97
19. *McElhinney v Ireland*: (2002) 34 E.H.R.R. 13
20. *McGinley and Egan v United Kingdom*: (1999) 27 E.H.R.R. 1
21. *McMichael v United Kingdom* (A/307-B): (1995) 20 E.H.R.R. 205
22. *Masson and Van Zon v Netherlands* (A/327-A): (1996) 22 E.H.R.R. 491
23. *Menson v United Kingdom*: (2003) 37 E.H.R.R. CD220
24. *Pellegrin v France*: (2001) 31 E.H.R.R. 26
25. *Petrovic v Austria*: (2001) 33 E.H.R.R. 14
26. *Pinder v United Kingdom*: (1985) 7 E.H.R.R. CD464
27. *Powell and Rayner v United Kingdom* (A/172): (1990) 12 E.H.R.R. 355
28. *Pressos Compania Naviera SA v Belgium* (A/332): (1996) 21 E.H.R.R. 301
29. *The Holy Monasteries v Greece* (A/301-A): (1995) 20 E.H.R.R. 1
30. *Tinnelly & Sons Ltd and McElduff v United Kingdom*: (1999) 27 E.H.R.R. 249
31. *Van Droogenbroeck v Belgium* (A/50): (1982) 4 E.H.R.R. 443
32. *W v United Kingdom* (A/121): (1988) 10 E.H.R.R. 29
33. *Z v United Kingdom*: (2002) 34 E.H.R.R. 3
34. Application No.9803/82, *Ketterick v United Kingdom*, October 15, 1982
35. Application No.33919/96, *R. v Belgium*, February 27, 2001
36. Application No.47679/99, *Staśaitis v Lithuania*, March 21, 2002

H24 **The following domestic case is referred to in the dissenting Opinion of Judge Loucaides joined by Judges Rozakis, Zupancic, Strážnická, Casadevall, Thomassen, Maruste and Traja:**
37. *Matthews v Ministry of Defence* [2002] EWHC 13
38. *X v Bedfordshire CC* [1995] 2 A.C. 633

H25 *Mr J. Grainger* (Agent), *Mr J. Eadie*, *Mr S. Cave*, *Mr G. Regan* (Advisers), for the UK Government.
Mr R. Gordon, *Mr J. Stratford*, *Mr F. Pilbrow* (Counsel), Mr J. Welch, Ms J. Drane (Solicitors), Ms V. Wakefield (Adviser), for the applicant.

THE FACTS

I. The circumstances of the case

9 The applicant was born in 1938 and is currently resident in Lancashire.

10 In 1953 he joined the British army at 15 years of age. He served with the Royal Engineers between February 1954 and April 1968 when he was discharged for reasons unrelated to the present application.

In 1981 he was diagnosed as suffering from hypertension and late onset bronchial asthma and in 1989 he was found to have high blood pressure and chronic obstructive airways disease (bronchitis—"COAD"). He has not worked since in or around 1992 and is registered as an invalid.

A. The Porton Down tests

11 The Chemical and Biological Defence Establishment at Porton Down ("Porton Down") was established during the First World War in order to conduct research

into chemical weapons with a view to advancing the protection of the United Kingdom's armed forces against such weapons. The research included tests of gases on humans as well as on animals. Servicemen who participated in the tests were paid extra wages.

12 The applicant participated in such tests in Porton Down. While there was some debate as to whether he attended in 1962, it was not disputed that he did so in July 1963. His service medical records contained no record of any tests at Porton Down.

1. Tests in 1962 at Porton Down

13 The applicant alleged as follows. In the spring of 1962 he was invited to Porton Down; he was medically examined on arrival; he was asked on three or four occasions to enter a sealed and unventilated room where he was seated and strapped to a chair; over a period of about six hours, drops of mustard gas were applied to patches of tissue which patches were taped to his skin; he was told that, if he were unlucky, he might suffer temporary pain or discomfort but otherwise he was not given any, or any proper, warning about the possible consequences of the tests for his health; once the tests were finished he returned to his unit; and there was no further medical review after he left Porton Down. He relied on a memorandum and file note of November 13, 1989[1] and on the conclusions in this respect of January 14, 2004 of the Pensions Appeal Tribunal ("PAT")[2] to substantiate his participation in tests in 1962.

14 While the Government did not deny that participation, they pointed to a number matters which appeared to militate against such a conclusion: the summary and alphabetical record books did not refer to his attendance in 1962 but only to his attendance in 1963; there was no documentary evidence at all of the 1962 tests whereas certain records existed of his 1963 tests; and if the PAT accepted his participation in the 1962 tests, this was based solely on his recollections.

2. Tests in 1963 at Porton Down

15 The nerve gas (known as G-agent or "GF") test is described in the relevant records as "exposure to single breath GF". The applicant alleged that he was told before the test that the experiment "could not harm a mouse"; that he was placed in an air-tight glass-partitioned cubicle containing a face mask, the mask was placed over his mouth and nose, the fitting was checked and the chamber was sealed; that a loudspeaker informed him that the test was about to begin and to inhale normally; that he had an immediate tightening of the chest muscles and lungs which wore off after the end of the test; and that blood samples were taken at regular intervals during the following 24 hours. The Government submitted that diluted GF vapours were put into a gas chamber and, as the name of the test suggested, volunteers took a single breath of air with calculated doses of GF gas through a tube connected to that chamber, they held their breath for two seconds and then exhaled.

16 The other test involved mustard gas and was described in the records as "H sensitivity and penetration". According to the applicant, it followed the same format as in 1962.

[1] See [24] below.
[2] See [63] below.

The Government added the following detail: the mustard gas test was designed to test the performance of protective clothing and was carried out in two parts. The first was a sensitivity test to determine an individual's sensitivity to mustard gas and it involved the placement of a dilute solution of the gas on the participant's upper arm. If after 24 hours the test subject had a small red mark, he or she was deemed too sensitive and participated no further in the tests. On the other hand, if the participant was not demonstrably sensitive, the second part consisted of putting a drop of dilute mustard gas solution on three samples of protective clothing left in place on the participant's body and the skin under the clothing was examined after 6 and then 24 hours. The participants were monitored before and after the tests. The rooms were properly ventilated, the dosages were small and safe and the tests were carefully planned and controlled.

B. The applicant's search for relevant records

17 From 1981 he was medically treated for breathlessness and high blood pressure and by 1987 these problems had significantly worsened. He began to search for his Porton Down records through what he described as "medical" and "political" means.

1. The "medical" route

18 In response to his doctor's query, in late 1987 the MOD supplied his doctor with his service medical records on a "medical in confidence" basis. Those records did not refer to the applicant's Porton Down tests.

19 In a letter of November 14, 1989 Porton Down responded to another enquiry from his doctor. The letter was sent on a "medical in confidence" basis and confirmed the applicant's participation in a GF gas test in July 1963. That GF test had been preceded and succeeded by a full medical examination which revealed no abnormality. The letter also referred (inaccurately, as it later emerged)[3] to seven blood tests conducted after the GF test and to their results and confirmed that the applicant had also taken "Peak Flowmeter measurements" and "breath holding tests", a clothing penetration study (apparently, although not expressly noted, the mustard gas tests) and a battery of personality tests. The results of these tests were not included in the letter and no other records supporting the statements made in the letter were enclosed. His doctor's stamp on the letter indicates that he decided to tell the applicant that all was normal. The applicant persuaded his doctor to show him the letter in 1994.

20 By letter dated December 14, 1989 a consultant informed the applicant's doctor that he doubted that the applicant's bronchial asthma was caused by his exposure to nerve gas. Further tests would be carried out.

21 A letter from Dr H (a Professor of Environmental Toxicology at the University of Leeds and later the court appointed expert witness in the PAT proceedings)[4] dated December 5, 1994 to the applicant stated that full and detailed records were required to judge the long-term effects of his participation in the tests and that a long-term epidemiological study would have been useful either to establish that

[3] See [36] below.
[4] See [42]–[68] below.

there were long-term effects or to reassure test participants that there were none. His letter of July 10, 1996 repeated his view as to the need for such a study.

22 An internal Porton Down memorandum of November 24, 1997 noted that certain blood test figures given in the letter to the applicant's doctor of November 14, 1989 were inaccurate. In addition, it was considered that the applicant's description of the tests was roughly consistent with the procedures in the 1960s. While there were no obvious gaps in the 1960s records, it could not be said that the records were complete: the applicant could have attended in 1962 and his name could have been omitted or incorrectly recorded due to a clerical error.

2. The "political" route

23 The applicant, inter alia, carried out a sit-in hunger strike at Porton Down, held a press conference in the House of Commons and requested Members of Parliament to put parliamentary questions.

24 Between November 11 and 14, 1989 he was on hunger strike outside Porton Down. On November 13, 1989 he spoke with the Secretary of Porton Down. The latter noted in a memorandum of that date that the applicant's description of the tests was strong enough to indicate that he had been there and he recommended a further search of the records. That Secretary also recorded in a file note (of the same date) that the applicant's description of his visits to Porton Down in 1962 and 1963 left him with a level of confidence that he had been a volunteer there on both occasions. This led to the letter of November 14, 1989 to the applicant's doctor.[5]

25 In January 1994 the applicant formed the Porton Down Volunteers' Association with the object of seeking recognition and redress for test participants. The association has over 300 members to date.

26 By letter dated January 26, 1994 the Chief Executive of Porton Down answered, at the request of the Secretary of State for Defence, a series of questions raised by a Member of Parliament about chemical and biological warfare testing. The Chief Executive's letter described the test procedure stating that participants were given a medical examination before and after the tests and recalled for check-ups "from time to time". It was pointed out that there was no evidence that the health of participants had deteriorated because of their test participation. On June 22, 1994 the Chief Executive confirmed the well-established policy of the Ministry of Defence ("MOD") to release service medical records to a veteran's doctor on a "medical in confidence" basis. The Chief Executive's letter of March 7, 1995 (in response to a parliamentary question to the Minister of State for Defence) noted that the tests did not include any plan for long-term systematic monitoring of participants: any monitoring thereafter was purely ad hoc and sporadic.

27 On February 2, 1994 the applicant wrote to the MOD requesting copies of his medical records and of reports on the relevant tests. The reply of March 9, 1994 from Porton Down recalled the MOD policy of release on a "medical in confidence" basis. The applicant's doctor had been provided with information in 1989 on this basis. It was "entirely up to your own doctor how much or how little of this information he conveys to you". Further queries from the applicant led to a similar response from Porton Down by letter dated April 20, 1994.

[5] See [19] above.

28 On December 12, 1994 Lord Henley stated in the House of Lords that the MOD would continue to send veterans to their doctors and would release medical records as appropriate. Information was provided to doctors to allow proper diagnosis and "would be released, if necessary". He repeated that there was no evidence over the previous 40 years that test participants had suffered harm to their health.

29 In response to a series of parliamentary questions put to the Secretary of State for Defence as to the necessity for a public enquiry, the Government's representative replied on February 28, 1995 that there was no evidence that any test participants had suffered any long-term damage to their health in the past four decades. Similar responses as to the lack of evidence of harm to the test participants were given by the Minister of State for Defence in Parliament on April 4 and May 2, 1995 in response to questions concerning the instigation of a study into the long-term health effects of exposure to chemical and biological substances.

30 On April 25, 1995 the applicant and the Labour Party defence spokesman took part in a press conference on the question of Porton Down volunteers and their requirements.

31 Following a meeting between them, on December 2, 1997 the Minister of State for Defence wrote to the applicant. He referred to the concerns of the applicant (and other test participants) that information about the tests was being withheld. He confirmed that this was not the case but rather reflected "less than thorough" record keeping than would be currently expected. Henceforth all volunteers would be able to obtain access to all the information held on them at Porton Down and steps would be taken to declassify reports so as to make that information more accessible.

Certain copy test documents were enclosed: (a) the alphabetical record book which recorded the applicant's attendance at Porton Down between July 13 and 19, 1963; (b) the summary record book which referred to the two tests carried out on the applicant involving GF and mustard gas and listed the monitoring procedures that were to be carried out on the applicant (chest X-rays, peak flowmeter tests, Quiz x 3x alcohol, breath-holding tests and blood tests); and (c) a report entitled "Effects of Inhaled GF on Man" which described the single-breath GF test and contained an analysis of the results of the tests carried out on 56 participants, believed to include the applicant's test. It was indicated that these documents were available to any test participant who requested them.

This was the first material obtained by the applicant about his participation in the tests.

The letter went on to note that much GF-related research work had already been published in open literature or was in the public records' office. The review of files to be disclosed would continue and the applicant was given a list of all relevant research papers already published between 1957 and 1987. There was no evidence to date to suggest that any volunteer had suffered long-term adverse effects. A full independent and long-term study of the health impacts of test participation was not, however, considered feasible or practical so none had or would be carried out.

32 In a letter dated August 31, 1999 to the PAT, Porton Down indicated that it was well acquainted with the applicant, having received numerous communications from the applicant and from Members of Parliament.

33 By letter dated May 3, 2001 Porton Down informed the applicant that it had discovered some old laboratory notebooks that included information about the 1963 tests: one book included some previously unavailable detail of the mustard patch tests. A pre-exposure chest X-ray and the associated report card were also now available. The applicant was to contact Porton Down if he wanted to see this material or have copies.

C. Records submitted by the Government in the present application

34 As well as those disclosed with the Minister of State's letter of December 2, 1997, the following documents were also submitted to this Court.

1. With the Government's observations of March 9, 1998

35 The Government indicated that these were all the relevant records that could be traced: (a) an extract from a laboratory record of results of personality and intelligence tests; (b) extracts from laboratory records of GF blood tests: seven blood samples were taken from the applicant; and (c) an explanation of the GF blood test results.

2. With the Government's observations of April 5, 2001

36 The Government corrected their previous explanations of the seven blood samples[6]: one was taken on July 13, 1963, a second prior to his exposure to GF and the remaining five were taken thereafter. They also corrected other errors relating to information provided in their earlier observations about those tests including the following:

> "the reference to '25 milligrams of GF [vapour per kilogram of body weight]' appears to have been a typographical error. In fact, calculated doses of GF ranged from 0.16 to 2.84 microgrammes per kilogramme of body weight".

They also disclosed documents recently discovered following a further search: (a) the applicant's pre-exposure X-ray and its associated report card[7]; (b) a report dated August 1942 which described the manner in which the sensitivity tests to mustard gas were performed and entitled "Technique of the Physiological Experiments Carried out on the Human Subjects at [Porton Down]"; and (c) extracts from a laboratory notebook entitled "Overgarment Tests. Mustard on Men", relating to mid-July 1963 and referring to the applicant.

D. The applicant's domestic proceedings

1. Application for a service pension

37 On June 10, 1991 the applicant claimed a service pension on the grounds of "hypertension/breathing problems" resulting from the Porton Down tests (and, in addition, from his radiation exposure on Christmas Island during the relevant nuclear tests there). The Department of Social Security ("DSS") obtained copies of

[6] See [19] above.
[7] See [33] above.

his service and civilian medical records together with a report from his doctor, which report confirmed that he suffered from hypertension, COAD and late onset of bronchial asthma. On January 28, 1992 the Secretary of State rejected his claim for a service pension as there was no causal link demonstrated between the tests and those medical conditions. The applicant did not pursue an appeal at that stage.

2. Certificate under section 10 of the Crown Proceedings Act 1947 ("the 1947 Act")

38 The applicant consulted solicitors in 1994 and obtained legal aid for proceedings. By letter dated November 14, 1994 to the Secretary of State, his solicitors threatened proceedings, inter alia, alleging negligence, assault and breach of statutory duty on the part of the MOD and demanding release of all medical and laboratory records in the possession of the Secretary of State or of Porton Down as regards the test periods in 1962 and 1963, failing which the applicant would apply to the High Court for pre-action discovery. The applicant's representatives met with MOD representatives in early January 1995 on a "without prejudice" basis and by letter dated June 5, 1995 requested confirmation from the MOD as to whether a certificate would issue under s.10 of the 1947 Act ("a s.10 certificate").

39 By letter dated July 4, 1995 to the applicant's solicitors, the claims section of the MOD wrote as follows:

> "War Pensions Agency has informed me that a Section 10 certificate in respect of acute bronchitis (1963), a bruised knee and loss of hearing will be regarded as attributable to service and a section 10 certificate will be issued. The other ailments for which [the applicant] claimed a war pension have not been regarded as attributable to service".

40 On August 3, 1995 a s.10 certificate was signed by the Secretary of State:

> "Insofar as the personal injury of <the applicant> is due to anything suffered as a result of his service in the Army between 16 February 1954 and 2 April 1968, I hereby certify that his suffering that thing has been treated as attributable to service for the purpose of entitlement to an award under the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 1983, which relates to disablement or death of members of the Army".

41 By letter dated August 8, 1995 the Treasury Solicitor provided a copy of the s.10 certificate to the applicant's representatives.

3. The Pensions Appeals Tribunal ("PAT")

42 Following the judgment of this Court in *McGinley and Egan v United Kingdom*[8] and the Government's disclosure of certain documents in their observations in the present case (on March 9, 1998), the applicant requested an adjournment of the

[8] *McGinley and Egan v United Kingdom*: (1999) 27 E.H.R.R. 1.

present application in order to pursue an appeal to the PAT and, in particular, disclosure of documents under r.6 of the Pensions Appeal Tribunals (England and Wales) Rules 1980 ("the PAT Rules"). The present application was adjourned.

43 On June 1, 1998 he lodged his PAT appeal. Since the War Pensions Agency ("WPA", a specialised agency of the Department of Social Security) clarified that a further form was required, on November 8, 1998 the applicant relodged the appeal.

44 In February 1999 the applicant received the Statement of Case. He obtained two extensions of the time-limit for the submission of his "Answer" to the Statement of Case (to take advice from an expert chemical pathologist on the documents already disclosed and on those which should also be requested during the PAT appeal and to consider the intervening observations of the Government in the present application) and he indicated that he would be making an application under r.6(1) of the PAT Rules.

45 On July 30, 1999 his Answer was submitted to the WPA along with a letter which noted that the Answer included an application for disclosure of documents under r.6(1) of the PAT Rules: para.18 of the Answer set out a list of 17 categories of document required by him under that rule.

46 On August 10, 1999 the WPA responded by pointing out that enquiries were being made to obtain all the information requested under r.6(1) of the PAT Rules. Once received, the WPA would ask for the agreement of the President of the PAT to disclose it.

47 On the same day the WPA wrote to Porton Down enclosing a copy of the applicant's r.6 request and asking for the information as soon as possible so that the agreement of the President of the PAT could be obtained.

48 On March 14 and April 13, 2000 the WPA sent the supplementary Statement of Case (now incorporating the supplemental medical evidence) to the applicant and to the PAT, respectively.

49 On August 3, 2000 the President of the PAT responded to the applicant's enquiry indicating that his case had not been listed as it awaited production of further documentary evidence and the Secretary of State's response. However, since the r.6 request should not have been made in the applicant's Answer to the Statement of Case, that request had just come to light. The applicant was to confirm to the President if he intended para.18 of his Answer to constitute his r.6 request and, if so, the President would be grateful to receive any observations that would assist his consideration of the relevance of the documents to the appeal issues. The applicant was also to identify the Department of State to which a r.6 direction should be addressed.

50 On November 9, 2000 the applicant confirmed to the President of the PAT that para.18 of his Answer indeed constituted his r.6 request and he made detailed submissions on the matters requested by the President.

51 By letter dated November 13, 2000 the President of the PAT requested the applicant to submit a draft direction and attend a hearing on it since he was concerned that the wording of some parts of the r.6 request appeared to be ambiguous and lack clarity. The applicant submitted a draft direction (essentially listing those documents already included in para.18 of his Answer).

52 By order dated February 1, 2001 the President of the PAT directed, pursuant to r.6(1) of the PAT Rules, disclosure of the scheduled documents by the Secretary of

State since the documents "were likely to be relevant to the issues to be determined in the appeal".

53 On July 6, 2001 the Secretary of State responded to the direction of the President of the PAT. It was marked "medical in confidence". It referred to the documents already submitted by the Government to this Court.[9] The Secretary of State was unable to give a definitive response to the request for the fifth category of document required namely,

> "any scientific or medical reports, whether published or prepared for internal use by Porton Down, the [MOD] or other Government departments or agencies of the volunteer studies or experiments in Porton Down between 1957 and 1968 which were similar or related to the studies or experiments in which [the applicant] was involved".

A full and careful review had been undertaken and was a time-consuming process. Many of the documents identified as being possibly relevant to the request were classified. The Secretary of State had asked for an urgent review of the classification to be undertaken and, once the review was completed, he would let the PAT have his full response. Otherwise the Secretary of State provided various explanations of the documents already submitted by the Government to this Court and details of the precise dates on which the applicant would have participated in the tests, of the levels of exposure to gases and of various headings and abbreviations in the disclosed documents. The only documents (additional to those already submitted to this Court) disclosed to the PAT were the applicant's service and payment records, the latter of which included a payment for attendance for a week at Porton Down in July 1963.

54 The MOD's letter was passed to the applicant on July 25, 2001. By letter dated July 19, 2002 the applicant wrote to the PAT apologising for not having responded and explaining the reasons for the delay.

55 By letter dated August 23, 2002 the MOD disclosed documents concerning the above-described fifth category: two reports entitled "The feasibility of performing follow up studies of the health of volunteers attending [Porton Down]" and "The single-breath administration of Sarin", from which reports individual names had been blanked out. The feasibility report acknowledged that the records held at Porton Down prior to the late 1970s generally consisted of the name, service number and age of participants at the date of testing but were not "sufficient to allow either a comprehensive morbidity study or mortality study to proceed". While a study could be carried out on post-1976 test participants,

> "such a study would be of very limited value and may only serve to draw attention to [Porton Down's] interest in possible long-term health problems experienced by volunteers".

The feasibility report concluded that a comprehensive follow up study of all volunteers was "impractical". Porton Down's library catalogue had also mentioned a document entitled

[9] See [34]–[36] above.

> "Unique papers relating to early exposure of volunteers to GD [O-Pinacolyl methyl phosphonoflouidate, commonly known as Soman] and GF and DM [diphenylaminearsine chloride, commonly known as Adamsite]".

However, a copy of this document could not be located. A letter of August 20, 2002 was also enclosed which certified that nine of the requested documents were "in the nature of departmental minutes or records" and would not therefore be disclosed.[10]

56 A hearing was fixed for October 3, 2002. On September 27, 2002 the applicant was obliged to request an adjournment since his counsel had advised that further questions needed to be put to Dr H. On September 30, 2002 the PAT declined to adjourn, indicating that it was unlikely Dr H could or would prepare a report.

57 On October 2, 2002 the MOD wrote to the PAT and the applicant. While nine documents had been previously certified non-disclosable, (letter of August 23, 2002),[11] seven of those nine documents could now be disclosed. The MOD had

> "had the opportunity of re-examining the documents ... with a view to assessing whether [they] could be the subject of voluntary disclosure ... in an effort to ensure that everything that can be disclosed has been disclosed and so as to ensure the maximum openness and the maximum assistance to the [PAT]".

Certain blocking out had been done on some disclosed documents to protect the identities of staff involved and to excise irrelevant material. Two documents remained undisclosable: the first did not appear "to contain anything of relevance" to the applicant's tests and, in any event, "contained information which remains security sensitive and is not properly subject to voluntary disclosure on security grounds"; and the second required permission from the USA before it could be disclosed.

58 The appeal came on for hearing on October 3, 2002. The applicant applied for an adjournment supported by the Veterans' Agency (the successor of the WPA—"VA"). The PAT decision (delivered on October 7, 2002) recorded as follows:

> "The [PAT] are deeply disturbed that this application has proved necessary as a result of the [applicant's] advisers failure to consider documents disclosed over a year ago, in a timely fashion.
>
> However, since the [VA] also appear to be without documentation and there is confusion by the [applicant] as to whether he also wishes to appeal for Hypertension, we have reluctantly decided to allow the adjournment.
>
> It is highly unsatisfactory that Court resources have been wasted in this way. To prevent this happening in the future the Tribunal intend to exercise some control over the ongoing progress of the appeal".

The PAT was to clarify with the MOD the status of certain classified documents and the extent to which they could be released to the public and directed the MOD to provide, by October 21, 2002, disclosure of further documents. The MOD, the VA and the applicant were to notify the PAT by November 18, 2002 of the

[10] r.6(1) of the PAT Rules.
[11] See [55] above.

questions and documents it wanted Dr H to examine. It was intended that the PAT would add its own questions and submit a composite questionnaire to Dr H who would report in response to the PAT. The applicant was also to confirm his position as regards the hypertension appeal by October 28, 2002.

59 On October 21, 2002, the MOD disclosed to the PAT three declassified documents. These were forwarded by the PAT to the applicant by letter dated November 8, 2002, accompanied by a warning that the MOD had released the documents for the purpose of the appeal and that no information in them was to be used for any other purpose without the consent of the MOD. By letter dated October 25, 2002 the applicant confirmed that his appeal had been intended to cover hypertension also, he explained the reasons for his confusion and he requested an extension of time to so appeal. A "hypertension" appeal form was lodged with the PAT on December 5, 2002.

60 By letter dated December 3, 2002 the PAT wrote to Dr H enclosing the documents disclosed by the MOD (by then) with two sets of questions (prepared by the applicant and the medical member of the PAT). By letter dated February 19, 2003 Dr H provided the PAT with a report. The applicant having noted that Dr H had omitted to respond to the PAT questions, Dr H did so in a supplemental report sent to the PAT under cover of a letter dated May 14, 2003.

61 In a document dated October 14, 2003 the MOD submitted its comments on Dr H's reports. On October 16, 2003 the VA submitted a supplementary Statement of Case.

62 The PAT appeal hearing took place on October 23, 2003. It allowed the hypertension appeal to be heard out of time but, once it became clear that the VA had not processed the appeal documentation filed by the applicant, the PAT reluctantly granted the MOD an adjournment to allow the VA time to "properly consider all the evidential material and prepare a reasoned medical opinion". The COAD appeal was, however, dismissed.

63 On January 14, 2004 the PAT delivered its written decision. As to the facts, the PAT accepted that the applicant had undergone tests for mustard gas "some time in 1962 as well as the documented tests in July 1963" despite the fact that there was no reference in his service records or in other research records to the 1962 test. The PAT also found "disquieting" the "difficulties" experienced by the applicant in obtaining the records which were produced to the PAT. The PAT also established the following facts:

> "1. We find that [the applicant] suffered no long-term respiratory effect from skin contact with mustard gas following both tests in 1962 and 1963.
>
> 2. We find that [the applicant] was administered only small doses of mustard gas and GF gas which would have resulted in minimal exposure to mustard gas by off gassing and a limited and transitory reaction to the GF gas. Although no records relating to doses exist, the mustard gas tests were designed to test the suitability of military clothing to exposure and not a gas test *per se*. Furthermore, after a fatality at Porton Down in 1953, safeguards were put in place to ensure that volunteers were only exposed to safe dosages.
>
> 3. The compelling weight of the evidence is that [the applicant] did not receive, in any of the tests, dosages likely to have long term effects as

described in the research papers. In particular, the [PAT Expert], although accepting the *possibility* that given further research through a long term follow-up study, a link might be found, concludes that there is no evidence to link [the applicant's] exposure to either gases with his present condition. We accept [the PAT Expert's] conclusion that, given the limited doses and [the applicant's] minimal immediate reactions, this would rule out a link between the tests and the claimed conditions.

4. We particularly rely on [Dr H's] expert report. He has analysed the specific data relevant to [the applicants] case and considered the conditions for which he is claiming in relation to that specific data. The research papers relied on by the [applicant], although of some evidential value, are very general and speculative. We therefore prefer the evidence, and the conclusions reached by [Dr H] in his reports".

The PAT also accepted, as a matter of law, that it was sufficient to show that the proven service event was only one of the causes of the condition even if there were other contributory factors. However:

"2. We do not accept that the lack of possible evidence of other follow-up tests is sufficient to constitute reliable evidence.

3. We find that there is some reliable evidence surrounding the Porton Down tests for which [the applicant] volunteered. However, this evidence tends, if anything, to support the view that there is in fact no link between those tests and [the applicant's] current conditions. The test of reasonable doubt is not therefore met.

4. There is no reliable evidence to suggest a causal link between the tests for either mustard gas or GF gas and the claimed condition.

5. [The PAT Expert's] views that "he cannot exclude the possibility" of a link between exposure to GF and/or mustard gas and the claimed condition, does not meet the "reasonable doubt" test. Furthermore, he "rules out" exposure to GF as a cause and deems it "unlikely" that mustard gas is a cause.

6. Finally, [the applicant's counsel] invites us to allow the appeal for reasons which can be summarised as "general fairness". The [PAT] has not legislative or discretionary power to do so. The decision of the [PAT] is to disallow the appeal for [COAD]".

64 On February 4, 2004 the applicant applied to the PAT for leave to appeal to the High Court (on the COAD matter) and for a stay of the hypertension appeal then pending before the PAT. On April 26, 2004 leave was refused, the PAT's reserved decision being delivered on April 28, 2004.

65 On May 11, 2004 the applicant applied for leave to appeal to the High Court. On July 13, 2004 leave was granted.

66 The applicant's appeal notice and supporting skeleton argument were submitted on August 10, 2004. The appeal was listed to be heard on October 7, 2004.

67 On October 8, 2004 the High Court allowed the appeal and referred the matter back to the PAT for a further hearing.

68 On March 7, 2005 a directions hearings was held before the PAT. It ordered the hypertension and COAD appeals to be heard together and mutual disclosure of any further documents relevant to the appeal by April 18, 2005. On the latter date the

Treasury Solicitor produced a "schedule of disclosure" listing and disclosing 11 documents: apart from 3 items, the applicant had not seen these before. The Treasury Solicitor maintained that disclosure of most of the documents (including two minutes of meetings which r.6 specifies can be withheld) was not obligatory as they were of marginal relevance, noted that all documents had been downgraded to "unclassified" and indicated that the MOD would use its best endeavours to produce the annexes referred to in certain documents.

E. Information services and health studies

69 The armed forces have, since 1998, put in place a service to deal with enquiries from Porton Down test participants ("the 1998 Scheme"). The relevant information pamphlet noted that participants could request their test records, that a search would be carried out for references to that person and for additional evidence of actual procedures, that a summary would be provided and that, if the person wanted to visit Porton Down, he or she could extract the actual records. While the pamphlet noted that reasonably comprehensive records had existed since 1942, individuals had to accept that old records in some cases were very sparse, that record keeping in years gone by was not up to current standards and that in certain cases a person's attendance might not even have been marked. The pamphlet claimed that no participant was worse off after the Porton Down tests.

70 In 2001 the Porton Down Volunteers Medical Assessment Programme was established by the MOD to investigate health concerns of Porton Down test participants. The study involved 111 participants but no control group. The report, published in April 2004, was entitled "Clinical Findings in 111 Ex-Porton Down Volunteers". It noted that over 20,000 had participated in the tests since Porton Down's establishment in 1916 and that 3,000 had participated in nerve gas tests and 6,000 in mustard gas tests, with some servicemen having been exposed to both. It concluded that:

> "On a clinical basis, no evidence was found to support the hypothesis that participation in Porton Down trials produced any long-term adverse health effects or unusual patterns of disease compared to those of the general population of the same age".

71 From July 2002 the MOD funded "an initial pilot research project" on mortality and cancer incidence among Porton Down test participants. It compared 500 participants with a control group of 500 other servicemen and the decision was taken that a full-scale epidemiological study should be undertaken. By mid-2003 this had begun and it was expected to take about two years to complete.

72 Further to the death of Aircraftsman Maddison in May 1953 after being exposed to Sarin gas (also referred to as GB gas, a nerve agent related to GF), a coroner's inquest was held and recorded "death by misadventure". An application was brought for a fresh inquest alleging, inter alia, that incomplete evidence had been before the coroner and in November 2002 the Court of Appeal ordered a fresh inquest. It concluded on November 15, 2004 with the jury finding that the cause of Mr Maddison's death was the "application of a nerve agent in a non-therapeutic experiment". Judicial review proceedings appear to be pending.

In or around 2004/2005 a non-governmental organisation ("Porton Down Veterans") discovered during searches in the public records office two letters of May and August 1953 containing legal advice from the Treasury Solicitor to the MOD about Mr Maddison's case and about s.10 of the 1947 Act. That organisation sent this material to the Veterans Policy Unit—Legacy Health Issues of the MOD on February 7, 2005. The Treasury Solicitor's letter of August 1953 noted as follows:

> "When the case was referred to me previously I did consider the relevance of section 10 of the Crown Proceedings Act 1947 but I came to the conclusion that it had no application. On the information before me I am still of that opinion. Subsection (1) of that section, which deals with injuries caused by acts of members of the Armed Forces, can have no application since the administration of the G.B. gas to . . . Maddison was (so I understand) carried out by [civilian] personnel and not by any member of the Armed Forces. Subsection (2) also seems inapplicable. [It] provides that no proceedings in tort are to lie against the Crown for death or personal injury due to anything suffered by a member of the Armed Forces if that thing is suffered by him "in consequence of the nature or condition of any equipment or supplies used for the purposes of the Armed Forces of the Crown". As I understand the facts of this case, G.B. gas cannot be said to be a "supply used for the purposes of the Armed Forces" at all, it being purely an experimental substance and one which has never been used for the purposes of the Armed Forces. If this is correct, then section 10 of the 1947 Act cannot protect the Crown or the Minister from liability".

II. Relevant domestic law and practice

A. Civil actions by servicemen against the Crown

1. Prior to 1947

73 It was a well-established and unqualified common-law rule that the Crown was neither directly nor vicariously liable in tort.

74 The rule was counterbalanced in several ways. Actions against the errant serviceman would be permitted in which case the Crown would invariably (if the defendant was acting in the course of his duty) accept responsibility for any damages awarded. In cases where the individual author of the injury could not be identified, a nominee defendant would be appointed to enable the claim to proceed. In addition, from 1919 a serviceman injured in the course of war service was entitled to a disability pension and his spouse to a pension. The scope of these entitlements later widened to include disability or death caused by injury attributable to any service in the armed forces (war service or not). A feature of these successive schemes was that entitlement to a pension did not depend on proof of fault against the Crown.

75 Further to strong criticism of the Crown's position as litigant, in the 1920s legislation was envisaged that would make the Crown liable in tort. The 1924 terms of reference of the drafting committee were to prepare a bill to provide, inter

alia, that the Crown should become liable to be sued in tort. Clause 11 of the draft bill produced in 1927 (and never adopted) provided, under the heading "Substantive Rights", that

> "Subject to the provisions of this Act, the Crown shall, notwithstanding any rule of law to the contrary, be liable in tort".

This provision was made subject to cl.29(1) (g) which read:

> "Except as therein otherwise expressly provided, nothing in this Act shall—
>
> (g) . . . entitle any member of the armed forces of the Crown to make a claim against the Crown in respect of any matter relating to or arising out of or in connection with the discipline or duties of those forces or the regulations relating thereto, or the performance or enforcement or purported performance or enforcement thereof by any member of those forces, or other matters connected with or ancillary to any of the matters aforesaid . . .".

2. The Crown Proceedings Act 1947 ("the 1947 Act")

76 The 1947 Act made far-reaching changes, both substantive and procedural, to the Crown's liability to be sued.

77 The 1947 Act was divided into four parts: Pt I "Substantive law" (ss.1 to 12 of the Act); Pt II "jurisdiction and procedure"; Pt III "judgments and execution"; and Pt IV "miscellaneous".

78 Section 1 provides for the Crown to be sued as of right rather than by a petition of right sanctioned by Royal fiat.

79 Section 2 of the 1947 Act provides:

> "2. Liability of the Crown in tort
>
> (1) Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject:—
>
> (a) in respect of torts committed by its servants or agents;
>
> (b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer;
>
> and
>
> (c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property;
>
> Provided that no proceedings shall lie against the Crown by virtue of paragraph (a) of this subsection in respect of any act or omission of a servant or agent of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action in tort against that servant or agent or his estate".

80 Members of the armed forces were to be treated differently. If they died or were injured in the course of their duties, the Crown could not be sued in tort once the Secretary of State certified that the death or injury would be treated as attributable

to service for the purposes of entitlement to a war pension. In particular, s.10 of the 1947 Act was entitled "Provisions relating to the armed forces" and provided as follows:

> "(1) Nothing done or omitted to be done by a member of the armed forces of the Crown while on duty as such shall subject either him or the Crown to liability in tort for causing the death of another person, or for causing personal injury to another person, in so far as the death or personal injury is due to anything suffered by that other person while he is a member of the armed forces of the Crown if—
>
> (a) at the time when that thing is suffered by that other person, he is either on duty as a member of the armed forces of the Crown or is, though not on duty as such, on any land, premises, ship, aircraft or vehicle for the time being used for the purposes of the armed forces of the crown, and
>
> (b) the [Secretary of State] certifies that his suffering that thing has been or will be treated as attributable to service for the purposes of entitlement to an award under the royal Warrant, Order in Council or Order of His Majesty relating to the disablement or death of members of the force of which he is a member:
>
> Provided that this subsection shall not exempt a member of the said forces from liability in tort in any case in which the court is satisfied that the act or omission was not connected with the execution of his duties as a member of those forces.
>
> (2) No proceedings in tort shall lie against the Crown for death or personal injury due to anything suffered by a member of the armed forces of the Crown if—
>
> (a) that thing is suffered by him in consequence of the nature or condition of any such land, premises, ship, aircraft or vehicle as aforesaid, or in consequence of the nature or condition of any equipment or supplies used for the purposes of those forces; and
>
> (b) [the Secretary of State] certifies as mentioned in the preceding subsection:
>
> nor shall any act or omission of an officer of the Crown subject him to liability in tort for death or personal injury, in so far as the death or personal injury is due to anything suffered by a member of the armed forces of the Crown being a thing as to which the conditions aforesaid are satisfied.
>
> (3) . . . a Secretary of State, if satisfied that it is the fact:—
>
> (a) that a person was or was not on any particular occasion on duty as a member of the armed forces of the Crown; or
>
> (b) that at any particular time any land, premises, ship, aircraft, vehicle, equipment or supplies was or was not, or were or were not, used for the purposes of the said forces;
>
> may issue a certificate certifying that to be the fact; and any such certificate shall, for the purpose of this section, be conclusive as to the fact which it certifies".

The words in s.2 of the 1947 Act "subject to the provisions of this Act" rendered s.2 subject to the provisions of s.10 of the 1947 Act.

3. Crown Proceedings (Armed Forces) Act 1987 ("the 1987 Act")

81 The exception contained in s.10 of the 1947 Act was removed by the Crown Proceedings (Armed Forces) Act 1987. This removal was not retrospective. Accordingly, after 1987 claims in tort by members of the armed forces (or their estates) who had died or been injured as a result of conduct which took place prior to 1987 could not proceed if the Secretary of State issued the relevant certificate. The reasons why the law was prospective only were explained by the Member of Parliament introducing the Bill as follows[12]:

> "Successive Government have resisted retrospective legislation as a basic concept, especially where such legislation imposes a retrospective liability on others. Secondly, it would be clearly wrong to impose retrospective liability on a serviceman for past actions, even if the Crown, his employer, were to stand behind him. That would involve individuals who are alleged to be guilty of negligence over the years being brought to book in a court of law for actions [for] which, at the time they were committed, they were not liable under the law. That is a strong argument against retrospective legislation. Thirdly, . . . where should the line be drawn in dealing with past claims so as to be fair and just towards all claimants? How could there be a logical cut-off point for considering claims either by the [MOD] or the courts. How could those whose claims which fell on the wrong side of the arbitrary line be satisfied? How could the [MOD], and ultimately the courts, be expected to assess old cases where the necessary documentary evidence or witnesses are no longer available?
>
> Those are practical questions to which, sadly, there are no ready answers. For that reason, I believe that the only reasonable course of action is to legislate for the repeal of section 10 from the date of enactment".

4. Limitation Act 1980

82 Section 11 of this Act provides that any action for damages for personal injury must be brought within three years of the cause of action arising.

B. The case of Matthews v Ministry of Defence

83 Mr Matthews served in the Royal Navy between 1955 and 1968. In 2001 he brought proceedings in negligence against the MOD (alleging the MOD's negligence and breach of statutory duty and its vicarious liability for the negligence and breach of duty of his fellow servicemen) claiming that he had suffered personal injury as a result of his exposure to asbestos fibres and dust while performing his duties as a serviceman.

[12] *Hansard*, HC, col. 572 (February 13, 1987).

1. The High Court [2002] EWHC 13 (QB), January 22, 2002

84 On the preliminary issue of whether the MOD could be pursued given s.10 of the 1947 Act, the High Court found that provision to be incompatible with Art.6(1) of the Convention.

85 In deciding whether s.10 amounted to a procedural or substantive limitation on his rights, the High Court considered that the issue turned on whether a s.10 certificate extinguished not only Mr Matthews' right to sue for damages but also his primary right arising from the Crown's duty of care:

> "If, after the passing of the 1947 Act, he had the primary right not to be exposed to asbestos in circumstances amounting to negligence or breach of statutory duty, section 10 merely extinguished his secondary right to claim damages for its breach, and that would amount merely to a procedural bar on his secondary right to claim his preferred remedy for breach of his primary right".

In concluding that s.10 amounted to a procedural bar to an existing right of action in tort and in thus finding Art.6 applicable, the High Court relied, in particular, on *Tinnelly & Sons Ltd and McElduff v United Kingdom*[13] and on *Fogarty v United Kingdom*.[14]

86 The limitation had to be therefore subjected to a proportionality test. In this respect, the High Court concluded that the disadvantages of a pension scheme were such that access to it was an "exceptionally, indeed an unacceptably" high price to pay for the advantage of not having to prove fault, an advantage which would only apply when the question of the fault of the other party was in doubt. Neither was the High Court convinced that the choice to repeal the 1947 Act prospectively was proportionate, considering, inter alia, that the finding of liability for conduct that was not a basis for liability when it took place, was far less pernicious a solution than denying proper damages to persons injured as a result of negligence.

2. The Court of Appeal [2002] EWCA Civ 773, May 29, 2002

87 The Court of Appeal allowed the MOD's appeal. Section 10 had a substantive and not procedural effect and the High Court's reliance on the above-cited *Fogarty* case was mistaken. The Master of the Rolls stated that:

> "The requirement in section 10 for a certificate from the Secretary of State as a precondition to defeating a claimant's cause of action is an unusual one and not easily analysed, and it cannot be treated simply as an option to impose a procedural bar on the claim".

88 In so finding, the Court of Appeal rejected the MOD's objection, based on *Pellegrin v France*[15] and, more recently, *R. v Belgium*,[16] to the applicability of

[13] *Tinnelly & Sons Ltd and McElduff v United Kingdom*: (1999) 27 E.H.R.R. 249.
[14] *Fogarty v United Kingdom*: (2002) 34 E.H.R.R. 12.
[15] *Pellegrin v France*: (2001) 31 E.H.R.R. 26.
[16] App. No.33919/96, *R. v Belgium*, February 27, 2001.

Art.6(1), the Court of Appeal finding that *Pellegrin* was concerned solely with "disputes raised by servants of the State over their conditions of service" whereas the proceedings before the Court of Appeal concerned the nature and effect of s.10 of the 1947 Act on a claim in tort against the MOD.

3. The House of Lords [2003] UKHL 4

89 The applicant appealed arguing that the Court of Appeal had ignored a clear principle established by the *Fogarty* case. The MOD did not pursue the *Pellegrin* argument.

90 The House of Lords (Lord Bingham of Cornhill, Lord Hoffmann, Lord Hope of Craighead, Lord Millett and Lord Walker of Gestingthorpe) unanimously rejected the appeal. The House of Lords considered the maintenance of the distinction between procedural and substantive limitations on access to court to be a necessary one since Art.6 was concerned with procedural fairness and the integrity of a state's judicial system rather than with the substantive content of its national law. However, the House of Lords acknowledged the difficulty in tracing the borderline between the substantive and procedural, considering the Convention jurisprudence to be indicative of some difficulty in this respect. Drawing on the text, historical context, legislative intent and the actual operation of s.10 of the 1947 Act and, further, on a comprehensive analysis of the Convention jurisprudence and applicable principles, the House of Lords concluded that s.10 of the 1947 Act maintained the existing lack of liability in tort of the Crown to service personnel for injury suffered which was attributable to service and served to ease servicemen towards the no-fault pension option by taking away the need to prove attributability. It amounted therefore to a substantive limitation on the liability of the Crown in tort to servicemen for service injury to which Art.6(1) did not apply.

91 Having reviewed the Convention jurisprudence, Lord Bingham noted that, whatever the difficulty in tracing the dividing line between procedural and substantive limitations of a given entitlement under domestic law, an accurate analysis of a claimant's substantive rights in domestic law was, nonetheless, an essential first step towards deciding whether he had, for the purposes of the autonomous meaning given to the expression by the Convention, a "civil right" such as would engage Art.6.

Lord Bingham went on to outline the historical evolution of s.10, considering it clear that there was no parliamentary intention to confer any substantive right to claim damages. "Few common law rules were better-established or more unqualified", he began, "than that which precluded any claim in tort against the Crown" and because "there was no wrong of which a claimant could complain (because the King could do no wrong) relief by petition of right was not available". Claims referred to as "exempted claims" against the Crown for damages for, inter alia, injury sustained by armed forces personnel while on duty were "absolutely barred". When proposals for reform were put forward in the 1920s, "no cause of action was proposed in relation to the exempted claims". When the Crown Proceedings Bill was introduced into Parliament in 1947 it again provided that the exempted claims should be "absolutely barred", but those fulfilling the qualifying condition would be compensated by the award of a pension on a no-fault basis.

When what was to become s.10(1) was amended uncontentiously in the House of Commons, the intention was not to alter the "essential thrust of the provision as previously drafted". The object of the new certification procedure was to

> "ease the path of those denied any right to a common law claim towards obtaining a pension, by obviating the need to prove attributability, an essential qualifying condition for the award of a pension".

Whereas the issue of a certificate under s.10(3) of the 1947 Act was discretionary as shown by the permissive "may", no such permissive language applied to the issuance of a certificate under s.10(1)(b).

> "It was plainly intended that, where the conditions were met, the Secretary of State should issue a certificate as was the invariable practice of successive Secretaries of State over the next 40 years".

Although different language had been used over the years, "the English courts had consistently regarded section 10(1) as precluding any claim at common law". It was in fact the "absolute nature of the exclusion imposed by section 10(1)" (coupled with the discrepancy, by 1987, between the value of a pension and of a claim for common law damages) which fuelled the demand for the revocation of s.10 and which led to the 1987 Act. In deciding whether s.10(1) imposed a procedural bar or denied any substantive right, regard had to be paid to the practical realities and, in that respect, the Secretary of State's practice had been "uniform and unvarying" so that any practitioner would have advised Mr Matthews that a s.10 certificate was "bound to be issued". Lord Bingham found the *Fogarty* case to be "categorically different" from the *Matthews* case at hand and concluded, for reasons closely reflecting those of the Court of Appeal and of Lord Walker,[17] that the appeal was to be rejected.

92 As regards the distinction between substantive and procedural bars to a judicial remedy, Lord Walker conducted a comprehensive analysis of the Convention jurisprudence, highlighting what he considered to be inconsistencies and the difficulties in applying it:

> "127. The distinction between substantive and procedural bars to a judicial remedy has often been referred to in the Strasbourg jurisprudence on Article 6 § 1, but the cases do not speak with a single clear voice. That is hardly surprising. The distinction, although easy to grasp in extreme cases, becomes much more debatable close to the borderline, especially as different legal systems draw the line in different places . . .
>
> 130. I have already referred to several of the most important Strasbourg cases, but it is useful to see how two contrasting themes have developed since the seminal *Golder* decision in 1975. Some cases emphasise the importance of avoiding any arbitrary or disproportionate restriction on a litigant's access to the court, whether or not the restriction should be classified as procedural in nature. Others attach importance to the distinction between substance and procedure.

[17] See below.

131. The first case to note is *Ashingdane v United Kingdom* . . . Section 141 (1) [of the Mental Health Act 1959] imposed substantive restrictions on his rights of action (requiring bad faith or negligence) and subsection (2) imposed a procedural restriction (the need for the Court's permission for the commencement of proceedings). The Commission . . . agreed with the parties that 'it is immaterial whether the measure is of a substantive or procedural character. It suffices to say that section 141 acted as an unwaivable bar, which effectively restricted the applicant's claim in tort'. But the Commission considered that the restrictions were not arbitrary or unreasonable, being intended to protect hospital staff from ill-founded or vexatious litigation. The Court . . . took a similar view.

132. In *Pinder v United Kingdom* . . . (from which *Ketterick* and *Dyer* are not significantly different) the Commission took the view . . . that section 10 of the 1947 Act brought about the substitution of a no-fault system of pension entitlement for the right to sue for damages, and that that removed the claimant's civil right: 'It follows, therefore, that the State does not bear the burden of justifying an immunity from liability which forms part of its civil law with reference to "a pressing social need" as contended by the applicant'. However the Commission then . . . referred to its report in *Ashingdane* and stated, 'These principles apply not only in respect of procedural limitations such as the removal of the jurisdiction of the court, as in the *Ashingdane* case, but also in respect of a substantive immunity from liability as in the present case. The question, therefore, arises in the present context, whether section 10 of the 1947 Act constitutes an arbitrary limitation of the applicant's substantive civil claims'.

133. The Commission held that section 10 was not arbitrary or disproportionate . . .:

134. *Powell and Rayner v United Kingdom* . . . was concerned with the effect of section 76(1) of the Civil Aviation Act 1982 on persons complaining of noise from aircraft travelling to and from Heathrow Airport. Section 76(1) excludes liability for any action in trespass or nuisance so long as the height of the aircraft was reasonable in all the circumstances, and its flight was not in breach of the provisions of the Act or any order made under it. In unanimously rejecting the claimants' claim under article 6(1) the European Court of Human Rights simply relied on the fact that the applicants had no substantive right to relief under English law. It rejected a subsidiary argument that the claimants' residuary entitlement to sue (in cases not excluded by section 76(1)) was illusory.

135. The Court's approach in *Fayed v United Kingdom* . . . was much less straightforward. . . . The Court's discussion of the relevant principles contained . . . the following passage . . .: 'Whether a person has an actionable domestic claim may depend not only on the substantive content, properly speaking, of the relevant civil right as defined under national law but also on the existence of procedural bars preventing or limiting the possibilities of bringing potential claims to court. In the latter kind of case Article 6 § 1 may have a degree of applicability. Certainly the Convention enforcement bodies may not create by way of interpretation of Article 6 § 1 a substantive civil

right which has no legal basis in the State concerned. However, it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1—namely that civil claims must be capable of being submitted to a judge for adjudication—if, for example, a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons'.

136. It is hard to tell how far the last sentence of this passage goes. The Court then referred . . . to the distinction between substantive and procedural restrictions: 'It is not always an easy matter to trace the dividing line between procedural and substantive limitations of a given entitlement under domestic law. It may sometimes be no more than a question of legislative technique whether the limitation is expressed in terms of the right or its remedy'. The Court did not go any further in attempting to resolve this problem on the ground that it might in any case have had to consider issues of legitimate aim and proportionality for the purposes of article 8 (respect for private life), even though there was in fact no complaint under article 8.

137. In *Stubbings v United Kingdom* . . . and *Tinnelly & Sons Ltd v United Kingdom* . . ., the Court considered whether restrictions on access to the court (in section 2 of the Limitation Act 1980 and section 42 of the Fair Employment (Northern Ireland) Act 1976 respectively) were justifiable without adverting expressly to the distinction between substantive and procedural bars. In *Waite and Kennedy v Germany* . . ., the Commission . . . described the immunity as merely a procedural bar, and as such requiring justification. The Court took the same view, regarding . . . the claimants' access to some unspecified procedures for alternative dispute resolution as being a material factor.

138. The two most recent cases are of particular importance. In *Z v United Kingdom* . . ., the Court . . . held that there had been no breach of Article 6 § 1 in your Lordships' decision in *X v Bedfordshire County Council* [1995] 2 AC 633 as to the responsibility of a local authority for children who had suffered neglect and abuse over a period of five years while their suffering was known to the local authority (but they were not the subject of any care order) . . . The whole of the Court's judgment on article 6 § 1 . . . merits careful study, but its essence appears from the following passages . . .: . . . 'The Court is led to the conclusion that the inability of the applicants to sue the local authority flowed not from an immunity but from the applicable principles governing the substantive right of action in domestic law. There was no restriction on access to court of the kind contemplated in the *Ashingdane* judgment'. In reaching these conclusions the majority of the Court stated in plain terms that its decision in *Osman* had been based on a misunderstanding of the English law of negligence.

139. Finally there is *Fogarty v United Kingdom* . . . That case was decided about six months after *Z* and by a constitution of the Court several of whose members had sat (and some of whom had dissented) in *Z*. In *Fogarty* the Court repeated verbatim . . . the passage from *Fayed* which I have already quoted. It rejected . . . the United Kingdom's argument that because of the

operation of state immunity the claimant did not have a substantive right under domestic law. The Court attached importance to the United States' ability to waive (in fact the judgment said 'not choose to claim') immunity as indicating that the bar was procedural. Nevertheless, the Court concluded . . . that: 'measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6(1). Just as the right of access to court is an inherent part of the fair trial guarantee in that article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity'. . . .

140. In trying to reconcile the inconsistencies in the Strasbourg jurisprudence it might be tempting to suppose that the Court's wide and rather speculative observations in *Fayed* (which were not its grounds for decision) marked a diversion which proved, in *Z*, to be a blind alley. But that explanation immediately runs into the difficulty that in *Fogarty*, six months after *Z*, the Court (constituted by many of the same judges) chose to repeat, word for word, the observations made in *Fayed*. The uncertain shadow of *Osman* still lies over this area of the law.

141. Nevertheless [Mr Matthews counsel] conceded that in order to succeed on the appeal, he had to satisfy your Lordships that section 10 of the 1947 Act constituted a procedural bar. He equated this task with satisfying your Lordships that Mr Matthews had at the commencement of his proceedings a cause of action against the [MOD], and that that cause of action was cut off (or defeated) by the [MOD's] invocation of the section 10 procedure. He treated this event as indistinguishable from the United States government's invocation, in *Fogarty*, of the defence of state immunity (to be precise, its decision not to waive state immunity). In each case, [Mr Matthews counsel] argued, the defendant was relying on a procedural bar to defeat a substantive claim which was valid when proceedings were commenced.

142. In my view, [Mr Matthews counsel's] concession was rightly made. Although there are difficulties in defining the borderline between substance and procedure, the general nature of the distinction is clear in principle, and it is also clear that Article 6 is, in principle, concerned with the procedural fairness and integrity of a state's judicial system, not with the substantive content of its national law. The notion that a state should decide to substitute a no-fault system of compensation for some injuries which might otherwise lead to claims in tort is not inimical to Article 6 § 1, as the Commission said in *Dyer* . . . (in a report, specifically dealing with section 10 of the 1947 Act, which has been referred to with approval by the Court in several later cases).

143. In the circumstances [Mr Matthews'] argument clings ever more closely to the bare fact that Mr Matthews had a cause of action when he issued his claim form, and that his claim could not be struck out as hopeless unless and until the Secretary of State issued a certificate under section 10. But European human rights law is concerned, not with superficial appearances or

verbal formulae, but with the realities of the situation (*Van Droogenbroeck v Belgium* ...). [Mr Matthews'] argument does, with respect, ignore the realities of the situation. It is common ground that the Secretary of State does in practice issue a certificate whenever it is (in legal and practical terms) appropriate to do so. He does not have a wide discretion comparable to that of a foreign government in deciding whether or not to waive state immunity (which may be by no means a foregone conclusion, especially in politically sensitive employment cases). The decision whether or not to waive immunity in *Fogarty* really was a decision about a procedural bar, but I am quite unpersuaded that it provides a parallel with this case. The fact is that section 10 of the 1947 Act did in very many cases before 1987, and still does in cases of latent injury sustained before 1987, substitute a no-fault system of compensation for a claim for damages. This was and is a matter of substantive law and the provision for an official certificate (in order to avoid or at least minimise the risk of inconsistent decisions on causation) does not alter that. Section 10(1)(b), taken on its own, is a provision for the protection of persons with claims against the [MOD]. I respectfully agree with Lord Bingham's analysis of the legislative history of the 1947 Act and with the conclusions which he draws from it.

144. In these circumstances I do not consider it necessary or desirable to attempt to assess whether section 10, if tested as a procedural bar, would meet the test of proportionality. There would be serious arguments either way and as it is not necessary to express a view I prefer not to do so".

93 Lord Hoffman agreed with Lord Walker's reasoning and conclusions and made certain additional observations. He noted that Mr Matthews' counsel (also counsel for the present applicant) had conceded that, if the 1947 Act simply said that servicemen had no right of action, it would not have infringed Art.6. Mr Matthews argued, however, that the structure of the 1947 Act was such that he had a civil right (a cause of action in tort) until a s.10 certificate was issued; if no certificate had been issued he would have been able to prosecute his action before the courts; and s.10 therefore gave the Secretary of State a power at his discretion to cut off the applicant's action and prevent him from bringing it before the courts. Lord Hoffman pointed out that, if the purpose of s.10(1)(b) and (2)(b) had been to give the Secretary of State a discretionary power "to swoop down and prevent people with claims against the Crown from bringing them before the courts", he would have agreed since such executive interference would run counter to the rule of law and the principle of the separation of powers. However, referring to the historical analysis of Lord Bingham, he considered it clear that s.10 delimited the substantive cause of action and the s.10 certificate was no more than a binding acknowledgement by the Secretary of State of the "attributable to service" requirement for an award of a pension, the quid pro quo for the inability to sue in tort. He too considered distinguishable the *Tinnelly* case (the *Matthews* case did not involve any encroachment by the executive upon the functions of the judicial branch) and the *Fogarty* case (having regard to the discretion available to the foreign Government to submit or not to jurisdiction).

94 Lord Hope analysed in some detail the Convention jurisprudence and principles, the history of the 1947 Act, the text and operation of s.10 and the s.10 certification process. He noted:

> "72. The overall context is provided by the fact that section 10 falls within the same Part [I] of the Act as section 2. Section 2, by which the basic rules for the Crown's liability in tort are laid down, is expressed to be 'subject to the provisions of this Act'. Section 10 is an integral part of the overall scheme of liability which is described in Part I of the Act. This was all new law. None of the provisions in this Part which preserved the Crown's immunity from suit in particular cases could be said, when the legislation was enacted, to be removing from anybody a right to claim which he previously enjoyed.
>
> 73. As for section 10 itself, ... [i]t proceeds on the assumption that if a claim is made under section 2 of the Act the Secretary of State will have to form a view, on the facts, as to whether or not the case is covered by the immunity. The Secretary of State is told that he cannot have it both ways. He is not allowed to assert the immunity without making a statement in the form of a certificate in the terms which the condition lays down. This has the effect of preventing him, as the minister responsible for the administration of the war pension scheme, from contesting the issue whether the suffering of the thing was attributable to service for the purposes of entitlement to an award under that scheme. This is a matter of substantive law. It is an essential part of the overall scheme for the reform of the law which the 1947 Act laid down. It does not take anything away from the claimant which he had before. On the contrary, it has been inserted into the scheme of the Act for his benefit".

Lord Hope concluded, in full agreement with the reasons expressed by Lord Walker, that s.10 amounted to a substantive limitation on the right to sue the Crown in tort.

95 Lord Millett's judgment also contained a comprehensive assessment of the Court's jurisprudence, the historical context and text of s.10 and the consequent purpose of the s.10 certificate. He noted:

> "If the serviceman brought proceedings against the Crown for damages, the question at once arose whether his injury was sustained in circumstances which qualified him for a pension, for if it was the Crown was not liable in damages. Sometimes the Secretary of State had already conceded, or the Tribunal had already found, that whatever the serviceman claimed to be the cause of his injury was attributable to service in the armed forces of the Crown. If so he would grant a certificate to that effect and the action would be struck out on the ground that it disclosed no cause of action.
>
> ... In such circumstances the Secretary of State had no discretion whether to grant or withhold a certificate. He was called on to certify an existing state of facts which prevented the proceedings from having any chance of success. It was his duty as a public servant to ascertain the facts and certify or not accordingly".

Lord Millett considered it plain that the s.10 certificate did not operate as a procedural bar to prevent the serviceman from having his civil right judicially

determined. As regards the *Fogarty* case, and unlike the other Law Lords, he considered that immunities claimed by a state which conformed to generally accepted norms of international law, fell outside Art.6 entirely. For the reasons outlined by each of their Lordships with which he agreed, he would also dismiss the appeal.

C. Service pensions

1. Entitlement to a service pension

96 The scheme currently in force for the payment of a service pension in respect of, inter alia, illnesses and injuries attributable to service is contained in the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 1983 ("the Pensions Order").

97 The basic condition for the award of a pension is that "the disablement or death of a member of the armed forces is due to service".[18] "Disablement" is defined as "physical or mental injury or damage, or loss of physical or mental capacity".[19] Where claims are made more than seven years after the termination of service, Art.5(1)(a) provides that the disablement or death is to be treated as "due to service" if it is due to an injury which is either attributable to service after September 2, 1939 or existed before or arose during such service and was and continues to be aggravated by it.

98 The Pensions Order provides that where, upon reliable evidence, a reasonable doubt exists whether the above conditions are fulfilled, the benefit of that doubt must be given to the claimant.[20]

2. The procedure for pension claims and appeals

99 The scheme for the payment of pensions is administered by a specialised agency of the DSS, formerly the War Pensions Agency ("WPA") and now the Veterans' Agency ("VA"). On receipt of an application, the VA, inter alia, obtains the claimant's service records (including service medical records) from the MOD and, with the assistance of additional medical evidence if required, assesses whether the claimant is suffering from a disability attributable to service. The Secretary of State decides on the basis of this assessment on the award of a service pension.

100 A claimant who is refused a war pension by the Secretary of State may appeal to the PAT[21] in accordance with the PAT Rules. This body is composed of a lawyer, a doctor and a serviceman or ex-serviceman of the same sex and rank as the claimant.

101 The VA provides the PAT with a "Statement of Case", which includes, inter alia, a transcript of the claimant's service records including service medical records, civilian medical records and reports including those prepared at the request of the VA and a statement outlining the Secretary of State's reasons for refusing the application. The claimant may submit an Answer to the Statement of Case and/or adduce further evidence. A hearing then takes place. The PAT

[18] Art.3 of the Pensions Order.
[19] Sch.4 to the Pensions Order.
[20] Art.5(4).
[21] See the Pensions Appeal Tribunals Act 1943.

examination is de novo so that the appellant does not have to show that the Secretary of State's decision was wrong. A further appeal lies to the High Court on a point of law with leave from the PAT or the High Court.

3. Disclosure of documents before the PAT

102 Rule 6 of the PAT Rules ("the r.6 procedure") is entitled "Disclosure of official documents and information" and provides as follows:

> "6
>
> (1) Where for the purposes of his appeal an appellant desires to have disclosed any document, or part of any document, which he has reason to believe is in the possession of a government department, he may, at any time not later than six weeks after the Statement of Case was sent to him, apply to the President for the disclosure of the document or part and, if the President considers that the document or part is likely to be relevant to any issue to be determined on the appeal, he may give a direction to the department concerned requiring its disclosure (if in the possession of the department) in such manner and upon such terms and conditions as the President thinks fit . . .
>
> (2) On receipt of a direction given by the President under this rule, the Secretary of State or Minister in charge of the government department concerned, or any person authorised by him in that behalf, may certify to the President—
>
> (a) that it would be contrary to the public interest for the whole or part of the document to which the direction relates to be disclosed publicly; or
>
> (b) that the whole or part of the document ought not, for reasons of security, to be disclosed in any manner whatsoever;
>
> and where a certificate is given under sub-paragraph (a), the President shall give such directions to the tribunal as may be requisite for prohibiting or restricting the disclosure in public of the document, or part thereof, as the case may be, and where a certificate is given under sub-paragraph (b) the President shall direct the tribunal to consider whether the appellant's case will be prejudiced if the appeal proceeds without such disclosure, and, where the tribunal are of the opinion that the appellant would be prejudiced if the appeal were to proceed without such disclosure, they shall adjourn the hearing of the appeal until such time as the necessity for non-disclosure on the ground of security no longer exists".

D. Access to Health Records Act 1990 ("the 1990 Act")

103 Prior to 1991 all medical records (civilian or service) were only disclosed on a "medical in confidence" basis. It was a matter for the doctor to decide if it was in the patient's best interests to see his or her records. The 1990 Act came into force on November 1, 1991 and it sets down the rights of persons to access to, inter alia, their service and civilian medical records. It applies only to records compiled after

the date of its entry into force and to records compiled "in connection with the care of the applicant".

JUDGMENT

I. Alleged violation of Article 6 of the Convention

104 The applicant complained that s.10 of the Crown Proceedings Act 1947 ("the 1947 Act") violated his right of access to court guaranteed by Art.6(1) of the Convention, the relevant parts of which provision are as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law".

A. The applicant's submissions

105 He maintained that the essential point, emphasised by the earlier jurisprudence,[22] was the constitutional protection of the domestic courts against executive control and the assumption of arbitrary power by the state. The Commission's decisions in *Ketterick*, *Pinder* and *Dyer*[23] and the Court's judgment in *Fayed v United Kingdom*[24] accepted this core constitutional safeguard.

Accordingly, whether s.10 of the 1947 Act could be described as a substantive limitation on his right of access to court or a procedural one, [65] of the *Fayed* judgment (as cited in the above-mentioned *Fogarty* case) meant that it should be subjected to a proportionality test. Lord Walker of the House of Lords in the *Matthews* case had recognised the difficulty in suggesting that the principle laid down in *Fayed* had been qualified by the judgment in the case of *Z v United Kingdom*[25] and the applicant considered that there was nothing inconsistent in the latter case with the *Dyer* decision or *Fayed* judgment.

106 Alternatively, s.10 was a procedural limitation on his right of access to court for a determination of his civil rights.

He had a "civil right" (a cause of action recognised by national law) within the meaning of Art.6(1) which was extinguished by the issuance of a s.10 certificate. The concept of civil rights was, and rightly so in the applicant's view, an autonomous Convention notion not solely dependent on domestic classifications. This ensured that a state could not legislate to divest itself of its Art.6 responsibilities and implied that a "civil right" could have a meaning or content different to domestic law. However, the House of Lords in the *Matthews* case analysed the existence of a "civil right" solely by reference to domestic law. It was true that there was an unresolved tension between, on the one hand, the principle that the expression "civil rights" had an autonomous meaning and, on the other, the principle that Art.6 applied only to disputes about civil rights which could be said at least on arguable grounds to be recognised under domestic law. The answer was

[22] notably *Golder v United Kingdom* (A/18): (1979–80) 1 E.H.R.R. 524; and *Ashingdane v United Kingdom* (A/93): (1985) 7 E.H.R.R. 528.
[23] App. No.9803/82, *Ketterick v United Kingdom*, October 15, 1982; *Pinder v United Kingdom*: (1985) 7 E.H.R.R. CD464; and *Dyer v United Kingdom* (1984) 39 D.R. 246.
[24] *Fayed v United Kingdom* (A/294-B): (1994) 18 E.H.R.R. 393, at [65].
[25] *Z v United Kingdom*: (2002) 34 E.H.R.R. 3.

to view domestic law as regulating whether a right had "some legal basis" in domestic law but not as determining whether there *was* a civil right. Accordingly, the fact that the applicant had, until the issuance of the s.10 certificate, a civil cause of action recognised by domestic law was sufficient to conclude that he had a "civil right" for the purposes of Art.6 of the Convention.

While the applicant did not contest the historical analysis of Lord Bingham in the *Matthews* case, he maintained that the actual operation of s.10 was also pertinent. He had a cause of action until the Secretary of State had, in the exercise of his discretion, issued the s.10 certificate, thereby extinguishing it. It was the existence of this discretion which distinguished his case from *Z* and rendered it indistinguishable from the *Fogarty* case. Section 10 may not have accorded a wide discretion, but it existed and if not exercised the cause of action subsisted. Indeed, it took nine months after the issuance of proceedings for the certificate to issue.

107 Having regard to the material sent by the Porton Down Veterans to the MOD on February 7, 2005[26] and the Government submissions thereon,[27] the applicant considered that the only relevant point was that, as the Government had recognised, the MOD change of policy as regards his civil action had no impact on the issues or submissions before the Court except to undermine the Government's assertion that s.10 certificates were invariably granted.

108 The applicant further rejected the contention, based on the above-cited *Pellegrin* judgment, that Art.6 did not apply. Noting that the MOD had not pursued this argument before the House of Lords, he pointed out that the principles laid down in the *Pellegrin* case were relevant only to disputes "raised by employees in the public sector over their conditions of service" as was later confirmed in the *Fogarty* case. In so far as it was suggested that the *R. v Belgium* case laid down a rule that any dispute between a serviceman and the services fell outside the scope of Art.6, that would be both inconsistent with the *Pellegrin* judgment and wrong in principle. If it was to be maintained that *Pellegrin* had laid down such a broad rule, that judgment was incorrect.

109 According to the applicant, the restriction on his right of access to court was also disproportionate. The legitimate aim pursued by restricting access was identified by the High Court (operational efficiency and discipline during training). However, in 1987 Parliament had clearly considered that any such aim was no longer worth pursuing, that aim had little to do with someone volunteering for tests and there was no rational connection between s.10 and the aim it purported to pursue since a s.10 certificate was so broad as to potentially cover situations having no connection with that legitimate aim.

Even with the pension alternative, the restriction was disproportionate to any such legitimate aim. The breadth of the restriction was greater than necessary to achieve its objective. The pension scheme was manifestly inadequate and this was an exceptionally high price to pay for the advantage of not having to prove fault. The fundamental injustice of s.10 of the 1947 Act was recognised by its repeal in 1987 and, further, service personnel who now discover an injury which was sustained prior to 1987 will be treated less favourably than those with a similar injury sustained after 1987.

[26] See [72] above.
[27] See [115] below.

B. The Government's submissions

110 The Government relied upon the judgments of the Court of Appeal and the House of Lords in the above-cited case of *Matthews v Ministry of Defence*. Both courts considered in some detail the Convention case law and had decided (the House of Lords unanimously) that Art.6 was inapplicable because s.10 of the 1947 Act was a substantive element of national tort law delimiting the extent of the civil right in question.

111 Even if difficult, the distinction between substantive and procedural provisions remained necessary. The oft-quoted [65] of the above-cited *Fayed* judgment provided no basis for ignoring this distinction and the Court of Appeal and the House of Lords convincingly explained why it should be maintained.

Any creation of a sort of hybrid category would expand the applicability of Art.6 beyond its proper boundaries, turning it from a provision guaranteeing procedural rights to one creating substantive ones, which would, in turn, go against the well-established principle that Art.6 applied only to civil rights which could be said on arguable grounds to be recognised under domestic law. In addition, the Government considered it vital to bear in mind the rationale underlying Art.6: the protection of the rule of law and the proper separation of powers from any threat.[28] A provision entitling the executive to exercise arbitrary discretion to prevent otherwise valid claims from being decided by the courts would threaten the rule of law, whereas s.10 brought with it no such threat as it simply defined the circumstances in which a no-fault pension scheme would replace a claim in tort for damages. Moreover, it was essential to analyse accurately an individual's substantive rights in domestic law taking into account the history and legislative context of the provision and its purpose (as did Lord Bingham). The purpose of the provision could then be measured against the underlying rationale of Art.6 of the Convention.

112 The core question was therefore the actual characterisation to be given (procedural or substantive) to the relevant limitation. The essential starting point was an accurate analysis of domestic law and considerable respect had to be shown to the analysis of the restriction by the higher domestic courts. The Government suggested caution as regards the terminology used so that, for example, the use of the word "immunity" was not determinative of the question: indeed, domestic law recognised an immunity from liability (substantive) and immunity from suit (procedural).

The Government further considered, for the reasons outlined in the *Matthews'* judgments, that s.10 was a substantive limitation. The uncontroversial starting point was that, prior to the 1947 Act, there was no common law right to claim damages in tort from the Crown: s.10 could not therefore have removed or taken away any pre-existing right. The 1947 Act created such a right in s.2 but did so expressly subject to s.10 which preserved the preclusion from claiming damages in cases concerning servicemen. In short, the parliamentary intention behind the 1947 Act was to maintain the pre-existing preclusion in so far as servicemen were concerned. Both ss.2 and 10 were contained in Pt I of the Act entitled "Substantive Law", a title which accurately reflected the nature of Pt I which was a composite of

[28] *Golder v United Kingdom* and Lord Hoffman in the *Matthews* case.

provisions laying down the basic rules for the Crown's liability in tort. Both the prior common law and the 1947 Act were rules of general application marking the limits of tortious liability in domestic law: they were expressed in the language of rules of substantive law and the circumstances in which there was no right to claim (the s.10 exception to the s.2 right to claim) were of general application and clearly set out on the face of the statute.

The certification provisions, properly understood in context, did not indicate the existence of a right to claim removed by some broad discretion of the executive. There was no such right in the first place and the discretion was a narrow one: In this latter respect, the circumstances in which Parliament intended that no action could be brought were fully defined,[29] the narrow discretion therein can be contrasted with the broad discretion in s.10(3) of the 1947 Act and the discretion was uniformly and invariably exercised. The purpose of the certification provisions was not to confer a broad discretion to take away an existing cause of action but rather to ease the path of servicemen towards an alternative pension by taking away the need to prove a causal link between the injury and service. If a certificate did not issue, a cause of action continued but under s.2 of the 1947 Act. Accordingly, the certification process did not have any purpose or effect which threatened the rule of law or the separation of powers or was inimical to the rationale behind Art.6.

For these reasons, the Government maintained that the Court of Appeal and the House of Lords correctly concluded in the *Matthews* case that s.10 was a substantive provision limiting the scope of the civil right.

113 Alternatively, the Government submitted that Art.6 was not applicable given the "functional" principles outlined in the above-cited *Pellegrin* judgment[30] as applied in *R. v Belgium*.[31]

114 In the further alternative, the Government argued that, even if Art.6 applied, any interference with the applicant's access to court was proportionate having regard, on the one hand, to the vagaries, costs and other difficulties of an uncertain fault-based action (where the task of determining whether it was just and reasonable to impose a duty of care would be especially difficult) and, on the other, to the certainty and relative efficiency of a no-fault-needs-based system The Commission (in the above-cited cases of *K*, *Dyer* and *Pinder*) concluded (as recently as 1984) that the creation of the no fault pension entitlement was an adequate alternative to the right to sue in negligence. The fact that the State decided in 1987 that the bar on service personnel suing in tort was no longer necessary for claims thereafter did not mean that the prior restriction was inappropriate or disproportionate.

115 Following receipt of the letter of the Porton Down Veterans of February 7, 2005,[32] the Government Agent caused urgent inquiries to be made. In submitting this correspondence to this Court, the Government pointed out that neither it nor the Secretary of State in 1995 (in issuing the s.10 certificate) was aware of these

[29] ss.10(1)(a) and (2)(b).
[30] At [66].
[31] *R. v Belgium*, cited above.
[32] See [72] above.

Treasury Solicitor letters until the above-noted letter of February 7, 2005. A policy decision had been taken by the MOD not to "take a s.10(1) point" as regards certain civil claims mounted by some Porton Down volunteers because at least some of the tests (including those conducted on Mr Maddison to which the Treasury Solicitor's letters related) had been conducted by or under the direction and control of civilian personnel and not solely by members of the armed forces. While it was not clear precisely which type of personnel were involved in tests on the applicant, "there appear to have been some armed forces personnel and some civilians involved" in the applicant's tests. The MOD stated that it would be prepared to treat the applicant as falling within the above-noted policy decision. The applicant could now sue for damages in tort given this decision of the MOD. He retained, in addition, the separate right to continue with his claim for a pension in the PAT since the s.10 certificate remained valid for the purpose of those proceedings. When the s.10 certificate issued in 1995, the Minister believed s.10 to be applicable and, until the Treasury Solicitor's letters of advice were recently produced, that was the belief of the Government Agent. They concluded that it was "at least arguable" that, if the applicant had commenced a civil negligence action following his s.10 certificate (of August 1995), the action would have been barred. According to the Government therefore the Art.6 issues he raised before the Court remained live.

C. The Court's assessment

1. General principles

116 The right of access to court guaranteed by Art.6 at issue in the present case was established in the above-cited *Golder* judgment[33] In that case, the Court found the right of access to court to be an inherent aspect of the safeguards enshrined in Art.6, referring to the principles of the rule of law and the avoidance of arbitrary power which underlay much of the Convention. Thus, Art.6(1) secures to everyone the right to have a claim relating to his civil rights and obligations brought before a court.[34]

117 Article 6(1) does not, however, guarantee any particular content for those (civil) "rights" in the substantive law of the Contracting States: the Court may not create through the interpretation of Art.6(1) a substantive right which has no legal basis in the state concerned.[35] Its guarantees extend only to rights which can be said, at least on arguable grounds, to be recognised under domestic law.[36]

118 The applicant maintained that there was a certain tension between this afore-mentioned principle, on the one hand, and, on the other, the established autonomous meaning accorded by the Court to the notion of "civil rights and obligations". Connected to this, he questioned the distinction between a restriction which delimits the substantive content properly speaking of the relevant civil right (to which the guarantees of Art.6(1) do not apply)[37] and a restriction which

[33] At [28]–[36].
[34] See, more recently, the above-cited judgment in *Z v United Kingdom*, at [91].
[35] The above-cited *Fayed v United Kingdom judgment*, at [65].
[36] *James v United Kingdom* (A/98): (1986) 8 E.H.R.R.123; *Z*, at [81] and the authorities cited therein together with *McElhinney v Ireland*: (2002) 34 E.H.R.R. 13, at [23].
[37] *Powell and Rayner v United Kingdom* (A/172): (1990) 12 E.H.R.R. 355, at [36] and *Z*, cited above, at [100].

amounts to a procedural bar preventing the bringing of potential claims to court, to which Art.6 could have some application.[38] The applicant argued that it was not necessary to maintain that distinction[39]: any restriction should be subjected to a proportionality test because the important point was to protect the courts from the assumption of arbitrary power and control on the part of the executive.

119 The Court cannot agree with these submissions of the applicant. It does not find any inconsistency between the autonomous notion of "civil"[40] and the requirement that domestic law recognises, at least on arguable grounds, the existence of a "right".[41] In addition, the Commission decisions in *Ketterick*, *Pinder* and *Dyer* must be read in the light, inter alia, of the judgment in the case of *Z*[42] and, in particular, in the light of the Court's affirmation therein as to the necessity to maintain that procedural/substantive distinction: fine as it may be in a particular case, this distinction remains determinative of the applicability and, as appropriate, the scope of the guarantees of Art.6 of the Convention. In both these respects, the Court would reiterate the fundamental principle that Art.6 does not itself guarantee any particular content of substantive law of the Contracting Parties.[43]

No implication to the contrary can be drawn, in the Court's view, from [67] of the *Fayed* judgment. The fact that the particular circumstances of, and complaints made in, a case may render it unnecessary to draw the distinction between substantive limitations and procedural bars[44] does not affect the scope of Art.6 of the Convention which can, in principle, have no application to substantive limitations on the right existing under domestic law.

120 In assessing therefore whether there is a civil "right" and in determining the substantive or procedural characterisation to be given to the impugned restriction, the starting point must be the provisions of the relevant domestic law and their interpretation by the domestic courts.[45] Where, moreover, the superior national courts have analysed in a comprehensive and convincing manner the precise nature of the impugned restriction, on the basis of the relevant Convention case law and principles drawn therefrom, this Court would need strong reasons to differ from the conclusion reached by those courts by substituting its own views for those of the national courts on a question of interpretation of domestic law[46] and by finding, contrary to their view, that there was arguably a right recognised by domestic law.

121 Finally, in carrying out this assessment, it is necessary to look beyond the appearances and the language used and to concentrate on the realities of the situation.[47] The Court must not be unduly influenced by, for example, the

[38] *Tinnelly & Sons Ltd and McElduff v United Kingdom*, cited above, at [62]; *Al-Adsani v the United Kingdom*: (2002) 34 E.H.R.R. 11, at [48]–[49]; *Fogarty v United Kingdom*, cited above, at [26]; and *McElhinney v Ireland*, cited above, at [25].

[39] Relying on the above-cited Commission decisions of *Ketterick*, *Pinder* and *Dyer* together with [65] of the *Fayed* judgment, as cited in the *Fogarty* judgment, at [25].

[40] *König v Germany* (A/27): (1979–80) 2 E.H.R.R. 170, at [89] and, more recently, *Ferrazzini v Italy*: (2002) 34 E.H.R.R. 45, at [24]–[31].

[41] *James v United Kingdom*, cited above, at [81]; *Lithgow v United Kingdom* (A/102): (1986) 8 E.H.R.R. 123, at [192]; and *The Holy Monasteries v Greece* (A/301-A): (1995) 20 E.H.R.R. 1, at [80].

[42] Cited above.

[43] See, amongst other authorities, *Z v United Kingdom*, cited above, at [87].

[44] See, e.g. *A v United Kingdom*: (1999) 27 E.H.R.R. 611, at [65].

[45] *Masson and Van Zon v Netherlands* (A/327-A): (1996) 22 E.H.R.R. 491, at [49].

[46] *Z*, at [101].

[47] *Van Droogenbroeck v Belgium* (A/50): (1982) 4 E.H.R.R. 443, at [38].

legislative techniques used[48] or by the labels put on the relevant restriction in domestic law: as the Government noted, the oft-used word "immunity" can mean an "immunity from liability" (in principle, a substantive limitation) or an "immunity from suit" (suggestive of a procedural limitation).

2. Application to the present case

122 The Court has therefore taken as a starting point the assessment of, and conclusions concerning, s.10 of the 1947 Act by the House of Lords in the above-cited *Matthews* case.

Drawing on the historical context, the text and purpose of, in particular, ss.2 and 10 of the 1947 Act, the House of Lords concluded that s.10 did not intend to confer on servicemen any substantive right to claim damages against the Crown but rather had maintained the existing (and undisputed) absence of liability in tort of the Crown to servicemen in the circumstances covered by that section. The Lords made it clear that prior to 1947 no right of action in tort lay against the Crown on the part of anyone. The doctrine that "the King could do no wrong" meant that the Crown was under no liability in tort at common law. Section 2 of the 1947 Act granted a right of action in tort for the first time against the Crown but the section was made expressly subject to the provisions of s.10 of the Act. Section 10 (which fell within the same part of the 1947 Act as s.2 entitled "substantive law")[49] provided that no act or omission of a member of the armed forces of the Crown while on duty should subject either that person or the Crown to liability in tort for causing personal injury to another member of the armed forces while on duty. Section 10 did not therefore remove a class of claim from the domestic courts' jurisdiction or confer an immunity from liability which had been previously recognised: such a class of claim had never existed and was not created by the 1947 Act. Section 10 was found therefore to be a provision of substantive law which delimited the rights of servicemen as regards damages' claims against the Crown and which provided instead as a matter of substantive law a no fault pension scheme for injuries sustained in the course of service.

123 As to whether there exist strong reasons to depart from this conclusion, the applicant mainly argued that the s.10 certificate issued by the Secretary of State operated as a procedural restriction to prevent him from pursuing a right of action which he enjoyed under the 1947 Act from the moment he suffered significant injury. The Court is unable to accept this argument. It finds that s.10 must be interpreted in its context and with the legislative intent and purpose in mind. As explained in detail in the judgments of Lords Bingham and Hope in the *Matthews* case, the object of the certification procedure introduced by s.10(1)(b) was not to alter the essential thrust of s.10 as originally drafted—namely, to exclude the Crown's liability altogether—but was rather to facilitate the grant of a pension to injured service personnel by obviating the need to prove that the injury was attributable to service.

Moreover, Lord Bingham pointed out that the "realities of the situation" were that it was "plainly intended" that the s.10 certificate would issue where the

[48] The *Fayed* judgment, at [67].
[49] See Lord Hope in the *Matthews* case at [94] above.

relevant conditions had been fulfilled and he noted that that had indeed been the uniform and unvarying practice of successive Secretaries of State for the 40 years thereafter, to the extent that any practitioner would have advised Mr Matthews that a s.10 certificate was bound to issue.[50] This narrow discretion conferred by s.10(1)(b) was to be contrasted with the broader discretion for which s.10(3) of the 1947 Act provided. For the reasons set out at [126] below, this finding as to the narrow discretion of the Secretary of State is not altered by the fact that the latter has now decided not to maintain "a s.10(1) point" against the applicant.

The Court finds this discretion conferred on the Secretary of State by s.10 to be fundamentally different in character from the unfettered discretion enjoyed by a foreign Government, which was the subject of the Court's examination in the *Fogarty* case, not to waive state immunity and thereby to prevent a claim otherwise well-founded in domestic law from being entertained by a domestic court.

The certification procedure provided for by s.10 is similarly to be distinguished from that considered by the Court in the *Tinnelly* case. In that case, the Fair Employment (Northern Ireland) Act 1976 clearly granted a right in national law to claim damages for religious discrimination when tendering for public contracts. Section 42 of the 1976 Act was not aimed at creating an exception for cases in which Parliament (when adopting the 1976 Act) considered discrimination justified but rather allowed the Secretary of State by a conclusive certificate, based on an assertion that the impugned act was done to protect national security, to stop court proceedings which would otherwise have been justified. As observed by Lord Hoffman, s.10 did not involve such encroachment by the executive into the judicial realm but rather concerned a decision by Parliament in 1947 that, in a case where injuries were sustained by service personnel which were attributable to service, no right of action would be created but rather a no fault pension scheme was to be put in place, the certificate of the Secretary of State serving only to confirm that the injuries were attributable to service and thereby to facilitate access to that scheme.

124 Accordingly, this Court finds no reason to differ from the unanimous conclusion of the Court of Appeal and the House of Lords as to the effect of s.10 in domestic law. It considers that the impugned restriction flowed from the applicable principles governing the substantive right of action in domestic law.[51] In such circumstances, the applicant had no (civil) "right" recognised under domestic law which would attract the application of Art.6(1) of the Convention.[52]

It is not therefore necessary also to examine the parties' submissions as to the proportionality of that restriction. It is further unnecessary to examine the Government's argument that Art.6 was inapplicable on the basis of the above-cited judgments in *Pellegrin* and *R. v Belgium*.

125 The Court concludes that Art.6 is not applicable and that there has not therefore been a violation of that provision.

126 Finally, the Court has noted the submissions of the parties concerning the recent discovery of the Treasury Solicitor's letters of advice from 1953 concerning

[50] See also Lord Walker in the *Matthews* case, at [92] above.
[51] *Z*, at [100].
[52] *Powell and Rayner v United Kingdom*, cited above, at [36].

another test participant.[53] The fact that the Secretary of State has now decided no longer to "take a s.10(1) point" in any civil action of the applicant, does not alter or otherwise affect the above conclusion in respect of s.10 in the applicant's case. That decision merely serves to resolve in the applicant's favour a doubt which has recently emerged (not commented upon by the applicant and remaining unclarified) as to whether the applicant in fact belonged to a category of persons to which the provisions of s.10 applied. Further, it is a decision which concerns the future, the Government having confirmed that the s.10 certificate remains valid for the purposes of the ongoing PAT appeal.

The Court has, however, returned to these submissions in the context of Art.8 of the Convention below.

II. Alleged violation of Article 1 of Protocol No.1 to the Convention

127 The applicant further complained that s.10 of the 1947 Act had also violated his right to peaceful enjoyment of his possessions guaranteed by Art.1 of Protocol No.1, the relevant parts of which Article are as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law . . .".

128 For the reasons outlined in the context of Art.6, the applicant maintained that he had a "possession" (a claim in negligence against the MOD) until deprived of it, in an unjustified manner, when the Secretary of State issued the s.10 certificate.[54] The Government pointed out that, while Art.1 of Protocol No.1 recognised a vested cause of action as a possession, any claim the applicant might otherwise have had in tort was always subject to s.10 of the 1947 Act and was defeasible. There had been, therefore, no interference with the applicant's rights under that provision. Indeed, Mr Matthews[55] did not pursue this argument before the House of Lords.

129 The Court recalls that a proprietary interest in the nature of a claim can only be regarded as a possession where it has a sufficient basis in national law, including settled case law of the domestic courts confirming it.[56] The applicant argued that he had a "possession" on the same grounds as he maintained that he had a "civil right" within the meaning of Art.6(1). For the reasons outlined under Art.6(1) above,[57] the Court considers that there was no basis in domestic law for any such claim. The applicant had no "possession" within the meaning of Art.1 of Protocol No.1 and the guarantees of that provision do not therefore apply.

130 Accordingly, there has been no violation of Art.1 of Protocol No.1.

[53] See [72], [107] and [115] above.
[54] *Pressos Compania Naviera SA v Belgium* (A/332): (1996) 21 E.H.R.R. 301, at [31].
[55] The above-cited *Matthews v Ministry of Defence*.
[56] *Kopecký v Slovakia*: (2005) 41 E.H.R.R. 43 at [52].
[57] See [122]–[124].

III. Alleged violation of Article 14 in conjunction with Article 6 and Article 1 of Protocol No.1

131 The applicant further argued under Art.14 (in conjunction with Art.6 and Art.1 of Protocol No.1) that s.10 of the 1947 Act was discriminatory. Article 14 reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] 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".

132 He maintained, for the reasons set out above in the context of Art.6 and Art.1 of Protocol No.1, that the impugned facts fell within the ambit of those Convention provisions. He further argued that he had been treated less favourably than other persons in an analogous position: he referred to other employees who had suffered injury as a result of the negligence or lack of foresight of their employers or, alternatively, to other servicemen injured as a result of activities after 1987. He also considered that difference in treatment to be disproportionate on the same grounds as he maintained the interference with his right of access to court was unjustified. The Government disagreed.

133 In the light of its findings[58] that the applicant had no "civil right" or "possession" within the meaning of Art.6(1) and Art.1 of Protocol No.1 so that neither Article was applicable, the Court considers that Art.14 is equally therefore inapplicable.[59]

134 There has therefore been no violation of Art.14 of the Convention.

IV. Alleged violation of Article 13 in conjunction with Article 6 and/or Article 1 of Protocol No.1

135 The applicant also complained under Art.13 in conjunction with Art.6 and Art.1 of Protocol No.1 that he was left without an effective remedy for the unlawful barring of his claim or, alternatively, the unlawful deprivation of his possessions.

136 The Government contended that there was no arguable claim of a violation of Art.1 of Protocol No.1 or, consequently, of Art.13. The Article reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] 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".

137 The Court notes that the applicant's complaints under Art.6 and Art.1 of Protocol No.1 are clearly directed against the provisions of s.10 of the 1947 Act. In this respect, the Court reiterates that Art.13 does not go so far as to guarantee a remedy allowing a Contracting State's primary legislation to be challenged before a national authority on grounds that it is contrary to the Convention.[60]

138 Accordingly, there has been no violation of Art.13 of the Convention.

[58] At [124] and [129] above.
[59] See, amongst many other authorities, *Petrovic v Austria*: (2001) 33 E.H.R.R. 14, at [22].
[60] *James v United Kingdom*, cited above, at [85].

V. Alleged violation of Article 8 of the Convention

139 The applicant complained about inadequate access to information about the tests performed on him in Porton Down. He considered that his access to information to allay his fears about the tests was sufficiently linked to his private and family life to raise an issue under Art.8 of the Convention, which, in so far as relevant, reads as follows:

> "1. Everyone has the right to respect for his private and family life, ...
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

A. The applicant's submissions

140 His primary submission was that the state failed to provide him with information about his test participation in breach of its positive obligation to respect his private and family life.

141 Relying mainly on this Court's judgments in *Gaskin v United Kingdom*,[61] *Guerra v Italy* (February 19, 1998, *Reports* 1998-I)[62] and the above-cited *McGinley and Egan v United Kingdom* judgment, he maintained that he had a right to information under Article 8 to allow him to understand and react to risks and dangers to which he had been exposed. This was a free-standing obligation (unattached to any judicial or other process) to provide an "effective" and "accessible" means to an individual to "seek all relevant and appropriate information". His particular need for information, and for the means of obtaining it, first arose in 1987 when he initially began to seek his records, well before and separate from any PAT appeal. In any event, attaching the positive obligation to the PAT process was absurd: it would effectively require someone (whether or not he or she was entitled to, or was interested in, a pension) to engage in a litigious process and, in particular, to apply for a pension and/or threaten litigation under section 2 of the 1947 Act; to hope that any pension application would be unsuccessful at first instance so that he/she could appeal to the PAT; and before the PAT to discharge a burden of proof and demonstrate the relevance of the documents to the litigation issues before he or she could obtain an order for disclosure under Rule 6 of the PAT Rules. Rule 6 is designed for the contentious litigation process and not to assuage fear by providing information: the applicants in the case of *McGinley and Egan* had not invoked the general right to information and their case was therefore distinguishable on the facts.

142 The applicant maintained that the state did not secure his right to an effective and accessible procedure to obtain the necessary information.

143 Prior to the 1998 Scheme[63] and his PAT appeal he had made significant attempts, apart from any litigation, to obtain information. The first information

[61] *Gaskin v United Kingdom* (A/160): (1990) 12 E.H.R.R. 36.
[62] *Guerra v Italy*: (1998) 26 E.H.R.R. 357.
[63] See [69] above.

disclosed was to his doctor on a "medical in confidence" basis so he did not see it until 1994. It was not, in any event, useful as it contained errors and gaps (it did not mention the mustard gas tests) and was unsubstantiated by underlying records. He obtained some meaningful disclosure in December 1997 and March 1998 but this too was inadequate and it came via extraordinary channels (a meeting with a Minister of State and in the context of this application). It did not amount to "all relevant and appropriate information": there was no mention of the 1962 tests and no information about the 1963 mustard gas test; the standards of record generation (at the time) and maintenance (thereafter) were recognised to be lacking; while it was stated that all documents had been disclosed, this was obviously not the case given later disclosure; and the letter of December 1997 contained assertions unsubstantiated by any records.

144 The subsequent 1998 Scheme could not cure this and was itself an inadequate means of obtaining information. The 1998 Scheme began more than 10 years after he had begun to seek information and subsequent to his introduction of the present application. The reassurances in the information pamphlet were unconvincing as they were not backed up by an epidemiological study and the pamphlet promised only a summary of records and the possibility of attending at Porton Down to inspect records. Indeed, the applicant considered that the 1998 Scheme confirmed the lack of adequate and effective means of obtaining information.

145 Similarly, the subsequent r.6 procedure did not cure this earlier lack of information and it was, in any event, neither effective nor accessible since it was a cumbersome, unwieldy and long procedure allowing incomplete and drip feed disclosure (the latest being in April 2005).

The procedure could be conditioned and limited as the President of the PAT wished, r.6 providing that the President "may" order disclosure *only* if the information "is likely to be relevant to any issue to be determined on appeal". In addition, the applicant considered the r.6 procedure to lack effective control: there were no time-limits on disclosure and disclosure was allowed on a piecemeal basis. There were also significant delays in the procedure. The applicant accepted that some delay was attributable to him and he explained the reasons for his delay in responding to the PAT's letter of July 25, 2001 and for applying to adjourn the October 2002 hearing. However, he argued that, those delays did not, in any event, lead to the overall delay in the procedure: the MOD continued to make disclosure thereafter and the hearing adjournment was attributable also to the VA which was not ready, to the reasonable confusion as to the scope of the appeal and to the need to put further questions to Dr H. The uncontrolled certification by the MOD of records as undisclosable "departmental minutes or records" also undermined the ability of the r.6 procedure to fulfil the positive obligation under Art.8, as did the power to withhold documents on "national security" grounds. The whole r.6 procedure was, in the applicant's view, marked by errors, contradictory statements and admissions that certain documents could no longer be found with the consequence that the information at the end of the disclosure process was incomplete. Had Messrs McGinley and Egan used the r.6 procedure, the Court would have inevitably concluded in its judgment as to the inability, both in principle and in practice, of that procedure to satisfy the positive obligation to provide an accessible and effective means of obtaining information.

146 Moreover, he maintained that all "relevant and appropriate information" had not been disclosed to him. Apart from the conclusion that could be drawn from the piecemeal disclosure to date, accompanied by unsubstantiated assurances (later contradicted) that all disclosure had been made, the applicant considered that two other factors demonstrated that all relevant and appropriate documents had not been disclosed.

In the first place, there was, in the applicant's view, an unacceptable failure to create and maintain records which rendered compliance with the Art.8 positive obligation impossible from the outset. Secondly, the Government had, until recently, refused to carry out a long-term follow-up study which was the only effective way to provide information. He considered unconvincing the reasoning and conclusion of the feasibility study report,[64] while the recently commissioned study[65] had still not been completed and, further, begged the question as to why it was not done earlier.

147 As to the proportionality of the state's position, the applicant noted that the Government did not plead a national security justification but rather one based on quite narrow "medical in confidence" grounds. While withholding information on "medical in confidence" grounds could serve a legitimate aim (the interests of health professionals compiling medical records and, consequently, the interests of patients), the applicant was not convinced of this in the present case since the only persons who stood to gain by the Porton Down scientists expressing themselves freely were the scientists themselves. In any event, the "medical in confidence" approach was abandoned generally (in 1991 with the entry into force of the Access to Health Records Act 1990) and specifically as regards Porton Down participants (with the introduction of the 1998 Scheme). This defence to full disclosure was clearly not proportionate having regard to the enormous importance of the information for the applicant; the paucity of the information disclosed and the piecemeal manner in which that had been done; the need for actual and original records to make a proper risk assessment; the anxiety and stress caused by the absence of such a risk assessment; the facts that the tests were in secret, that the participants were forbidden to speak of them and that there were no safeguards against abuse put in place; the toxic and hazardous material to which the participants were exposed; and the lack of an adequate follow-up study which might have generated conclusions to clarify the issue for test participants one way or the other.

148 Relying on the detailed legal submissions made, and shortcomings highlighted, in the context of his primary Art.8 submission, the applicant advanced two alternative and secondary arguments.

In the first place, he maintained that the procedures and systems surrounding the tests did not fulfil the procedural requirements inherent in respect for private life, so that the Government had failed adequately to secure and respect his Art.8 interests.[66]

[64] See [55] above.
[65] See [70] above.
[66] *W v United Kingdom* (A/121): (1988) 10 E.H.R.R. 29; and *McMichael v United Kingdom* (A/307-B): (1995) 20 E.H.R.R. 205.

Secondly, he argued that the Government had failed to secure his Art.8 rights in that they failed adequately to investigate and research (or, alternatively, to put in place an adequate system to investigate and research) the potential risks to which they had chosen to expose him. Just as Arts 2 and 3 implied an investigatory requirement,[67] so a similar obligation arose under Art.8 of the Convention.

B. The Government's submissions

149 While the Government considered that there was no evidence that the tests had had a negative impact on his health, the key answer to the applicant's complaint was, as found in the above-cited *McGinley and Egan* judgment, that the positive obligation under Art.8 to provide an effective and accessible procedure giving access to all relevant and appropriate information had been fulfilled by the r.6 procedure. This was a conclusion of principle not altered by, and indeed confirmed by, the facts of the present case.

150 The procedure was demonstrably accessible to the applicant and he had successfully invoked and used it. It had been available to him at all relevant times since the illnesses in respect of which he claimed a pension manifested themselves in the late 1980s. He had not appealed to the PAT until November 1998 or made the r.6 request until July 1999. Accordingly, the period prior to July 1999 could not be relied upon to assess the accessibility (or indeed the effectiveness) of the r.6 procedure. In addition, should the current state epidemiological study provide evidence to support the applicant's case, he could begin his pension claim again.

151 The r.6 procedure was also capable of being effective and, on the facts of the present case, was effective in producing the relevant documents for the applicant in a reasonable period of time.

152 It was in principle effective since it allowed disclosure of documents directly corresponding to the positive obligation under Art.8. The retention of certain documents on national security or public interest grounds did not undermine its effectiveness and was Convention compatible, as it enabled a balance to be struck between the competing interests involved and was not without statutory safeguards (the text of r.6 itself). There was no systematic delay or "lack of control" over the r.6 procedure.

It was also effective in the present case. Pursuant to the applicant's request, a r.6 order was made setting out in broad terms the simple categories of document to be disclosed. The Secretary of State approached compliance in a timely manner, thoroughly and with an evident disposition to conduct an extensive and wide-ranging search in order to disclose the maximum documents possible. A wide range of test documentation was disclosed: nothing of significance was withheld on national security grounds. The applicant made no further request under r.6 for disclosure to the PAT.

153 If there was some delay attributable to the State after July 1999, it did not undermine the effectiveness of the process and there was no tangible evidence of prejudice to the applicant's case. The applicant had the "responsive documents" well in advance of the PAT hearing and was able to make use of them as he

[67] *McCann v United Kingdom* (A/324): (1996) 21 E.H.R.R. 97; *Jordan v United Kingdom*: (2003) 37 E.H.R.R. 2; *Edwards v United Kingdom*: (2002) 35 E.H.R.R. 19; and *Menson v United Kingdom*: (2003) 37 E.H.R.R. CD220.

considered appropriate. The delay in furnishing the fifth category of documents[68] was not surprising given the width of that category, the need to ensure completeness, the time which had elapsed since the tests and the "need to consider serious classification issues". Moreover, any delay by those authorities was to be measured against the applicant's own delays: r.6 was only invoked in July 1999 although it had been available since the late 1980s when the applicant began to look for documents; he caused confusion, and consequently delay, as regards the breadth of the PAT appeal; and, indeed, the Government attributed to the applicant any delay after the Secretary of State's letter of July 6, 2001. Furthermore, and other than the timely disposal of the PAT proceedings, there were no time sensitive issues as in, for example, the preventative measures at issue in the above-cited *Guerra* case.

Disclosure in stages was not unexpected (given the broad category of documents requested, their age and the numerous checks required) and it was a better option that holding all documents until all had been located. As to the suggestion that the documentation was not complete, the Government pointed out that, as in *McGinley and Egan*, the State could not be held responsible for any allegation concerning the failure to make or maintain records prior to the State's acceptance of the right of individual petition in 1966. As to the complaint about a refusal to carry out a follow-up study, the Government argued that there was no positive obligation to do so, that on no view could such an obligation arise without compelling evidence that there was a material problem and that, in any event, there was at the time an ongoing epidemiological study to assuage fears of the servicemen.

154 Finally, the Government also referred to the medical responses in 1987 and 1989, to meetings and correspondence with the Secretary of State in 1997, to the 1998 Scheme and to the ongoing epidemiological study, to conclude that the applicant had had access to all relevant information.

C. The Court's assessment

1. Applicability

155 The Government was not definitive about the applicant's participation in tests in 1962 despite the findings of the PAT. The Court considers that it is not necessary for current purposes to resolve this dispute since, in any event, it is accepted that the applicant attended at the Chemical and Biological Defence Establishment at Porton Down in 1963 to participate in testing on armed forces personnel of mustard and nerve gas.

The tests are described at [15]–[16] above and involved the applicant's exposure to small doses of both of these agents for research purposes. In the case of mustard gas, the PAT expressly found that the aim was to test the suitability of military clothing to exposure[69] and it would appear from the inhalation of nerve gas, that the aim was to test the reaction of service personnel to it. Even accepting the Government's clarifications about the manner in which those tests were

[68] See [53] and [55] above.
[69] The PAT finding of fact at [63] above.

conducted, the Court considers that the issue of access to information, which could either have allayed the applicant's fears or enabled him to assess the danger to which he had been exposed, was sufficiently closely linked to his private life within the meaning of Art.8 as to raise an issue under that provision.[70] It is not necessary to examine whether the case also gives rise to a separate issue under the family life aspect of this Article.

156 It follows that Art.8 is applicable.

2. Compliance

157 The applicant considered that the State failed to provide him with access to information in violation of his rights under Art.8. The Court recalls that, in addition to the primarily negative undertakings in Art.8 of the Convention, there may be positive obligations inherent in effective respect for private life. In determining whether or not such a positive obligation exists, it will have regard to the fair balance that has to be struck between the general interest of the community and the competing interests of the individual concerned, the aims in the second paragraph of Art.8 being of a certain relevance.[71]

158 In the *Gaskin* case, a file existed containing details of the applicant's childhood history which he had no opportunity of examining in its entirety. The Court found that the United Kingdom, in handling his requests for access to those records, was in breach of a positive obligation flowing from Art.8 of the Convention:

> ". . . persons in the situation of the applicant have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development. On the other hand, it must be borne in mind that confidentiality of public records is of importance for receiving objective and reliable information, and that such confidentiality can also be necessary for the protection of third persons. Under the latter aspect, a system like the British one, which makes access to records dependent on the consent of the contributor, can in principle be considered to be compatible with the obligations under Article 8, taking into account the State's margin of appreciation. The Court considers, however, that under such a system the interests of the individual seeking access to records relating to his private and family life must be secured when a contributor to the records either is not available or improperly refuses consent. Such a system is only in conformity with the principle of proportionality if it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent. No such procedure was available to the applicant in the present case".

159 In the later *Guerra* case[72] the Court ascertained whether the national authorities had taken the necessary steps to provide the applicants with information concerning risks to their health and well-being:

[70] The above-cited *McGinley and Egan* judgment, at [97].
[71] The above-cited *Gaskin v United Kingdom* judgment, at [42].
[72] Cited above.

"The Court reiterates that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely (see, mutatis mutandis, the *López Ostra* judgment cited above, p. 54, § 51). In the instant case the applicants waited, right up until the production of fertilisers ceased in 1994, for essential information that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory.

The Court holds, therefore, that the respondent State did not fulfil its obligation to secure the applicants' right to respect for their private and family life, in breach of Article 8 of the Convention".

160 Subsequently, in the above-cited *McGinley and Egan* case, the Court also examined whether the state had fulfilled a positive obligation to provide information to the applicant servicemen who had participated in armed forces atmospheric tests of nuclear weapons. It distinguished the *Guerra* case since, in that case, it was not disputed that the applicants were at risk from the neighbouring factory or that the state had in its possession information which would have enabled them to assess this risk and take steps to avert it whereas Messrs McGinley and Egan had only demonstrated that one set of relevant records remained in the hands of the authorities (radiation level records). It went on:

"... the Government have asserted that there was no pressing national security reason for retaining information relating to radiation levels ... following the tests.

101. In these circumstances, given the applicants' interest in obtaining access to the material in question and the apparent absence of any countervailing public interest in retaining it, the Court considers that a positive obligation under Article 8 arose. Where a Government engages in hazardous activities, such as those in issue in the present case, which might have hidden adverse consequences on the health of those involved in such activities, respect for private and family life under Article 8 requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information.

102. As regards compliance with the above positive obligation, the Court recalls its findings in relation to the complaint under Article 6 § 1, that Rule 6 of the Tribunal Rules provided a procedure which would have enabled the applicants to have requested documents relating to the MOD's assertion that they had not been dangerously exposed to radiation, and that there was no evidence before it to suggest that this procedure would not have been effective in securing disclosure of the documents sought .... However, neither of the applicants chose to avail themselves of this procedure or, according to the evidence presented to the Court, to request from the competent authorities at any other time the production of the documents in question.

For these reasons the present case is different from that of *Gaskin* ..., where the applicant had made an application to the High Court for discovery of the records to which he sought access.

103. The Court considers that, in providing the above Rule 6 procedure, the State has fulfilled its positive obligation under Article 8 in relation to these applicants. It follows that there has been no violation of this provision".

161 The present applicant's uncertainty, as to whether or not he had been put at risk through his participation in the tests carried out in Porton Down, could reasonably be accepted to have caused him substantial anxiety and stress.[73] Indeed, the clear evidence is that it did. From the onset of his medical problems in 1987, he single-mindedly pursued through various means[74] any relevant information which could inform him about his test participation and assuage his anxiety as to the consequences. While the PAT found, relying on its expert's report, that there was no reliable evidence to suggest a causal link between the tests and the applicant's claimed medical conditions, that was not until 2004 and, in any event, the High Court has since allowed his appeal and sent the matter back to the PAT, before which the matter is pending. Moreover, as is now clear, a significant number of "relevant records" of the 1963 tests were still in existence in 1966, the date of the respondent State's declarations under Arts 25 and 46 of the Convention[75]: the documents included with the letter of December 2, 1987 from the Minister of State for Defence; those documents referred to in the letter of May 3, 2001 from Porton Down; the records submitted with the Government's observations in the present case (on March 9, 1998 and April 5, 2001); and the additional documents disclosed to the PAT on July 6, 2001, August 23, 2002, October 2 and 21, 2002 and on April 18, 2005.

On the other hand, the Government has not asserted that there was any pressing reason for withholding the above-noted information although they commented on the vagaries of locating old records which had inevitably become dispersed. Reasons of "medical confidence" were not pleaded by the Government and such reasons would, in any event, be inconsistent with the dilution of the notion in the 1990 Act and the apparent decision not to raise it in the context of the 1998 Scheme and Porton Down records. Following certain revisions of its position and de-classification of documents,[76] the Government submitted that, "nothing of significance" had been withheld on national security grounds.[77]

162 In such circumstances, the Court considers that a positive obligation arose to provide an "effective and accessible procedure" enabling the applicant to have access to "all relevant and appropriate information"[78] which would allow him to assess any risk to which he had been exposed during his participation in the tests.[79]

163 As to compliance with this positive obligation, the Government mainly relied on the Court's conclusion in the *McGinley and Egan* judgment that the r.6 procedure before the PAT fulfilled this obligation.

164 The Court considers that that conclusion does not apply in the present case since the essential complaints of Messrs McGinley and Egan and the present applicant

[73] *McGinley and Egan* judgment, at [99].
[74] Detailed at [17]–[33] above.
[75] *McGinley and Egan* judgment, at [88].
[76] See [53], [55], [57], [59] and [68] above.
[77] See [152] above.
[78] *McGinley and Egan* judgment, at [101].
[79] *Guerra*, at [60].

are not comparable. The search for documents by the former was inextricably bound up with their domestic applications for pensions in respect of illnesses they maintained were caused by their participation in nuclear tests. In contrast, the present applicant had made numerous attempts to obtain the relevant records[80] independently of any litigation and, in particular, of a pension application. Indeed, even when he applied for a pension in 1991, he continued to seek documents in parallel with that application since the r.6 procedure was not, in any event, available at first instance. If the present applicant appealed to the PAT it was because he felt constrained to do so in order to make his r.6 request for documents following the judgment of this Court in the above-cited *McGinley and Egan* case in June 1998.

165 The Court's *McGinley and Egan* judgment did not imply that a disclosure procedure linked to litigation could, as a matter of principle, fulfil the positive obligation of disclosure to an individual, such as the present applicant, who has consistently pursued such disclosure independently of any litigation. Consistently with the above-cited *Guerra* and *Gaskin* cases and as the applicant argued, it is an obligation of disclosure (of the nature summarised at [162] above) not requiring the individual to litigate to obtain it.

166 The Government also relied more generally upon the disclosure which had been made through the "medical" and "political" means and upon the other information services and health studies.[81] However, the Court does not consider that, either individually or collectively, these could constitute the kind of structured disclosure process envisaged by Art.8. In any event, it is evident that those processes resulted in partial disclosure only given the later disclosure of relevant records, notably during the present application and the PAT appeal.

In particular, the applicant's doctor was given information in 1987 and 1989. However, the applicant did not see it until 1994 given the "medical in confidence" basis of disclosure, the information did not refer to the mustard gas tests, it was not accompanied by the underlying records and it was, in any event, incorrect as regards certain matters.[82] Having been refused disclosure of further information, the applicant was given access for the first time to original records in 1997: this was an ad hoc procedure adopted in response to his tenacious pursuit of the information[83] and it constituted but the first of many instalments.

Moreover, none of the processes described as "information services and health studies"[84] began until almost 10 years after the applicant had commenced his search for records and, further, after he had introduced his application with this Court.

As to the 1998 Scheme, the Court recalls the difficulties experienced by the authorities, even in a judicial context before the PAT, in providing records pursuant to the r.6 order of the President of the PAT. Even taking into account only the period following the making of the r.6 order by the President in February 2001, the disclosure has been piecemeal (over five occasions listed at [161] above, the most recent being in April 2005), the state reviewed its position on the

[80] Outlined at [17]–[33] above.
[81] See [17]–[33] and [69]–[71] above.
[82] See [19] and [36] above.
[83] See [19]–[33] above.
[84] See [69]–[71] above.

classification of certain material on several occasions during that period[85] and, over four years after the r.6 order, disclosure remains unfinished.[86] Indeed, the PAT described as "disquieting" the difficulties experienced by the applicant in obtaining the records produced to the PAT. In the same vein, it is also illustrative that none of the authorities dealing with the r.6 procedure or the present application was aware until recently of the Treasury Solicitor's letters from 1953.[87] These demonstrated difficulties in making comprehensive and structured disclosure to date undermines, in the Court's view, any suggestion that an individual's attendance at Porton Down to review records retained there (the 1998 Scheme) could lead to the provision of all relevant and appropriate information to that person. It is undoubtedly the case that certain records (existing after 1996) were, given their age and nature, somewhat dispersed so that the location of all relevant records was, and could still be, difficult. However, it is equally the case that the absence of any obligation to disclose and inform facilitates this dispersal of records and undermines an individual's right to obtain the relevant and appropriate disclosure.

Finally, the Porton Down Volunteers Medical Assessment Programme involved only 111 participants and no control group whereas 3,000 service personnel had participated in nerve gas tests and 6,000 in mustard gas tests, with some having been involved in both types of test. The full-scale epidemiological study did not begin until 2003 and has not yet been completed.

167 In such circumstances, the Court considers that the State has not fulfilled the positive obligation to provide an effective and accessible procedure enabling the applicant to have access to all relevant and appropriate information which would allow him to assess any risk to which he had been exposed during his participation in the tests.

168 It is not therefore necessary to examine the applicant's additional submission that the positive obligation required the completion of a "long-term follow-up study"[88] or the applicant's alternative and secondary arguments outlined at [148] above.

169 There has been a violation of Art.8 of the Convention.

VI. Alleged violation of Article 10 of the Convention

170 The applicant also complained about the inadequate provision of information under Art.10 which, in so far as relevant, reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. . . .
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society,

[85] See [53], [55], [57], [59] and [68].
[86] See the letter of April 18, 2005, at [68] above.
[87] See [72] above.
[88] See [146] above.

> in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, ... for preventing the disclosure of information received in confidence, ...".

171 While the applicant acknowledged that the Court had preferred to examine such questions under Art.8 to date, he maintained that as a matter of principle the right to seek access to information was an important and inherent part of the protection of Art.10 of the Convention. The Government did not agree.

172 The Court recalls its conclusion in the *Leander v Sweden* judgment[89] and in the above-cited *Gaskin* case[90] and, more recently, confirmed in the above-cited *Guerra* judgment,[91] that the freedom to receive information "prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him" and that that freedom

> "cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to ... disseminate information of its own motion".

It sees no reason not to apply this established jurisprudence.

173 There has thus been no interference with the applicant's right to receive information as protected by Art.10.

VII. Application of Article 41 of the Convention

174 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

175 As regards pecuniary loss, the applicant considered that the failure to disclose information and the application to him of the s.10 certificate denied him the opportunity to bring proceedings in tort against the MOD armed with the necessary evidence to establish the relevant causal link. Access to the PAT did not assist since the pension system was not an adequate substitute for a civil claim and since the PAT was constrained by the limited evidence available to it which resulted, in turn, from the state's failure to create and properly retain records, to carry our proper short- and long-term monitoring of participants and to commission follow-up work and epidemiological studies. While he did not specify the level of damages sought for this loss of opportunity, he indicated that it represented his loss of earnings due to ill-health resulting from his test participation.

As to his alleged non-pecuniary loss, he claimed to have been denied access to the relevant information for a very long time. This coupled with unsubstantiated assertions by the authorities that no harm was done by the tests only served to cause

[89] *Leander v Sweden* (A/116): (1987) 9 E.H.R.R. 433, at [74].
[90] At [52].
[91] At [53].

him substantial anxiety, stress and uncertainty. He made considerable efforts (medical, political and judicial) to obtain the information over almost 20 years. He did not believe that the r.6 procedure was the answer and, in any event, he maintained that he still had not had access to all information. The finding of violation would not adequately compensate him and he considered that it warranted a substantial award, although he did not specify a sum.

176 The Government recalled, as regards both the pecuniary and non-pecuniary loss alleged, that the applicant had access, at all material times, to a pension scheme (in substitution for a civil action), the PAT and the r.6 procedure. He had obtained information under r.6, his entitlement to a pension remained open and he would obtain a pension if he were to meet the threshold for an award.

177 The Court recalls that it has not found a violation of Art.6 as regards the impugned s.10 certificate. In addition, the Court's finding of a violation was based on the applicant's right per se to information about his test participation independently of any litigation. In any event, it is not possible to speculate as to the applicant's prospects of establishing a causal link between his test participation and ill health had he been provided with an "effective and accessible procedure" giving access to "all relevant and appropriate information".

178 Nonetheless, the Court considers that the applicant must have suffered feelings of frustration, uncertainty and anxiety: the tests concerned substances which, in theory, were military weapons; he had been ill with chronic respiratory problems since 1987 when he began his search for information; he made substantial and determined efforts to obtain this information through various means (medical, political and judicial) over a long period of time; disclosure has been gradual and apparently is not complete.[92] The Court considers that this non-pecuniary loss cannot be compensated solely by the finding of violation.

179 Having regard to awards made in similar cases, the Court awards, on an equitable basis, €8,000, which sum is to be converted into pounds sterling at the date of settlement.

B. Costs and expenses

180 The applicant claimed a total sum (inclusive of value added tax—"VAT") of £100,109.67 in legal costs and expenses for the PAT proceedings and the present application, including the anticipated costs of the hearing before this Court in October 2004.

In particular, he claimed £86,663.84 as regards the present application, including the fees of a solicitor and a trainee solicitor (almost 100 hours work) and of three counsel (including one Q.C.). The legal costs and expenses of the domestic PAT proceedings amounted to £13,445.83, including the fees of a solicitor and trainee (for approximately 40 hours work) and of two counsel (one of whom had not been involved in the present application). The relevant fee notes and vouchers were submitted detailing the costs. The applicant did not claim the costs and expenses of his appeal to the High Court from the PAT since r.28 of the PAT Rules provided that he was entitled to his costs once leave to appeal was granted.

[92] See [161] and [166] above.

181 The Government considered the claims concerning the proceedings before this Court to be excessive. It considered unnecessary the appointment of three counsel (for the present proceedings) and contended that the solicitors' fees should, in any event, have been lower. Certain items of work were vaguely described and counsels' fee rates had not been included. It challenged the necessity for the applicant's lengthy submissions before the Grand Chamber. It maintained that £29,000 would be a reasonable sum in legal costs and expenses for the Convention proceedings. The Government did not comment on the costs and expenses claimed for the PAT proceedings.

182 The Court recalls that only legal costs and expenses found to have been actually and necessarily incurred (in the case of domestic proceedings, in seeking redress for the violations of the Convention found or preventing a violation occurring) and which are reasonable as to quantum are recoverable under Art.41 of the Convention.[93]

183 On the one hand, the present application was of some complexity. It required an examination in a Chamber and in the Grand Chamber including several rounds of observations and an oral hearing. It was adjourned for a number of years pending the applicant's PAT appeal. During the adjournment, the applicant kept the Court informed of progress and thereafter continued the PAT proceedings at the same time as the present application. It is reasonable to accept as necessarily incurred the PAT costs to date (excluding the High Court appeal costs which are not claimed), despite the finding under Art.8 above, given not least that those proceedings have led to disclosure of much documentation as recently as April 2005. Further costs, both in terms of the present application and the PAT proceedings, have been incurred since the date of the oral hearing, the date to which the applicant had estimated his costs and expenses.

184 On the other hand, the Court considers excessive the appointment of three counsel as well as a solicitor (and a trainee solicitor) to the present application and two counsel (together with a solicitor and trainee) to the PAT proceedings. It is not explained why one of the counsel working on the PAT appeal was not involved in the application to this Court: this would have led to some duplication of work. In addition, and as the Government pointed out, certain heads of work in counsels' fee notes are not clearly explained and they have not noted their rates. Moreover, the estimated fees for the hearing before this Court (approximately £37,000 including the travel, accommodation and legal fees of three counsel as well as of a solicitor) are unreasonably high. Furthermore, the applicant's claim under Art.6, which was a significant part of the application, was unsuccessful so that the costs and expenses allowed should be reduced.[94]

185 Making its assessment on an equitable basis, the Court awards the sum of €47,000 in respect of the costs and expenses of the PAT proceedings and the present application (which sum is to be converted into pounds sterling at the rate applicable on the date of settlement and is inclusive of any VAT which may be chargeable) less the legal aid amounts of €3,228.72 already paid by the Council of Europe.

[93] See, e.g. App. No.47679/99, *Stašaitis v. Lithuania*, March 21, 2002, at [102]–[103].
[94] The above-cited *Z*, at [134].

C. Default interest

186 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 3 percentage points.

For these reasons, THE COURT

1. *Holds* by nine votes to eight that there has been no violation of Art.6(1) of the Convention;
2. *Holds* by 16 votes to 1 that there has been no violation of Art.1 of Protocol No.1 to the Convention;
3. *Holds* unanimously that there has been no violation of Art.14 in conjunction with Art.6 and Art.1 of Protocol No.1 to the Convention;
4. *Holds* by 16 votes to 1 that there has been no violation of Art.13 of the Convention in conjunction with Art.6 and Art.1 of Protocol No.1 to the Convention;
5. *Holds* unanimously that there has been a violation of Art.8 of the Convention;
6. *Holds* unanimously that there has been no violation of Art.10 of the Convention;
7. *Holds* unanimously

(a) that the respondent State is to pay the applicant, within three months, the following amounts to be converted into pounds sterling on the date of settlement:
  (i) €8,000 in respect of non-pecuniary damage;
  (ii) €47,000 in respect of costs and expenses (inclusive of any VAT which may be chargeable) less the legal aid amounts of €3,228.72 already paid by the Council of Europe;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus 3 percentage points;

8. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Concurring Opinion of Judges Caflisch and Ress[95]

O-I1 We agree with the present judgment. We agree in particular, regarding the scope of Art.6(1) of the Convention, that the restriction contained in s.10 of the Crown Proceedings Act 1947 barred the applicant from suing the Crown and that it derived from the applicable principles governing the substantive right of action in domestic law.[96]

O-I2 Having reached the above conclusion, the Court has found it unnecessary to dwell on the alternative argument submitted by the Government[97] to the effect that

[95] Paragraph numbers added by the publisher.
[96] See [124] of the judgment.
[97] See [113] of the judgment.

Art.6(1) was not applicable on account of the Court's judgments in *Pellegrin v France*[98] and *R. v Belgium*,[99] which exclude from the scope of that provision cases pertaining to the relationship between the state and state officials engaged in the exercise of public functions. As the Court pointed out in *Pellegrin*,

> "the only disputes excluded from the scope of Article 6 § 1 of the Convention are those which are raised by public servants whose duties typify the specific activities of the public service in so far as the latter is acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities. A manifest example of such activities is provided *by the armed forces* and the police".[100]

O-I3 The present case squarely fits into the above category, which is why we find that the applicant's complaint under Art.6(1) of the Convention must also fail on the basis of the alternative argument put forward by the Government but not examined by the Court.

Dissenting Opinion of Judge Loucaides Joined by Judges Rozakis, Zupancic, Strážnická, Casadevall, Thomassen, Maruste and Traja[101]

O-II1 I am unable to agree with the majority that the applicant had no civil "right" recognised under domestic law which could attract the application of Art.6(1) of the Convention and that as a consequence there has been no violation of that provision. I believe that the applicant in this case had a civil *right* in respect of the tort of negligence, subject to a procedural limitation. I therefore find that Art.6(1) of the Convention is applicable and that, in so far as the applicant was denied access to a court, there has been a violation of the provisions of that Article. I shall set out in detail the reasons for my approach.

O-II2 The basic issue in the case is whether the limitations imposed by s.10 of the Crown Proceedings Act 1947 amount to procedural or other non-substantive restrictions on bringing an action before the British courts in cases such as that of the applicant, or whether they limit the extent of the substantive cause of action with the result that the applicant cannot invoke Art.6 of the Convention because he is not entitled to any civil right. In deciding this issue we have to take into account the domestic law and at the same time bear in mind the autonomous Convention concept of a civil right. In other words, the question is whether the applicant had a cause of action in respect of which he was denied access to a court because of procedural restrictions or whether he did not have a cause of action at all and consequently no question of access to the Court arises in any event under Art.6 of the Convention.

O-II3 Until 1947 no cause of action in tort lay against the state ("the Crown"). Political and social developments appear to have led to a radical change in the situation. Section 2 of the 1947 Act introduced a provision by which the Crown would be subject to liability in tort. However, s.2 was subject to s.10, which provided for different treatment of the armed forces. If members of the armed forces were

[98] Cited above, at [66].
[99] Cited above.
[100] At [66]. Emphasis added.
[101] Paragraph numbers added by the publisher.

injured in the course of their duties, the Crown could not be sued in tort *if* the Secretary of State certified that the death or injury could be treated as attributable to service for the purposes of entitlement to a war pension, the idea being to substitute a no-fault pension system for an action in tort. While the placement of ss.2 and 10 in Pt I of the 1947 Act, entitled "Substantive law", is relevant, it is also pertinent to observe that a cause of action in tort against the Crown could be pursued by a serviceman against the Crown if the Secretary of State did not issue a "s.10 certificate". It must be underlined that s.10 of the 1947 Act was repealed in 1987, allowing armed forces personnel to sue the Crown in tort without any restrictions, but the repeal concerned events post-dating the entry into force of the 1987 Act and clearly does not apply to the applicant's case.

O-II4 Prior to the decision on admissibility in the present case, the High Court[102] found s.10 of the 1947 Act to be incompatible with Art.6 on the ground that it amounted to a procedural bar which was disproportionate.[103] Since the admissibility stage, the Court of Appeal and the House of Lords have overturned the High Court's ruling, finding that s.10 delimited the substantive cause of action so that Art.6 was inapplicable.[104]

O-II5 Consequently, I believe that in deciding whether the fact that the applicant was unable to bring an action against the state for negligence, a possibility afforded to every private individual under the same law, is a procedural or substantive issue, it is useful to bear in mind the approach of the High Court and the House of Lords on this very issue in the *Matthews* case.

O-II6 According to the High Court, the relevant provisions of the 1947 Act did not affect the applicant's right of action but simply prevented him from suing the state for damages on account of a breach of that right. In other words there was a right of action but the remedy was unavailable. In this connection, the court took into account the fact that the applicant was prevented from suing under the provisions in question as a consequence of a decision by the Secretary of State to issue a certificate entitling him to a no-fault pension. The High Court stressed the following on this point:

O-II7 (a) Even working on the assumption that the certificate required by s.10 of the Act as a condition for preventing an action in tort against the state was generally issued as a matter of policy in every case in which the Secretary of State was satisfied that there was a connection between the serviceman's injuries and his service in the armed forces, that did not mean that the Secretary of State responsible for issuing such a certificate could not depart from this policy if he wished to.

O-II8 (b) If the legislature had intended to exclude claims by members of the armed forces, such as the applicant, from the scope of the state's liability in tort and not simply make such liability dependent on certain procedural conditions, it could simply have specified that the provisions regarding tortious liability were not to apply to claims by such persons.[105]

[102] In *Matthews v Ministry of Defence* [2002] EWHC 13, document 6, at [79]–[89].
[103] At [84]–[86] of the judgment.
[104] At [87]–[95] of the judgment.
[105] See [18] and [22].

O-II9 The approach of the House of Lords was that the legislation complained of by the applicant provided for the first time for the State's liability in tort. The legislation in question defined the extent of the cause of action in respect of such acts. Section 10, which prevented the applicant from suing in the circumstances of his case, set a limit on the cause of action, leaving cases such as his outside the scope of such action.

O-II10 Regarding the fact that non-liability for tort in cases such as that of the applicant depended on the issuing of a certificate by the Secretary of State leading to the payment of a pension, a fact on which the High Court relied in finding that the limitation of access to a court in such cases was a procedural bar and not a substantive one, the House of Lords took the view that according to

> "... the realities of the situation ... the Secretary of State does in practice issue a certificate whenever it is (in legal and practical terms) appropriate to do so. He does not have a wide discretion comparable to that of a foreign government in deciding whether or not to waive State immunity".[106]

O-II11 I take it that the House of Lords meant that certification by the Secretary of State in practice was more of a formality rather than a procedure involving the exercise of a substantial discretion.

O-II12 Having considered carefully the legal position before 1947, the 1947 Act and the case law, I am inclined to support the conclusion that we are not dealing here with the exclusion of the right of access to a court on account of the delimitation of the scope of the particular civil tort, but with restrictions on access to the court in respect of a civil right on account of certain conditions of a procedural nature. More specifically, I believe that the tort of negligence for which the applicant seeks judicial redress has a well-established legal basis in the domestic law of the respondent state. Until 1947 it was not actionable against the state. One could argue that until then the state did not have any legal liability because according to the British legal system prevailing at the time, "the King could do not wrong". I do not find this traditional legal fiction sufficiently convincing to have neutralised in terms of the Convention the civil wrong of negligence as far as claims against the State were concerned. It did, however, prevent any action against the State. It should be recalled that whether there is a civil right in any country is not decided exclusively by reference to the domestic law. The courts may examine whether there is a sufficient legal basis for a civil right in the state in question regardless of the domestic conditions or limitations.

O-II13 But even assuming that the State had no liability at all for any tort because "the King could do no wrong", the fact remains that after the 1947 Act the state became liable for torts committed by its public servants. The substantive provisions of this Act do not exclude cases such as that of the applicant from the scope of the state's tortious liability. And here I must say that I agree with the statement in the judgment of the High Court that if the 1947 Act was intended to exclude members of the armed forces from the reforms introduced by ss.1 and 2, then one would have expected a clear provision to the effect that these reforms were not to apply to claims by such persons. In such cases the question whether any particular claim fell

[106] See [92]–[93] of the judgment.

within this category or not would have had to be decided by the courts on the basis of the relevant facts.[107]

O-II14 It is correct that section 10 of the Act provides that the Crown is not subject to liability in tort in respect of acts causing death or personal injury to members of the armed forces *if* certain conditions are satisfied, one of them being that the Secretary of State certifies that the suffering of the relevant injury has been or will be treated as attributable to service for the purposes of entitlement to a pension. The question then arises whether this provision is part of the definition of the relevant civil right, or whether it simply regulates an already existing civil liability through procedural restrictions. I favour the second alternative and in this respect I again subscribe to the approach of the High Court, to which I have already referred.

O-II15 Providing for a condition such as certification by the Secretary of State, rather than defining a series of exceptions and leaving the question of their existence in any particular case to be decided by the courts, lends support to the view that the relevant restriction on the right of access to the court is procedural in nature. In this connection, I believe that it is also pertinent to point out that certification by the Secretary of State also amounts to intervention by the executive, in fact a member of the Government, in the determination of the question whether an individual is qualified to bring an action in the courts for negligence. Given the political status of the Secretary of State, his intervention points to a procedural rather than a substantive limitation on the right to bring an action. This is because holders of political posts are responsible for the formulation of policies and their application and this involves the exercise of substantial discretion. And, as was rightly pointed out by the High Court, the fact that the certificate was generally issued as a matter of policy in every case in which the Secretary of State was satisfied that there was a connection between the serviceman's injuries and his service in the armed forces did not mean that the Secretary of State could not depart from this policy if he wished to. Such a change of policy is illustrated by what was discovered, after the hearing in this case before our Court, in connection with a case similar to that of the applicant.[108]

O-II16 The Secretary of State may issue the certificate in question or he may not. If he is not satisfied that the relevant situation requires such a certificate or, to use the words of the House of Lords, if he finds that it is not appropriate to issue the certificate, people in the applicant's position can sue for the civil wrong of negligence, which already exists. The Secretary of State may not have wide discretion comparable to that of a foreign government in deciding whether or not to waive state immunity, but he certainly does have the possibility or the power to decide each case in one way or another. If he issues the certificate there can be no judicial action. If he does not, people in the applicant's position can bring an action on a legal basis that already exists. Indeed, it is important to stress that in such cases the existing legal basis is the general right to sue the state in tort under s.2 of the Act. No new legal basis is provided for in the absence of the relevant certification and therefore no new legal basis is required. This supports the conclusion that the restrictions regarding members of the armed forces do not fall within the definition

[107] See the case of *Powell and Rayner v United Kingdom*, cited above, concerning the substantive limitation under s.76(1) of the Civil Aviation Act 1982.

[108] See [72] of the judgment; reference is made to this point below.

or delimitation of the general liability of the Crown in tort as introduced by the substantive provisions of the 1947 Act. Furthermore, taking into account the wording of the Act, the distinction made by the High Court between the existence of a right and a remedy is, I believe, correct. The legal basis of the right is there. The remedy is conditional.

O-II17 The certificate by the Secretary of State may in general be issued as a matter of course. Nevertheless, it may not be issued and the assumed nature of certification does not strengthen the respondent Government's case any further. Admittedly, the *Fogarty* case regarding immunities differs from the present case. But even a claim for immunity is in practice generally a formal claim before the courts. Embassies issue certificates claiming diplomatic or state immunities even for non-payment of their diplomats' debts, and such certificates are issued as a matter of course.

O-II18 What is also important in this respect is the fact that after the hearing before the Court in the present case it was discovered that according to legal advice given by the Treasury Solicitor to the Ministry of Defence in 1953 concerning another test participant in the same position as the applicant, s.10 of the Crown Proceedings Act 1947 was not applicable and its provisions could not therefore protect the Crown or the Minister from liability. As a consequence of that, the Secretary of State has decided that he will no longer "take a section 10(1) point of view" in any civil action brought by the applicant. So it appears that in the present case there were two contradictory approaches regarding the exclusion of Crown liability by virtue of s.10 of the 1947 Act. This is an additional strong argument in support of the position that s.10 certificates were not granted as a matter of course. The Secretary of State may exercise his or her discretion in one way or another through an assessment of the situation on the basis of the same facts. This is strongly indicative of a procedural limitation on the right of access to a court in respect of the claim. It certainly seems to undermine the view expressed by the House of Lords and the Government that the exercise of discretion in issuing s.10 certificates is not substantial. On the contrary, it appears from these new facts that the Secretary of State in issuing a certificate is making an assessment or appraisal of the situation that goes beyond the mere finding of fact or the verification of the fulfilment of certain legal conditions. It has been demonstrated that the same situation may be assessed in two different, contradictory ways. The political status of the Secretary of State and the nature of the conditions that he has to consider when deciding whether or not to issue a certificate ("... if [the] suffering ... has been or will be treated as attributable to service ...".) do play a role in such an assessment.

O-II19 But, being concerned with human rights, we must not lose sight of the demands of the rule of law which formed a basis for the acceptance of a right of access to a court. The rule of law requires that individuals should be allowed to have their civil rights examined by independent judicial institutions. This applies a fortiori to claims against the State. In such cases we must adopt a more liberal approach or interpretation of the legal situation so as to allow room for the right of access to a court rather than lean towards the extinction of, or the creation of absolute bars to, such a right—if, of course, there is a reasonable opportunity to do so. And in this case I believe that there is such an opportunity.

O-II20 The raison d'être of the restrictions on the relevant right of the members of the armed forces in the present case has ceased to exist since 1987. This is a factor to be taken into consideration, both in support of my position that the restrictions in question did not limit that right and in support of the conclusion that as such restrictions were procedural, they could not be considered proportionate to the aim pursued. On this subject I again fully subscribe to the reasoning of the High Court.[109]

O-II21 Finally, I must state that I do not agree with the argument made by the Government[110] to the effect that Art.6(1) is inapplicable on account of the Court's judgments in *Pellegrin v France*[111] and *R. v Belgium*.[112] My disagreement is based on precisely the same reasons as those set out by the Court of Appeal in the *Matthews* case.[113] Furthermore, I note that the Ministry of Defence did not raise this argument before the House of Lords in that case.

O-II22 In view of my finding regarding the violation of Art.6 of the Convention, I do not think that it is necessary to deal with the complaint concerning Art.1 of Protocol No.1.

Dissenting Opinion of Judge Zupančič[114]

O-III1 In decisional terms I follow the nuanced approach of Judge Loucaides's dissent in which he, on balance, opts for the *procedural* perspective.

O-III2 In conceptual terms, however, I find it difficult to accept that the issue should depend on the somewhat fictional distinction between what is "procedural" and what is "substantive". However, this artificial separation of "procedural" and "substantive" has been maintained and further built upon by our own case law. Article 6 and its precedential progeny such as "access to court" derive from an unconscious, or at any rate unstated, underlying premise.

O-III3 The premise is that the procedure is a mere ancillary and adjective means, a transmission belt, to bring about the substantive rights.

O-III4 At its inception it perhaps made political sense that an international instrument such as the European Convention on Human Rights should attempt to limit its effect to what was seen as a mere procedural means. The establishment of a substantive right would then, at least seemingly, remain in the sovereign domain of the domestic law. With time, however, this imagined tectonic boundary between what is substantive and what is "merely" procedural has developed into a seismic fault line. It generates hard cases, as the split in the vote demonstrates, which make bad law. In a case, moreover, where the executive is given the discretion to interfere with access to court, we face a checks-and-balances (separation of powers) issue typically to be resolved by a domestic constitutional judicial body.

O-III5 It is ironic that we should, precisely in British cases, build on the distinction between what is procedural and what is substantive. While the Continental legal systems have, for historical reasons, traditionally maintained the strictness of the

[109] See [38]–[43] of its judgment and [86] of our judgment.
[110] Judgment at [113].
[111] Cited above, at [66].
[112] Cited above.
[113] See [88] of the judgment.
[114] Paragraph numbers added by the publisher.

distinction, it is precisely the common law system which has always considered the right and the remedy to be interdependent.[115] Is the remedy something "substantive"? Or is it "procedural"? Is the legal fiction "the Crown can do no wrong"—and the consequent blocking of action (immunity)—merely procedural? Or has the substantive right of the plaintiff simply been denied? As we move from one British case to another the dilemma appears in cameo.

O-III6 It is becoming clear that we need to resort back to common sense. Despite the slender majority's vote to the contrary, it is easy to maintain that any immunity from any suit is a *procedural* block. On the other hand, we are aware that both the intent and the effect of such an immunity is to deny one of the most logically compelling *substantive* claims in law. What then is a right? Is it not true that a "right"—including a "human right"—becomes something legally relevant, paradoxically, only when it is alleged to have been denied? Philosophers and politicians may have the luxury of being able to speak of rights deontologically and in abstracto. In law, however, it is the adversary procedural context which makes the substantive rights come out in the open, i.e. exist. The right appears on the legal horizon when an infringed interest of a legal subject is procedurally asserted and the remedy actively pursued. A non-vindicated right is mere hypothetical abstraction.

O-III7 Human relations in society may be saturated with all kinds of potential rights. Nevertheless, in most cases they remain unasserted either because they are not violated in the first place or because the aggrieved person omits to pursue them procedurally. Moreover, a right without a remedy is a simple recommendation ("natural obligation"). It follows that a right is doubly dependent on its concomitant remedy. If the remedy does not exist a right is not a right; if the remedy is not procedurally pursued the right will not be vindicated. The right and its remedy are not only interdependent. They are consubstantial.

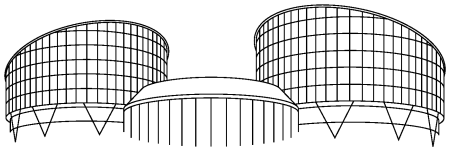
O-III8 To speak of rights as if they existed apart from their procedural context is artificially—say for pedagogical, theoretical or nomotechnical reasons—to separate what in practical terms is inseparable. A substantive right is not a mirror image of its procedural remedy.

O-III9 A substantive right *is* its remedy.

O-III10 It is ironic that so often common sense and common law should come into direct collision. It is doubly ironic that the majority should speak of avoiding mere appearances and sticking to realities[116] when the distinction the judgment is built upon is pure legal fiction. We may have muddled through another case but the underlying false premise remains. The dilemma is certain to come back.

O-III11 The way to address this dilemma is, obviously, to cease subscribing to the false premise. It is difficult to address this in the abstract. However, at least in cases in which the fault-line is potentially decisive, where it collides with justice and common sense, since we are a Court of Human Rights, we should opt for an autonomous meaning of "substantive due process". Intellectual honesty demands no less.

[115] See more extensively, *Zupančič*, "Adjudication and the Rule of Law" (2003) 5 *European Journal of Law Reform* 23–125.
[116] See [121] of the judgment.



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

TROISIÈME SECTION

AFFAIRE ROŞIIANU c. ROUMANIE

(Requête n° 27329/06)

ARRÊT

STRASBOURG

24 juin 2014

Cet arrêt deviendra définitif dans les conditions définies à l'article 44 § 2 de la Convention. Il peut subir des retouches de forme.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

En l'affaire Roşiianu c. Roumanie,

La Cour européenne des droits de l'homme (troisième section), siégeant en une chambre composée de :

Josep Casadevall, *président,*
Alvina Gyulumyan,
Ján Šikuta,
Luis López Guerra,
Johannes Silvis,
Valeriu Griţco,
Iulia Antoanella Motoc, *juges,*
et de Santiago Quesada, *greffier de section,*

Après en avoir délibéré en chambre du conseil le 3 juin 2014,

Rend l'arrêt que voici, adopté à cette date :

PROCÉDURE

1. À l'origine de l'affaire se trouve une requête (n° 27329/06) dirigée contre la Roumanie et dont un ressortissant de cet État, M. Ioan Romeo Roşiianu (« le requérant »), a saisi la Cour le 4 juillet 2006 en vertu de l'article 34 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales (« la Convention »).

2. Le requérant a été représenté par M^e^ D. Hătneanu, avocate à Bucarest. Le gouvernement roumain (« le Gouvernement ») a été représenté par son agente, M^me^ C. Brumar, du ministère des Affaires étrangères.

3. Le requérant allègue en particulier que le refus du maire de Baia Mare de mettre à exécution des décisions définitives de justice lui ordonnant de communiquer au requérant des informations à caractère public s'analyse en une ingérence dans sa liberté d'expression qui, d'une part, ne poursuit aucun but légitime et, d'autre part, qui n'est pas nécessaire dans une société démocratique et en une méconnaissance de son droit à un tribunal. Il invoque les articles 6 et 10 de la Convention.

4. Le 26 juin 2012, la requête a été communiquée au Gouvernement.

EN FAIT

I. LES CIRCONSTANCES DE L'ESPÈCE

5. Le requérant est né en 1969 et réside à Baia Mare.

6. À l'époque des faits, le requérant était depuis six ans le présentateur d'une émission de télévision diffusée sur une chaîne locale à Baia Mare

portant, entre autres, sur la question de l'utilisation des fonds publics par la mairie. En janvier 2005, l'émission du requérant fut arrêtée et celui-ci licencié. Son émission fut remplacée immédiatement par une autre émission financée par la mairie, portant sur les activités de cette autorité publique.

7. Aux fins de l'exercice de sa profession, le requérant fit des démarches auprès du maire de la ville de Baia Mare pour obtenir la communication de plusieurs informations à caractère public. Ses demandes étaient fondées sur les dispositions de la loi n° 544/2001 relative au libre accès aux informations à caractère public (ci-après « loi n° 544/2001 »).

8. Ainsi, le 8 février 2005, le requérant demanda au maire de Baia Mare de lui communiquer une série d'informations à caractère public concernant les déplacements sur le territoire national et à l'étranger des fonctionnaires de la mairie, les contrats de publicité souscrits par la mairie, les frais occasionnés par l'organisation de diverses fêtes publiques et leur mode d'organisation, les frais liés à la maintenance des véhicules de la mairie et les communications téléphoniques ainsi que la participation du maire aux conseils d'administration ou aux assemblées générales des actionnaires de différentes sociétés commerciales. Les informations concernant les contrats de publicité et les communications téléphoniques étaient demandées pour les périodes pré et post-électorales.

9. Le 28 février 2005, le requérant formula une nouvelle demande d'informations à caractère public auprès du maire de Baia Mare concernant principalement les échanges de terrains et d'espaces commerciaux réalisés par la mairie, les exonérations de dettes de sociétés commerciales à capital privé, les investissements réalisés par la mairie et la gestion des biens lui appartenant ainsi que des informations concernant l'affiliation des fonctionnaires de la mairie à des partis politiques. Cette demande concernait les informations couvrant la période commençant lors du premier mandat du maire.

10. Le 9 mai 2005, le requérant formula une troisième demande d'informations à caractère public auprès du maire de Baia Mare. Elle concernait principalement les rémunérations versées au maire en sa qualité de membre du conseil d'administration de sociétés commerciales et de régies autonomes subordonnées à la mairie, les différentes primes versées aux fonctionnaires de la mairie, les sociétés commerciales à capital privé s'étant vu attribuer des contrats publics, l'organisation des marchés publics, les dettes de la mairie, les fonds non remboursables dont elle avait bénéficié ainsi que les sommes attribuées par la mairie pour l'entretien des routes, la salubrité, le déneigement et pour d'autres activités similaires.

11. Le maire répondit au requérant par des lettres des 17 mars, 11 avril et 16 juin 2005. Dans ces lettres, le maire répondit de manière laconique en renvoyant à de nombreuses annexes.

12. Estimant que les lettres susmentionnées ne contenaient pas des réponses adéquates à ses demandes d'information, le requérant saisit le tribunal administratif de trois actions séparées tendant à la condamnation du maire à lui communiquer lesdites informations et au versement des dommages-intérêts.

13. Au cours des procédures, le maire soutint qu'il avait répondu aux demandes d'informations du requérant et insista sur la complexité des informations sollicitées et le travail important requis de la part de la mairie pour y répondre dans un délai pertinent.

14. Par trois décisions définitives distinctes des 14 septembre 2005, 2 mars 2006 et 20 mars 2006, la cour d'appel de Cluj accueillit les actions du requérant et condamna le maire à lui communiquer la grande majorité des informations demandées. Pour ce faire, la cour d'appel nota qu'en vertu de l'article 10 de la Convention et de la loi n° 544/2001 relative au libre accès aux informations à caractère public, le requérant avait le droit d'obtenir lesdites informations qu'il entendait utiliser dans l'exercice de son activité de journaliste. Or, les lettres envoyées par le maire ne constituaient pas des réponses adéquates à ces demandes.

15. Par les décisions des 14 septembre 2005 et 2 mars 2006, la cour d'appel de Cluj condamna également le maire à verser au requérant 1 000 lei (RON) (environ 276 euros (EUR)) et 1 500 RON (environ 426 EUR) respectivement, à titre de préjudice moral. Pour ce faire, elle nota que le requérant avait été entravé dans ses activités de recherche du fonctionnement d'une autorité publique et d'information des citoyens à cet égard. Par la méconnaissance de son droit au libre accès à des informations à caractère public, le requérant avait été dans l'impossibilité d'exercer sa profession de journaliste selon ses propres critères. Enfin, le fait qu'il avait été contraint de s'adresser à la justice afin de faire valoir son droit, la frustration et la conscience de son impuissance face à cette situation attestaient de la souffrance subie par celui-ci. Dans sa décision du 14 septembre 2005, la cour d'appel de Cluj nota en particulier que le refus du maire de lui fournir les informations sollicitées équivalait à la mise à néant du droit de recevoir et de communiquer des informations, droit garanti par l'article 10 de la Convention.

16. Par la décision du 20 mars 2006, la cour d'appel de Cluj refusa en revanche d'accorder un dommage moral. Pour cela, elle prit en compte le volume important des informations sollicitées par le requérant qui exigeaient une réponse détaillée de la part du maire.

17. Le requérant demanda l'exécution forcée des décisions pour ce qui était du dommage moral, mais le maire refusa d'obtempérer. Ce n'est que plusieurs mois plus tard que le conseil municipal envoya à l'huissier de justice les sommes couvrant le dommage moral.

18. S'agissant de la première décision définitive du 14 septembre 2005, le requérant saisit les tribunaux nationaux d'une action visant à la condamnation du maire à exécuter ladite décision dans sa partie concernant la communication des informations et le paiement d'une amende civile. Par une décision définitive du 26 avril 2006, le tribunal départemental de Maramureş accueillit l'action du requérant et condamna le maire à exécuter la décision définitive du 14 septembre 2005 et à verser une amende civile de 2 816 RON (environ 800 EUR). Le tribunal constata que le 12 décembre 2005, le maire avait invité le requérant à retirer des photocopies de plusieurs documents totalisant 402 pages, après paiement des taxes, conformément aux dispositions légales (paragraphe 25 ci-dessous), mais qu'il s'agissait en réalité de documents disparates contenant des informations susceptibles d'interprétations diverses, ce qui ne pouvait en aucun cas s'analyser comme une exécution de la décision susmentionnée.

19. Le 28 novembre 2005, le requérant déposa également une plainte pénale contre le maire du chef d'abus d'autorité contre les particuliers au motif que celui-ci avait refusé de lui communiquer les informations sollicitées. Il compléta sa plainte ultérieurement du chef de détournement de fonds et abus d'autorité contre l'intérêt public au motif que la somme de 1 000 RON (environ 276 EUR) due à titre du dommage moral lui avait été versée par le conseil municipal et non par le maire.

20. Les 8 et 16 décembre 2005, 17 et 21 mars et 9 juin 2006, le maire envoya des lettres au requérant l'invitant à retirer auprès de la mairie, après le paiement des frais des photocopies, différents documents totalisant plusieurs milliers de pages, en réponse à chacune de ses trois demandes d'information. Ces lettres sont produites au dossier de la présente requête par le Gouvernement, mais sans les documents auxquels elles renvoient. Le contenu de ces documents n'est pas non plus précisé.

21. Le 28 mars 2006, le procureur ouvrit des poursuites pénales contre le maire du chef d'abus d'autorité contre les particuliers. Néanmoins, par une décision du 18 août 2006, le parquet clôtura la procédure pénale et condamna le maire au paiement d'une amende administrative de 800 RON (environ 227 EUR). Il estima que le maire avait méconnu ses obligations, en ne répondant que le 9 juin 2006 à la demande du requérant auquel il avait envoyé une lettre avec plusieurs annexes. Toutefois, le retard s'expliquait par la complexité des informations sollicitées par le requérant qui impliquaient une charge de travail importante pour les fonctionnaires de la mairie. Cette décision fut confirmée, sur recours du requérant, par le procureur en chef du parquet, le 25 septembre 2006.

22. Le 7 février 2007, un huissier de justice somma, à la demande du requérant, le maire de Baia Mare d'exécuter la décision de la cour d'appel du 2 mars 2006, dans sa partie concernant la transmission d'informations à caractère public, mais en vain.

23. D'après les informations fournies par le requérant, les décisions définitives de la cour d'appel de Cluj sont demeurées inexécutées, malgré ses nombreuses démarches.

II. LE DROIT ET LA PRATIQUE INTERNES PERTINENTS

A. La Constitution

24. L'article pertinent de la Constitution de la Roumanie est ainsi libellé :

Article 31
Le droit à l'information

« (1) Le droit de la personne d'avoir accès à toute information à caractère public ne peut être limité.

(2) Les autorités publiques, conformément aux compétences qui leur incombent, sont tenues d'assurer l'information correcte des citoyens au sujet des affaires publiques et des affaires à caractère personnel.

(3) Le droit à l'information ne doit pas porter préjudice aux mesures de protection des jeunes gens ou à la sécurité nationale.

(4) Les media, publics et privés, sont tenus d'assurer l'information correcte de l'opinion publique.

(5) Les services publics de la radio et de la télévision sont autonomes. Ils doivent garantir aux groupes sociaux et politiques importants l'exercice du droit à l'antenne. L'organisation desdits services et le contrôle parlementaire de leur activité sont réglementés par une loi organique. »

B. La loi n° 544/2001 relative au libre accès aux informations à caractère public

25. L'information à caractère public est définie par la loi, notamment comme toute information concernant les activités ou résultant des activités d'une autorité publique (article 2). La loi prévoit le droit de toute personne de demander et d'obtenir auprès des autorités publiques le libre accès aux informations à caractère public (article 6). L'autorité publique doit répondre à une demande dans un délai de dix jours, sauf pour les demandes complexes pour lesquelles le délai est de trente jours (article 7). Si la communication d'informations requiert la transmission de photocopies de documents, les frais de reproduction incombent à la personne sollicitant les informations (article 9). Les personnes qui effectuent des études ou des recherches à titre personnel ou à titre professionnel, ont libre accès à la documentation des autorités publiques, sur simple demande (article 11).

C. La pratique des juridictions nationales

26. Les tribunaux internes ont estimé que le délai de trente jours prévu par la loi pour répondre à une demande d'information est impératif et que les autorités publiques sont censées organiser leurs services de manière à ce que ce délai soit respecté, indifféremment du volume des informations sollicitées (cour d'appel de Bucarest, arrêt n° 76 du 3 février 2003). Les tribunaux ont également estimé que les autorités publiques ne peuvent pas soumettre l'accès aux informations à caractère public à la condition de l'existence de rapports d'activité annuels centralisant les différentes données statistiques (cour d'appel de Bucarest, arrêt n° 203 du 9 février 2006). Il appartient aux autorités publiques de traiter et de conserver l'information de manière adéquate et dans un délai raisonnable dans leurs bases de données de sorte qu'elle soit accessible aux intéressés (cour d'appel de Bucarest, arrêt n° 2389 du 15 novembre 2010). La publicité d'une certaine information sur le site internet d'une autorité (cour d'appel de Bucarest, arrêt n° 203 du 9 février 2006 ; cour d'appel de Timişoara, arrêt n° 319 du 4 mars 2009) ou le versement d'un document contenant une certaine information dans le cadre d'une procédure judiciaire parallèle (cour d'appel de Ploieşti, arrêt n° 232 du 11 février 2009) n'exonère pas une autorité publique de l'obligation de communiquer cette même information à la personne intéressée.

EN DROIT

I. OBSERVATION PRÈLIMINAIRE

27. Dans la présente affaire, le requérant dénonce l'inexécution de trois décisions de justice définitives ordonnant au maire de Baia Mare de lui communiquer des informations à caractère public. Il estime que cette situation constitue à la fois une méconnaissance de son droit à un tribunal et en une ingérence dans sa liberté d'expression. Il invoque les articles 6 et 10 de la Convention à l'appui de ses griefs.

28. Le Gouvernement estime que l'essentiel de la présente affaire concerne la méconnaissance alléguée du droit du requérant à la réception des informations, droit que celui-ci a entendu faire protéger par les tribunaux nationaux et que ces derniers ont expressément cité dans leurs décisions. En conséquence, il considère que les allégations du requérant devraient être examinées uniquement sous l'angle de l'article 10 de la Convention qui garantit le droit à la liberté d'expression.

29. Invoquant l'affaire *Kenedi c. Hongrie* (n° 31475/05, arrêt du 26 mai 2009), concernant la non-exécution d'une décision de justice ordonnant à une autorité publique de donner accès au requérant, historien, à des informations pour ses recherches, le requérant estime que ses griefs tirés des articles 6 et 10 de la Convention devraient être examinés séparément.

30. La Cour estime que, dans les circonstances de l'espèce, les griefs du requérant doivent faire l'objet d'un examen sous l'angle à la fois de l'article 6 et de l'article 10 de la Convention. En effet, s'il est vrai qu'en l'espèce l'exécution des décisions définitives est essentielle pour la protection de la liberté d'expression garantie par l'article 10 de la Convention, la question préalable qui doit être examinée, à savoir celle du droit du requérant à un accès à un tribunal, relève de l'article 6 de la Convention. Ce grief diffère donc par nature de celui présenté en vertu de l'article 10 et doit être considéré séparément (voir, pour une situation similaire, *Kenedi* précité, §§ 35-45).

II. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 6 § 1 DE LA CONVENTION

31. Le requérant se plaint de l'inexécution des trois décisions de justice définitives ordonnant au maire de Baia Mare de lui communiquer des informations à caractère public, cela en méconnaissance de l'article 6 § 1 de la Convention, ainsi libellé dans ses parties pertinentes :

> « Toute personne a droit à ce que sa cause soit entendue (...) par un tribunal (...), qui décidera (...) des contestations sur ses droits et obligations de caractère civil (...) »

A. Sur la recevabilité

32. Le Gouvernement excipe en premier lieu d'une incompatibilité *ratione materiae* du grief. Renvoyant en particulier à l'affaire *Geraguyn Khorhurd Patgamavorakan Akumb c. Armenie* ((dec.), n° 11721/04, 14 avril 2009), il soutient que le requérant avait sollicité des informations électorales dans le contexte des élections locales de 2004, informations auxquelles l'accès était garanti par la législation électorale. Dans ces conditions, aux yeux du Gouvernement, le requérant entendait exercer une fonction publique visant à la publicité des élections et à l'information des citoyens sur les activités des élus pendant leurs mandats. En conséquence, l'issue des procédures judiciaires n'était pas déterminante pour un quelconque droit de nature privé, mais pour l'exercice de sa fonction publique de « chien de garde » des réalités publiques.

33. Le requérant soutient que les décisions de justice dont il a demandé l'exécution portaient sur l'accès aux informations, qui selon la jurisprudence de la Cour (*Kenedi* précité, §§ 33-34 ; *Shapovalov c. Ukraine*, n° 45835/05, §§ 48-49, 31 juillet 2012, et, *mutatis mutandis*, *Youth Initiative for Human*

Rights c. Serbie, n° 48135/06, § 20, 25 juin 2013) constitue un droit civil au sens de l'article 6 § 1 de la Convention. Il souligne qu'il a sollicité les informations litigieuses dans le but d'exercer sa profession de journaliste et d'informer le public sur les activités de la mairie de Baia Mare. Son droit d'accès à ces informations était garanti par le droit national et reconnu par les juridictions roumaines.

34. La Cour note que, dans la présente affaire, le requérant est un journaliste qui a demandé l'accès à des informations publiques dans le but d'exercer sa profession et d'informer le public sur les activités de la mairie de Baia Mare. Dans ces conditions, les procédures engagées devant les tribunaux nationaux étaient donc déterminantes pour ses intérêts privés et professionnels découlant de son droit à la liberté d'expression. Non seulement l'accès du requérant à de telles informations était garanti par la loi n° 544/2001 relative au libre accès aux informations à caractère public, mais il a été de surcroît reconnu par les juridictions nationales. Le fait que deux de ses questions (paragraphe 8 *in fine* ci-dessus) concernaient des périodes pré et post-électorales, ne saurait exclure l'intérêt privé et professionnel du requérant pour les informations en cause (*Shapovalov* précité, § 49).

35. Dans ces conditions, la Cour considère que le droit d'accès du requérant à certaines informations faisait bien partie en l'espèce du droit à la liberté d'expression, tel que garanti par l'article 10 de la Convention, qui est un « droit civil » au sens de l'article 6 § 1 de la Convention. Il convient dès lors de rejeter l'exception d'irrecevabilité *ratione materiae* soulevée par le Gouvernement.

36. Par ailleurs, la Cour constate que ce grief n'est pas manifestement mal fondé au sens de l'article 35 § 3 a) de la Convention et qu'il ne se heurte à aucun autre motif d'irrecevabilité. Il convient donc de le déclarer recevable.

B. Sur le fond

1. Arguments des parties

37. Le requérant soutient qu'en dépit de ses nombreuses démarches, le maire de Baia Mare n'a pas exécuté les décisions de justice lui enjoignant de communiquer certaines informations à caractère public. Il souligne d'abord que les documents mis à sa disposition par le maire ne représentent pas une exécution desdites décisions. Il insiste à cet égard sur la différence entre l'accès aux documents et l'accès à l'information. Il met en exergue ainsi la différence entre, d'une part, les informations sollicitées que le maire seul pouvait produire et, d'autre part, les milliers des pages de documents pour lesquels il devait acquitter les frais de reproduction et auxquels il aurait pu avoir accès sur la base de la même loi n° 544/2001.

Il allègue de surcroît qu'il n'est pas opportun de demander à un individu, qui a obtenu une créance contre l'État à l'issue d'une procédure judiciaire, d'engager par la suite une procédure d'exécution forcée afin d'obtenir satisfaction ; c'est à l'autorité en question qu'il appartient de jouer un rôle actif dans la mise à exécution de la créance. Le volume important de travail qu'exigerait l'exécution des décisions de justice, qui n'a été d'ailleurs invoqué par le maire qu'après l'adoption des décisions susmentionnées, ne saurait, à ses yeux, constituer un motif pour refuser l'accès à des informations à caractère public. D'ailleurs ce motif ne figure pas parmi ceux mentionnés dans la Constitution ou dans la loi n° 544/2001. Enfin, le requérant estime que son grief est similaire à celui que la Cour a examiné dans l'affaire *Kenedi*, précitée.

38. Le Gouvernement soutient que les décisions litigieuses ont été exécutées.

2. Appréciation de la Cour

39. La Cour rappelle que l'exécution d'un jugement ou d'un arrêt, de quelque juridiction que ce soit, doit être considérée comme faisant partie intégrante du « procès » au sens de l'article 6 de la Convention. Le droit à un tribunal serait illusoire si l'ordre juridique interne d'un État contractant permettait qu'une décision judiciaire définitive et obligatoire reste inopérante au détriment d'une partie (*Immobiliare Saffi c. Italie* [GC], n° 22774/93, § 63, CEDH 1999-V).

40. Dans la présente affaire, le requérant a obtenu trois décisions judiciaires définitives prescrivant au maire de Baia Mare de lui communiquer certaines informations à caractère public.

41. Les parties divergent quant au point de savoir si ces décisions ont été exécutées ou non. Le Gouvernement soutient que le maire a informé le requérant qu'il pouvait retirer plusieurs documents contre le paiement des taxes correspondant aux frais de reproduction. Il renvoie à cet effet aux lettres des 8 et 16 décembre 2005, 17 et 21 mars et 9 juin 2006 (paragraphe 20 ci-dessus). Le requérant, pour sa part, expose que les décisions en question sont restées inexécutées à ce jour. Il souligne d'abord que les documents mis à sa disposition par le maire ne représentent pas une exécution desdites décisions. Il insiste à cet égard sur la différence entre l'accès aux documents et l'accès à l'information. Il met en exergue ainsi la différence entre, d'une part, les informations sollicitées que le maire seul pouvait produire et, d'autre part, les milliers de pages de documents pour lesquels il devait acquitter les frais de reproduction et auxquels il aurait pu avoir accès de toute manière sur la base de la même loi n° 544/2001.

42. La Cour note que les tribunaux internes ont conclu que l'invitation adressée au requérant afin de retirer des photocopies de plusieurs documents disparates contenant des informations susceptibles d'interprétations diverses, ne pouvait en aucun cas s'analyser comme une exécution d'une

décision judiciaire ordonnant la communication d'information à caractère public (paragraphe 18 ci-dessus). Il apparaît en outre que cette approche s'inscrit dans la ligne de la jurisprudence interne (paragraphe 26 ci-dessus).

43. Dans ces conditions, la Cour estime que les lettres susmentionnées ne satisfaisaient pas à une exécution adéquate des décisions judiciaires. Qui plus est, la Cour n'est pas en mesure de déterminer si les documents auxquels ces lettres renvoient contiennent les informations sollicitées par le requérant, faute pour le Gouvernement d'avoir versé lesdits documents au dossier de la présente requête ou d'en envoyer un résumé.

44. La Cour admet que le droit d'accès à un tribunal ne peut obliger un État à faire exécuter chaque jugement de caractère civil quel qu'il soit et quelles que soient les circonstances (*Sanglier c. France*, n° 50342/99, § 39, 27 mai 2003). Cependant, elle note que l'autorité en cause dans la présente affaire fait partie de l'administration municipale, qui constitue un élément de l'État de droit, son intérêt s'identifiant avec celui d'une bonne administration de la justice. Or, si l'administration refuse ou omet de s'exécuter, ou encore tarde à le faire, les garanties de l'article 6 dont a bénéficié le justiciable pendant la phase judiciaire de la procédure perdent toute raison d'être (*Hornsby c. Grèce*, 19 mars 1997, § 41, *Recueil des arrêts et décisions* 1997-II).

45. De plus, il n'est pas opportun de demander à un individu, qui a obtenu une créance contre l'État à l'issue d'une procédure judiciaire, de devoir par la suite engager une procédure d'exécution forcée afin d'obtenir satisfaction (*Metaxas c. Grèce*, n° 8415/02, § 19, 27 mai 2004). Néanmoins, en l'espèce, le requérant a exercé plusieurs démarches en vue de l'exécution des décisions judiciaires, en demandant l'infliction d'une amende au maire, en déposant une plainte pénale et en demandant même l'exécution forcée d'une des décisions auprès d'un huissier de justice.

De plus, la Cour observe que les motifs que l'administration aurait pu invoquer afin de justifier une impossibilité objective d'exécution n'ont jamais été portés à la connaissance du requérant par le biais d'une décision administrative formelle (*Sabin Popescu c. Roumanie*, n° 48102/99, § 72, 2 mars 2004).

46. Ces éléments suffisent à la Cour pour conclure que, dans la présente affaire, en refusant d'exécuter les décisions judiciaires définitives ordonnant la communication d'informations à caractère public au requérant, les autorités nationales l'ont privé d'un accès effectif à un tribunal.

47. Par conséquent, il y a lieu de conclure à la violation de l'article 6 § 1 de la Convention.

III. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 10 DE LA CONVENTION

48. Le requérant soutient que l'inexécution des trois décisions de justice définitives ordonnant au maire de Baia Mare de lui communiquer des informations à caractère public constitue de surcroît une violation de l'article 10 de la Convention, ainsi libellé :

> « 1. Toute personne a droit à la liberté d'expression. Ce droit comprend la liberté d'opinion et la liberté de recevoir ou de communiquer des informations ou des idées sans qu'il puisse y avoir ingérence d'autorités publiques et sans considération de frontière. Le présent article n'empêche pas les États de soumettre les entreprises de radiodiffusion, de cinéma ou de télévision à un régime d'autorisations.
>
> 2. L'exercice de ces libertés comportant des devoirs et des responsabilités peut être soumis à certaines formalités, conditions, restrictions ou sanctions prévues par la loi, qui constituent des mesures nécessaires, dans une société démocratique, à la sécurité nationale, à l'intégrité territoriale ou à la sûreté publique, à la défense de l'ordre et à la prévention du crime, à la protection de la santé ou de la morale, à la protection de la réputation ou des droits d'autrui, pour empêcher la divulgation d'informations confidentielles ou pour garantir l'autorité et l'impartialité du pouvoir judiciaire. »

A. Sur la recevabilité

1. Sur la qualité de victime et l'application de l'article 37 §§ 1 b) et c) de la Convention

49. Le Gouvernement soutient en premier lieu que le requérant ne peut se prétendre victime d'une violation de l'article 10 de la Convention et que la requête doit être rayée du rôle de la Cour au motif que le litige a été résolu et qu'il ne se justifie plus de poursuivre l'examen de la requête pour tout autre motif. Il invoque à l'appui les articles 34 et 37 § 1 b) et c) de la Convention. À cet effet, le Gouvernement souligne que les tribunaux nationaux, dans leurs décisions définitives des 14 septembre 2005 et 2 et 20 mars 2006, ont reconnu la violation des droits garantis par l'article 10 de la Convention et ont, en outre, accordé au requérant une réparation adéquate et suffisante consistant dans l'injonction faite au maire de lui communiquer les informations sollicitées et dans un dédommagement moral ainsi que dans l'amende infligée au maire. De plus, après l'adoption de ces décisions de justice, le maire a informé le requérant qu'il pouvait retirer les informations en question contre le paiement des taxes correspondant aux frais de reproduction.

50. Le requérant estime qu'il est toujours victime d'une violation de l'article 10 de la Convention, étant donné que les décisions de justice mentionnées par le Gouvernement sont restées inexécutées à ce jour. Il expose également que le dédommagement moral ne constitue qu'une réparation complémentaire par rapport à l'injonction de communiquer les informations sollicitées et qu'en tout état de cause, il n'a été accordé que

dans deux des trois procédures engagées. En outre, l'amende infligée au maire n'était pas une réparation à son égard, mais une somme versée à l'État.

Enfin, le requérant soutient que, eu égard à sa profession et aux contraintes temporelles du travail journalistique, seule une communication rapide des informations mentionnées par les trois décisions de justice définitives aurait constitué une véritable exécution de celles-ci.

51. S'agissant de la qualité de victime du requérant, la Cour rappelle que, selon sa jurisprudence constante, par « victime » l'article 34 désigne la personne directement concernée par l'acte ou l'omission litigieux, l'existence d'un manquement aux exigences de la Convention se concevant même en l'absence de préjudice et que, pour qu'un requérant puisse se prétendre victime d'une violation, il faut, non seulement, qu'il ait la qualité de victime au moment de l'introduction de la requête, mais que celle-ci subsiste au cours de la procédure devant la Cour (*Stoicescu c. Roumanie* (révision), n° 31551/96, § 55, 21 septembre 2004).

52. La Cour rappelle également qu'aux termes de l'article 37 §§ 1 b) et c) de la Convention, elle peut, « [à] tout moment de la procédure, (...) décider de rayer une requête du rôle lorsque les circonstances permettent de conclure (...) b) que le litige a été résolu (...) et c) que, pour tout autre motif dont la Cour constate l'existence, il ne se justifie plus de poursuivre l'examen de la requête ». Pour pouvoir conclure à l'applicabilité dans le cas d'espèce de la disposition précitée, la Cour doit répondre à deux questions successives : d'abord celle de savoir si les faits dont l'intéressé se plaint persistent ou non, et ensuite celle de savoir si les conséquences ayant pu résulter d'une violation de la Convention à raison de ces faits ont été effacées (*Kaftaïlova c. Lettonie* (radiation) [GC], n° 59643/00, § 48, 7 décembre 2007).

53. La Cour note que les arguments du Gouvernement sont fondés sur l'existence de décisions de justice reconnaissant la méconnaissance du droit du requérant à l'accès aux informations et lui octroyant un dédommagement, ainsi que sur l'envoi d'invitations par la mairie de Baia Mare au requérant à retirer des photocopies de documents internes. Or, il convient de noter que le grief du requérant tiré de l'article 10 de la Convention, vise précisément l'inexécution desdites décisions de justice. Dans ces conditions, la Cour estime que les arguments du Gouvernement sont étroitement liés à la substance du grief tiré de l'article 10 de la Convention. Dès lors, il y a lieu de joindre les exceptions au fond.

2. Sur l'application de l'article 35 § 3 b) de la Convention

54. En deuxième lieu, le Gouvernement tire une exception d'irrecevabilité d'un défaut de préjudice important pour le requérant. À cet égard, il soutient que les décisions judiciaires litigieuses ont été exécutées et que, dès lors, le requérant n'a pas subi un préjudice important. Par ailleurs,

il souligne que la présente affaire concerne principalement une durée de procédure civile, matière dans laquelle la Cour a une jurisprudence constante, de sorte que le respect des droits de l'homme n'exige pas non plus que la Cour poursuive l'examen de ce grief. Par ailleurs, le grief du requérant a été dûment examiné par les tribunaux internes.

55. Le requérant considère qu'il a subi un préjudice important car le refus délibéré du maire de Baia Mare de lui communiquer les informations sollicitées l'a empêché de transmettre, en sa qualité de journaliste, des questions d'intérêt public. Il renvoie également à la jurisprudence de la Cour selon laquelle la liberté d'expression constitue l'un des fondements essentiels d'une société démocratique, l'une des conditions primordiales de son progrès et de l'épanouissement de chacun. La violation de cette liberté porte préjudice à la construction démocratique et devrait être sanctionnée en conséquence.

56. La Cour constate que le présent grief concerne l'accès du requérant, journaliste, aux informations à caractère public détenues par une autorité publique, en application de plusieurs décisions judiciaires définitives. À cet égard, elle rappelle l'importance cruciale de la liberté d'expression, qui constitue l'une des conditions préalables au bon fonctionnement de la démocratie (*Appleby et autres c. Royaume-Uni*, n° 44306/98, § 39, CEDH 2003-VI). Dans ces conditions, elle considère que le défaut allégué à un tel accès comporte non seulement un préjudice non pécuniaire important pour le requérant, mais constitue également une raison pour continuer l'examen du grief compte tenu de ce qu'il soulève des questions importantes pour le respect des droits de l'homme. Il convient, dès lors, de rejeter cette exception du Gouvernement.

3. Sur le bien-fondé du grief

57. La Cour constate que ce grief n'est pas manifestement mal fondé au sens de l'article 35 § 3 (a) de la Convention et qu'il ne se heurte à aucun autre motif d'irrecevabilité. Il convient donc de le déclarer recevable.

B. Sur le fond

1. Arguments des parties

58. Le requérant soutient que le refus du maire de Baia Mare de lui communiquer les informations sollicitées l'a empêché d'exercer sa profession de journaliste. Il rejette l'affirmation du Gouvernement selon laquelle il a reçu une partie des informations sollicitées concernant les activités de la mairie qu'il aurait pu transmettre au public. Il souligne que, en sa qualité de journaliste, il est tenu par des obligations professionnelles qui exigent une vérification préalable complète des informations rendues publiques. Le requérant met en exergue également le fait que le

Gouvernement n'a pas réussi à démontrer, par des preuves adéquates, tels des articles publiés dans la presse, qu'il avait pu couvrir les sujets concernant les activités de la mairie.

59. Le requérant allègue en outre que le refus du maire de lui communiquer les informations à caractère public constitue une ingérence dans sa liberté d'expression qui n'est pas prévue par la loi. En outre, aucun des buts légitimes énumérés au deuxième paragraphe de l'article 10 de la Convention n'a été soulevé par les autorités internes au cours des procédures internes ou par le Gouvernement devant la Cour afin de justifier l'inexécution des décisions judiciaires litigieuses. Enfin, l'arbitraire des autorités internes dans l'exécution des décisions judiciaires ne saurait être considéré comme justifié dans une société démocratique basée sur l'État de droit. À l'instar de l'article 6 § 1 de la Convention, le requérant estime que son grief tiré de l'article 10 de la Convention est similaire à celui que la Cour a examiné dans l'affaire *Kenedi*, précitée.

60. Le Gouvernement allègue que le requérant n'a pas été entravé dans l'exercice de sa profession de journaliste étant donné qu'il s'est vu communiquer, initialement, une partie des informations sollicitées et, ultérieurement, l'intégralité de ces informations. Il mentionne également que l'obligation de supporter les frais de reproduction des documents était prévue par la loi.

2. Appréciation de la Cour

61. La Cour a toujours dit que le public a droit à recevoir les informations d'intérêt général. Sa jurisprudence en la matière a été élaborée en rapport avec la liberté de la presse, les médias ayant pour rôle de communiquer des informations et des idées sur les questions d'intérêt général (*Observer et Guardian c. Royaume-Uni*, 26 novembre 1991, § 59, série A no 216 ; *Thorgeir Thorgeirson c. Islande*, 25 juin 1992, § 63, série A no 239). À cet égard, la Cour doit faire preuve de la plus grande prudence lorsque les mesures prises par l'autorité nationale sont de nature à dissuader la presse, l'un des « chiens de garde » de la société, de participer à la discussion de problèmes d'un intérêt général légitime (*Bladet Tromsø et Stensaas c. Norvège* [GC], no 21980/93, § 64, CEDH 1999-III ; *Jersild c. Danemark*, 23 septembre 1994, § 35, série A no 298), même lorsqu'il s'agit de mesures qui ne font que compliquer l'accès à l'information.

62. Eu égard à l'intérêt protégé par l'article 10, la loi ne peut permettre des restrictions arbitraires qui pourraient devenir une forme de censure indirecte si les autorités devaient faire obstacle à la collecte des informations. Cette collecte est en effet, par exemple, une démarche préalable essentielle à l'exercice du journalisme. Elle est inhérente à la liberté de la presse et, à ce titre, protégée. L'ouverture d'espaces de débat public fait partie du rôle de la presse (*Dammann c. Suisse* (n° 77551/01,

§ 52, 25 avril 2006, et *Társaság a Szabadságjogokért c. Hongrie*, n° 37374/05, § 27, 14 avril 2009).

63. À l'instar de l'affaire *Kenedi* précitée, la Cour note que la présente requête concerne l'accès du requérant à des informations à caractère public qui lui étaient nécessaires dans l'exercice de sa profession, accès qui est un élément essentiel de l'exercice du requérant de sa liberté d'expression. Le requérant a obtenu trois décisions judiciaires lui garantissant l'accès auxdites informations. Devant la Cour, les parties divergent quant au point de savoir si ces décisions ont été exécutées ou non. La Cour rappelle néanmoins qu'elle a déjà conclu par la négative à cette question sur le terrain de l'article 6 § 1 de la Convention (paragraphe 43 ci-dessus).

64. La Cour constate ensuite que le requérant cherchait légitimement à collecter des informations sur un sujet d'importance générale, à savoir les activités de la mairie de Baia Mare. De plus, étant donné que l'intention du requérant était de communiquer au public les informations en question et de contribuer ainsi au débat public sur la bonne gouvernance publique, il est clair qu'il a subi une atteinte à son droit de communiquer des informations. Partant, il y a eu ingérence dans les droits du requérant consacrés par l'article 10 § 1 de la Convention (*Társaság a Szabadságjogokért* précité, § 28, *Kenedi* précité, § 43 ; et *Youth Initiative for Human Rights* précité, § 24).

65. La Cour rappelle qu'une atteinte aux droits garantis par le paragraphe 1 de l'article 10 est contraire à la Convention si elle ne respecte pas les exigences prévues au paragraphe 2. Il faut donc déterminer si l'ingérence ici incriminée était « prévue par la loi », si elle poursuivait un ou plusieurs des buts légitimes visés dans cette disposition et si elle était « nécessaire dans une société démocratique » pour atteindre ce ou ces buts.

66. En l'occurrence, la Cour rappelle qu'elle a déjà conclu sous l'angle de l'article 6 § 1 de la Convention, comme certaines des autorités judiciaires nationales, que les invitations adressées au requérant afin de retirer des photocopies de plusieurs documents disparates contenant des informations susceptibles d'interprétations diverses, ne pouvait en aucun cas s'analyser en une exécution d'une décision judiciaire ordonnant la communication d'information à caractère public. Dans ces conditions, il n'y a pas eu de mise à exécution adéquate des décisions judiciaires litigieuses.

67. De surcroît, la Cour note que la mairie n'a jamais soutenu que les informations demandées n'étaient pas disponibles (*Társaság a Szabadságjogokért* précité, § 36). La complexité des informations sollicitées et le travail important requis de la part de la mairie pour procéder à leur compilation ont été invoqués uniquement pour expliquer l'impossibilité de fournir ces informations dans le plus court délai.

Eu égard à ce qui précède, la Cour estime que le Gouvernement n'a apporté aucun argument démontrant que l'ingérence dans le droit du

requérant était prévue par la loi ni qu'elle poursuivait un ou plusieurs buts légitimes.

68. Par conséquent, il y a eu de rejeter les exceptions soulevées par le Gouvernement (paragraphe 49 ci-dessus) et de conclure qu'il y a eu violation de l'article 10 de la Convention.

IV. SUR L'APPLICATION DE L'ARTICLE 41 DE LA CONVENTION

69. Aux termes de l'article 41 de la Convention,

> « Si la Cour déclare qu'il y a eu violation de la Convention ou de ses Protocoles, et si le droit interne de la Haute Partie contractante ne permet d'effacer qu'imparfaitement les conséquences de cette violation, la Cour accorde à la partie lésée, s'il y a lieu, une satisfaction équitable. »

A. Dommage

70. Le requérant réclame 10 000 euros (EUR) au titre du préjudice moral qu'il aurait subi en raison du refus de la mairie de Baia Mare de lui communiquer les informations à caractère public sollicitées.

71. Le Gouvernement estime qu'en l'espèce le préjudice moral serait suffisamment compensé par un constat de violation et qu'en tout état de cause, eu égard à la jurisprudence de la Cour en la matière, le montant demandé est excessif.

72. La Cour estime que le requérant a subi un préjudice moral et considère qu'il y a lieu de lui octroyer 4 000 EUR à ce titre.

B. Frais et dépens

73. Le requérant demande également la somme de 4 748 EUR (soit 4 448 EUR pour les honoraires d'avocat à verser directement à M^{e} Hătneanu et 300 EUR pour les frais de secrétariat, à verser directement à l'organisation APADOR-CH) au titre des frais et dépens exposés pour les besoins de la procédure devant la Cour. Il dépose une convention d'honoraires pour un montant de 4 448 EUR et un engagement à verser les frais de secrétariat engagés par l'organisation susmentionnée pendant la procédure.

74. Le Gouvernement ne conteste pas le nombre d'heures indiqué par l'avocate pour préparer la présente affaire, compte tenu de sa complexité, mais estime en revanche que le tarif horaire de l'avocate est excessif.

75. Selon la jurisprudence de la Cour, un requérant ne peut obtenir le remboursement de ses frais et dépens que dans la mesure où se trouvent établis leur réalité, leur nécessité et le caractère raisonnable de leur taux. En l'espèce, compte tenu des critères susmentionnés, du relevé détaillé des heures de travail qui lui a été soumis et des questions qui se posaient dans la

présente affaire, la Cour octroie aux requérants 4 448 EUR au titre des honoraires d'avocat, à verser directement à M[e] Hătneanu, et 300 EUR au titre des frais de secrétariat, à verser directement à APADOR-CH.

C. Intérêts moratoires

76. La Cour juge approprié de calquer le taux des intérêts moratoires sur le taux d'intérêt de la facilité de prêt marginal de la Banque centrale européenne majoré de trois points de pourcentage.

PAR CES MOTIFS, LA COUR, À L'UNANIMITÉ,

1. *Joint* au fond de la requête les exceptions tirées de la qualité de victime du requérant et de l'application de l'article 37 §§ 1 b) et c) et les *rejette* ;

2. *Déclare* la requête recevable ;

3. *Dit* qu'il y a eu violation de l'article 6 § 1 de la Convention ;

4. *Dit* qu'il y a eu violation de l'article 10 de la Convention ;

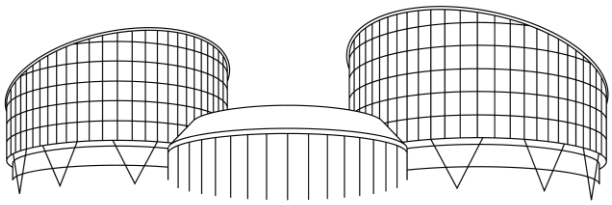
5. *Dit*
   a) que l'État défendeur doit verser au requérant, dans les trois mois à compter du jour où l'arrêt sera devenu définitif conformément à l'article 44 § 2 de la Convention, les sommes suivantes, à convertir dans la monnaie de l'État défendeur, au taux applicable à la date du règlement :
      i) 4 000 EUR (quatre mille euros), plus tout montant pouvant être dû à titre d'impôt, pour dommage moral ;
      ii) 4 448 EUR (quatre mille quatre cent quarante-huit euros), plus tout montant pouvant être dû à titre d'impôt par le requérant, pour honoraires d'avocat, à verser directement à M[e] Hătneanu ;
      iii) 300 EUR (trois cents euros), plus tout montant pouvant être dû à titre d'impôt par le requérant, pour frais de secrétariat, à verser directement à l'organisation APADOR-CH ;
   b) qu'à compter de l'expiration dudit délai et jusqu'au versement, ces montants seront à majorer d'un intérêt simple à un taux égal à celui de la facilité de prêt marginal de la Banque centrale européenne applicable pendant cette période, augmenté de trois points de pourcentage ;

6. *Rejette* la demande de satisfaction équitable pour le surplus.

Fait en français, puis communiqué par écrit le 24 juin 2014, en application de l'article 77 §§ 2 et 3 du règlement.

Santiago Quesada
Greffier

Josep Casadevall
Président



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

SECOND SECTION

CASE OF YOUTH INITIATIVE FOR HUMAN RIGHTS v. SERBIA

(Application no. 48135/06)

JUDGMENT

STRASBOURG

25 June 2013

FINAL

25/09/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Youth Initiative for Human Rights v. Serbia,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Guido Raimondi, *President,*
Peer Lorenzen,
Dragoljub Popović,
András Sajó,
Nebojša Vučinić,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 28 May 2013,

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

PROCEDURE

1. The case originated in an application (no. 48135/06) against the Republic of Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a non-governmental organisation based in Belgrade, Youth Initiative for Human Rights ("the applicant"), on 29 November 2006.

2. The applicant was represented by Ms T. Drobnjak, a lawyer practising in Belgrade. The Serbian Government ("the Government") were represented by their Agent, Mr S. Carić.

3. The applicant complained, under Articles 6 and 10 of the Convention, about a refusal of the intelligence agency of Serbia to provide it with certain information concerning electronic surveillance, notwithstanding a final and binding decision of the Information Commissioner in its favour.

4. On 15 September 2010 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant is a non-governmental organisation set up in 2003 and based in Belgrade. It monitors the implementation of transitional laws with a view to ensuring respect for human rights, democracy and the rule of law.

6. On 31 October 2005 the applicant requested the intelligence agency of Serbia (*Bezbednosno-informativna agencija*) to inform it how many people had been subjected to electronic surveillance by that agency in 2005.

7. On 4 November 2005 the agency refused the request, relying thereby on section 9(5) of the Freedom of Information Act 2004.

8. On 17 November 2005 the applicant complained to the Information Commissioner (*Poverenik za informacije od javnog značaja i zaštitu podataka o ličnosti* – "the Commissioner"), a domestic body set up under the Freedom of Information Act 2004 to ensure the observance of that Act.

9. On 22 December 2005 the Commissioner found that the intelligence agency had breached the law and ordered that the information requested be made available to the applicant within three days. The agency appealed, but on 19 April 2006 the Supreme Court of Serbia held that it lacked standing and dismissed its appeal.

10. On 23 September 2008 the intelligence agency notified the applicant that it did not hold the information requested.

II. RELEVANT DOMESTIC LAW

11. The Freedom of Information Act 2004 (*Zakon o slobodnom pristupu informacijama od javnog značaja*, published in Official Gazette of the Republic of Serbia no. 120/04, amendments published in Official Gazette nos. 54/07, 104/09 and 36/10) has been in force since 13 November 2004. The relevant provisions of the Act read as follows:

Section 5(2)

"Everyone shall have the right to access information of public interest by being allowed to examine a document containing that information, by being entitled to make a copy of that document, and by being entitled to receive a copy of that document on request, by post, fax, electronic mail or otherwise."

Section 8

"The rights provided for in this Act may, in exceptional circumstances, be subject to limitations set out in this Act, to the extent necessary in a democratic society to prevent a serious violation of a prevailing interest based on the Constitution or law.

Nothing in this Act may be interpreted so as to lead to the destruction of any of the rights set forth herein or to their limitation to a greater extent than is provided for in paragraph 1 above."

Section 9

"Access to information of public interest may be refused, if its disclosure would:

...

(5) Disclose information or a document formally qualified as State, official, commercial or other secret, or as accessible to a limited group of people, if the

> disclosure of that information or document could seriously undermine a legitimate interest which has priority over freedom of information."

12. In accordance with section 22(1) of the Act, an applicant may lodge a complaint with the Commissioner if a public authority refuses his or her request for access to information. The decisions of the Commissioner are final and binding (see section 28(1) of the Act).

III. RELEVANT INTERNATIONAL DOCUMENTS

13. The International Covenant on Civil and Political Rights, adopted under the auspices of the United Nations on 16 December 1966, entered into force in respect of Serbia on 12 March 2001. Article 19 of that Covenant guarantees freedom of expression in similar terms to those used in Article 10 of the Convention. In July 2011 the Human Rights Committee, the body of independent experts set up to monitor the implementation of that treaty, reiterated in its General Comment No. 34 that Article 19 of the Covenant embraced a right of access to information held by public bodies (document CCPR/C/GC/34 of 12 September 2011, § 18). It further stated that such information included records held by a public body, regardless of the form in which the information was stored, its source and the date of production (ibid.). Lastly, the Human Rights Committee emphasised that when a State party imposed restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself; in other words, the relation between right and restriction and between norm and exception must not be reversed (see § 21 of that document).

14. The Joint Declaration by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression of December 2004 reads, in the relevant part, as follows:

> "The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.
>
> ...
>
> Access to information is a citizens' right. As a result, the procedures for accessing information should be simple, rapid and free or low-cost.
>
> The right of access should be subject to a narrow, carefully tailored system of exceptions to protect overriding public and private interests, including privacy. Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information. The burden should be on the public authority seeking to deny access to show that the information falls within the scope of the system of exceptions.

Public authorities should be required to meet minimum record management standards. Systems should be put in place to promote higher standards over time.

The access to information law should, to the extent of any inconsistency, prevail over other legislation.

Those requesting information should have the possibility to appeal any refusals to disclose to an independent body with full powers to investigate and resolve such complaints.

National authorities should take active steps to address the culture of secrecy that still prevails in many countries within the public sector. This should include provision for sanctions for those who wilfully obstruct access to information. Steps should also be taken to promote broad public awareness of the access to information law.

Steps should be taken, including through the allocation of necessary resources and attention, to ensure effective implementation of access to information legislation.

Urgent steps should be taken to review and, as necessary, repeal or amend, legislation restricting access to information to bring it into line with international standards in this area, including as reflected in this Joint Declaration.

...

Certain information may legitimately be secret on grounds of national security or protection of other overriding interests. However, secrecy laws should define national security precisely and indicate clearly the criteria which should be used in determining whether or not information can be declared secret, so as to prevent abuse of the label 'secret' for purposes of preventing disclosure of information which is in the public interest. Secrecy laws should set out clearly which officials are entitled to classify documents as secret and should also set overall limits on the length of time documents may remain secret. Such laws should be subject to public debate."

15. The Joint Declaration by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression of December 2006 reads, in so far as relevant, as follows:

"Public bodies, whether national or international, hold information not for themselves but on behalf of the public and they should, subject only to limited exceptions, provide access to that information."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

16. The applicant complained, under Article 10 of the Convention, that the intelligence agency of Serbia had denied it access to certain information concerning electronic surveillance, despite a final and binding decision of the Information Commissioner in its favour. Article 10 reads as follows:

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

2. The exercise of these freedoms, since it carries with it duties and responsibilities, 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."

A. Admissibility

17. The Government argued that the application was out of time, taking into account the dates of the decisions of the Information Commissioner and the Supreme Court of Serbia in the applicant's case. They further submitted that Article 10 did not guarantee a general right of access to information and that the application was, as a result, incompatible *ratione materiae*. Lastly, they claimed that the application was incompatible *ratione personae* as the applicant did not need the information sought.

18. The applicant disagreed.

19. With regard to the first objection, the Court notes that the applicant did not complain about the decisions to which the Government referred, as they were in its favour. On the contrary, it complained about a refusal of the intelligence agency of Serbia to provide it with certain information despite those decisions. Given that the applicant filed its application with the Court while the impugned situation was ongoing, this objection must be rejected.

20. With regard to the second and third objections, the Court recalls that the notion of "freedom to receive information" embraces a right of access to information (see *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, § 35, 14 April 2009). The Court has also held that when a non-governmental organisation is involved in matters of public interest, such as the present applicant, it is exercising a role as a public watchdog of similar importance to that of the press (*Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 103, 22 April 2013). The applicant's activities thus warrant similar Convention protection to that afforded to the press (see *Társaság a Szabadságjogokért*, cited above, § 27). Accordingly, the Government's remaining objections must also be rejected.

21. As this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and it is not inadmissible on any other grounds, it must be declared admissible.

B. Merits

22. The applicant submitted that the refusal of the intelligence agency to provide it with information as to the use of electronic surveillance measures had adversely affected its ability to exercise its role as a public watchdog, in breach of Article 10 of the Convention.

23. The Government claimed that the intelligence agency did not hold the information requested (they referred to the intelligence agency's letter of 23 September 2008 mentioned in paragraph 10 above). They added that freedom to receive information merely prohibited a State from restricting a person from receiving information that others wished or might be willing to impart to him; that freedom could not be construed as imposing on a State, in the circumstances of the present case, positive obligations to collect and disseminate information of its own motion (see *Guerra and Others v. Italy*, 19 February 1998, § 53, *Reports of Judgments and Decisions* 1998-I).

24. The Court notes that the applicant requested the intelligence agency to provide it with some factual information concerning the use of electronic surveillance measures. The agency first refused the request, relying thereby on the statutory provision applicable to secret information. After an order by the Information Commissioner that the information at issue be nevertheless disclosed, the intelligence agency notified the applicant that it did not hold that information. As the applicant was obviously involved in the legitimate gathering of information of public interest with the intention of imparting that information to the public and thereby contributing to the public debate, there has been an interference with its right to freedom of expression (see, by analogy, *Társaság a Szabadságjogokért*, cited above, § 28, and *Kenedi v. Hungary*, no. 31475/05, § 43, 26 May 2009).

25. The exercise of freedom of expression may be subject to restrictions, but any such restrictions ought to be in accordance with domestic law. The Court finds that the restrictions imposed by the intelligence agency in the present case did not meet that criterion. The domestic body set up precisely to ensure the observance of the Freedom of Information Act 2004 examined the case and decided that the information sought had to be provided to the applicant. It is true that the intelligence agency eventually responded that it did not hold that information, but that response is unpersuasive in view of the nature of that information (the number of people subjected to electronic surveillance by that agency in 2005) and the agency's initial response.

26. The Court concludes that the obstinate reluctance of the intelligence agency of Serbia to comply with the order of the Information Commissioner was in defiance of domestic law and tantamount to arbitrariness.

There has accordingly been a violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

27. The applicant complained that the refusal of the intelligence agency to comply with the order of the Information Commissioner amounted also to a violation of Article 6 of the Convention.

28. The Government contested that argument.

29. Having regard to the finding relating to Article 10 of the Convention, the Court considers that it is not necessary to examine the admissibility or the merits of the same complaint under Article 6 (see, by analogy, *Lepojić v. Serbia*, no. 13909/05, § 79, 6 November 2007, and *Filipović v. Serbia*, no. 27935/05, § 60, 20 November 2007).

III. APPLICATION OF ARTICLE 46 OF THE CONVENTION

30. The relevant part of Article 46 of the Convention reads as follows:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution. ..."

31. Before examining the applicant's claim for just satisfaction under Article 41 of the Convention and in view of the circumstances of the instant case, the Court wishes to consider what consequences may be drawn for the respondent State from Article 46. It reiterates that by virtue of Article 46 the High Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers of the Council of Europe. It follows, among other things, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned any sums awarded under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII). The aim is to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded (*restitutio in integrum*) (see *Emre v. Switzerland (no. 2)*, no. 5056/10, § 69, 11 October 2011). Although it is in principle not for the Court to determine what remedial measures may be appropriate to satisfy the respondent State's obligations under Article 46 of the Convention, the violation found in this case, by its very nature, does not leave any real choice as to the measures required to remedy it (see *Assanidze v. Georgia* [GC], no. 71503/01, § 202, ECHR 2004-II, and *Karanović v. Bosnia and Herzegovina*, no. 39462/03, § 29, 20 November 2007).

32. In view of the foregoing, the Court finds that the most natural execution of its judgment, and that which would best correspond to the principle of *restitutio in integrum*, would have been to secure that the intelligence agency of Serbia provide the applicant with the information requested (namely, how many people were subjected to electronic surveillance by that agency in the course of 2005).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

33. 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."

34. The applicant claimed 8,000 euros (EUR) for non-pecuniary damage suffered on account of the fact that, because of the refusal of the intelligence agency to provide it with the information requested, it had been unable to generate, and contribute to, an open and well-informed public debate on the use of electronic surveillance measures in Serbia.

35. The Government contested that claim.

36. The Court considers that the finding of a breach and the order made in paragraph 32 above constitute sufficient just satisfaction for any non-pecuniary damage which the applicant may have suffered (see *Társaság a Szabadságjogokért*, cited above, § 43).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 10 of the Convention admissible;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds* that there is no need to examine the complaint under Article 6 of the Convention;

4. *Holds* that the respondent State must ensure, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, that the intelligence agency of Serbia provide the applicant with the information requested;

5. *Holds* that the finding of a violation and the order made under point 4 constitute sufficient just satisfaction for any non-pecuniary damage sustained by the applicant.

Done in English, and notified in writing on 25 June 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Guido Raimondi
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Sajó and Vučinić is annexed to this judgment.

G.R.A.

S.H.N.

JOINT CONCURRING OPINION OF JUDGES SAJÓ AND VUČINIĆ

We are in full agreement with the conclusions and reasoning of this judgment. It is of particular importance for those countries where, even today, long lasting habits make it difficult to have access to data which, in the days of totalitarianism, were used for oppressive purposes by secret services. However, we write this concurring opinion in particular to highlight the general need to interpret Article 10 in conformity with developments in international law regarding freedom of information, which entails access to information held by public bodies. We refer, in particular, to Human Rights Committee, General Comment No. 34 (document CCPR/C/GC/34 of 12 September 2011, § 18).

The Court has recently (in its *Gillberg v. Sweden* [GC] judgment, (no. 41723/06, § 74, 3 April 2012) restated that "the right to receive and impart information explicitly forms part of the right to freedom of expression under Article 10. That right basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him (see, for example, *Leander v. Sweden*, 26 March 1987, § 74, Series A no. 116, and *Gaskin v. the United Kingdom*, 7 July 1989, § 52, Series A no. 160)."

The Grand Chamber did not quote the continuation of paragraph 74 of the Leander judgment: "Article 10 (art. 10) does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual."

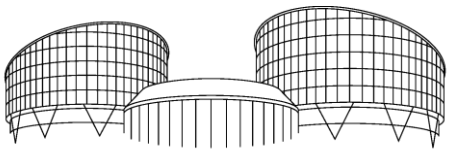
In view of the legal developments summarized in the judgment, and the Council of Europe Convention on Access to Official Documents (2009, not yet in force), and in particular, in view of the demands of democracy in the information society, we find it appropriate to highlight certain implications of the present judgment in light of *Gillberg* that the Court should address in due course:

1. In the world of the Internet the difference between journalists and other members of the public is rapidly disappearing. There can be no robust democracy without transparency, which should be served and used by all citizens.

2. The case raises the issue of the positive obligations of the State, which arise in respect of the accessibility of data controlled by Government. The authorities are responsible for storing such information and loss of data cannot be an excuse, as the domestic authorities erroneously claimed in the present case. The difference between the State's negative and positive obligations is difficult to determine in the context of access to information. Given the complexity of modern data management the simple lack of a

prohibition of access may not suffice for the effective enjoyment of the right to information.

3. Without prejudice to the specific circumstances of the *Leander* case, to grant the citizen more restricted access to important information that concerns him or her and is generated or is used by the authorities than to the general public on public information may seem illogical, at least in certain circumstances. An artificial distinction between public data and data of personal interest may even hamper access to public information. Of course, access to information under Article 10 must respect, in particular, informational self-determination and the considerations referred to in *Klass and Others v. Germany* (6 September 1978, § 81, Series A no. 28).



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

FIRST SECTION

CASE OF ÖSTERREICHISCHE VEREINIGUNG ZUR ERHALTUNG, STÄRKUNG UND SCHAFFUNG EINES WIRTSCHAFTLICH GESUNDEN LAND- UND FORST-WIRTSCHAFTLICHEN GRUNDBESITZES v. AUSTRIA

(Application no. 39534/07)

JUDGMENT

STRASBOURG

28 November 2013

FINAL

28/02/2014

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria[1],

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Isabelle Berro-Lefèvre, *President*,
Elisabeth Steiner,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 5 November 2013,

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

PROCEDURE

1. The case originated in an application (no. 39534/07) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an association registered in Austria, the Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes ("the applicant association"), on 24 August 2007.

2. The applicant association was represented by Mr R. Mutenthaler, a lawyer practising in Ybbs. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for European and International Affairs.

3. The applicant association alleged that the refusal of the Tyrol Real Property Transactions Commission to grant it access to all its decisions issued since January 2000 amounted to a violation of its right to receive information.

4. On 10 March 2010 the application was communicated to the Government.

[1] For citation purposes, the short title Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria should be used.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant is a registered association which has its seat in Vienna. Its aim is to research and study past and present transfers of ownership of agricultural and forest land in order to reach conclusions as to the impact of such transfers on society. The applicant association also gives opinions on draft laws falling within its field of interest.

6. In essence, agricultural and forest land transactions require approval by local and regional authorities. The latter are called Regional Real Property Transactions Commissions (*Landes-Grundverkehrs-kommissionen*). The aim of this requirement, laid down in the Real Property Transactions Acts of the *Länder*, is to preserve land for agricultural use and forestry and, in some of the regions including Tyrol, to avoid the proliferation of second homes. The applicant association states that it is sent all decisions issued by the Regional Real Property Transactions Commissions with the exception of the one for Tyrol. In the decisions it receives, the names of parties and other sensitive data are usually anonymised.

7. On 26 April 2005 the association asked the Tyrol Real Property Transactions Commission ("the Commission") to provide, by mail, all decisions issued since 1 January 2005 in anonymised form, the costs thereof to be reimbursed. By letter of 12 July 2005 the Commission replied that it could not comply with the request owing to lack of time and personnel.

8. On 18 July 2005 the applicant association submitted a further request, this time requesting the provision, by mail, of all decisions issued since 1 January 2000 in anonymised form. In the event of refusal of the application, it demanded a formal decision in accordance with the Tyrol Access to Information Act (*Tiroler Auskunftspflichtgesetz* - "the Information Act"). The applicant association argued that since the Commission's decisions concerned "civil rights" within the meaning of Article 6 of the Convention, the decisions should be either publicly announced or made public by other appropriate means.

9. In its decision of 10 October 2005 the Commission rejected the request, holding that the transmission of anonymised copies of its decisions did not constitute information within the meaning of section 1(2) of the Information Act, which defines information as "existing knowledge on matters known to the authority at the time it provides the information". Moreover, even if the request were to fall within the scope of that provision, the Information Act stated that pursuant to section 3(1) subparagraph (c) there was no duty to provide the information if doing so would require so many resources that the functioning of the authority would be affected. The decision stated that complaints could be lodged with the Constitutional

Court (*Verfassungsgerichtshof*) and the Administrative Court (*Verwaltungsgerichtshof*).

10. The applicant association complained to both the Constitutional Court and the Administrative Court. It relied on Article 10 of the Convention.

11. In its submissions in reply to the applicant association's complaint to the Constitutional Court and the Administrative Court, the Commission maintained that its decisions did not constitute information within the meaning of the Information Act. It argued that a decision contained the facts of the case and the legal conclusions the authority had drawn from them. Legal arguments could be discussed and decisions could be challenged and set aside if the legal conclusions were found to be wrong. Therefore, giving someone access to a decision was comparable to giving someone legal advice, as opposed to providing information as defined in the Information Act.

12. On 21 September 2006 the Administrative Court declared that it did not have jurisdiction to deal with the case and rejected the applicant association's complaint. The Administrative Court held that it was only competent to deal with complaints against decisions regarding transfers of building plots and not with complaints brought against the Commission's decisions on transfers of agricultural or forest land. As the applicant association had not claimed to have been party to the transfer of a building plot, it could not base its complaint on that status. Neither did the Information Act contain any rule stating that complaints about decisions by the Commission pursuant to the Information Act were to be lodged with the Administrative Court. Therefore the matter was excluded from the Administrative Court's jurisdiction. Consequently, the statement in the Commission's decision that a complaint could be lodged with the Administrative Court was not correct.

13. On 27 February 2007 the Constitutional Court declined to deal with the case for lack of prospects of success from the perspective of constitutional law, and also because the matter was not excluded from the Administrative Court's jurisdiction. The decision was served on the association's representative on 4 April 2007.

14. After the Government had been notified of the present application, the applicant association, relying on the Government's argument in respect of exhaustion of domestic remedies (see paragraph 26 below), lodged an application under Article 138 of the Federal Constitution seeking a ruling from the Constitutional Court on the negative conflict of jurisdiction between it and the Administrative Court.

15. On 2 December 2011 the Constitutional Court issued a decision stating that it was competent to rule on the applicant association's complaint against the Commission's decision of 10 October 2005. Consequently, it set

aside its own decision of 27 February 2007 and awarded the applicant association reimbursement of the costs of the proceedings.

16. In a further decision of 2 December 2011, the Constitutional Court ruled on the merits of the applicant association's complaint. Referring to the Court's case-law and its own case-law, it held in particular that whilst the right to receive information enshrined in Article 10 of the Convention prohibited States from restricting the receipt of information that others wished to or might be willing to impart, it did not – by contrast – impose a positive obligation on States to collect and disseminate information of their own motion. The Constitutional Court added that, in accordance with its established case-law, Article 10 did not require the State to grant access to information or to make information available of its own motion. Consequently, the Commission's refusal to transmit anonymised copies of all decisions issued during a specific period of time to the applicant association did not constitute an interference with the latter's right under Article 10 of the Convention.

17. As to the applicant association's argument that the Commission's decision was arbitrary as it had failed to provide reasons, the Constitutional Court referred to the explanatory report on the Information Act and endorsed the Commission's view that the applicant association's request was not merely a question of obtaining information about one or more specific issues, but would require the Commission to compile – of its own motion – all decisions issued over a period of some years, to anonymise them, and to send paper copies thereof to the applicant association. The Commission had therefore rightly taken the view that the applicant association's request did not fall within the scope of section 1 of the Information Act. Moreover, the Commission had also dealt with the merits of the request in that it had concluded that the provision of information could be refused pursuant to section 3(1) subparagraph (c) of the Information Act as it would require investigations, calculations or preparations considerably impinging on the fulfilment of its other tasks.

18. Lastly, the Constitutional Court observed that the applicant association could be implicitly relying also on Article 6 of the Convention. It noted that neither the Court's case-law in respect of public access to court decisions nor its own case-law guaranteed the right to obtain anonymised copies of all decisions issued by the Commission over a lengthy period. According to the Constitutional Court's case-law, access had to be given to the judgments delivered by the highest courts which dealt with cases raising important legal issues. However, this did not apply to all the Commission's decisions.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Information Act

19. The Information Act (Regional Law Gazette 4/1989) regulates the duty of the authority to provide information:

Section 1 provides as follows:

> "(1) The authority of the *Land*, municipalities, municipal associations and any other self-governing bodies regulated by regional law are under an obligation to provide anyone with information about their sphere of competence unless provided otherwise in section 3.
>
> (2) Information is the notification of existing knowledge on matters known to the authority at the time it provides the information."

Section 2, in so far as relevant, provides as follows:

> "(1) Anyone may require authorities of the *Land*, municipalities, municipal associations and any other self-governing bodies regulated by regional law to provide information orally, in writing, or by phone, telex or telegraph. ..."

Section 3, in so far as relevant, provides as follows:

> "(1) No information shall be provided if the provision of such information is contradictory to a statutory duty of confidentiality.
>
> (2) There is no duty to provide information if
>
> ...
>
> (c) the provision of information would require investigations, calculations or preparations considerably impinging on the proper fulfilment of the authority's other tasks..."

B. The Tyrol Real Property Transactions Act

20. The aim of the Tyrol Real Property Transactions Act as in force at the material time (Regional Law Gazette 61/1996 as amended by Regional Law Gazette 75/1999), was to preserve land for agricultural and forestry use and to avoid the proliferation of second homes.

21. Contracts concerning the transfer of ownership and certain other rights relating to agricultural or forest land therefore required approval by local real property transactions authorities. Appeals against their decisions could be lodged with the Commission either by the parties if they considered the decision had violated their rights or by the Regional Real Property Transactions Referee (*Grundverkehrsreferent*) if he considered that the decision ran contrary to the public interest. A complaint could be lodged with the Constitutional Court against decisions of the Commission relating to the transfer of agricultural and forest land. If approval was declined, the transfer of land was null and void.

22. The Regional Real Property Transactions Commission was composed of nine members and substitute members, who were appointed for five years and were not bound in the exercise of their functions by any instructions. As a rule the Commission held oral hearings in public.

23. An annual report on "The situation of real property transfers in Tyrol" published by the Regional Government includes a report containing general information on the Commission's activities. It can be seen from these reports that in the period from 2000 to 2005, between 119 and 160 appeals per year were lodged with the Commission, the majority of which concerned transfers of agricultural and forest land. It can also be seen that the Commission issued

- 86 decisions in 2000;
- 65 decisions in 2001;
- 106 decisions in 2002;
- 109 decisions in 2003;
- 109 decisions in 2004; and
- 105 decisions in 2005.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

24. The applicant association complained that its right to receive information had been violated as it was refused access to the decisions of the Tyrol Real Property Transactions Commission. The applicant association relied on Article 10, which reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, 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."

25. The Government contested that argument.

A. Admissibility

26. The Government had initially argued that the applicant association had not exhausted domestic remedies since it had failed to make use of an

application under Article 138 § 1(b) of the Federal Constitution in order to resolve the negative conflict of jurisdiction which resulted from the Administrative Court's decision of 21 September 2006 and the Constitutional Court's decision of 27 February 2007. As the applicant association subsequently requested that the Constitutional Court rule on that conflict of jurisdiction and obtained a decision by the Constitutional Court on the merits on 2 December 2011 (see paragraph 16 above), the Government withdrew their objection based on the non-exhaustion of domestic remedies.

27. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

28. The applicant association asserted that Article 10 of the Convention required States, to a certain extent, to make information available to the public. In its view the decisions of judicial bodies such as the Commission should be publicly accessible. Given the possibilities of electronic data processing, the authorities could easily create an online information system providing access to the decisions of the Commission, while making provision for the protection of confidential data where necessary. Such a system, namely the Federal Legal Information System (*Rechtsinformations-system des Bundes*), existed at federal level and made decisions of the highest courts and various other courts and authorities available. Where such a system did not exist, the State should at least provide anonymised paper copies of decisions upon request. Regarding the Government's argument that Austrian administrative law did not make provision for unrestricted access to files, the applicant association submitted that it had not requested access to files but rather the provision of decisions in anonymised form.

29. In the applicant association's view, such interference with its right to receive information could not be justified. It asserted that interests in the rule of law and due process argued in favour of making decisions by judicial authorities available to the public, while the interests of confidentiality could be protected by anonymising them. In response to the Government's argument that granting the request would have demanded considerable effort, the applicant association criticised the fact that the Commission had not provided any figures indicating the number of decisions to be made available or the actual amount of time needed to provide anonymised copies.

30. The Government argued that the Commission's refusal to provide anonymised paper copies of all decisions issued since 1 January 2000 could not be regarded as an interference with the applicant association's rights under Article 10. According to the Court's case-law, Article 10 of the Convention prohibited Contracting States from interfering with the receipt of information that someone wished to impart. However, it did not impose a positive obligation on the State to collect and disseminate information itself. Although the State had to set up its information system in such a way that an individual could obtain generally accessible information, it was not obliged to provide access to confidential information.

31. Access to files containing decisions issued in administrative proceedings was usually given only to parties with a special legal interest in the specific case. The applicant association could not claim to have a special interest in all decisions issued by the Commission over a lengthy period. Thus, the refusal to provide anonymised copies of all decisions issued since 1 January 2000 did not constitute an interference with its rights under Article 10 of the Convention. Moreover, a right to be provided with all decisions issued by the Commission over a lengthy period could not be inferred from Article 6 of the Convention either.

32. In the alternative, assuming that there had in fact been an interference with the applicant association's rights under Article 10, the Government asserted that such interference had been justified. They pointed out in particular that it served legitimate aims: it protected the rights of others – namely their interest in non-disclosure of the contents of proceedings affecting them personally, which might for instance include personal data concerning the location and price of land that had been purchased – and prevented the disclosure of confidential information. Moreover, it served to preserve the proper functioning of the authority concerned. Had the applicant association's request been granted, compliance with it would have required substantial resources to anonymise numerous decisions issued over a number of years and would thus have jeopardised the fulfillment of the Commission's main tasks. A weighing up of interests showed that this latter interest had to prevail over the applicant association's interest in obtaining access to all these decisions in anonymised form. Consequently, the interference had also been proportionate.

2. The Court's assessment

(a) Whether there has been an interference

33. The Court has consistently recognised that the public has a right to receive information of general interest. Its case-law in this field has been developed in relation to press freedom, the purpose of which is to impart information and ideas on such matters. The Court has emphasised that the

most careful scrutiny on its part is called for when measures taken by the national authorities may potentially discourage the participation of the press, one of society's "watchdogs", in the public debate on matters of legitimate public concern (see *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, § 26, 14 April 2009, with references to *Observer and Guardian v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216; *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, § 63, Series A no. 239; *Jersild v. Denmark*, 23 September 1994, § 35, Series A no. 298; and *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 64, ECHR 1999-III).

34. Furthermore, the Court has held that the gathering of information is an essential preparatory step in journalism and an inherent, protected part of press freedom (see *Dammann v. Switzerland* (no. 77551/01, § 52, 25 April 2006). However, the function of creating forums for public debate is not limited to the press. That function may also be exercised by non-governmental organisations, the activities of which are an essential element of informed public debate. The Court has therefore accepted that non-governmental organisations, like the press, may be characterised as social "watchdogs". In that connection their activities warrant similar Convention protection to that afforded to the press (see *Társaság a Szabadságjogokért*, cited above, § 27, and *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 103, 22 April 2013).

35. The applicant association is a non-governmental organisation the aim of which is to research the impact of transfers of ownership of agricultural and forest land on society. It also contributes to the legislative process by submitting comments on draft laws falling within its field of expertise. In the present case it wished to obtain information about the decisions of the Commission, that is to say the appellate authority approving or refusing transfers of agricultural and forest land under the Tyrol Real Property Transactions Act. The aims pursued by that Act – namely preserving land for agricultural and forestry use and avoiding the proliferation of second homes – are subjects of general interest.

36. The applicant association was therefore involved in the legitimate gathering of information of public interest. Its aim was to carry out research and to submit comments on draft laws, thereby contributing to public debate. Consequently, there has been an interference with the applicant association's right to receive and to impart information as enshrined in Article 10 § 1 of the Convention (see *Társaság a Szabadságjogokért*, cited above, § 28; see also *Kenedi v. Hungary*, no. 31475/05, § 43, 26 May 2009).

(b) Whether the interference was justified

37. The Court reiterates that an interference with an applicant's rights under Article 10 § 1 will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 10. It should therefore be determined

whether it was "prescribed by law", whether it pursued one or more of the legitimate aims set out in that paragraph, and whether it was "necessary in a democratic society" in order to achieve those aims.

38. In dismissing the applicant association's request, the Commission relied on sections 1 and 3(1) subparagraph (c) of the Information Act. The Court is thus satisfied that the interference at issue was "prescribed by law" within the meaning of Article 10 § 2 of the Convention.

39. The Government argued that the interference served legitimate aims, namely the protection of the rights of others and the non-disclosure of confidential information. The applicant association argued that these interests could have been protected by anonymising the copies of the decision. The Court considers that the interference in question can be seen as having pursued the legitimate aim of the protection of the rights of others.

40. The Court must examine whether the interference was also "necessary" within the meaning of Article 10 § 2. In respect of the general principles concerning the necessity of an interference with the right to freedom of expression, the Court refers to its recent judgment in the case of *Animal Defenders International* (cited above, § 100).

41. In the specific context of access to information, the Court has held that the right to receive information basically prohibits a Government from preventing a person from receiving information that others wished or were willing to impart (see *Leander v. Sweden*, 26 March 1987, § 74, Series A no. 116). Furthermore, it has held that the right to receive information cannot be construed as imposing on a State positive obligations to collect and disseminate information of its own motion (see *Guerra and Others v. Italy*, 19 February 1998, § 53, *Reports of Judgments and Decisions* 1998-I). However, in *Társaság a Szabadságjogokért* – which concerned a request for access to information by a non-governmental organisation for the purposes of contributing to public debate – the Court noted that it had recently advanced towards a broader interpretation of the notion of the "freedom to receive information" and thereby towards the recognition of a right of access to information (cited above, § 35). Furthermore it drew a parallel to its case-law concerning the freedom of the press, stating that the most careful scrutiny was called for when authorities enjoying an information monopoly interfered with the exercise of the function of a social watchdog (ibid., § 36, with reference to *Chauvy and Others v. France*, no. 64915/01, § 66, ECHR 2004-VI).

42. In the present case the applicant association requested paper copies of all decisions issued by the Commission from 1 January 2000 to mid-2005. It argued in essence that the State had an obligation either to publish all decisions of the Commission in an electronic database or to provide it with anonymised paper copies upon request. The Court does not consider that a general obligation of this scope can be inferred from its case-law

under Article 10. However, its task in the present case is to examine whether the reasons given by the domestic authorities for refusing the applicant association's request were "relevant and sufficient" in the specific circumstances of the case and whether the interference was proportionate to the legitimate aim pursued.

43. Both the Commission and the Constitutional Court relied on a two-fold argument. Firstly, they considered that the applicant association's request did not fall within the scope of the Information Act. Secondly, they argued that, even if it did, the request could be refused on the grounds that its fulfilment would require substantial resources which would jeopardise the fulfilment of the Commission's other tasks. The Constitutional Court noted in particular that the applicant association's request was not concerned with obtaining information on one or more specific issues but would have required the Commission to compile, of its own motion, all decisions issued over a period of some years, to anonymise them and to send paper copies thereof to the applicant association. The Government also relied on this line of argument.

44. The Court observes that there is a difference between the present case and *Társaság a Szabadságjogokért*, which concerned a request by a non-governmental organisation to be given access to a particular document – a constitutional complaint for the review of certain provisions of the Criminal Code – lodged by a member of parliament. In reaching its conclusion that the refusal of access was in breach of Article 10, the Court had regard to the fact that the information sought was "ready and available" and did not necessitate the collection of any data by the Government (see *Társaság a Szabadságjogokért* cited above, § 36). However, in assessing whether the interference complained of in the present case was "necessary" within the meaning of Article 10 § 2, the Court must consider all the circumstances of the case.

45. The Court notes that the applicant association, by requesting anonymised copies of the Commission's decisions, accepted that the decisions at issue contained personal data which would have to be removed before the decisions could be made available. It also understood that the production and mailing of the requested copies involved a certain cost, which it proposed to reimburse. Nevertheless, the applicant association's request met with an unconditional refusal.

46. Given that the Commission is a public authority deciding disputes over "civil rights" within the meaning of Article 6 of the Convention (see, *Eisenstecken v. Austria*, no. 29477/95, § 20, ECHR 2000-X, with further references), which are, moreover, of considerable public interest, the Court finds it striking that none of the Commission's decisions was published, whether in an electronic database or in any other form. Consequently, much of the anticipated difficulty referred to by the Commission as a reason for its refusal to provide the applicant association with copies of numerous

decisions given over a lengthy period was generated by its own choice not to publish any of its decisions. In this context the Court notes the applicant association's submission - which has not been disputed by the Government - that it receives anonymised copies of decisions from all other Regional Real Property Commissions without any particular difficulties.

47. In sum, the Court finds that the reasons relied on by the domestic authorities in refusing the applicant association's request for access to the Commission's decisions - though "relevant" - were not "sufficient". While it is not for the Court to establish in which manner the Commission could and should have granted the applicant association access to its decisions, it finds that a complete refusal to give it access to any of its decisions was disproportionate. The Commission, which, by its own choice, held an information monopoly in respect of its decisions, thus made it impossible for the applicant association to carry out its research in respect of one of the nine Austrian *Länder*, namely Tyrol, and to participate in a meaningful manner in the legislative process concerning amendments of real property transaction law in Tyrol. The Court therefore concludes that the interference with the applicant association's right to freedom of expression cannot be regarded as having been necessary in a democratic society.

48. There has accordingly been a violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

49. The applicant association complained that it did not have an effective remedy in respect of its complaint under Article 10. It relied on Article 13 of the Convention, which reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] 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."

50. The Government contested that argument.

51. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

52. The applicant association asserted that, in their respective decisions of 21 September 2006 and 27 February 2007, the Administrative Court and the Constitutional Court had refused to examine the merits of its complaint concerning the Commission's refusal to provide it with copies of all decisions issued over a specified period of time.

53. The Government submitted that a complaint to the Constitutional Court constituted an effective remedy. Even a refusal to deal with a complaint entailed a summary examination of the subject matter. Moreover, in the present case the applicant association had had the possibility of challenging the Constitutional Court's refusal to deal with the case by

lodging an application under Article 138 of the Federal Constitution in order to resolve the negative conflict of jurisdiction between the Administrative Court and the Constitutional Court.

54. As the Court has held on many occasions, Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief. The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be "effective" in practice as well as in law. The "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant (see, for instance, *Kudła v. Poland*, no. 30210/96, § 157, ECHR 2000-XI).

55. The Court therefore has to examine whether Austrian law afforded the applicant association the possibility of complaining about the alleged violation of its right to freedom of expression and whether this remedy was "effective" in the sense that it could have afforded appropriate redress for the alleged violation.

56. The Court observes that the Administrative Court held that it was not competent to deal with the applicant association's complaint. The Constitutional Court in its turn also refused to deal with the case, making the assumption that the case was not excluded from the Administrative Court's jurisdiction. However, the applicant association had the possibility of bringing an application under Article 138 of the Federal Constitution which allowed this negative conflict of jurisdiction to be resolved. It made use of this option, with the result that the Constitutional Court set aside its previous decision and ruled on the merits of the applicant association's complaint under Article 10. The fact that the outcome was not favourable for the applicant association does not detract from the effectiveness of the remedy.

57. The Court is therefore satisfied that the applicant association had an effective remedy at its disposal in respect of its complaint under Article 10. Consequently, there has been no violation of Article 13 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

58. 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. Costs and expenses

59. Whereas the applicant association did not claim compensation for pecuniary or non-pecuniary damage, in its observations of 27 August 2010, it claimed a total of 5,579.66 euros (EUR) for the costs and expenses incurred in the domestic proceedings, comprising EUR 80 for expenses incurred before the Commission, EUR 2,940.78 for costs and expenses incurred before the Administrative Court and EUR 2,558.88 for costs and expenses incurred in the first set of proceedings before the Constitutional Court. The applicant association also claimed costs for a further set of proceedings to be conducted before the Constitutional Court - under Article 138 of the Federal Constitution - unless such costs were to be reimbursed by the Constitutional Court.

60. In respect of the Convention proceedings, the applicant association claimed "adequate compensation for the cost of representation" without specifying an amount.

61. The Government observed that the applicant association had failed to substantiate the expenses it claimed to have incurred before the Commission. They noted the claim for reimbursement of costs and expenses incurred before the Administrative Court and for the first set of proceedings before the Constitutional Court, without making any further comment. Moreover, they observed that the costs of a possible further set of proceedings before the Constitutional Court had not yet been actually incurred.

62. Lastly, the Government submitted that the applicant association had failed to substantiate the costs claimed in respect of the Convention proceedings, as required. They observed that the applicant's submissions before the Court were in any event largely similar to those already made before the domestic authorities.

63. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, taking into account the documents in its possession and the above criteria, the Court awards a total amount of EUR 5,499.66 for the costs incurred in the proceedings before the Administrative Court and the first set of proceedings before the

Constitutional Court. It notes that in the second set of proceedings before the Constitutional Court, the applicant association was awarded reimbursement of its costs and has not made any further claims in that respect in the proceedings before the Court. Furthermore, the Court dismisses the remainder of the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the sum of EUR 2,000 for the proceedings before the Court.

64. Consequently, the Court, rounding up the amount, awards a total of EUR 7,500 under the head of costs and expenses.

B. Default interest

65. The Court considers it appropriate that the default interest rate 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

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by six votes to one, that there has been a violation of Article 10 of the Convention;

3. *Holds*, unanimously, that there has been no violation of Article 13 of the Convention;

4. *Holds*, unanimously,
   (a) that the respondent State is to pay the applicant association, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (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;

5. *Dismisses*, unanimously, the remainder of the applicant association's claim for just satisfaction.

Done in English, and notified in writing on 28 November 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Isabelle Berro-Lefèvre
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Møse is annexed to this judgment.

I.B.L.
S.N.

PARTLY DISSENTING OPINION OF JUDGE MØSE

1. I agree that for the reasons set out in the judgment there was no violation of Article 13 but cannot follow my colleagues in finding that Article 10 has been violated (see paragraphs 37 to 48 of the judgment).

2. The general principles concerning freedom of expression are well known and have been summarised, for instance, in *Mouvement raëlien Suisse v. Switzerland* [GC], no. 16354/06, § 48, 13 July 2012. It is also common ground that the press exercises a vital role of "public watchdog" in imparting information of serious public concern. When measures are taken or sanctions imposed by national authorities in such matters, the most careful scrutiny on the part of the Court is called for (see, among many authorities, Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, §§ 59 and 64, ECHR 1999-III).

3. The Grand Chamber has accepted that when a non-governmental organisation (NGO) draws attention to matters of public interest, it is exercising a public watchdog role of similar importance to that of the press (see *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 103, 22 April 2013). I agree with this point of departure. However, whether there is a violation or not depends on a concrete assessment. In *Animal Defenders*, which concerned the prohibition of paid political advertising on radio and television, the majority did not find a breach of Article 10.

4. At Chamber level, an NGO's role as a watchdog was raised in *Vides Aizsardzibas Klubs v. Latvia*, no. 57829/00, § 42, 27 May 2004; *Steel and Morris v. the United Kingdom*, no. 68416/01, § 89, ECHR 2005-II; and *Riolo v. Italy*, no. 42211/07, § 63, 17 July 2008 (which related to a researcher in political science writing a newspaper article). The facts in those cases are very different from the present case.

5. As regards access to information, I agree with the initial recapitulation of relevant case law in paragraph 41 of the judgment, including the references to *Leander v. Sweden*, 26 March 1987, § 74, Series A no. 116, and *Guerra and Others v. Italy*, 19 February 1998, § 53, *Reports of Judgments and Decisions* 1998-I. The majority then refer to *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, 14 April 2009, which concerned access to information by an NGO. In my view, that case does not support a finding of a violation in the present case (see paragraphs 7-8 below).

6. In paragraphs 34-36 of the judgment, reference is made to *Dammann v. Switzerland*, no. 77551/01, § 52, 25 April 2006; the case of *Társaság a Szabadságjogokért*, cited above, §§ 26 and 27; and *Kenedi v. Hungary*, no. 31475/05, § 43, 26 May 2009. The first judgment concerns the conviction of a journalist who had taken certain preparatory steps to obtain information in alleged breach of the Swiss penal code, and is clearly

distinguishable from the present case. Nor is the third judgment comparable: the applicant – a historian – had obtained a court judgment granting him access to certain documents deposited with the Ministry of the Interior. In spite of subsequent court decisions in line with the original judgment, the authorities obstructed his access.

7. As mentioned by the majority (see paragraph 44 of the judgment), the case of *Társaság a Szabadságjogokért*, cited above, concerned a request by an NGO to be given access to a particular document – a constitutional complaint. The Court found that the refusal of access was in breach of Article 10, taking into account that the information sought was "ready and available" and did not require the collection of any data by the Government (ibid., § 36, with reference to *Guerra and Others*, cited above, § 53). Moreover, the Court held in that case that private data protection considerations could not justify the interference (ibid., § 37).

8. By contrast, the request made by the applicant association in the present case required the provision of anonymised paper copies of all decisions by the Tyrol Real Property Commission issued over a period of more than five years. The decisions were not in a state to be sent. It appears that the applicant association itself, by requesting anonymised copies, understood that the decisions concerned contained personal data which would have to be removed before they could be made available. The Commission refused the request on the grounds that its fulfilment, even if it were accepted that it fell within the scope of the Information Act, would require substantial resources which would jeopardise the fulfilment of the Commission's other tasks. The Constitutional Court endorsed this line of argument, finding that the Commission would have to compile all the decisions, anonymise them and send paper copies to the applicant association.

9. It is noteworthy that according to the annual report published by the Regional Government, the Commission issued between 65 and 109 decisions per year in the relevant period from 2000 to 2005 (see paragraph 23 of the judgment). The applicant association's request therefore related to several hundred decisions. In my view, there was thus no arbitrariness in the argument that complying with the applicant association's request would have had a negative impact on the fulfillment of the Commission's tasks. I therefore accept that the reasons given for the refusal of the applicant association's request were relevant and sufficient.

10. Lastly, it should be noted that the applicant association is not left completely without any possibility to obtain information about the Commission's decisions. A certain amount of information is available in the Regional Government's annual report. Moreover, the Commission is not an authority of last resort. A complaint against its decisions can be lodged with the Constitutional Court and a collection of the latter's decisions – which, as a rule, contain a summary of the challenged decision – is published in an

online database, the Federal Legal Information System. Consequently, the interference with the applicant association's right under Article 10 was also proportionate.

11. In my view, these considerations lead to the conclusion that the domestic authorities did not overstep their margin of appreciation when refusing the applicant association's request. The fact that all other Regional Real Property Commissions sent out anonymised copies is not sufficient to alter that conclusion.

12. There has accordingly been no violation of Article 10 of the Convention.

BURDEN v UNITED KINGDOM

BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

APPLICATION NO.13378/05

(The President, Judge Costa; Judges Bratza, Zupančič, Tulkens, Türmen, Bîrsan, Vajić, Tsatsa-Nikolovska, Baka, Ugrekhelidze, Kovler, Steiner, Borrego Borrego, Myjer, Björgvinsson, Ziemele, Berro-Lefèvre)

(2008) 47 E.H.R.R. 38

April 29, 2008

Discrimination; Inheritance tax; Protection of property; Siblings

H1 The applicants were unmarried sisters. They had lived together all their lives and, for the previous 31 years, had lived in a house which they owned in their joint names. Each had made a will leaving all their property to the other.

H2 Under domestic law, when one of the sisters died, the survivor would be liable to pay inheritance tax on any assets received under the will. The tax rate was nil for the first £300,000 and 40 per cent thereafter. However, property which passed from one spouse to another, or from one civil partner to another in the case of same-sex couples, was exempt from inheritance tax. The applicants, as sisters, were not entitled to marry each other, nor to form a civil partnership with the other.

H3 The applicants complained of a violation of their rights under Art.1 of Protocol No.1, taken with Art.14.

H4 **Held:**

(1) unanimously that the Government's preliminary objections should be dismissed;

(2) by 15 votes to 2 that there had been no violation of Art.1 of Protocol No.1, taken with Art.14.

1. Preliminary objection; "victim" status and exhaustion of domestic remedies (Article 34 and Article 35)

H5 (a) In order to lodge a petition, a person must be able to claim that they were "the victim of a violation". However, an individual could be a victim of a violation, in the absence of an individual measure of implementation, if he was required to modify his conduct as a result, or if he was a member of a class of people who risk being directly affected by the law in question. [34]

H6 (b) Given the advanced age of the applicants, the nature of their wills and the value of their property, there was a real risk that one of them would be required to

pay inheritance tax in the immediate future. The applicants were sufficiently affected by the legislation to be victims within the meaning of Art.34. [35]

H7 (c) Since neither applicant had, as yet, suffered a pecuniary loss, the only remedy available in the domestic courts would be a declaration of incompatibility under s.4 of the Human Rights Act 1998. However, since this placed no legal obligation on the executive or legislature to amend the offending law, it could not be said that such a declaration amounted to an effective remedy within the meaning of Art.35 and, therefore, the applicants were not required first to bring their case in the domestic courts. [40]–[44]

H8 (d) The preliminary objections were dismissed [45].

2. Right to peaceful enjoyment of possessions taken with the prohibition on discrimination in the enjoyment of Convention rights (Article 1 of Protocol No.1 taken with Article 14)

H9 (a) The relationship between siblings was not analogous to a marriage or same-sex partnership. Marriage and same-sex partnership are expressly forbidden to close family members. The fact that the applicants had lived together for many years did not change the position. [62]

H10 (b) Marriage conferred a special status on those who entered into it and was a status recognised by the Convention. Some aspects of this special status had been devolved to persons who entered into a civil partnership, but none had been further devolved to mere cohabitants. [63]–[65]

H11 (c) The applicants could not be compared to a married couple or same-sex couple in a civil partnership. It followed that there had been no discrimination and no violation of Art.14 in conjunction with Art.1 of Protocol No.1. [66]

H12 **The following cases are referred to in the Court's judgment:**

1. *Akdivar v Turkey* (1997) 23 E.H.R.R. 143
2. *B v United Kingdom* (2006) 42 E.H.R.R. 11
3. *Bowman v United Kingdom* (1998) 26 E.H.R.R. 1
4. *Campbell and Cosans v United Kingdom* (1982) 4 E.H.R.R. 293
5. *DH v Czech Republic* (2008) 47 E.H.R.R. 3
6. *Eckle v Germany* (1983) 5 E.H.R.R. 1
7. *Hobbs v United Kingdom* (2007) 44 E.H.R.R. 54
8. *Inze v Austria* (1988) 10 E.H.R.R. 394
9. *Ireland v United Kingdom* (1979–80) 2 E.H.R.R. 25
10. *Johnston v Ireland* (1987) 9 E.H.R.R. 203
11. *Klass v Germany* (1979–80) 2 E.H.R.R. 214
12. *Lindsay v United Kingdom* (1987) 9 E.H.R.R. CD555
13. *Marckx v Belgium* (1979–80) 2 E.H.R.R. 330
14. *Mazurek v France* (2006) 42 E.H.R.R. 9
15. *Norris v Ireland* (1991) 13 E.H.R.R. 186
16. *Open Door Counselling Ltd v Ireland* (1993) 15 E.H.R.R. 244
17. *Stec v United Kingdom* (2006) 43 E.H.R.R. 47
18. *Walker v United Kingdom* (2004) 39 E.H.R.R. SE4
19. *Willis v United Kingdom* (2002) 35 E.H.R.R. 21
20. Application No.11192/84, *Montion v France*, May 14, 1987

21. Application No.12604/86, *G v Belgium*, July 10, 1991
22. Application No.45851/99, *Shackell v United Kingdom*, April 27, 2000
23. Application No.59314/00, *Dodds v United Kingdom*, April 8, 2003
24. Application No.43783/98, *Orion-Břeclav v Czech Republic*, January 13, 2004
25. Application No.8374/03, *Pearson v United Kingdom*, April 27, 2004
26. Application No.29800/04, *Upton v United Kingdom*, April 11, 2006

H13 **The following domestic cases are referred to in the Court's judgment:**
27. *A v Secretary of State for the Home Department* [2005] UKHL 71

H14 **The following cases are referred to in the dissenting Opinion of Judge Zupančič:**
28. *Stec v Kingdom* (2006) 43 E.H.R.R. 47

H15 **The following cases are referred to in the dissenting Opinion of Judge Borrego Borrego:**
29. *Stec v Kingdom* (2006) 43 E.H.R.R. 47

H16 *Mr D. Pannick Q.C.* (counsel); *Mr S. Grodzinski* (counsel); *Ms E. Gedye* (solicitor); *Ms E. Stradling* (solicitor) for the applicants.
Ms H. Mulvein (agent); *Mr J. Crow* (counsel); *Mr J. Couchman* (adviser); *Ms K. Innes* (adviser); *Mr S. Gocke* (adviser); *Mr R. Linham* (adviser) for the Government.

THE FACTS

I. The circumstances of the case

9 The facts of the case, as submitted by the parties, may be summarised as follows.

10 The applicants are unmarried sisters, born on May 26, 1918 and December 2, 1925 respectively. They have lived together, in a stable, committed and mutually supportive relationship, all their lives; for the last 31 years in a house built on land inherited from their parents in Wiltshire.

11 The house is owned by the applicants in their joint names. According to an expert valuation dated January 12, 2006, the property was worth £425,000, or £550,000 if sold together with the adjoining land. The sisters also jointly own two other properties, worth £325,000 in total. In addition, each sister owns in her sole name shares and other investments worth approximately £150,000. Each has made a will leaving all her property to the other.

12 The applicants submitted that the value of their jointly-owned property had increased to the point that each sister's one-half share was worth significantly more than the current exemption threshold for inheritance tax.[1]

[1] See [13] below.

II. Relevant domestic law

A. Inheritance tax

13 By ss.3, 3A and 4 of the Inheritance Tax Act 1984, inheritance tax is charged at 40 per cent on the value of a person's property, including his or her share of anything owned jointly, passing on his or her death, and on lifetime transfers made within seven years of death. The charge is subject to a nil-rate threshold of £300,000 for transfers between April 5, 2007 and April 5, 2008.[2]

14 Interest is charged, currently at 4 per cent, on any tax not paid within six months after the end of the month in which the death occurred, no matter what caused the delay in payment. Any inheritance tax payable by a person to whom land is transferred on death may be paid, at the tax-payer's election, in 10 equal yearly instalments, unless the property is sold, in which case outstanding tax and interest must be paid immediately.[3]

15 Section 18(1) of the Inheritance Tax Act provides that property passing from the deceased to his or her spouse is exempt from charge. With effect from December 5, 2005, this exemption was extended to a deceased's "civil partner".[4]

B. The Civil Partnership Act 2004

16 The purpose of the Civil Partnership Act was to provide same-sex couples with a formal mechanism for recognising and giving legal effect to their relationships, and to confer on them, as far as possible, the same rights and obligations as entailed by marriage.

17 A couple is eligible to form a civil partnership if they are: (i) of the same sex; (ii) not already married or in a civil partnership; (iii) over the age of 16; (iv) not within the prohibited degrees of relationship.

18 A civil partnership is, like marriage, indeterminate in nature and can end only on death, dissolution or annulment. The Civil Partnership Act created a comprehensive range of amendments to existing legislation, covering inter alia pensions, tax, social security, inheritance and immigration, intended to create parity between civil partnership and marriage for all purposes except in the very few cases where there was an objective justification for not doing so. The courts have similar powers to control the ownership and use of the civil partners' property upon dissolution of a civil partnership as upon dissolution of a marriage.

19 When the Civil Partnership Bill was passing through Parliament, an amendment to it was adopted in the House of Lords by 148 votes to 130, which would have had the effect of extending the availability of civil partnership, and the associated inheritance tax concession, to family members within the "prohibited degrees of relationship", if: (i) they were over 30 years of age; (ii) they had cohabited for at least 12 years; and (iii) they were not already married or in a civil partnership with some other person. The amendment was reversed when the Bill returned to the House of Commons.

[2] Finance Act 2005 s.98.
[3] Inheritance Tax Act 1984 s.227(1)–(4).
[4] See [16]–[18] below.

20 During the course of the debate in the House of Lords, Lord Alli, a Labour peer, stated:

> "I have great sympathy with the noble Baroness, Lady O'Caithlin [the Conservative peer who proposed the amendment], when she talks about siblings who share a home or a carer who looks after a disabled relative. Indeed, she will readily acknowledge that I have put the case several times—at Second Reading and in Grand Committee—and I have pushed the Government very hard to look at this issue. There is an injustice here and it needs to be dealt with, but this is not the Bill in which to do it. This Bill is about same-sex couples whose relationships are completely different from those of siblings."

During the same debate, Lord Goodhart, Liberal Democrat peer, stated:

> "There is a strongly arguable case for some kind of relief from inheritance tax for family members who have been carers to enable them to continue living in the house where they have carried out their caring duties. But that is a different argument and this is not the place or the time for that argument. This Bill is inappropriate for dealing with that issue."

During the course of the debate in the Standing Committee of the House of Commons, Jacqui Smith MP, Deputy Minister for Women and Equality, stated:

> "As I suggested on Second Reading, we received a clear endorsement of the purpose of the Bill—granting legal recognition to same-sex couples, ensuring that the many thousands of couples living together in long-term committed relationships will be able to ensure that those relationships are no longer invisible in the eyes of the law, with all the difficulties that that invisibility brings.
>
> We heard a widespread agreement from Members across almost all parties that the Civil Partnership Bill is not the place to deal with the concerns of relatives, not because those concerns are not important, but because the Bill is not the appropriate legislative base on which to deal with them."

C. The Human Rights Act 1998

21 The Human Rights Act 1998 entered into force on October 2, 2000. Section 3(1) provides:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

Section 4 of the 1998 Act provides (so far as relevant):

> "(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
>
> (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.
>
> . . .

(6) A declaration under this section . . .
(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it was given; and
(b) is not binding on the parties to the proceedings in which it is made."

Section 6 provides:

"(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
(2) Subsection (1) does not apply to an act if
(a) as a result of one or more provisions of primary legislation, the authority could not have acted any differently; or
(b) in the case of one or more provisions of . . . primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions."

Section 10 provides:

"(1) This section applies if –
(a) a provision of legislation has been declared under section 4 to be incompatible with a Convention right and, if an appeal lies –
(i) all persons who may appeal have stated in writing that they do not intend to do so; or
(ii) the time for bringing an appeal has expired and no appeal has been brought within that time; or
(iii) an appeal brought within that time has been determined or abandoned; or
(b) it appears to a Minister of the Crown or Her Majesty in Council that, having regard to a finding of the European Court of Human Rights made after the coming into force of this section in proceedings against the United Kingdom, a provision of legislation is incompatible with an obligation of the United Kingdom arising from the Convention.
(2) If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility."

22 The Government submitted that the objective of giving the national courts the power under s.4 had been to provide a formal means for notifying the Government and Parliament about a situation in which legislation was found not to comply with the Convention, and to provide a mechanism for speedily correcting the defect. Once a declaration had been made (or once the European Court of Human Rights had found a violation based on a provision of domestic law), there were two alternative avenues for putting right the problem: either primary legislation could be introduced in Parliament, or the Minister concerned could exercise his summary power of amendment under s.10 of the Human Rights Act 1998.

23 When the Human Rights Bill passed through the House of Lords on November 27, 1997, the Lord Chancellor explained that:

> "[W]e expect that the government and Parliament will in all cases almost certainly be prompted to change the law following a declaration of incompatibility."

One of the Ministers with responsibility for the Human Rights Act explained to the House of Commons on October 21, 1998 that:

> "Our proposals [for remedial orders] safeguard parliamentary procedures and sovereignty, ensure proper supervision of our laws and ensure that we can begin to get the ability both to enforce human rights law and to create a human rights culture. They also ensure that we can do it in the context of not having to worry that if something is decided by the Strasbourg court or by our courts that creates an incompatibility, we do not have a mechanism to deal with it in the quick and efficient way that may be necessary."

24 According to statistics provided by the Government and last updated on July 30, 2007, since the Human Rights Act came into force on October 2, 2000 there had been 24 declarations of incompatibility. Of these, six had been overturned on appeal and three remained subject to appeal in whole or in part. Of the 15 declarations which had become final, three related to provisions that had already been remedied by primary legislation at the time of the declaration; seven had been remedied by subsequent primary legislation; one had been remedied by a remedial order under s.10 of the Act; one was being remedied by primary legislation in the course of being implemented; one was the subject of public consultation; and two (relating to the same issue) would be the subject of remedial measures which the Government intended to lay before Parliament in the autumn of 2007. In one case, *A v Secretary of State for the Home Department* [2005] UKHL 71; [2005] 2 A.C. 68, the House of Lords made a declaration of incompatibility concerning s.23 of the Anti-Terrorism, Crime and Security Act 2001, which gave the Secretary of State power to detain suspected international terrorists in certain circumstances. The Government responded immediately by repealing the offending provision by s.16 of the Prevention of Terrorism Act 2005.

III. Relevant comparative law and material

25 Whilst in common law systems there has traditionally been freedom of testamentary devolution, in civil law systems the order of succession is generally established by statute or code, with some particularly privileged categories of heirs, normally the spouse and close relatives, being granted automatic rights to a portion of the estate (the so-called reserved shares), which cannot generally be modified by the decedent's will. The position of each heir depends therefore on the combined effect of family law and tax law.

26 From the information available to the Court, it would appear that some form of civil partnership, with varying effects on matters of inheritance, are available in 16 Member States, namely Andorra, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Iceland, Luxembourg, the Netherlands, Norway, Slovenia, Spain, Sweden, Switzerland and the United Kingdom. Spouses and close

relatives, including siblings, are granted statutory inheritance rights in virtually all Member States. In a majority of Member States, siblings are treated less favourably in terms if succession rights than the surviving spouse but more favourably than the surviving civil partner; and only a few Member States grant the surviving civil partner inheritance rights equal to those of the surviving spouse. Inheritance tax schemes usually follow the order of succession, although in certain countries, such as France and Germany, the surviving spouse is granted a more favourable tax exemption than any other category of heir.

JUDGMENT

27 The applicants complained under Art.1 of Protocol No.1, taken in conjunction with Art.14 of the Convention, that when one of them died, the survivor would face a significant liability to inheritance tax, which would not be faced by the survivor of a marriage or a civil partnership.

Article 1 of Protocol No.1 provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Article 14 of the Convention provides:

> "The enjoyment of the rights and freedoms set forth in [the] 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."

I. The Government's preliminary objections

28 The Government contested the admissibility of the application on a number of grounds under Arts 34 and 35(1) of the Convention.

Article 34 provides:

> "The Court may receive applications from any person . . . claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto."

Article 35(1) states:

> "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international

law, and within a period of six months from the date on which the final decision was taken."

A. The applicants' victim status

1. The Chamber's conclusions

29 The Chamber found, unanimously, that, given the applicants' advanced age and the very high probability that one would be liable to pay inheritance tax upon the death of the other, they could claim to be directly affected by the impugned law.

2. The parties' submissions

(a) The Government

30 The Government submitted that the Chamber's reasoning did not support its conclusion. Neither applicant had yet been required to pay inheritance tax; at least one of them would definitely never have to pay it; and, since it was not inevitable that one would predecease the other, it was a matter of speculation whether either would ever suffer any loss. The applicants could not, therefore, claim to be "victims" of any violation, and their complaint represented a challenge to the tax regime *in abstracto*, which the Court could not entertain.

31 The legal test for "victim status" was very clear from the case law: the word "victim" denotes a person who is directly affected by the act or omission in issue.[5] The present case was on that ground distinguishable from *Marckx v Belgium* (1979–80) 2 E.H.R.R. 330, where the applicants had been complaining about certain provisions of Belgian law that applied automatically to the illegitimate child and her mother, and *Inze v Austria* (1988) 10 E.H.R.R. 394, where the complaint concerned rights of inheritance where the parent had already died. In contrast, the requirement to pay inheritance tax did not apply automatically. The applicants were not so affected by the risk of a future liability to tax as to bring them into a comparable position to the applicants in *Campbell and Cosans v United Kingdom* (1982) 4 E.H.R.R. 293 where the Court found that a threat of inhuman and degrading punishment could in itself breach Art.3 of the Convention, or *Norris v Ireland* (1991) 13 E.H.R.R. 186, where the existence of criminal sanctions for homosexual acts must necessarily have affected the applicant's daily conduct and private life.

(b) The applicants

32 The applicants agreed with the Chamber's unanimous finding that they could properly claim to be victims. It was virtually certain that one would predecease the other, and similarly certain that the value of the deceased's estate would exceed the nil-rate threshold for inheritance tax and that the survivor would face a significant liability to inheritance tax which would not be faced by the survivor of a marriage or civil partnership.[6] Thus, as in *Marckx* or *Johnston v Ireland* (1987) 9 E.H.R.R.

[5] See, for example, *Eckle v Germany* (1983) 5 E.H.R.R. 1 at [66].
[6] See [15] above.

203, both of which concerned complaints about the effect of illegitimacy on succession rights under domestic law, the applicants ran a very high risk of a violation of their Convention rights. It was, moreover, clear from the Court's case law[7] that the "mere threat" of conduct prohibited by the Convention might constitute the person at threat a victim, provided the threat was sufficiently real and immediate. Here the threat was very real; even before either had died, the legislation had an impact on them, as it affected their choices about disposing of their property. They had "an awful fear" hanging over them that the house would have to be sold to pay the tax, and they should not have to wait until one of them died before being able to seek the protection of the Convention.

3. The Grand Chamber's assessment

The Court recalls that, in order to be able to lodge a petition in pursuance of
33 Art.34, a person, non-governmental organisation or group of individuals must be able to claim "to be the victim of a violation … of the rights set forth in the Convention". In order to claim to be a victim of a violation, a person must be directly affected by the impugned measure.[8] The Convention does not, therefore, envisage the bringing of an *actio popularis* for the interpretation of the rights set out therein or permit individuals to complain about a provision of national law simply because they consider, without having been directly affected by it, that it may contravene the Convention.[9]

34 It is, however, open to a person to contend that a law violates his rights, in the absence of an individual measure of implementation, if he is required either to modify his conduct or risk being prosecuted[10] or if he is a member of a class of people who risk being directly affected by the legislation.[11] Thus, in the *Marckx* case, (1979–1980) 2 E.H.R.R. 330 the applicants, a single mother and her five-year-old, "illegitimate" daughter, were found to be directly affected by, and thus victims of, legislation which would, inter alia, limit the child's right to inherit property from her mother upon the mother's eventual death, since the law automatically applied to all children born out of wedlock. In contrast, in *Willis v United Kingdom* (2002) 35 E.H.R.R. 21, the risk to the applicant of being refused a widow's pension on grounds of sex at a future date was found to be hypothetical, since it was not certain that the applicant would otherwise fulfil the statutory conditions for the payment of the benefit at the date when a woman in his position would become entitled.

35 In the present case, the Grand Chamber agrees with the Chamber that, given the applicants' age, the wills they have made and the value of the property each owns, the applicants have established that there is a real risk that, in the not too distant future, one of them will be required to pay substantial inheritance tax on the property inherited from her sister. In these circumstances, the applicants are directly affected by the legislation and can claim to be victims of the alleged discriminatory treatment.

[7] See, for example, *Campbell and Cosans* (1982) 4 E.H.R.R. 293.
[8] See *Ireland v United Kingdom* (1979–80) 2 E.H.R.R. 25 at [239]–[240]; *Eckle* (1983) 5 E.H.R.R. 1; and *Klass v Germany* (1979–80) 2 E.H.R.R. 214 at [33].
[9] *Norris* (1991) 13 E.H.R.R. 186 at [31].
[10] See *Norris* (1991) 13 E.H.R.R. 186 at [31]; *Bowman v United Kingdom* (1998) 26 E.H.R.R. 1.
[11] *Johnston* (1987) 9 E.H.R.R. 203 at [42]; *Open Door Counselling Ltd v Ireland* (1993) 15 E.H.R.R. 244.

B. Domestic remedies

1. The Chamber's conclusions

36 The Chamber's findings as regards exhaustion of domestic remedies were as follows[12]:

> "The Court is very much aware of the subsidiary nature of its role and that the object and purpose underlying the Convention, as set out in Article 1—that rights and freedoms should be secured by the Contracting State within its jurisdiction—would be undermined, along with its own capacity to function, if applicants were not encouraged to pursue the means at their disposal within the State to obtain available redress (see *B. and L. v. the United Kingdom* (dec.), no. 36536/02, 29 June 2004). The rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention thus obliges applicants to use first the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness (*Akdivar and Others v. Turkey*, no. 21893/93, §§ 65-67, *Reports* 1996-IV; *Aksoy v. Turkey*, no. 21987/93, §§ 51-52, *Reports* 1996-VI).
>
> The Government argue that the remedy under the Human Rights Act allowing an applicant to seek a declaration from a domestic court that legislation is incompatible with the Convention is sufficiently certain and effective for the purposes of Article 35 § 1. Such a declaration creates a discretionary power in the relevant government minister to take steps to amend the offending provision, either by a remedial order or by introducing a Bill in Parliament.
>
> The Court found in [*Hobbs v United Kingdom* (2007) 44 E.H.R.R. 54] that this remedy was not sufficiently effective, essentially for two reasons: first, because a declaration was not binding on the parties to the proceedings in which it was made; and, secondly, because a declaration provided the appropriate minister with a power, not a duty, to amend the offending legislation by order so as to make it compatible with the Convention. Moreover, the minister concerned could exercise that power only if he considered that there were 'compelling reasons' for doing so.
>
> The Court considers that the instant case is distinguishable from *Hobbs*, where the applicant had already suffered financial loss as a result of the discrimination about which he complained but could not have obtained monetary compensation through the grant of a declaration of incompatibility. It is closer to *B. and L.*, where there had been no financial loss, although those applicants had already been prevented by the impugned legislation from marrying each other. In the present case, as in *B. and L.*, it is arguable that, had a declaration of incompatibility been sought and made, the applicants might have been able to benefit from a future change in the law.

[12] At [35]–[40].

However, it remains the case that there is no legal obligation on the minister to amend a legislative provision which has been found by a court to be incompatible with the Convention. The Court notes that, according to the information provided by the Government, by August 2006 such amendments had occurred in ten out of the thirteen cases where a declaration had been finally issued by the courts, and in the remaining three, reforms were pending or under consideration . . .. It is possible that at some future date evidence of a long-standing and established practice of ministers giving effect to the courts' declarations of incompatibility might be sufficient to persuade the Court of the effectiveness of the procedure. At the present time, however, there is insufficient material on which to base such a finding.

The Court does not consider that these applicants could have been expected to have exhausted, before bringing their application to Strasbourg, a remedy which is dependent on the discretion of the executive and which the Court has previously found to be ineffective on that ground. It therefore rejects the Government's second objection to admissibility."

2. The parties' submissions

(a) The Government

37 The Government referred to the Court's case law to the effect that it is incumbent on an applicant to pursue a domestic remedy if it is "effective and capable of providing redress for the complaint".[13] In the present case, since neither applicant had suffered any liability for inheritance tax, the most that the Court could award, in the event that it found in favour of the applicants, would be a declaration that the Inheritance Tax Act represented a violation of their Convention rights. Assuming that the claim was well founded on the merits, this was also the relief that the High Court in the United Kingdom would have awarded under s.4 of the Human Rights Act. If a declaration by this Court would constitute just satisfaction for the purposes of Art.41 of the Convention, the Government submitted that a declaration of incompatibility by the High Court must necessarily be regarded as an available and effective domestic remedy for the purposes of Art.35.

38 The Government referred to the information set out at [24] above and emphasised that there was not a single case where it had refused to remedy a declaration of incompatibility. While as a matter of pure law it was true, as the Court had found in *Hobbs*, that such a declaration was not binding on the parties and gave rise to a power for the Minister, rather than a duty, to amend the offending legislation, this was to ignore the practical reality that a declaration of incompatibility was highly likely to lead to legislative amendment.

(b) The applicants

39 The applicants referred to the Commission's case law to the effect that the remedies an applicant is required to make use of must not only be effective but also

[13] *Hobbs v United Kingdom* (2007) 44 E.H.R.R. 54.

independent of discretionary action by the authorities.[14] They argued that a declaration of incompatibility could not be regarded as an effective remedy because the procedures to change the law could not be initiated by those who had obtained a declaration or enforced by any court or organ of State. The Court had accepted a similar argument in *Hobbs* and also in Application No.59314/00, *Dodds v United Kingdom*, April 8, 2003, *Walker v United Kingdom* (2004) 39 E.H.R.R. SE4, Application No.8374/03, *Pearson v United Kingdom* (dec.), April 27, 2004 and, finally, *B v United Kingdom* (2006) 42 E.H.R.R. 11, where the Government had made submissions almost identical to those in the present case.

3. The Grand Chamber's assessment

40 The Grand Chamber recalls that the Human Rights Act places no legal obligation on the executive or the legislature to amend the law following a declaration of incompatibility and that, primarily for this reason, the Court has held on a number of previous occasions that such a declaration cannot be regarded as an effective remedy within the meaning of Art.35(1).[15] Moreover, in cases such as *Hobbs*, *Dodds*, *Walker* and *Pearson*, where the applicant claims to have suffered loss or damage as a result of the breach of his Convention rights, a declaration of incompatibility has been held not to provide an effective remedy because it is not binding on the parties to the proceedings in which it is made and cannot form the basis of an award of monetary compensation.

41 The Grand Chamber is prepared to accept the Government's argument that the present case can be distinguished from *Hobbs*, given that neither applicant complains of having already suffered pecuniary loss as a result of the alleged violation of the Convention. It has carefully examined the material provided to it by the Government concerning legislative reform in response to the making of a declaration of incompatibility, and notes with satisfaction that in all the cases where declarations of incompatibility have to date become final, steps have been taken to amend the offending legislative provision.[16] However, given that there have to date been a relatively small number of such declarations that have become final, it agrees with the Chamber that it would be premature to hold that the procedure under s.4 of the Human Rights Act provides an effective remedy to individuals complaining about domestic legislation.

42 Nonetheless, the Grand Chamber is mindful that the principle that an applicant must first make use of the remedies provided by the national legal system before applying to the international Court is an important aspect of the machinery of protection established by the Convention.[17] The European Court of Human Rights is intended to be subsidiary to the national systems safeguarding human rights[18] and it is appropriate that the national courts should initially have the opportunity to determine questions of the compatibility of domestic law with the Convention and

[14] For example, App. No.11192/84, *Montion v France*, May 14, 1987 and App. No.12604/86, *G v Belgium*, July 10, 1991.
[15] See the decisions in *Hobbs* (2007) 44 E.H.R.R. 54, App. No.59314/00, *Dodds*, April 8, 2003, *Walker* (2004) 39 E.H.R.R. SE4, App. No.8374/03, *Pearson*, April 27, 2004 and *B v United Kingdom* (2006) 42 E.H.R.R. 11; and also App. No.29800/04, *Upton v United Kingdom*, April 11, 2006.
[16] See [24] above.
[17] See *Akdivar v Turkey* (1997) 23 E.H.R.R. 143 at [65].
[18] *Akdivar* (1997) 23 E.H.R.R. 143 at [65]–[66].

that, if an application is nonetheless subsequently brought to Strasbourg, the European Court should have the benefit of the views of the national courts, as being in direct and continuous contact with the forces of their countries.

43 The Grand Chamber agrees with the Chamber that it cannot be excluded that at some time in the future the practice of giving effect to the national courts' declarations of incompatibility by amendment of the legislation is so certain as to indicate that s.4 of the Human Rights Act is to be interpreted as imposing a binding obligation. In those circumstances, except where an effective remedy necessitated the award of damages in respect of past loss or damage caused by the alleged violation of the Convention, applicants would be required first to exhaust this remedy before making an application to the Court.

44 This is not yet the case, however, and the Grand Chamber therefore rejects the Government's objection on grounds of non-exhaustion of domestic remedies.

C. Conclusion

45 The Court accordingly rejects the Government's preliminary objections.

II. Alleged violation of Article 14 of the convention in conjunction with Article 1 of Protocol No.1

A. The Chamber's conclusions

46 The Chamber rejected the Government's argument, relying inter alia on the judgment in *Marckx*, that Art.1 of Protocol No.1 was inapplicable since there was no right under the Article to acquire possessions. The Chamber noted that the applicants complained not, as in the *Marckx* case, that they would be prevented from acquiring property but that the survivor would be required to pay tax on existing property which they jointly owned, an outcome which the Chamber had held to be highly probable. Since the duty to pay tax on existing property fell within the scope of Art.1 of Protocol No.1, Art.14 was applicable.

47 The Chamber left open the question whether the applicants could claim to be in an analogous position to a married or Civil Partnership Act couple and found that the difference in treatment was not inconsistent with Art.14 of the Convention, for the following reasons[19]:

> "In this regard, the Court recalls its finding in [App. No.45851/99, *Shackell v United Kingdom*, April 27, 2000] that the difference of treatment for the purposes of the grant of social security benefits, between an unmarried applicant who had a long-term relationship with the deceased, and a widow in the same situation, was justified, marriage remaining an institution that was widely accepted as conferring a particular status on those who entered it. The Court decided in *Shackell*, therefore, that the promotion of marriage by way of the grant of limited benefits for surviving spouses could not be said to exceed the margin of appreciation afforded to the respondent State. In the present case, it accepts the Government's submission that the inheritance tax exemption for married and civil partnership couples likewise pursues a

[19] At [59]–[61].

legitimate aim, namely to promote stable, committed heterosexual and homosexual relationships by providing the survivor with a measure of financial security after the death of the spouse or partner. The Convention explicitly protects the right to marry in Article 12, and the Court has held on many occasions that sexual orientation is a concept covered by Article 14 and that differences based on sexual orientation require particularly serious reasons by way of justification (see, for example, *Karner v. Austria*, no. 40016/98, § 37, ECHR 2003-IX and the cases cited therein). The State cannot be criticised for pursuing, through its taxation system, policies designed to promote marriage; nor can it be criticised for making available the fiscal advantages attendant on marriage to committed homosexual couples.

In assessing whether the means used are proportionate to the aim pursued, and in particular whether it is objectively and reasonably justifiable to deny co-habiting siblings the inheritance tax exemption which is allowed to survivors of marriages and civil partnerships, the Court is mindful both of the legitimacy of the social policy aims underlying the exemption, and the wide margin of appreciation that applies in this field . . .. Any system of taxation, to be workable, has to use broad categorisations to distinguish between different groups of taxpayers (see [*Lindsay v United Kingdom* (1987) 9 E.H.R.R. CD555]). The implementation of any such scheme must, inevitably, create marginal situations and individual cases of apparent hardship or injustice, and it is primarily for the State to decide how best to strike the balance between raising revenue and pursuing social objectives. The legislature could have granted the inheritance tax concessions on a different basis: in particular, it could have abandoned the concept of marriage or civil partnership as the determinative factor and extended the concession to siblings or other family members who lived together, and/or based the concession on such criteria as the period of cohabitation, the closeness of the blood relationship, the age of the parties or the like. However, the central question under the Convention is not whether different criteria could have been chosen for the grant of an inheritance tax exemption, but whether the scheme actually chosen by the legislature, to treat differently for tax purposes those who were married or who were parties to a civil partnership from other persons living together, even in a long-term settled relationship, exceeded any acceptable margin of appreciation.

In the circumstances of the case, the Court finds that the United Kingdom cannot be said to have exceeded the wide margin of appreciation afforded to it and that the difference of treatment for the purposes of the grant of inheritance tax exemptions was reasonably and objectively justified for the purposes of Article 14 of the Convention. There has accordingly been no violation of the Article, read in conjunction with Article 1 of Protocol No. 1 to the Convention, in the present case."

B. The parties' submissions

1. The Government

48 The Government emphasised that there was no right under Art.1 of Protocol No.1 to acquire possessions; in the Court's case law on domestic inheritance laws, it had consistently held that, before the relevant death occurred, the presumptive heir had no property rights and that his or her hope of inheriting in the event of death could not therefore amount to a "possession".[20] Since each applicant was still alive and her complaint, as surviving sister, concerned the potential future impact of domestic law on her power to inherit, Art.1 of Protocol No.1 did not apply, and nor therefore did Art.14. The complaint made by each sister as the prospective first to die was also outside the ambit of Art.1 of Protocol No.1, because there was no restriction under domestic law on the applicants' ability to dispose of their property, only a potential liability to tax arising after death, when the deceased would no longer be in a position to enjoy her former possessions.

49 In the alternative, if the Court were to find that the complaint fell within the ambit of Art.1 of Protocol No.1, the Government denied that domestic law gave rise to any discrimination contrary to Art.14.

First, the applicants could not claim to be in an analogous situation to a couple created by marriage or civil partnership. The very essence of their relationship was different, because a married or Civil Partnership Act couple chose to become connected by a formal relationship, recognised by law, with a number of legal consequences; whereas for sisters, the relationship was an accident of birth. Secondly, the relationship between siblings was indissoluble, whereas that between married couples and civil partners might be broken. Thirdly, a married couple and civil partners made a financial commitment by entering into a formal relationship recognised by law and, if separated, the court could divide their property and order financial provision to be made by one partner to the other. No such financial commitment arose by virtue of the relationship between siblings.

The special legal status of parties to a marriage had been recognised by the Commission in *Lindsay v United Kingdom* (1987) 9 E.H.R.R. CD555, and by the Court in App. No.45851/99, *Shackell v United Kingdom*, April 27, 2000.

50 The Government accepted that, if the applicants could be described as in an analogous position to a couple, there was a difference in treatment as regards exemption from inheritance tax. However, this difference in treatment did not exceed the wide margin of appreciation enjoyed by the state, both in the field of taxation and when it came to financial measures designed to promote marriage.[21]

The policy underlying the inheritance tax concession given to married couples was to provide the survivor with a measure of financial security, and thus promote marriage. The purpose of the Civil Partnership Act was to provide same-sex couples with a formal mechanism for recognising and giving legal effect to their relationships, and the inheritance tax concession for civil partners served the same

[20] See *Marckx* (1979–80) 2 E.H.R.R. 330 at [50]; and also *Inze* (1988) 10 E.H.R.R. 394 at [38]; *Mazurek v France* (2006) 42 E.H.R.R. 9 at [42]–[43].

[21] See *Lindsay* (1987) 9 E.H.R.R. CD555 and App. No.45851/99, *Shackell v United Kingdom*, April 27, 2000.

legitimate aim as it did in relation to married couples. Given the development of society's attitudes, the same arguments justified the promotion of stable, committed same-sex relationships. That objective would not be served by extending similar benefits to unmarried members of an existing family, such as siblings, whose relationship was already established by their consanguinity, and recognised by law. The difference in treatment thus pursued a legitimate aim.

51 The difference in treatment was, moreover, proportionate, given that the applicants, as siblings, had not undertaken any of the burdens and obligations created by a legally recognised marriage or civil partnership. If the Government was to consider extending the inheritance tax concession to siblings, there would be no obvious reason not to extend it also to other cohabiting family members. Such a change would have considerable financial implications, given that the annual income from inheritance tax was approximately £2.8 billion.

2. The applicants

52 The applicants argued that if, as they had previously contended, they could claim to be victims of discrimination, the fact that neither had yet died could not provide a separate and substantive defence. Unlike the applicants in *Marckx*, the present applicants were not complaining about a provision of the English law of inheritance and, the principle that the Convention does not guarantee the right to acquire possessions on intestacy or through voluntary disposition was irrelevant. In circumstances where it was effectively inevitable that there would be significant tax to pay by the surviving sister, the facts fell within the scope of Art.1 of Protocol No.1, and Art.14 was thus also applicable.

53 The applicants could properly be regarded as being in a similar situation to a married or same-sex Civil Partnership Act couple. While it was true, as the Government had asserted, that many siblings were connected by nothing more than their common parentage, this was far from the case with the present applicants, who had chosen to live together in a loving, committed and stable relationship for several decades, sharing their only home, to the exclusion of other partners. Their actions in so doing were just as much an expression of their respective self-determination and personal development as would have been the case had they been joined by marriage or a civil partnership. The powers of the domestic courts to make property orders upon the breakdown of a marriage or civil partnership did not entail that the applicants were not in an analogous situation to such couples as regards inheritance tax. Moreover, the very reason that the applicants were not subject by law to the same corpus of legal rights and obligations as other couples was that they were prevented, on grounds of consanguinity, from entering into a civil partnership. They had not raised a general complaint about their preclusion from entering into a civil partnership, because their concern was focussed upon inheritance tax discrimination and they would have entered into a civil partnership had that route been open to them. It was circular for the Government to hold against the applicants the very fact that they cannot enter into a civil partnership.

54 Given that, as the Government asserted, the purpose of the inheritance tax exemption for married and civil partnership couples was the promotion of stable

and committed relationships, the denial of an exemption to cohabiting adult siblings served no legitimate aim. The mere fact of being sisters did not entail a stable, committed relationship, and only a small minority of adult siblings were likely to share the type of relationship enjoyed by the applicants, involving prolonged mutual support, commitment and cohabitation.

55 The applicants agreed with the Government that there was no obvious reason why, if the exception were granted to siblings, it should not also be extended to other family members who cohabit, but argued that this did not support a conclusion that the difference in treatment bore any relationship of proportionality to any legitimate aim. Such an exemption would, in fact, serve the policy interest invoked by the Government, namely the promotion of stable, committed family relationships among adults. Whilst the applicants accepted that the Court had no jurisdiction to dictate to the Government how best to remedy the discrimination, the amendment to the Civil Partnership Bill passed by the House of Lords[22] showed that it would be possible to construct a statutory scheme whereby two siblings or other close relations who had cohabited for a fixed number of years and chosen not to enter into a marriage or civil partnership could obtain certain fiscal rights or advantages. The Government's reliance on the margin of appreciation was misplaced in the light of the recognition given to the injustice faced by those in the applicants' position when the Civil Partnership Act was passing through Parliament.[23] The applicants pointed out that the Government had been unable to provide an estimate of the loss of revenue which would flow from an inheritance tax exemption along the lines proposed in the House of Lords. They could not estimate the cost either, but pointed out that the lost revenue would have to be offset by the potential gains, for example, those flowing from an increased tendency, encouraged by the exemption, of close relations to care for disabled or elderly relatives, thus avoiding the need for state-funded care.

C. The third parties' submissions

1. The Government of Belgium

56 According to the Belgian Government, a state was entitled to pursue through its taxation system policies designed to promote marriage and to make available the fiscal advantages attendant on marriage to committed homosexual couples. Such policies pursued the common goal of the protection of the form of family life which, in the view of national legislatures, provided the best prospect of stability.

2. The Government of the Republic of Ireland

57 The Irish Government submitted that the applicants had failed to establish discrimination contrary to Art.14, since their entire complaint hinged upon the fundamentally erroneous assumption that they were in an analogous position to a married couple and/or a Civil Partnership Act couple. The applicants' submissions failed to advert to the significant legal obligations inherent in marriage/civil partnership. There was no single, homogeneous comparator between the appli-

[22] See [19] above.
[23] See [19] above.

cants and the above types of couple; indeed it was clear from the applicants' arguments that their position was analogous, not to married or Civil Partnership Act couples, but rather to any persons in an established, mutually supportive, cohabiting relationship. It would be truly extraordinary if the enactment of legislation conferring rights upon same-sex couples who chose to register their relationship could have the effect of requiring the state to extend the entitlements thereby conferred to a potentially infinite class of persons in cohabiting relationships.

D. The Grand Chamber's assessment

58 The Grand Chamber recalls that Art.14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. The application of Art.14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention. It is necessary but it is also sufficient for the facts of the case to fall "within the ambit" of one or more of the Convention Articles.[24]

59 Taxation is in principle an interference with the right guaranteed by the first paragraph of Art.1 of Protocol No.1, since it deprives the person concerned of a possession, namely the amount of money which must be paid. While the interference is generally justified under the second paragraph of this Article, which expressly provides for an exception as regards the payment of taxes or other contributions, the issue is nonetheless within the Court's control, since the correct application of Art.1 of Protocol No.1 is subject to its supervision.[25] Since the applicants' complaint concerns the requirement for the survivor to pay tax on property inherited from the first to die, the Grand Chamber considers that the complaint falls within the scope of Art.1 of Protocol No.1 and that Art.14 is thus applicable.

60 The Court has established in its case law that in order for an issue to arise under Art.14 there must be a difference in the treatment of persons in relevantly similar situations.[26] Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment, and this margin is usually wide when it comes to general measures of economic or social strategy.[27]

61 The applicants claim to be in a relevantly similar or analogous position to cohabiting married and Civil Partnership Act couples for the purposes of inheritance tax. The Government, however, argues that there is no true analogy because the applicants are connected by birth rather than by a decision to enter into a formal relationship recognised by law.

[24] See *Stec v United Kingdom* (2006) 43 E.H.R.R. 47 at [39].
[25] See, for example, App. No.43783/98, *Orion-Břeclav v Czech Republic*, January 13, 2004.
[26] *DH v Czech Republic* (2008) 47 E.H.R.R. 3 at [175].
[27] *Stec* (2006) 43 E.H.R.R. 47 at [51]–[52].

62 The Grand Chamber commences by remarking that the relationship between siblings is qualitatively of a different nature to that between married couples and homosexual civil partners under the United Kingdom's Civil Partnership Act. The very essence of the connection between siblings is consanguinity, whereas one of the defining characteristics of a marriage or Civil Partnership Act union is that it is forbidden to close family members.[28] The fact that the applicants have chosen to live together all their adult lives, as do many married and Civil Partnership Act couples, does not alter this essential difference between the two types of relationship.

63 Moreover, the Grand Chamber notes that it has already held that marriage confers a special status on those who enter into it. The exercise of the right to marry is protected by Art.12 of the Convention and gives rise to social, personal and legal consequences.[29] In *Shackell*, the Court found that the situations of married and unmarried heterosexual cohabiting couples were not analogous for the purposes of survivors' benefits, since "marriage remains an institution which is widely accepted as conferring a particular status on those who enter it". The Grand Chamber considers that this view still holds true.

64 Since the coming into force of the Civil Partnership Act in the United Kingdom, a homosexual couple now also has the choice to enter into a legal relationship designed by Parliament to correspond as far as possible to marriage.[30]

65 As with marriage, the Grand Chamber considers that the legal consequences of civil partnership under the 2004 Act, which couples expressly and deliberately decide to incur, set these types of relationship apart from other forms of cohabitation. Rather than the length or the supportive nature of the relationship, what is determinative is the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature. Just as there can be no analogy between married and Civil Partnership Act couples, on one hand, and heterosexual or homosexual couples who choose to live together but not to become husband and wife or civil partners, on the other hand,[31] the absence of such a legally binding agreement between the applicants renders their relationship of cohabitation, despite its long duration, fundamentally different to that of a married or civil partnership couple. This view is unaffected by the fact that, as noted at [26] above, Member States have adopted a variety of different rules of succession as between survivors of a marriage, civil partnership and those in a close family relationship and have similarly adopted different policies as regards the grant of inheritance tax exemptions to the various categories of survivor; states, in principle, remaining free to devise different rules in the field of taxation policy.

66 In conclusion, therefore, the Grand Chamber considers that the applicants, as cohabiting sisters, cannot be compared for the purposes of Art.14 with a married or Civil Partnership Act couple. It follows that there has been no discrimination and, therefore, no violation of Art.14 taken in conjunction with Art.1 of Protocol No.1.

[28] See [17] above and, generally, *B v United Kingdom* (2006) 42 E.H.R.R. 11.
[29] *B v United Kingdom* (2006) 42 E.H.R.R. 11 at [34].
[30] See [16]–[18] above.
[31] See App. No.45851/99, *Shackell v United Kingdom*, April 27, 2000.

For these reasons, THE COURT:

1. *Rejects* unanimously the Government's preliminary objections.
2. *Holds* by 15 votes to 2 that there has been no violation of Art.14 of the Convention taken in conjunction with Art.1 of Protocol No.1.

Concurring Opinion of Judge Bratza[32]

O-I1 The Grand Chamber has reached the same conclusion as the Chamber but by a somewhat different route. As appears from the judgment,[33] the Chamber left open the question whether the applicants, as siblings, could claim to be in an analogous position to a married couple or to those in a civil partnership, holding that any difference of treatment was in any event reasonably and objectively justified, regard being had to the wide margin of appreciation enjoyed by states in the area of taxation. The Grand Chamber has preferred to found its decision on the lack of analogy between those who have entered into a legally binding marriage or civil partnership agreement, on the one hand and those, such as the applicants, who are in a long term relationship of cohabitation, on the other.

O-I2 While I fully share the view of the majority of the Grand Chamber that there has been no violation of Art.14 of the Convention taken in conjunction with Art.1 of Protocol No.1, I continue to have a preference for the reasoning of the Chamber in arriving at this conclusion.

Concurring Opinion of judge David Thór Björgvinsson[34]

O-II1 I agree with the majority in finding that there has been no violation of Art.14 of the Convention taken in conjunction with Art.1 of Protocol No.1. However, I prefer different reasoning.

O-II2 When Art.14 is applied, in essence two questions must be answered: first, whether there is a difference in treatment of persons in relevantly similar or analogous situations; secondly, if this is the case, whether the difference in treatment is justified.

O-II3 The majority has at [62]–[65] of the judgment found that cohabiting sisters cannot be compared for the purposes of Art.14 of the Convention with married or civil partnership couples. Therefore they are not in a relevantly similar or analogues situation and no breach of Art.14 has occurred.

O-II4 The reasoning of the majority, as presented at [62]–[65] of the judgment, is in my view flawed by the fact that it is based on comparison of factors of a different nature and which are not comparable from a logical point of view. It is to a large extent based on reference to the specific legal framework which is applicable to married couples and civil partnership couples but which does not, under the present legislation, apply to the applicants as cohabiting sisters. However, although in the strict sense the complaint only relates to a difference in treatment as concerns inheritance tax, in the wider context it relates, in essence, to the facts that different rules apply and that consanguinity between the applicants prevents them

[32] Paragraph numbering added by the publisher.
[33] See [47].
[34] Paragraph numbering added by the publisher.

from entering into a legally binding agreement similar to marriage or civil partnership, which would make the legal framework applicable to them, including the relevant provisions of the law on inheritance tax.

O-II5 I believe that in these circumstances any comparison of the relationship between the applicants, on the one hand, and the relationship between married couples and civil partnership couples, on the other, should be made without specific reference to the different legal framework applicable, and should focus only on the substantive or material differences in the nature of the relationship as such. Despite important differences, mainly as concerns the sexual nature of the relationship between married couples and civil partner couples, when it comes to the decision to live together, closeness of the personal attachment and for most practical purposes of daily life and financial matters, the relationship between the applicants in this case has, in general and for the alleged purposes of the relevant inheritance tax exemptions in particular, more in common with the relationship between married or civil partnership couples, than there are differences between them. Despite this fact, the law prohibits them from entering into an agreement similar to marriage or civil partnership and thus take advantage of the applicable rules, including the inheritance tax rules. That being so, I am not convinced that the relationship between the applicants as cohabiting sisters cannot be compared with married or civil partner couples for the purposes of Art.14 of the Convention. On the contrary there is in this case a difference in treatment of persons in situations which are, as a matter of fact, to a large extent similar and analogous.

O-II6 The question then arises whether the difference in treatment is objectively and reasonably justified. In substance I agree with the reasoning offered at [59]–[61] of the Chamber judgment on this point, which are cited at [47] of this judgment, namely that the difference in treatment for the purposes of granting of inheritance tax exemptions was reasonably and objectively justified.

O-II7 In this regard it should also be borne in mind that the institution of marriage is closely linked to the idea of the family, consisting of a man and a woman and their children, as one of the cornerstones of the social structure in the United Kingdom, as well as in the other Member States of the Council of Europe. On the basis of this assumption, a whole framework of legal rules, of both a private and public nature, has come into existence over a long period of time. These rules relate to the establishment of marriage and mutual rights and obligations between spouses in both personal and financial matters (including inheritance) and in relation to their children, if any, as well as with regard to taxes (including inheritance taxes), social security, and other matters. The applicability of such rules, or similar rules, in many of the Member States have gradually, step by step, and mostly upon the initiative of the legislature in the respective countries, been extended to cover relationships other than those traditionally falling under marriage in the formal legal sense, namely civil partnership couples (including individuals of the same sex), and thereby the legislator has responded to new social realities and changing moral and social values. However, it is important to have in mind that each and every step taken in this direction, positive as it may seem to be from the point of view of equal rights, potentially has important and far reaching consequences for the social structure of society, as well as legal consequences, i.e. for the social security and tax system in the respective countries. It is precisely for this reason

that it is not the role of this Court to take the initiative in this matter and impose upon the Member States a duty further to extend the applicability of these rules with no clear view of the consequences that it may have in the different Member States. In my view it must fall within the margin of appreciation of the respondent State to decide when and to what extent this will be done.

Dissenting Opinion of Judge Zupančič[35]

O-III1 I have voted for a violation in this case for reasons which have little to do with policy and values but have everything to do with formal logic. In other words, the majority's position is logically inconsistent. The simplest way of explaining this is to say that where a person in certain situations has said A, he is logically required to say B. In this case the issue is clearly discrimination concerning the inheritance tax exemption for two unmarried sisters who have lived for many years together in the same household. They, when approaching old age, wanted to have the right to inheritance tax exemption given that the exemption has been granted by the UK legislature to other couples living together in the same household.

O-III2 This brings us straight to the *medias res* of the tax law. The policies applied to taxation are clearly very important because they give financial incentives to certain choices that people are likely to make. For example, if it were to be a policy of the law-giver to encourage heterosexual marriage it would then be logical for the legislator to offer certain tax credits, advantages, incentives to couples living together irrespective of whether they have children or not. If the legislature wants to encourage child-bearing it will give the same traditional tax incentives only to couples living together and having children. If the legislature wishes to discourage divorce, it will premise these advantages on the couples remaining together.

O-III3 As to the reasonable goals such incentives are intended to further, they may or they may not be disclosed by the law-giver. But even if they are completely disclosed it does not mean that they are completely predictable. These tax incentives act together with many other factors including many other tax incentives and disincentives. In any event, tax policy is an economic policy but it is also a social policy in disguise. For example, progressive taxation is a strongly equalising economic factor undoing many untoward aspects of social stratification.

O-III4 As for the inheritance tax policy, radical solutions have sometimes been applied. An extremely high inheritance tax, for example, may indicate the law-giver's preference for earned rather than inherited wealth. Be that as it may, the inheritance tax policy is not a simple linear decision-making choice. Rather, it is an integral part of a complex web of economic decisions that heavily influence the distribution of wealth and thus the whole social structure.

O-III5 Before we move into the question of discrimination, let us point out that discrimination as such simply means making and establishing differences. This meaning also derives from the Latin word *discriminare*. All decision-making in all three branches of power all the time is about establishing and enforcing different decisions for different situations. In this sense, there is nothing wrong with "discriminating" unless the "specific establishment of differences" pertains to

[35] Paragraph numbering added by the publisher.

what in constitutional law we call a "suspect class" such as the classes taxatively enumerated in Art.14 of the European Convention on Human Rights. In other words, where gender, race, colour of skin, language, religion, political or other opinion, national or social origin, minority status, property, birth or other status are concerned, discrimination is in principle proscribed. These suspect classes, it is well to point out, are simply an exception to the general rule which permits all kinds of differentiated decision-making for other non-suspect classes. Prohibition of discrimination—enforcing distinction—is thus an exception rather than the rule.

O-III6 When it comes to the suspect classes this does not mean that the discrimination is categorically forbidden. Rather, it means that within these classes discrimination is permitted through the application of equal protection, proportionality and reasonableness tests. Even within the suspect classes discrimination may be permissible if the goal pursued by the discrimination is sufficiently compelling and if the law or other decision under scrutiny is rationally related to this sufficiently important interest.

O-III7 It is clear that some of the Art.14 categories, for example, race or national origin, call for the strictest scrutiny test. Under this test, the decision (or the law underlying it) would be upheld only if it was suitably tailored to serve a compelling state interest. When it comes to gender, or illegitimacy of birth, the decision would be presumed invalid under the intermediate test unless substantially related to a sufficiently important interest.

O-III8 The mildest proportionality (reasonableness) test is applied to social and economic matters such as the one at hand. Here the test inquires whether the legislation at issue is rationally related to a legitimate government interest. The question in other words is whether not giving tax exemption to the two Burden sisters is rationally related to a legitimate government interest.

O-III9 Of course, it is always possible to say that a government has a legitimate interest in collecting money from taxes paid by the taxpayers. The same goes for the inheritance tax payable upon the death of the person whose estate becomes taxable when transferred through inheritance to another person. What is the legitimate government interest behind this kind of taxation?

O-III10 It is difficult to maintain that there is anything inherently legitimate about taxing the transfer of wealth upon the death of an individual. For example, one might argue that the state adds insult to injury when taxing an estate left to the survivors of a close relationship. In this sense, one might imagine a scale of taxation that would be progressive in positive correlation with the relational distance between the deceased and the surviving relative. But this is just one aspect of inheritance taxation, an example perhaps of how inherently questionable the inheritance taxation is in principle.

O-III11 When it comes, therefore, to the differentiation between different classes as regards inheritance taxation it is inherently difficult to maintain that the treatment of one class in preference to another class is rationally related to any legitimate government interest. Yet, once we accept inheritance taxation as something normal, the differentiation between different classes for inheritance taxation purposes become decisive.

O-III12 If the Government has decided not to tax married couples, this is the starting-point for the suspicion of discrimination in our case. The Government may reasonably maintain that the close relationship of a couple provides sufficient reason for the tax exemption. Those who are not married, in other words, are then a priori not entitled for the tax exemption. The cut-off criterion is clear.

O-III13 However, when the Government decides to extend this privilege to other modes of association, this black and white distinction is broken and the door is open for reconsideration of the question whether the denial of the tax advantage to other modes of association is rationally related to a legitimate government interest.

O-III14 The majority deals with these questions at [62]–[65]. At [62] the majority remarks:

> "[T]he relationship between siblings is qualitatively of a different nature to that between married couples and homosexual civil partners under the United Kingdom's Civil Partnership Act. The very essence of the connection between siblings is consanguinity, whereas one of the defining characteristics of a marriage or Civil Partnership Act union is that it is forbidden to close family members."

I ask myself, at this point, why would consanguinity be any less important than the relationship between married and civil partners? Of course, the quality of consanguinity is different from sexual relationships but this has no inherent bearing on the proximity of the persons in question.

O-III15 One could easily reverse the argument and say, for example, that the "consanguine" identical twins are far closer genetically and otherwise since in reality they are clones of one another, than anybody could ever be to anybody else. And yet if the Burden sisters were identical twins they would not be entitled to the same exemption, in counter-distinction to even the most ephemeral and fleeting relationship. So, what does the qualitative difference referred to by the majority come to? Is it having sex with one another that provides the rational relationship to a legitimate government interest?

O-III16 At [63] the Grand Chamber then expresses the view that marriage confers a special status on those who enter into it. The analysis of [63] tends to show that the majority does not regard the arguments at [62] as sufficiently persuasive, i.e. the majority feels that it must add, *ex abundante cautela*, this "special nature" of marriage as a contract. If the contract is not explicit, the legal consequences do not flow from it. But this argument, too, is specious—even if we do not consider common law marriage as a historical phenomenon in which consensual cohabitation, even under canon law, confers all the rights and duties on the couple concerned. The further reference to different solutions in different Member States being irrelevant—since at least some of them consider cohabitation a factual question with legal consequences equivalent to an explicit marriage—makes it imperative for the majority to resort to the final rescue in saying:

> "This view is unaffected by the fact that, as noted in paragraph 26 above, Member States have adopted a variety of different rules of succession as between survivors of a marriage, civil partnership and those in a close family relationship and have similarly adopted different policies as regards the grant of inheritance tax exemptions to the various categories of survivor; States, in

> principle, remaining free to devise different rules in the field of taxation policy."

O-III17 Needless to say, this final reference to margins of appreciation makes all other argumentation superfluous.

O-III18 The logic "if you say A, you should also say B", which I referred to at the beginning of this dissenting opinion, is explicitly reiterated at [53] of *Stec v United Kingdom* (2006) 43 E.H.R.R. 47:

> "If [. . .] a State does decide to create a benefit [. . .], it must do so in a manner which is compatible with Article 14 of the Convention (see the admissibility decision in [*Stec v United Kingdom*]., §§ 54-55, ECHR 2005-. . .)."

O-III19 A priori, the state is not required to create a benefit, in this case extra-marital tax exemptions. If the state nevertheless does decide to extend the tax exemption to one extra-marital group, it should employ at least a minimum of reasonableness while deciding not to apply the benefit to other groups of people in relationship of similar or closer proximity.

O-III20 I believe making consanguinity an impediment is simply arbitrary.

Dissenting Opinion of Judge Borrego Borrego[36]

O-IV1 To my great regret, I cannot agree with the majority's approach, as in my opinion the judgment does not deal with the problem raised by this case.

I. The complaint

O-IV2 The complaint arises from the fact that the applicants are not entitled to inheritance tax exemption. They are two sisters who have "lived together, in a stable, committed and mutually supportive relationship, all their lives"[37] and are unable to enter into a civil partnership, being legally prevented from doing so by the Civil Partnership Act 2004, under which the exemption may be claimed only by the homosexual couples contemplated therein.[38]

II. The Chamber's judgment (or the true judicial response to a complaint)

O-IV3 "[T]he inheritance tax exemption for married and civil partnership couples . . . pursues a legitimate aim": after examining that aim the Chamber, in accordance with the Court's case law, went on to assess "whether the means used [were] proportionate to the aim pursued". The majority of the Chamber took the view that:

> "[T]he United Kingdom cannot be said to have exceeded the wide margin of appreciation afforded to it and that the difference of treatment for the purposes of the grant of inheritance tax exemptions was reasonably and objectively justified for the purposes of Article 14 of the Convention."[39]

[36] Translation. Paragraph numbering added by the publisher.
[37] At [10].
[38] Art.1 of Protocol No.1 taken together with Art.14 of the Convention.
[39] At [61] of the judgment.

O-IV4 The Chamber's judgment was adopted by four judges; three judges expressed their disagreement in two dissenting opinions. In the first of those opinions Judges Bonello and Garlicki said:

> "The majority seems to agree that there has been a marginal situation or an individual case 'of apparent hardship or injustice' (paragraph 60) in respect of the applicants. What seems to us, however, to be missing in the majority's position is a full explanation as to why and how such injustice can be justified. A mere reference to the margin of appreciation is not enough."

The second dissenting opinion, that of Judge Pavlovschi, follows the same general line.

III. The approach followed by the majority of the Grand Chamber

O-IV5 The United Kingdom authorities[40] and the Chamber's judgment expressly and explicitly recognise the injustice due to the lack of provision for inheritance tax exemption in the case of close relations, like the applicants. That circumstance is completely ignored in the Grand Chamber's judgment.

O-IV6 The question of the state's margin of appreciation and its limits, which is at the heart of the case and was dealt with as such in the Chamber's judgment, has completely disappeared from the Grand Chamber's judgment.

O-IV7 The majority of the Grand Chamber assert that there are two differences between the applicants' relationship and that between two civil partners, the first being the sisters' consanguinity and the second the legally binding nature of a civil partnership. The majority accordingly consider that since the two situations are not comparable there has been no discrimination.

O-IV8 But who has disputed the existence of a relation of consanguinity between two sisters or the legal status of a civil partnership? No one. These are two facts over which there is no disagreement. Trying to ground a case on undisputed facts is the best example there can be of a circular, or I might even say concentric, argument.

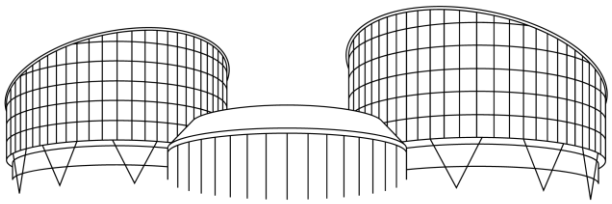
O-IV9 The parties before the Court, the Chamber which first heard the case, the panel of five judges, I myself and, I would think, all those who have taken an interest in the case consider that the "serious question affecting the interpretation … of the Convention"[41] on which the Grand Chamber was required to rule in the present case is a very simple one: it is whether or not granting inheritance tax exemption to same-sex couples in a civil partnership but not to the applicant sisters, who are also a same-sex couple, is a measure proportionate to the legitimate aim pursued.

O-IV10 In my opinion, by declining to give a reply to the complaint before the Court the majority of the Grand Chamber have disregarded a Grand Chamber precedent expressed in the following terms:

> "Although Protocol No.1 does not include the right to receive a social security payment of any kind, if a State does decide to create a benefits scheme, it must do so in a manner which is compatible with Article 14."[42]

[40] At [19] and [20].
[41] Convention Art.43(2).
[42] *Stec v United Kingdom* (2006) 43 E.H.R.R. 47 at [55] *in fine*.

O-IV11 This judgment of the Grand Chamber will no doubt be described as politically correct. I consider nevertheless that it has not been rendered in accordance with Art.43 of the Convention, because the Grand Chamber, instead of trying to explain the difference in treatment for tax purposes between the two types of couple mentioned, preferred not to give reasons and restricted itself to a description of the facts, saying for example that two sisters are linked by consanguinity or that a civil partnership has legal consequences. The fact that the Grand Chamber did not give a reply to the applicants, two elderly ladies, fills me with shame, because they deserved a different approach. I would like to close by quoting Horace, who wrote in *Ars Poetica*, "*parturient montes, nascetur ridiculus mus*".



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

1959 · 50 · 2009

SECOND SECTION

CASE OF KENEDI v. HUNGARY

(Application no. 31475/05)

JUDGMENT

STRASBOURG

26 May 2009

FINAL

26/08/2009

This judgment may be subject to editorial revision.

In the case of Kenedi v. Hungary**,**

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Françoise Tulkens, *President,*
Ireneu Cabral Barreto,
Vladimiro Zagrebelsky,
Danutė Jočienė,
András Sajó,
Nona Tsotsoria,
Işıl Karakaş, *judges,*
and Sally Dollé, *Section Registrar,*

Having deliberated in private on 5 May 2009,

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

PROCEDURE

1. The case originated in an application (no. 31475/05) against the Republic of Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Hungarian national, Mr János Kenedi ("the applicant"), on 10 August 2005.

2. The applicant was represented by Ms A. Csapó, a lawyer practising in Budapest. The Hungarian Government ("the Government") were represented by Mr L. Höltzl, Agent, Ministry of Justice and Law Enforcement.

3. The applicant alleged that the Hungarian authorities' protracted reluctance to grant him unrestricted access to certain documents, authorised by a court order, had prevented him from terminating a professional undertaking, namely, to write an objective study on the functioning of the Hungarian State Security Service in the 1960s. He had been unable to have the court order enforced within a reasonable time.

4. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1947 and lives in Budapest.

6. The applicant, a historian, specialises in the functioning of the secret services of dictatorships, comparative studies of the political police forces of totalitarian regimes and the functioning of Soviet-type States. He has published several works in this field.

7. With a view to publishing a study concerning the functioning, in the 1960s, of the Hungarian State Security Service of the Ministry of the Interior, on 21 September 1998 the applicant requested the Ministry to grant him access to certain documents deposited with it.

8. His request was denied on 10 November 1998; the Ministry made reference to a decision of 29 October 1998 classifying the documents as State secrets until 2048.

9. On 10 December 1998 the applicant brought an action against the Ministry, basing his claim on section 21 of Act no. 63 of 1992 on the Protection of Personal Data and the Public Nature of Data of Public Interest. Claiming a right of unrestricted access to the documents, he submitted that the data he sought were necessary for the purposes of his ongoing historical research.

10. On 19 January 1999 the Budapest Regional Court found for the applicant, granting him access to the documents for research purposes. It observed that the documents in question had indeed been classified during the Communist era. However, according to section 28(2) of Act no. 65 of 1995 on State and Service Secrets, they would have had to have been characterised as such again before 30 June 1996. Since this characterisation had not taken place, the documents had lost their classified nature *ipso iure* by 1 July 1996, irrespective of the decision of 29 October 1998.

11. On 20 April 1999 the Supreme Court rejected the respondent's appeal as it had been introduced outside the statutory time-limit.

12. On 1 November 1999 the Ministry proposed access to the applicant if he signed a confidentiality undertaking.

13. On 10 October 2000 the applicant requested the enforcement of the judgment, arguing that the respondent's imposition of a condition of confidentiality was unacceptable. On 21 December 2000 the enforcement procedure was initiated and an enforcement order issued. In its reasoning, the Budapest Regional Court observed that the respondent did not have the right to require confidentiality from the applicant as a precondition to the access granted by the enforceable judgment.

14. On 21 November 2001 the Supreme Court upheld on appeal the decision of 21 December 2000 but deleted from the reasoning the confidentiality observation.

15. Meanwhile, on 12 June 2001 the Ministry brought an action with a view to having the enforcement proceedings terminated. On 25 February 2002 the Pest Central District Court dismissed the action, holding that the respondent's proposal of 1 November 1999 was unsatisfactory and that,

therefore, the initiation of enforcement proceedings had been lawful. On 15 October 2002 the Regional Court dismissed the Ministry's appeal.

16. On 29 October 2002 the Ministry issued the applicant with a permit for access to documents, but restricted him from publishing the information thus acquired to the extent that "State secrets" were concerned.

17. In the absence of a permit granting unrestricted access to all the documents concerned, the court found that there had not been compliance with the enforcement order, and on 23 June 2003 the Ministry was fined 100,000 Hungarian forints (HUF) (approximately 400 euros (EUR)).

18. On 18 December 2003 all but one of the documents were transferred to the National Archives and thus became public.

19. A further enforcement fine of HUF 300,000 (approximately EUR 1,200) was imposed on 22 October 2004 in respect of the one remaining classified document. The Ministry filed an objection, arguing that the document was no longer at its disposal since it had been transferred to the Archives of the Ministry of Defence on 6 February 2004.

20. On 26 January 2005 the District Court dismissed the respondent's objection, holding that a change in the physical whereabouts of the document did not exempt the Ministry from its obligation to grant the applicant access.

21. On 10 June 2005 the District Court dismissed the Ministry's request to have it established that the Archives were its successor in the matter.

22. On 24 January 2006 the Regional Court quashed the decisions of 22 October 2004, 26 January 2005 and 10 June 2005, and remitted the case to the first-instance court.

23. On 21 April 2006 the District Court again dismissed the Ministry's request to have it established that the Archives were its successor in the matter. However, on 4 July 2006 it observed that the newly founded Ministry of Local Government and Regional Development was indeed the successor. On 20 October 2006 it rejected the new Ministry's request to have the proceedings interrupted pending the succession arrangements.

24. On 5 June 2007 the Regional Court dismissed the new Ministry's appeals against the decisions of 21 April, 4 July and 20 October 2006. The Ministry's petition for a review by the Supreme Court was to no avail.

25. To date, the applicant has not had unrestricted access to the remaining document in question.

II. RELEVANT DOMESTIC LAW

26. Section 21 of Act no. 63 of 1992 on the Protection of Personal Data and the Public Nature of Data of Public Interest provides as follows:

> "(1) If an applicant's request for data of public interest is denied, he or she shall have access to a court.

(2) The burden of proof concerning the lawfulness and well-foundedness of the refusal shall rest with the organ handling the data.

(3) The action shall be brought within 30 days from the notification of the refusal against the organ which has denied the information sought.

...

(6) The court shall give priority to these cases.

(7) If the court accepts the applicant's claim, it shall issue a decision ordering the organ handling the data to communicate the information of public interest which has been sought."

27. Section 28(2) of Act no. 65 of 1995 on State and Service Secrets (which entered into force on 1 July 1995) provides as follows:

"The review of the classification of classified documents originating from before 1980 shall be terminated within one year from the entry into force of this Act. Once this time-limit has passed, the documents shall cease to be classified."

THE LAW

I. ADMISSIBILITY

28. The applicant complained of the lengthy non-enforcement of a court judgment authorising his access, for the purpose of professional, historical research, to documents from the 1960s on the Hungarian State Security Service. He invoked Articles 6 § 1, 10 and 13 of the Convention. The Government contested the applicant's allegations.

29. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

30. The applicant complained about his inability to obtain the enforcement, within a reasonable time, of a final court decision in his favour, in breach of Article 6 § 1 of the Convention, the relevant part of which provides as follows:

"In the determination of his civil rights and obligations ... everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

31. The Government submitted that the applicant's conduct – namely his insistence on having unrestricted access to all the documents – had contributed to the protraction of the proceedings. In their view, the Supreme Court's decision of 21 November 2001 had deprived the applicant of any

legal basis for claiming unlimited access to all the documents with a view to publication. In any event, the principal decision of 19 January 1999 had granted the applicant access only for the purposes of research.

32. The applicant contested these views.

A. Applicability of Article 6 § 1

33. The Court observes that the domestic courts recognised the existence of the right underlying the access sought by the applicant. The access was necessary for the applicant, a historian, to accomplish the publication of a historical study. The Court notes that the intended publication fell within the applicant's freedom of expression as guaranteed by Article 10 of the Convention. In that connection, it recalls that the right to freedom of expression constitutes a "civil right" for the purposes of Article 6 § 1. Moreover, the applicability of this latter provision has not been disputed by the parties.

34. The Court is therefore satisfied that the subject matter of the case falls under the civil limb of Article 6 § 1.

B. Compliance with Article 6 § 1

35. The period to be taken into consideration began on 10 November 1998, when the applicant's initial request was denied, and has not ended to date. In this connection, the Court reiterates that the execution of a judgment given by any court must be regarded as an integral part of a "hearing" for the purposes of Article 6 (*Hornsby v. Greece*, 19 March 1997, § 40, *Reports of Judgments and Decisions* 1997-II). The period has thus lasted some ten and a half years for three levels of jurisdiction and the execution phase.

36. The Court is not persuaded by the Government's assertion that the applicant's enforcement claim was ill-founded (see paragraph 31 above) and the procedure thus futile. On the contrary, it observes that, subsequent to the Supreme Court's decision of 21 November 2001, the courts dealt with the merits of the claim on numerous other occasions, repeatedly finding in the applicant's favour, and even fining the respondent for non-compliance (see paragraphs 13 to 24 above).

37. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

38. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present application (see *Frydlender*, cited above).

39. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or convincing argument capable of persuading it to reach a different conclusion in the present circumstances. Having regard to its case-law on the subject, the Court finds that the length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

There has accordingly been a breach of Article 6 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

40. The applicant also complained that the Ministry's protracted reluctance to grant him unrestricted access to the documents in question had prevented him from publishing an objective study on the functioning of the Hungarian State Security Service.

41. The Court considers that this complaint falls to be examined under Article 10 of the Convention which provides as relevant:

> "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. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, 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 ..."

42. The Government conceded that there had been an interference with the applicant's right to freedom of expression. They submitted that the retroactive classification of the documents in question pursued the legitimate aim of national security, in which field States enjoy a certain margin of appreciation. Moreover, it was the applicant's own fault that the study in question had not been accomplished since, intransigently, he had insisted on having completely unrestricted access. The applicant contested these views.

43. The Court observes that the Government have accepted that there has been an interference with the applicant's right to freedom of expression. The Court emphasises that access to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant's right to freedom of expression (see, *mutatis mutandis*, *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, §§ 35 to 39, 14 April 2009).

An interference with an applicant's rights under Article 10 § 1 will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 10. It should therefore be determined whether the present interference was "prescribed by law", pursued one or more of the legitimate aims set out in that paragraph and was "necessary in a democratic society" in order to achieve those aims.

44. The Court reiterates that the phrase "prescribed by law" in the second paragraph of Article 10 alludes to the very same concept of lawfulness as that to which the Convention refers elsewhere when using the same or similar expressions, notably the expressions "in accordance with the law" and "lawful" found in the second paragraph of Articles 8 to 11. The concept of lawfulness in the Convention, apart from positing conformity with domestic law, also implies qualitative requirements in the domestic law such as foreseeability and, generally, an absence of arbitrariness (see *Rekvényi v. Hungary* [GC], no. 25390/94, § 59, ECHR 1999-III).

45. The Court observes that the applicant obtained a court judgment granting him access to the documents in question (see paragraph 10 above). Thereafter, a dispute evolved as to the extent of that access. However, the Court notes that, in line with the original decision, the domestic courts repeatedly found for the applicant in the ensuing proceedings for enforcement and fined the respondent Ministry. In these circumstances, the Court cannot but conclude that the obstinate reluctance of the respondent State's authorities to comply with the execution orders was in defiance of domestic law and tantamount to arbitrariness. The essentially obstructive character of this behaviour is also manifest in that it led to the finding of a violation of Article 6 § 1 of the Convention (see paragraph 39 above) from the perspective of the length of the proceedings. For the Court, such a misuse of the power vested in the authorities cannot be characterised as a measure "prescribed by law".

It follows that there has been a violation of Article 10 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 13 IN CONJUNCTION WITH ARTICLE 10 OF THE CONVENTION

46. Lastly, the applicant complained that he had had no effective remedy at his disposal in respect of his grievance under Article 10, as required by Article 13 of the Convention, which provides as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Government submitted that the remedies of which the applicant had availed himself were effective in the circumstances. The applicant contested this view.

47. The Court reiterates that Article 13 of the Convention guarantees to anyone who claims, on arguable grounds, that his or her rights and freedoms as set forth in the Convention have been violated, an effective remedy before a national authority. The Court considers that the obligation of States under that Article also encompasses a duty to ensure that the competent

authorities enforce remedies when granted (compare Article 2 § 3 (c) of the International Covenant on Civil and Political Rights). For the Court, it would be inconceivable if Article 13 secured the right to a remedy, and provided for it to be effective, but did not guarantee the implementation of remedies used successfully. To hold the contrary would lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention (see, *mutatis mutandis*, *Hornsby*, cited above, § 40).

48. In the instant case, the respondent State body, being itself in the first place bound by the rule of law, adamantly resisted the applicant's lawful attempts to secure the enforcement of his right, as granted by the domestic courts. In these circumstances, the Court considers that the procedure designed to remedy the violation of the applicant's Article 10 rights at the domestic level proved ineffective.

It follows that there has been a violation of Article 13 read in conjunction with Article 10 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

49. 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

50. The applicant did not wish to claim pecuniary damage for his failed research project, but assessed what may be termed his non-pecuniary damage at 6,000 euros (EUR) for the time and effort he had devoted to pursuing his case before the domestic authorities.

51. The Government did not express an opinion on the matter.

52. The Court considers that the applicant must have suffered some non-pecuniary damage and considers it appropriate to award the full amount claimed.

B. Costs and expenses

53. The applicant claimed EUR 18,000 in respect of legal fees incurred during the domestic proceedings. This sum corresponds to 300 hours of legal work charged at 15,000 Hungarian forints per hour.

54. The Government did not express an opinion on the matter.

55. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown

that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 7,000 for the costs and expenses necessarily incurred in the domestic proceedings in an attempt to prevent the violations which the Court has found.

C. Default interest

56. 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.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

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

3. *Holds* that there has been a violation of Article 10 of the Convention;

4. *Holds* that there has been a violation of Article 13 read in conjunction with Article 10 of the Convention;

5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Hungarian forints at the rate applicable at the date of settlement:
      (i) EUR 6,000 (six thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage,
      (ii) EUR 7,000 (seven thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 26 May 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President

TÁRSASÁG A SZABADSÁGJOGOKÉRT v HUNGARY

BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

Application No.37374/05

The President, Judge Tulkens; Judges Cabral Barreto, Zagrebelsky, Jočienė, Popović, Sajó, Tsotsoria: April 14, 2009

(2011) 53 E.H.R.R. 3

Data protection; Freedom of expression; Freedom of information; Hungary; Personal data; Requests for information

H1 In March 2004, a Member of Parliament (MP) lodged a complaint with the Constitutional Court for abstract review of certain aspects of the Criminal Code. The applicant, the Hungarian Civil Liberties Union, requested the Constitutional Court to grant them access to the pending complaint, in accordance with s.19 of Act 63 of 1992 on the Protection of Personal Data and the Public Nature of Data of Public Interest (the Data Act).

H2 On October 12, 2004 the Constitutional Court denied the request without having consulted the MP, explaining that a complaint pending before it could not be made available to outsiders without the approval of its author. The applicant challenged this decision. On January 24, 2005 the Regional Court dismissed the applicant's action. The court held that the complaint could not be regarded as "data" and the lack of access to it could not be disputed under the Data Act. On May 5, 2005, the Court of Appeal upheld the first-instance decision. It considered that the complaint contained some "data"; however, that data was personal and could not be accessed without the author's approval. Such protection of personal data could not be overridden by other lawful interests, including the accessibility of public information.

H3 The applicant complained that these decisions constituted an infringement of its right to receive information of public interest, in breach of art.10.

H4 **Held** unanimously:

(1) that there had been a violation of art.10;
(2) that the finding of a violation constituted sufficient just satisfaction for any non-pecuniary damage;
(3) that the respondent State was to pay the applicant costs and expenses;
(4) that the remainder of the applicant's claim for just satisfaction be dismissed.

1. Freedom of expression; freedom to receive information (article 10)

H5 (a) It was well established in Convention jurisprudence, particularly regarding press freedom, that the public had a right to receive information of general interest. The most careful scrutiny was called for when measures taken by a national authority were capable of discouraging the participation of the press in public debate. The applicant, an association involved in human rights litigation, may be characterised like the press, as a social "watchdog". In these circumstances, the activities of the association warranted similar Convention protection to that afforded to the press. [26]–[27]

H6 (b) The application for abstract review of the criminal legislation in issue, especially by an MP, constituted a matter of public interest. The applicant was therefore involved in the legitimate gathering of information on a matter of public importance. The Constitutional Court's monopoly of information amounted to a form of censorship, and accordingly interfered with the applicant's right to impart information. [28]–[29]

H7 (c) The interference, as provided under the Data Protection Act, was prescribed by law. Similarly, the restriction pursued the legitimate aim of protecting personal data. [31]–[34]

H8 (d) Whilst there may not be any general right of access to official documents, where an organisation performs the function of a social "watchdog", any barrier to the exercise of these functions calls for the most careful scrutiny. The Constitutional Court was effectively an information monopoly which interfered with the exercise of the applicant's functions of a social watchdog. The information sought by the applicant was ready and available and did not require the collection of any data by the Government. Therefore, the respondent State had an obligation not to impede the flow of information sought by the applicant. [35]–[36]

H9 (e) The applicant had requested information about the constitutional complaint eventually without the personal data of its author. Moreover, no reference to the private life of the MP could be discerned from his constitutional complaint. In any event, it would be fatal to the freedom of expression if public figures could censor the press and public debate in the name of their personality rights, by alleging that their opinions on public matters were related to their person and therefore constituted private data which could not be disclosed without consent. The role of "public watchdogs" must be protected. These considerations could not justify the interference with the applicant's freedom of expression. [37]–[39]

2. Just satisfaction: non-pecuniary damages; costs and expenses; default interest

H10 The finding of a violation constituted sufficient just satisfaction for any non-pecuniary damage which the applicant may have suffered. The applicant was awarded a sum in respect of costs and expenses incurred in the proceedings Provision was made for interest in default of payment. [43], [46], [47]

H11 **The following cases are referred to in the Court's judgment:**
Bladet Tromsø v Norway (2000) 29 E.H.R.R. 125
Chauvy v France (2005) 41 E.H.R.R. 29
Goodwin v United Kingdom (1996) 22 E.H.R.R. 123
Jersild v Denmark (1995) 19 E.H.R.R. 1

Leander v Sweden (1987) 9 E.H.R.R. 433
Observer v United Kingdom (1992) 14 E.H.R.R. 153
Steel v United Kingdom (2005) 41 E.H.R.R. 22
Thorgeirson v Iceland (1992) 14 E.H.R.R. 843
Loiseau v France (46809/99) September 28, 2004
Vides Aizsardzības Klubs v Latvia (57829/00) May 27 2004
Dammann v Switzerland (77551/01) April 25 2006
Sdružení Jihočeské Matky v la République tchèque (19101/03) July 10, 2006
Riolo v Italy (42211/07) July 17 2008

THE FACTS

I. The circumstances of the case

6 The applicant is an association founded in 1994, with its seat in Budapest.

7 In March 2004 a Member of Parliament (the MP) and other individuals lodged a complaint for abstract review with the Constitutional Court. The complaint requested the constitutional scrutiny of some recent amendments to the Criminal Code which concerned certain drug-related offences.

8 In July 2004 the MP gave a press interview concerning the complaint.

9 On September 14, 2004 the applicant—a non-governmental organisation whose declared aim is to promote fundamental rights as well as to strengthen civil society and the rule of law in Hungary and which is active in the field of drug policy—requested the Constitutional Court to grant them access to the complaint pending before it, in accordance with s.19 of Act 63 of 1992 on the Protection of Personal Data and the Public Nature of Data of Public Interest (the Data Act 1992).

10 On October 12, 2004 the Constitutional Court denied the request without having consulted the MP, explaining that a complaint pending before it could not be made available to outsiders without the approval of its author.

11 On November 10, 2004 the applicant brought an action against the Constitutional Court. It requested the Budapest Regional Court to oblige the respondent to give it access to the complaint, in accordance with s.21(7) of the Data Act 1992.

12 On December 13, 2004 the Constitutional Court adopted a decision on the constitutionality of the impugned amendments to the Criminal Code. It contained a summary of the complaint in question and was pronounced publicly.

13 Notwithstanding the fact that the Constitutional Court procedure had already been terminated, on January 24, 2005 the Regional Court dismissed the applicant's action. It held in essence that the complaint could not be regarded as "data" and the lack of access to it could not be disputed under the Data Act 1992.

14 The applicant appealed, disputing the Regional Court's findings. Moreover, it requested that the complaint be made available to it after the deletion of any personal information contained therein.

15 On May 5, 2005 the Court of Appeal upheld the first-instance decision. It considered that the complaint contained some "data"; however, that data was "personal" and could not be accessed without the author's approval. Such protection of personal data could not be overridden by other lawful interests, including the accessibility of public information.

16 The applicant's secondary claim was rejected without any particular reasoning.

II. Relevant domestic law

A. The Constitution of the Republic of Hungary

"Article 59
(1) … [E]veryone has the right to a good reputation, the privacy of his home and the protection of secrecy in private affairs and personal data. …
Article 61
(1) … [E]veryone has the right to express freely his/her opinion and, furthermore, to access and distribute information of public interest."

B. Act 32 of 1989 on the Constitutional Court

"Section 1
The competence of the Constitutional Court includes:
(b) posterior review of the constitutionality of statutes …
Section 21
(2) The procedure under section 1 (b) may be initiated by anyone."

C. The Data Act 1992

"Section 2 (as in force at the material time)
(4) *Public information*: data, other than personal data, which relates to the activities of, or is processed by, a body or a person carrying out State or municipal tasks or other public duties defined by the law. …
Section 3
(1) (a) Personal data may be processed if the person concerned consents to it …
Section 4
Unless exception is made under the law, the right to protection of personal data and the personality rights of the person concerned must not be violated by … interests related to data management, including the public nature (section 19) of data of general interest. …
Section 19
(1) The organs or persons charged with exercising State … functions shall, within the scope of their competence …, promote and secure the right of the public to be informed accurately and speedily.
(2) The organs mentioned in subsection 1 hereof shall regularly publish or otherwise make accessible the most important data … concerning their activities. …
(3) Those mentioned in subsection 1 hereof shall ensure that anyone is able to access any data of public interest which they may handle, unless the data has been lawfully declared State or service secrets by a competent authority … or the law restricts the right of public access to data of public interest, specifying the types of data concerned, regard being had to:
(a) the interests of national defence;
(b) the interests of national security;
(c) the interests of the prevention or prosecution of crime;
(d) the interests of central finances or foreign exchange policy;
(e) foreign relations or relations with international organisations;

(f) a pending court procedure. …

Section 21

(1) If an applicant's request for data of public interest is denied, he or she shall have access to a court.

(2) The burden of proof concerning the lawfulness and well-foundedness of the refusal shall lie with the organ handling the data.

(3) The action shall be brought within 30 days from the notification of the refusal against the organ which has denied the information sought. …

(6) The court shall give priority to these cases.

(7) If the court accepts the applicant's claim, it shall issue a decision ordering the organ handling the data to communicate the information of public interest which has been sought."

JUDGMENT

I. Alleged violation of article 10 of the Convention

17 The applicant submitted that the Hungarian court decisions in the present case had constituted an infringement of its right to receive information of public interest. In its view, this was in breach of art.10 of the Convention, of which the relevant part reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. …
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, … for the protection of the reputation or rights of others, [or] for preventing the disclosure of information received in confidence."

A. The Government's arguments

18 The Government did not contest that there had been an interference with the applicant's rights under art.10 of the Convention. However, it emphasised that para.2 of that provision allowed the contracting states to restrict this right in certain circumstances. According to the Court's case law, states have a certain margin of appreciation in determining whether or not a restriction on the rights protected by art.10 is necessary.

19 It submitted that the Constitution recognised the rights to freedom of expression and access to information of public interest, and ensured their exercise by regulation under separate laws. The possibility to interfere with these rights was therefore prescribed by law. The Data Act 1992 regulated the functioning of the fundamental rights enshrined in arts 59(1) and 61(1) of the Constitution. Its definition of public information, which had been in force until an amendment on June 1, 2005, had excluded personal data, whilst ensuring access to other types of data. In the instant case, the second-instance court had established that the data sought to be accessed had been personal, because it had contained the MP's personal details and opinions,

which would enable conclusions to be drawn about his personality. The mere fact that the MP had decided to lodge a constitutional complaint could not be regarded as consent to disclosure, since the Constitutional Court deliberated *in camera* and its decisions, although pronounced publicly, did not contain personal information about those having applied. Consequently, constitutional applicants did not have to take into account the possibility that their personal details would be disclosed.

20 The Government endorsed the courts' finding that the handling of public data was governed by the rule defining its public nature, whilst that of personal data by the rule of self-determination. Hence, access to data of a public nature could be restricted on the ground that it contained information the preservation of which was essential to protect personal data. Should the legislature make constitutional complaints and the personal data contained therein accessible to anyone by characterising the complaints as public information, this would discourage citizens from instituting such proceedings. Therefore, in the Government's view, the domestic courts in the present case had acted lawfully and in conformity with the Convention when they had denied access to the MP's constitutional complaint.

21 Within the framework of the Data Act 1992, the right of access to data of public interest was restricted by the right to the protection of personal data. The Government maintained that this restriction met the requirements laid down in the Convention, in that it was prescribed by law, it was applied in order to protect the rights of others and it was necessary in a democratic society.

B. The applicant's arguments

22 The applicant submitted at the outset that to receive and impart information is a precondition of freedom of expression, since one could not form or hold a well-founded opinion without knowing the relevant and accurate facts. Since it is actively engaged in Hungarian drug policy, the denial of access to the complaint in question had made it impossible for it to accomplish its mission and enter into the public debate about the issue. It claimed to play a press-like role in this connection, since its work allowed the public to discover, and form an opinion about, the ideas and attitudes of political leaders concerning drug policy. The Constitutional Court had thwarted its attempt to start a public debate at the preparatory stage.

23 The applicant further maintained that states have positive obligations under art.10 of the Convention. Since, in the present case, the Hungarian authorities had not needed to collect the impugned information, because it had been ready and available, their only obligation would have been not to bar access to it. The disclosure of public information on request in fact falls within the notion of the right "to receive", as understood by art.10(1). This provision protects not only those who wish to inform others but also those who seek to receive such information. To hold otherwise would mean that freedom of expression is no more than the absence of censorship, which would be incompatible with the abovementioned positive obligations.

24 The applicant also submitted that the private sphere of politicians was narrower than that of other citizens, since they exposed themselves to criticism. Therefore, access to their personal data might be necessary if it concerned their public performance, as in the present case. If one accepted the Government's arguments, all data would be considered personal and excluded from public scrutiny—which

would render the notion of public information meaningless. In any event, no details of the protected private sphere of the MP would have been made public in connection with his complaint.

25 Moreover, the applicant disputed the existence of a legitimate aim. The Constitutional Court had never asked the MP whether he would permit the disclosure of his personal data contained in his constitutional complaint. Therefore it could not be said that the restriction had served the protection of his rights. The Constitutional Court's real aim had been to prevent a public debate on the question. For the applicant, the secrecy of such complaints was alarming, since it prevented the public from assessing the Constitutional Court's practice. However, even assuming the existence of a legitimate aim, the restriction had not been necessary in a democratic society. Wide access to public information is in line with recent development of human rights' protection, as well as with Resolution 1087(1996) of the Council of Europe's Parliamentary Assembly.

C. The Court's assessment

1. Whether there has been an interference

26 The Court has consistently recognised that the public has a right to receive information of general interest. Its case law in this field has been developed in relation to press freedom which serves to impart information and ideas on such matters.[1] In this connection, the most careful scrutiny on the part of the Court is called for when the measures taken by the national authority are capable of discouraging the participation of the press, one of society's "watchdogs", in the public debate on matters of legitimate public concern,[2] even measures which merely make access to information more cumbersome.

27 In view of the interest protected by art.10, the law cannot allow arbitrary restrictions which may become a form of indirect censorship should the authorities create obstacles to the gathering of information. For example, the latter activity is an essential preparatory step in journalism and is an inherent, protected part of press freedom.[3] The function of the press includes the creation of forums for public debate. However, the realisation of this function is not limited to the media or professional journalists. In the present case, the preparation of the forum of public debate was conducted by a non-governmental organisation. The purpose of the applicant's activities can therefore be said to have been an essential element of informed public debate. The Court has repeatedly recognised civil society's important contribution to the discussion of public affairs.[4] The applicant is an association involved in human rights litigation with various objectives, including the protection of freedom of information. It may therefore be characterised, like the press, as a social "watchdog".[5] In these circumstances, the Court is satisfied that its activities warrant similar Convention protection to that afforded to the press.

[1] See *Observer v United Kingdom* (1992) 14 E.H.R.R. 153 at [59] and *Thorgeirson v Iceland* (1992) 14 E.H.R.R. 843 at [63].
[2] See *Bladet Tromsø v Norway* (2000) 29 E.H.R.R. 125 at [64] and *Jersild v Denmark* (1995) 19 E.H.R.R. 1 at [35].
[3] See *Dammann v Switzerland* (77551/01) April 25, 2006 at [52].
[4] See, for example, *Steel v United Kingdom* (2005) 41 E.H.R.R. 22 at [89].
[5] See *Riolo v Italy* (42211/07) July 17 2008 at [63]; *Vides Aizsardzības Klubs v Latvia* (57829/00) May 27 2004C at [42].

28 The subject matter of the instant dispute was the constitutionality of criminal legislation concerning drug-related offences. In the Court's view, the submission of an application for an *a posteriori* abstract review of this legislation, especially by a Member of Parliament, undoubtedly constituted a matter of public interest. Consequently, the Court finds that the applicant was involved in the legitimate gathering of information on a matter of public importance. It observes that the authorities interfered in the preparatory stage of this process by creating an administrative obstacle. The Constitutional Court's monopoly of information thus amounted to a form of censorship. Furthermore, given that the applicant's intention was to impart to the public the information gathered from the constitutional complaint in question, and thereby to contribute to the public debate concerning legislation on drug-related offences, its right to impart information was clearly impaired.

29 There has therefore been an interference with the applicant's rights enshrined in art.10(1) of the Convention.

2. Whether the interference was justified

30 The Court reiterates that an interference with an applicant's rights under art.10(1) will infringe the Convention if it does not meet the requirements of para.2 of art.10. It should therefore be determined whether it was "prescribed by law", whether it pursued one or more of the legitimate aims set out in that paragraph and whether it was "necessary in a democratic society" in order to achieve those aims.

(a) "Prescribed by law"

31 The applicant requested the information, relying on the Data Protection Act which guarantees access to data of public interest. The Government argued that the relevant legislation provided a sufficient legal basis for the interference with the applicant's right to freedom of expression, the treatment of "personal data" overriding the element of public interest.

32 The Court is satisfied that the interference was "prescribed by law", within the meaning of art.10(2) of the Convention.

(b) Legitimate aim

33 The applicant argued that the restriction could not be said to have served the protection of the MP's rights, since the Constitutional Court had never asked his permission for the disclosure of his personal data. The Government argued that the interference served to protect the rights of others.

34 The Court considers that the interference in question can be seen as having pursued the legitimate aim of the protection of the rights of others, within the meaning of art.10(2) of the Convention.

(c) Necessary in a democratic society

35 The Court recalls at the outset that:

> "Article 10 does not … confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual,"[6]

[6] *Leander v Sweden* (1987) 9 E.H.R.R. 433 at [74] *in fine*.

and that, "it is difficult to derive from the Convention a general right of access to administrative data and documents".[7] Nevertheless, the Court has recently advanced towards a broader interpretation of the notion of "freedom to receive information"[8] and thereby towards the recognition of a right of access to information.

36 In any event, the Court notes that:

> "[T]he right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him."[9]

It considers that the present case essentially concerns an interference—by virtue of the censorial power of an information monopoly—with the exercise of the functions of a social watchdog, like the press, rather than a denial of a general right of access to official documents. In this connection, a comparison can be drawn with the Court's previous concerns that preliminary obstacles created by the authorities in the way of press functions call for the most careful scrutiny.[10] Moreover, the state's obligations in matters of freedom of the press include the elimination of barriers to the exercise of press functions where, in issues of public interest, such barriers exist solely because of an information monopoly held by the authorities. The Court notes at this juncture that the information sought by the applicant in the present case was ready and available[11] and did not require the collection of any data by the Government. Therefore, the Court considers that the state had an obligation not to impede the flow of information sought by the applicant.

37 The Court observes that the applicant had requested information about the constitutional complaint eventually without the personal data of its author. Moreover, the Court finds it quite implausible that any reference to the private life of the MP, hence to a protected private sphere, could be discerned from his constitutional complaint. It is true that he had informed the press that he had lodged the complaint, and therefore his opinion on this public matter could, in principle, be identified with his person. However, the Court considers that it would be fatal for freedom of expression in the sphere of politics if public figures could censor the press and public debate in the name of their personality rights, alleging that their opinions on public matters are related to their person and therefore constitute private data which cannot be disclosed without consent. These considerations cannot justify, in the Court's view, the interference of which complaint is made in the present case.

38 The Court considers that obstacles created in order to hinder access to information of public interest may discourage those working in the media or related fields from pursuing such matters. As a result, they may no longer be able to play their vital role as "public watchdogs" and their ability to provide accurate and reliable information may be adversely affected.[12]

39 The foregoing considerations lead the Court to conclude that the interference with the applicant's freedom of expression in the present case cannot be regarded

[7] *Loiseau v France* (46809/99) September 28, 2004.
[8] See *Sdružení Jihočeské Matky v la République tchèque* (19101/03) July 10, 2006 .
[9] *Leander* (1987) 9 E.H.R.R. 433 at [74].
[10] See *Chauvy v France* (2005) 41 E.H.R.R. 29 at [66].
[11] See, *a contrario*, *Guerra v Italy* (1998) 26 E.H.R.R. 357 at [53] *in fine*.
[12] See, mutatis mutandis, *Goodwin v United Kingdom* (1996) 22 E.H.R.R. 123 at [39].

as having been necessary in a democratic society. It follows that there has been a violation of art.10 of the Convention.

II. Application of article 41 of the Convention

40 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

41 The applicant claimed €5,000 for non-pecuniary damage suffered on account of the fact that, because of the restriction complained of, it had been unable to generate, and contribute to, an open and well-informed public debate on drug policy.

42 The Government contested this claim.

43 The Court considers that the finding of a violation constitutes sufficient just satisfaction for any non-pecuniary damage which the applicant may have suffered.

B. Costs and expenses

44 The applicant claimed €5,594 in respect of legal fees incurred before the Court (this amount, which includes VAT at 20 per cent, would correspond to altogether 44 hours of work by its lawyer) and €80 in respect of clerical costs.

45 The Government contested this claim.

46 According to the Court's case law, an applicant is entitled to the reimbursement of costs and expenses only insofar as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant €3,000 for costs and expenses under all heads.

C. Default interest

47 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 3 percentage points.

For these reasons, THE COURT unanimously:

(1) *Holds* that there has been a violation of art.10 of the Convention.

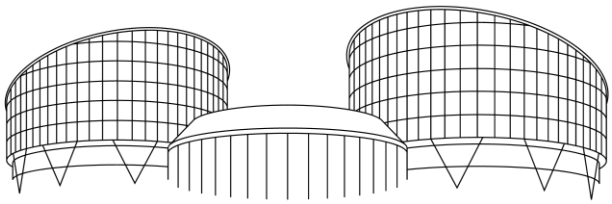
(2) *Holds* that the finding of a violation constitutes sufficient just satisfaction for any non-pecuniary damage which the applicant may have suffered.

(3) *Holds*:

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with art.44(2) of the Convention, €3,000 (three thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into Hungarian forints at the rate applicable at the date of settlement;

(b) that from the expiry of the abovementioned 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 3 percentage points.

(4) *Dismisses* the remainder of the applicant's claim for just satisfaction.



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

GRAND CHAMBER

CASE OF GILLBERG v. SWEDEN

(Application no. 41723/06)

JUDGMENT

STRASBOURG

3 April 2012

This judgment is final but it may be subject to editorial revision.

In the case of Gillberg v. Sweden,

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

Nicolas Bratza, *President*,
Jean-Paul Costa,
Françoise Tulkens,
Nina Vajić,
Dean Spielmann,
Corneliu Bîrsan,
Karel Jungwiert,
Elisabeth Steiner,
Elisabet Fura,
Egbert Myjer,
Danutė Jočienė,
Päivi Hirvelä,
Ledi Bianku,
Mihai Poalelungi,
Nebojša Vučinić,
Kristina Pardalos,
Paulo Pinto de Albuquerque, *judges*,

and Erik Fribergh, *Registrar*,

Having deliberated in private on 28 September 2011 and on 8 March 2012,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 41723/06) against the Kingdom of Sweden lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Swedish national, Mr Christopher Gillberg ("the applicant"), on 10 October 2006.

2. The applicant was represented by Mr Bertil Bjernstam, a Bachelor of Laws from Gothenburg, and by Mr Clarence Crafoord and Ms Anna Rogalska Hedlund, lawyers practising in Stockholm. The Swedish Government ("the Government") were represented by their Agents, Mr Anders Rönquist, Ms Charlotte Hellner and Ms Gunilla Isaksson, from the Ministry for Foreign Affairs.

3. The applicant complained in particular that in civil proceedings concerning access to public documents, and in subsequent criminal

proceedings against him concerning misuse of office, his rights under Articles 8 and 10 of the Convention had been breached.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). On 2 November 2010 a Chamber composed of J. Casadevall, President, E. Fura, B. M. Zupančič, A. Gyulumyan, I. Ziemele, L. López Guerra, A. Power, judges, and also of S. Quesada, Section Registrar, delivered its judgment. It unanimously declared the complaint under Articles 8 and 10 relating to the criminal proceedings against the applicant admissible and the remainder of the application inadmissible, and held, by five votes to two, that there had been no violation of Article 8 of the Convention and, unanimously, that there had been no violation of Article 10 of the Convention. The joint dissenting opinion of A. Gyulumyan and I. Ziemele was annexed to the judgment.

5. On 11 April 2011, following a request by the applicant received at the Court on 25 January 2011, the Panel of the Grand Chamber decided to refer the case to the Grand Chamber under Article 43 of the Convention.

6. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24 of the Rules of Court.

7. The applicant and the Government each filed further written observations (Rule 59 § 1) on the merits.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 28 September 2011 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr C. EHRENKRONA, *Counsel,*
Mr A. RÖNQUIST
Ms C. HELLNER,
Ms G. ISAKSSON,
Mr M. SÄFSTEN,
Ms A. STAWARZ, *Advisers;*

(b) *for the applicant*
Mr C. CRAFOORD,
Mr E. ERIKSSON,
Ms A. ROGALSKA HEDLUND, *Counsel,*
Mr B. BJERNSTAM,
Mr S. SCHEIMAN, *Advisers.*

The applicant was also present.

The Court heard addresses by Mr Crafoord, Mr Eriksson and Mr Ehrenkrona, as well as Ms Rogalska Hedlund's and Mr Ehrenkrona's answers to questions put by judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1950 and lives in Gothenburg.

10. He is a professor, specialising in child and adolescent psychiatry, at the University of Gothenburg.

11. In the period between 1977 and 1992 a research project was carried out at the University of Gothenburg in the field of neuropsychiatry, focusing on cases of Attention-Deficit Hyperactivity Disorder (ADHD) or Deficits in Attention, Motor Control and Perception (DAMP) in children. The aim was to elucidate the significance thereof and associated problems from a long-term perspective. Parents to a group of one hundred and forty-one pre-school children volunteered to participate in the study, which was followed up every third year. Certain assurances were made to the children's parents and later to the young people themselves concerning confidentiality. The research file, called the Gothenburg study, was voluminous and consisted of a large number of records, test results, interview replies, questionnaires and video and audio tapes. It contained a very large amount of privacy-sensitive data about the children and their relatives. Several doctoral theses have been based on the Gothenburg study. The material was stored by the Department of Child and Adolescent Psychiatry, of which the applicant was director. The project was originally set up and started by other researchers but the applicant subsequently took over responsibility for completing the study.

12. The applicant alleged that the Ethics Committee of the University of Gothenburg had made it a precondition in their permits that sensitive information about the individuals participating in the study would be accessible only to the applicant and his staff and that he had therefore promised absolute confidentiality to the patients and their parents. That fact was disputed by the Government.

13. Two permits were issued by the Ethics Committee of the University of Gothenburg, on 9 March 1984 and 31 May 1988 respectively, consisting of one page each and indicating, among other things, the dates of application (respectively 26 January 1984 and 24 March 1988), the researchers involved in the project, the name of the project and the date of approval; they bore the signatures of the chairman and the secretary of the Ethics Committee. They contained no specific requirements and no reference to "secrecy" or "absolute secrecy".

14. In a letter of 17 February 1984 to the parents of the children participating in the study, the applicant stated, *inter alia*:

> "All data will be dealt with in confidentiality and classified as secret. No data processing that enables the identification of your child will take place. No information

has been provided previously or will be provided to teachers about your child except that when starting school she/he took part in a study undertaken by Östra Hospital, and its present results will, as was the case for the previous study three years ago, be followed up."

15. A later undated letter from the applicant to the participants in the study included the following wording:

"Participation is of course completely voluntary and as on previous occasions you will never be registered in public data records of any kind and the data will be processed in such a way that nobody apart from those of us who met you and have direct contact with you will be able to find out anything at all about you."

A. Proceedings concerning access to the research material

16. In February 2002 a sociologist, K, requested access to the background material. She was a researcher at Lund University and maintained that it was of great importance to have access to the research material and that it could, without risk of damage, be released to her with conditions under Chapter 14, section 9, of the Secrecy Act (*Sekretesslagen*; SFS 1980:100). She had no interest in the personal data as such but only in the method used in the research and the evidence the researchers had for their conclusions. Her request was refused by the University of Gothenburg on 27 February 2002 because K had not shown any connection between the requested material and any research, and on the ground that the material contained data on individuals' health status which, if disclosed, might harm an individual or persons related to that individual. An appeal against the decision was lodged with the Administrative Court of Appeal (*Kammarrätten i Göteborg*), which referred the matter to the University of Gothenburg to examine whether the material could be released after removal of identifying information or with a condition restricting K's right to pass on or use the data. The University of Gothenburg again refused the request on 10 September 2002, on the ground that the data requested was subject to secrecy, that there was no possibility of releasing the material after removal of identifying information, nor was there sufficient evidence to conclude that the requested material could be released with conditions. K again appealed against the decision to the Administrative Court of Appeal.

17. In the meantime, in July 2002, a paediatrician, E, also requested access to the material. He submitted that he needed to keep up with current research, that he was interested in how the research in question had been carried out and in clarifying how the researchers had arrived at their results, and that it was important to the neuropsychiatric debate that the material should be exposed to independent critical examination. His request was refused by the University of Gothenburg on 30 August 2002, for the same reasons as its refusal to K, a decision against which E appealed to the Administrative Court of Appeal.

18. By two separate judgments of 6 February 2003, the Administrative Court of Appeal found that K and E had shown a legitimate interest in gaining access to the material in question and that they could be assumed to be well acquainted with the handling of confidential data. Therefore, access should be granted to K and E, but subject to conditions made by the University of Gothenburg in order to protect the interests of the individuals concerned in accordance with various named provisions of the Secrecy Act.

19. The University of Gothenburg's request to the Supreme Administrative Court (*Regeringsrätten)* for relief for substantive defects (*resning*) was refused on 4 April 2003.

20. In vain the applicant and some of the individuals participating in the study also applied to the Supreme Administrative Court for relief for substantive defects. Their requests were refused on 4 April, 16 May and 22 July 2003 respectively, because they were not considered to be party to the case (*bristande talerätt).*

21. In the meantime, on 7 April 2003 the University of Gothenburg decided that, "provided that the individuals concerned gave their consent", the documents would be released to K and E with conditions specified in detail in the decisions.

22. K and E appealed against certain of the conditions imposed by the University of Gothenburg. They also reported the University of Gothenburg's handling of the case to the Parliamentary Ombudsman, which in decisions of 10 and 11 June 2003 criticised the University of Gothenburg, notably regarding the delays in replying to the request for access.

23. In two separate judgments of 11 August 2003, the Administrative Court of Appeal lifted some of the conditions imposed by the university. It pointed out that in the judgments of 6 February 2003 K and E had already been given the right of access to the requested documents and that the only matter under examination was the conditions of access, which could only be imposed if they were designed to remove a given risk of damage, and that a condition should be framed to restrict the recipient's right of disposal over the data. Thereafter, six conditions were set regarding K's access, including that the data was only to be used within the Swedish Research Council funded research project called "The neurological paradigm: on the establishment of a new grand theory in Sweden" which K had specified before the Administrative Court of Appeal, that she was not allowed to remove copies from the premises where she was given access to the documents, and that transcripts of released documents containing data on psychological, medical or neurological examinations or treatment, or concerning the personal circumstances of individuals, and notes concerning such examinations, treatment or circumstances from a document released to her, would be destroyed when the above research project was completed and at the latest by 31 December 2004. Six similar conditions were also imposed on E, including that data in the released documents referring to

psychological, medical, psychiatric or neurological examinations or treatment, and data in the released documents concerning the personal circumstances of an individual, was to be used for examination of how the researchers who participated in the research project in which the documents had been used had arrived at their results and conclusions, and so that E could generally maintain his competence as a paediatrician.

24. The University of Gothenburg did not have a right to appeal against the judgments and on 5 November 2003 the applicant's request to the Supreme Administrative Court for relief for substantive defects was refused because he was not considered to be a party to the case.

25. In the meantime, in a letter of 14 August 2003 to the applicant, the Vice-Chancellor of the university stated that, by virtue of the judgments of the Administrative Court of Appeal, K and E were entitled to immediate access to the documents on the conditions specified. Furthermore, by decision of the university, K and E were to be given access to the documents on the university's premises on a named street and the documents therefore had to be moved there from the Department of Child and Adolescent Psychiatry without delay. The letter stated that the transportation of the documents was to begin on 19 August 2003 at 9 a.m. The applicant was requested to arrange for the documents to be available for collection at that time and, if necessary, to ensure that all the keys to the rooms where the material was kept were delivered to a person P.

26. The applicant replied in a letter of 18 August 2003 that he did not intend to hand over either the material or the keys to the filing cabinets to P. On the same day the Vice-Chancellor had a meeting with the applicant.

27. On instruction by the Vice-Chancellor, on 19 August 2003 P visited the Department of Child and Adolescent Psychiatry. He was met by controller L, who handed him a document showing that L had been instructed by the applicant not to release either the material in question or the keys to the filing cabinets.

28. By letter of 1 September 2003 the Vice-Chancellor of the University of Gothenburg informed K and E that since the applicant refused to transfer the material for the present he could not help them any further and that he was considering bringing the applicant before the Public Disciplinary Board (*Statens ansvarsnämnd*) on grounds of disobedience.

29. On 18 October 2003 the applicant had a meeting with the Vice-Chancellor of the University of Gothenburg about the case. Moreover, in autumn 2003 the applicant and various persons corresponded with the Vice-Chancellor, including a professor of jurisprudence and Assistant Director General of the Swedish Research Council who questioned the judgments of the Administrative Court of Appeal, which prompted the Vice-Chancellor to consider whether it would be possible to impose new conditions on K and E. The case was discussed within the University Board and subsequently, by decision of 27 January 2004, the University of

Gothenburg decided to refuse to grant access to K because, in the light of a memorandum drawn up on 12 March 2003 by the Swedish Research Council, there was no connection between K's research and the research project that she had specified before the Administrative Court of Appeal. Likewise, in a decision of 2 February 2004 the university decided to impose a new condition on E before giving him access. It stated that it had reason to believe that E's activities and position did not justify giving him access to the material, even subject to restrictions. E thus had to demonstrate that his duties for the municipality included reviewing or otherwise acquiring information about the basic material on which the research in question was based.

30. The decisions were annulled by the Administrative Court of Appeal by two separate judgments of 4 May 2004.

31. The applicant's request to the Administrative Supreme Court for relief for substantive defects was refused on 28 September 2004 and 1 July 2005, because he was not considered to be party to the case.

32. In the meantime, according to the applicant, the research material was destroyed during the weekend of 7 and 9 May 2004 by three of his colleagues.

B. Criminal proceedings against the applicant

33. On 18 January 2005 the Parliamentary Ombudsman decided to initiate criminal proceedings against the applicant and by a judgment of 27 June 2005 the District Court (*Göteborgs Tingsrätt*) convicted the applicant of misuse of office pursuant to Chapter 20, Article 1 of the Penal Code (*Brottsbalken)*. The applicant was given a suspended sentence and ordered to pay fifty day-fines of 750 Swedish kronor (SEK), amounting to a total of SEK 37,500, (approximately 4,000 Euros (EUR).

34. The Vice-Chancellor of the university was also convicted of misuse of office for having disregarded, through negligence, his obligations as Vice-Chancellor by failing to ensure that the documents were available for release as ordered in accordance with the judgments of the Administrative Court of Appeal. The Vice-Chancellor was sentenced to forty day-fines of SEK 800, amounting to a total of SEK 32,000 (approximately EUR 3,400).

35. The Parliamentary Ombudsman also decided to initiate criminal proceedings against the Chair of the Board of Gothenburg University, but the charges were later dismissed.

36. Finally, by a judgment issued on 17 March 2006, the three officials who had destroyed the research material were convicted of the offence of suppression of documents and given a suspended sentence and fined.

37. On appeal, on 8 February 2006 the applicant's conviction and sentence were upheld by the Court of Appeal (*Hovrätten för Västra Sverige*) in the following terms:

General observations on the university's management of the case

"In its two initial judgments of 6 February 2003 the Administrative Court of Appeal held that K and E were entitled to have access to the documents requested. In its two subsequent judgments of 11 August 2003 the Administrative Court of Appeal decided on the conditions that would apply in connection with the release of the documents to them. The judgments of the Administrative Court of Appeal had therefore settled the question of whether the documents were to be released to K and E once and for all.

At the hearing in the Administrative Court of Appeal, the university had the opportunity to present reasons why the documents requested should not be released to K and E. Once the judgments, against which no appeal could be made, had been issued in February 2003, whether or not the university considered that they were based on erroneous or insufficient grounds had no significance. After the February judgments the university was only required to formulate the conditions it considered necessary to avoid the risk of any individuals sustaining harm through the release of the documents. Subsequently the university had the opportunity to present its arguments to the Administrative Court of Appeal for the formulation of the conditions it had chosen. After the Administrative Court of Appeal had determined which conditions could be accepted, the question of the terms on which [K and E] could be allowed access to the documents requested was also settled once and for all. There was then no scope for the university to undertake any new appraisal of K's and E's right of access to the documents.

Therefore, in the period referred to in the indictment [from 11 August 2003 until 7 May 2004] it was no longer the secrecy legislation that was to be interpreted but the judgments of the Administrative Court of Appeal. Their contents were clear. [The Vice-Chancellor's] letters of 14 August 2003 to [the applicant] and of 1 September 2003 to K and E show that the university administration had understood that it was incumbent on the university to release the documents without delay.

The promptness required by the Freedom of the Press Act in responding to a request for access to a public document should in itself have caused the university to avoid measures leading to further delay in releasing the documents. Despite this, in its interpretation of the conditions and in laying down additional conditions, the university made it more difficult for K and E to gain access to the documents."

The applicant's liability

"The prosecutor has maintained that after the judgments of the Administrative Court of Appeal of 11 August 2003 and until 7 May 2004, when the material is said to have been destroyed, [the applicant] in his capacity as head of the Department of Child and Adolescent Psychiatry, wilfully disregarded the obligations of his office by failing to comply with the judgments of the Administrative Court of Appeal and allow [E and K] access to the documents. According to the indictment, [the applicant] in so doing not only refused to hand over the documents in person but also refused to make them available to the university administration.

The research material was the property of the university and hence to be regarded as in the public domain. It was stored in the Department of Child and Adolescent Psychiatry, where [the applicant] was the head. [The Vice-Chancellor's] letter of 14 August 2003, to which copies of the judgments of the Administrative Court of Appeal relating to the conditions were attached, made it clear to [the applicant] that

the material in question must be released. As head of the department, [the applicant] was responsible for making the material available to [K and E]. [The applicant's] awareness of his immediate responsibility is revealed not least by the instructions that he gave to [L] before the visit of [P] not to allow the university administration access to the material. It is also shown by [the applicant's] written reply on 18 August 2003 to [the Vice-Chancellor].

Through [the Vice-Chancellor] the university had instructed [the applicant] to release the material to the university, so that it could be moved to premises where K and E could examine it. In view of this, the Court of Appeal, like the District Court, does not consider that [the applicant] can be held culpable because he refused to hand over the documents in person. However, it was incumbent upon him to make the documents available for removal in accordance with the instructions he had received from the university.

[The applicant] has protested that he did not consider that there was any serious intent behind the instruction he received from the [Vice-Chancellor] on 14 August 2003. Here he has referred in particular to the meeting on 18 August 2003 and to the fact that P did not follow up his visit to the department and that he received no new directive to make the material available.

[The Vice-Chancellor], however, has stated that on no occasion did he withdraw the instructions issued on 14 August 2003, and that it must have been quite clear to [the applicant] that they continued to apply, even though they were not explicitly repeated. According to the Vice-Chancellor, nothing transpired at the meeting on 18 August 2003 that could have given [the applicant] the impression that these instructions no longer applied or that they were not intended seriously. [The Vice-Chancellor's] statement in this respect has been confirmed by the Director at the Vice-Chancellor's office, W. It is further borne out by the fact that after the meeting on 18 August 2003 W was given the task of drawing up a complaint to the Government Disciplinary Board for Higher Officials on the subject of [the applicant's] refusals and that the latter was aware that a complaint of this kind was being considered. In addition, it can be seen from a number of e-mails from [the applicant] to [the Vice-Chancellor] that during the entire autumn he considered that he was required to hand over the documents and that he maintained his original refusal to obey his instructions. It has also been shown that when the Board met on 17 December 2003, [the Vice-Chancellor] was still considering making a complaint to the Disciplinary Board. Finally, [a witness, AW] has testified that at a meeting with [the applicant] shortly after the beginning of 2004, when asked whether he still persisted in his refusal, he confirmed that this was the case.

All things considered, the Court of Appeal finds that it has been shown that [the applicant] was aware that the instructions to make the material available to the administration applied during the entire period from when he learnt about the judgments of the Administrative Court of Appeal on 14 August 2003. It was incumbent on him to take the action required to comply with the judgments.

[The applicant] has stated that he was never prepared to participate in the release of the documents to K and E. His actions were, in other words, intentional and their result was that K and E were categorically denied a right that is guaranteed by the Constitution and that is also of fundamental importance in principle. All things considered, the Court of Appeal finds that [the applicant's] conduct means that he disregarded the obligation that applied to him as head of department in such a manner

that the offence of misuse of office should be considered. [The applicant] has however also objected that his conduct should be regarded as excusable in view of the other considerations that he had to bear in mind.

He has thus claimed that in the situation that had arisen he was prevented by medical ethics and research ethics from disclosing information about the participants in the study and their relatives. He referred in particular to international declarations drawn up by the World Medical Association and to the Convention.

The nature of the international declarations agreed on by the World Medical Association is not such as to give them precedence over Swedish law. [The applicant's] objections on the basis of the contents of these declarations therefore lack significance in this case.

Article 8 of the Convention lays down that everyone has the right to respect for his or her private and family life, and that this right may not be interfered with by a public body except in certain specified cases. The provisions of the Secrecy Act are intended, in accordance with Article 8 of the Convention, to protect individuals from the disclosure to others of information about their personal circumstances in cases other than those that can be regarded as acceptable with regard to the right to insight into the workings of the public administration. These regulations must be considered to comply with the requirements of the Convention, and the judgments of the Administrative Court of Appeal lay down how they are to be interpreted in this particular case. [The applicant's] objection that his conduct was excusable in the light of the Convention cannot, therefore, be accepted.

[The applicant] has also asserted that he risked criminal prosecution for breach of professional secrecy if he released the documents to [K and E]. However, the judgments of the Administrative Court of Appeal determined once and for all that the secrecy Act permitted release of the documents. For this reason there was of course no possibility of prosecution for breach of professional secrecy, which, in the opinion of the Court of Appeal, [the applicant] must have realised.

[The applicant] has also stated that he was bound by the assurances of confidentiality he had given to the participants in the study in accordance with the requirements established for the research project. The assurances were given in 1984, in the following terms: "All data will be dealt with in confidence and classified as secret. No data processing that enables the identification of your child will take place. No information has been provided previously or will be provided to teachers about your child except that when starting school she/he took part in a study undertaken by Östra Hospital and its present results will, as was the case for the previous study three years ago, be followed up." A later assurance of confidentiality had the following wording: "Participation is of course completely voluntary and as on previous occasions you will never be registered in public data records of any kind and the data will be processed in such a way that nobody apart from those of us who met you and have direct contact with you will be able to find out anything at all about you."

The assurances of confidentiality given to the participants in the study go, at least in some respects, further than the Secrecy Acts permits. The Court of Appeal notes that there is no possibility in law to provide greater secrecy than follows from the Secrecy Act and that it is not possible to make decisions on issues concerning confidentiality until the release of a document is requested. It follows therefore that the assurances of confidentiality cited above did not take precedence over the law as it stands or a

court's application of the statutes. [The applicant's] objections therefore have no relevance in assessing his criminal liability.

Finally, [the applicant] has claimed that his actions were justifiable in view of the discredit that Swedish research would incur and the decline in willingness to participate in medical research projects that would ensue if information submitted in confidence were then to be disclosed to private individuals. The Court of Appeal notes that there are other possibilities of safeguarding research interests, for example by removing details that enable identification from research material so that sensitive information cannot be divulged. What [the applicant] has adduced on this issue cannot exonerate him from liability.

[The applicant's] actions were therefore not excusable. On the contrary, for a considerable period he failed to comply with his obligations as a public official arising from the judgments of the Administrative Court of Appeal. His offence cannot be considered a minor one. [The applicant] shall therefore be found guilty of misuse of office for the period after 14 August 2003, when he was informed of the judgments of the Administrative Court of Appeal. The offence is a serious one as [the applicant] wilfully disregarded the constitutional right of access to public documents. On the question of the sentence, the Court of Appeal concurs with the judgment of the District Court.

38. Leave to appeal to the Supreme Court was refused on 25 April 2006.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The right of public access to official documents

39. The principle of public access to official documents (*offenlighetsprincipen*) has a history of more than two hundred years in Sweden and is one of the cornerstones of Swedish democracy. One of its main characteristics is the constitutional right for everyone to study and be informed of the contents of official documents held by the public authorities. This principle allows the public and the media to exercise scrutiny of the State, the municipalities and other parts of the public sector which, in turn, contributes to the free exchange of opinions and ideas and to efficient and correct management of public affairs and, thereby, to maintaining the legitimacy of the democratic system (see Govt. Bill 1975/76:160 pp. 69 et seq.). The principle of public access to official documents is enshrined in Chapter 2, Sections 1 and 12, of the Freedom of the Press Act. Thus, every Swedish citizen is entitled to have free access to official documents, in order to encourage the free exchange of opinion and the availability of comprehensive information (Chapter 2, Section 1; foreign nationals enjoy the same rights in this respect as Swedish citizens, Chapter 14, Section 5).

40. A document is official if it is held by and is regarded as having been received or "drawn up" by a public authority (Chapter 2, Sections 3 and 6-7, of the Freedom of the Press Act). A document is "drawn up" when it is dispatched by an authority. A document that is not dispatched is "drawn up" when the matter to which it relates is finally settled by the authority in question. If the document does not relate to any specific matter, it is "drawn up" when it has been finally checked or has otherwise received its final form. As research is considered to be an activity in its own right *(faktiskt handlande)* (see, for example, the Chancellor of Justice, 1986 p. 139), it cannot be said to relate to any specific matter. This means, in turn, that research material, as a rule, is "drawn up" and thereby official, as soon as it has been finally checked or otherwise received its final form. It could be added that preliminary outlines, drafts, and similar documents enumerated in Chapter 2, Section 9, of the Freedom of the Press Act are not deemed to be official unless they introduce new factual information or have been accepted for filing. Finally, there is no general requirement that a document be filed in order to be considered official, and registration does not affect the issue of whether a document is official or not (cf. Chapter 15, Section 1, of the Secrecy Act).

41. An official document to which the public has access shall be made available on request forthwith, or as soon as possible, at the place where it is held, and free of charge, to any person wishing to examine it, in such form that it can be read, listened to, or otherwise comprehended; a document may also be copied, reproduced or used for sound transmission (Chapter 2, Section 12). Such a decision should normally be rendered the same day or, if the public authority in question has to consider whether the requested document is official or whether the information is public, within a few days (see, for example, the Parliamentary Ombudsman's decision of 23 November 2007 in case no. 5628-2006). A certain delay may also be acceptable if the request concerns very extensive material. If a document cannot be made available without disclosure of such part of it as constitutes classified material, the rest of the document shall be made available to the person requesting access in the form of a transcript or copy (Section 12). A public authority is under no obligation to make a document available at the place where it is held if this presents serious difficulty.

B. Restrictions on the right of public access to official documents

42. An unlimited right of public access to official documents could, however, result in unacceptable harm to different public and private interests. It has therefore been considered necessary to provide exceptions. These exceptions are laid down in Chapter 2, Section 2 (first paragraph), of the Freedom of the Press Act, which reads as follows:

> The right of access to official documents may be restricted only if restriction is necessary having regard to
> 1. the security of the State or its relations with another State or an international organisation;
> 2. the central fiscal, monetary or currency policy of the State;
> 3. the inspection, control or other supervisory activities of a public authority;
> 4. the interest of preventing or prosecuting crime;
> 5. the economic interest of the public institutions;
> 6. the protection of the personal or economic circumstances of private subjects;
> 7. the preservation of animal or plant species.

43. According to paragraph 2 of the same provision, restrictions on the right of access to official documents shall be scrupulously specified in a provision of a special act of law or, if this is deemed more appropriate in a particular case, in another act of law to which the special act refers (see, for example, Govt. Bill 1975/76:160 pp. 72 et seq. and Govt. Bill 1979/80:2, Part A, pp. 48 et seq.). The special act of law referred to is the Secrecy Act. Pursuant to such a provision, the Government may issue more detailed provisions for its application in an ordinance (*förordning)*. Since the mandate to restrict the right of public access to official documents lies exclusively with the Swedish Parliament (*Riksdag*), it is not possible for a public authority to enter into an agreement with a third party exempting certain official documents from the right of public access, or to make similar arrangements.

44. The Secrecy Act contains provisions regarding the duty to observe secrecy in the activities of the community and regarding prohibitions against making official documents available (Chapter 1, Section 1). The latter provisions limit the right of access to official documents provided for in the Freedom of the Press Act (*Tryckfrihetsförordningen*, SFS 1949:105). They relate to prohibitions on disclosing information, irrespective of the manner of disclosure. The question of whether secrecy should apply to information contained in an official document cannot be determined in advance, but must be examined each time a request for access to a document is made. Decisive for this issue is whether making a document available could imply a certain risk of harm. The risk of harm is defined in different ways in the Secrecy Act, having regard to the interests that the secrecy is intended to protect. Thus, the secrecy may be more or less strict depending on the interests involved. The secrecy legislation has been elaborated in this way in order to provide sufficient protection, for example, for the personal integrity of individuals, without the constitutional right of public access to official documents being circumscribed more than is considered necessary. In the present case, the Administrative Court of Appeal, in its judgments of 6 February 2003, found that secrecy applied to the research material under Chapter 7, Sections 1, 4, 9 and 13, of the Secrecy Act (Chapter 7 deals with secrecy with regard to the protection of the personal circumstances of individuals).

45. If a public authority deems that such a risk of loss, harm, or other inconvenience which, pursuant to a provision on secrecy, constitutes an obstacle to information being communicated to a private subject, can be removed by imposing a restriction limiting the private subject's right to re-communicate or use the information, the authority shall impose such a restriction when the information is communicated (Chapter 14, Section 9, of the Secrecy Act). As an example of such a restriction, the preparatory notes mention prohibiting the dissemination of the content of a document or the publication of secret information contained in a document (see Govt. Bill 1979/80:2, Part A, p. 349). An individual who has been granted access to a document subject to a restriction limiting the right to use the information may be held criminally liable if he or she does not respect that restriction (see Chapter 20, Section 3, of the Penal Code).

C. Procedure concerning requests for public access to official documents

46. A request to examine an official document must be made to the public authority which holds the document (Chapter 2, Section 14, of the Freedom of the Press Act and Chapter 15, Section 6, of the Secrecy Act). As mentioned above, there are specific requirements of promptness regarding the handling of such requests. A decision by an authority other than the Swedish Parliament or the Government to refuse access to a document is subject to appeal to the courts – as a general rule, an administrative court of appeal – and, further, to the Supreme Administrative Court (Chapter 2, Section 15, of the Freedom of the Press Act; Chapter 15, Section 7, of the Secrecy Act and Sections 33 and 35 of the 1971 Administrative Court Procedure Act (*Förvaltningsprocesslagen*; SFS 1971:291)). Leave to appeal is required in the last-mentioned court. Only the person seeking access has a right of appeal. Thus, if the Administrative Court of Appeal – contrary to the public authority holding the document in question – decides that a document must be made available, its judgment is not open to appeal by the public authority in question, or by private subjects who consider that harm would be inflicted on them as a consequence of access to the document being granted (see RÅ 2005 note 1 and RÅ 2005 ref. 88). The reason why the right of appeal has been narrowly limited is that once the competing interests have been considered by a court the legislator has given priority to the principle of public access to official documents over other private and public interests (see, for example, Govt. Bill 1975/76:160 p. 203 and RÅ 2003 ref. 18, which concerned an institution's request for relief for substantive defects).

D. Responsibility of public officials and criminal provisions

47. The principle of public access to official documents is applicable to all activities within the public sector and every public official is obliged to be acquainted with the laws and regulations in this area. This is in particular the case where a certain official – following a special decision or otherwise – has the duty to examine requests for access to official documents (Chapter 15, Section 6, second paragraph of the Secrecy Act). Formally, the head of the public authority has the primary responsibility to ensure that such requests are duly examined. However, the task may be delegated to other office holders within the authority and this is what is usually done in practice for the purposes of the authority's daily activities. Such delegation has to be in accordance with the regulations of the authority (Section 21 of the former Government Agencies and Institutes Ordinance, *Verksförordningen* SFS 1995:1322, applicable at the relevant time). Irrespective of a public official's particular competence or power under the regulations of the authority in question, he or she has a general duty to perform the tasks that are part of his or her official duties. As previously mentioned, this duty involves the obligation to assist in making official documents available forthwith, or as soon as possible, to persons who are considered to have the right of access to them under the legislation described above.

48. By virtue of Chapter 20, Article 1, of the Penal Code a person who, in the exercise of public authority, by act or by omission, intentionally or through carelessness, disregards the duties of his office, will be sentenced for misuse of office (*tjänstefel)*. The provision reads as follows:

Chapter 20, Article 1:

> "A person who, in the exercise of public authority, by act or by omission, intentionally or through carelessness, disregards the duties of his office, shall be sentenced for misuse of office to a fine or a maximum term of imprisonment of two years. If, having regard to the perpetrator's official powers or the nature of his office considered in relation to his exercise of public power in other respects or having regard to other circumstances, the act may be regarded as petty, punishment shall not be imposed. If an offence mentioned in the first paragraph has been committed intentionally and is regarded as serious, the perpetrator shall be sentenced for gross misuse of office to a term of imprisonment of at least six months and at most six years. In assessing whether the crime is serious, special attention shall be given to whether the offender seriously abused his position or whether the crime occasioned serious harm to an individual or the public sector or gave rise to a substantial improper benefit. A member of a national or municipal decision-making assembly shall not be held responsible under the provisions of the first or second paragraphs of this Article for any action taken in that capacity. Nor shall the provisions of the first and second paragraphs of this Article apply if the crime is punishable under this or some other Law."

49. A suspended sentence may be imposed by the courts for an offence for which a fine is considered an inadequate penalty, and such a sentence is, as a general rule, combined with day-fines. A maximum total of 200 day-fines may be imposed. When determining the amount, account is taken of the economic circumstances of the accused, but a day-fine may not exceed 1,000 Swedish kronor (SEK) (Chapter 25, Section 2, Chapter 27, Sections 1 and 2, and Chapter 30, Section 8 of the Penal Code).

50. In Sweden a suspended sentence does not refer to any specific number of days of imprisonment. Under Chapter 27 of the Penal Code a suspended sentence is always subject to a probationary period of two years. A suspended sentence may be linked to specific conditions. If the person convicted commits a new crime during the probationary period the courts may, having due regard to the nature of the new crime, revoke the suspended sentence and impose a joint sanction for the crimes (Chapter 34 of the Penal Code).

E. The Parliamentary Ombudsmen

51. The functions and powers of the four Parliamentary Ombudsmen are laid down in particular in Chapter 12, Section 6 of the Instrument of Government (*Regeringsformen*) and in the Act with Instructions for the Parliamentary Ombudsmen (*Lagen med instruktion för Riksdagens ombudsmän;* SF5 1986:765). Their main task is to supervise the application of laws and other regulations in the public administration. It is their particular duty to ensure that public authorities and their staff comply with the laws and other statutes governing their actions. An Ombudsman exercises supervision, either on complaint from individuals or of his or her own motion, by carrying out inspections and other investigations which he or she deems necessary. The examination of a matter is concluded by a decision in which the Ombudsman states his or her opinion whether the measure taken by the authority contravenes the law or is otherwise wrongful or inappropriate. The Ombudsmen may also make pronouncements aimed at promoting uniform and proper application of the law. An Ombudsman's decisions are considered to be expressions of his or her personal opinion. They are not legally binding upon the authorities. However, they do have persuasive force, command respect and are usually followed in practice. An Ombudsman may, among many other things, institute criminal proceedings against an official who has committed an offence by departing from the obligations incumbent on him or her in his or her official duties (for example, as in the present case, misuse of office). The Ombudsman may also report an official to the competent authority for disciplinary measures. The Ombudsman may attend deliberations of the courts and the administrative authorities and is entitled to have access to their minutes and other documents.

III. THE HELSINKI DECLARATION

52. The Helsinki Declaration, adopted by the 18th World Medical Association's General Assembly in Finland in June 1964, with later amendments, states, *inter alia*:

INTRODUCTION

1. The World Medical Association (WMA) has developed the Declaration of Helsinki as a statement of ethical principles for medical research involving human subjects, including research on identifiable human material and data. The Declaration is intended to be read as a whole and each of its constituent paragraphs should not be applied without consideration of all other relevant paragraphs.

2. Although the Declaration is addressed primarily to physicians, the WMA encourages other participants in medical research involving human subjects to adopt these principles.

3. It is the duty of the physician to promote and safeguard the health of patients, including those who are involved in medical research. The physician's knowledge and conscience are dedicated to the fulfilment of this duty.

4. The Declaration of Geneva of the WMA binds the physician with the words, "The health of my patient will be my first consideration," and the International Code of Medical Ethics declares that, "A physician shall act in the patient's best interest when providing medical care."

5. Medical progress is based on research that ultimately must include studies involving human subjects. Populations that are underrepresented in medical research should be provided appropriate access to participation in research.

6. In medical research involving human subjects, the well-being of the individual research subject must take precedence over all other interests.

...

10. Physicians should consider the ethical, legal and regulatory norms and standards for research involving human subjects in their own countries as well as applicable international norms and standards. No national or international ethical, legal or regulatory requirement should reduce or eliminate any of the protections for research subjects set forth in this Declaration.

BASIC PRINCIPLES FOR ALL MEDICAL RESEARCH

11. It is the duty of physicians who participate in medical research to protect the life, health, dignity, integrity, right to self-determination, privacy, and confidentiality of personal information of research subjects.

...

14. The design and performance of each research study involving human subjects must be clearly described in a research protocol. The protocol should contain a

statement of the ethical considerations involved and should indicate how the principles in this Declaration have been addressed. The protocol should include information regarding funding, sponsors, institutional affiliations, other potential conflicts of interest, incentives for subjects and provisions for treating and/or compensating subjects who are harmed as a consequence of participation in the research study. The protocol should describe arrangements for post-study access by study subjects to interventions identified as beneficial in the study or access to other appropriate care or benefits.

15. The research protocol must be submitted for consideration, comment, guidance and approval to a research ethics committee before the study begins. This committee must be independent of the researcher, the sponsor and any other undue influence. It must take into consideration the laws and regulations of the country or countries in which the research is to be performed as well as applicable international norms and standards but these must not be allowed to reduce or eliminate any of the protections for research subjects set forth in this Declaration. The committee must have the right to monitor ongoing studies. The researcher must provide monitoring information to the committee, especially information about any serious adverse events. No change to the protocol may be made without consideration and approval by the committee.

...

23. Every precaution must be taken to protect the privacy of research subjects and the confidentiality of their personal information and to minimize the impact of the study on their physical, mental and social integrity.

24. In medical research involving competent human subjects, each potential subject must be adequately informed of the aims, methods, sources of funding, any possible conflicts of interest, institutional affiliations of the researcher, the anticipated benefits and potential risks of the study and the discomfort it may entail, and any other relevant aspects of the study. The potential subject must be informed of the right to refuse to participate in the study or to withdraw consent to participate at any time without reprisal. Special attention should be given to the specific information needs of individual potential subjects as well as to the methods used to deliver the information. After ensuring that the potential subject has understood the information, the physician or another appropriately qualified individual must then seek the potential subject's freely-given informed consent, preferably in writing. If the consent cannot be expressed in writing, the non-written consent must be formally documented and witnessed. ...

THE LAW

I. THE SCOPE OF THE CASE BEFORE THE GRAND CHAMBER

53. From the outset, the Grand Chamber reiterates that the content and scope of the "case" referred to it are delimited by the Chamber's decision on admissibility (see, *inter alia, K. and T. v. Finland* [GC], no. 25702/94,

§§ 140-141, ECHR 2001-VII; *Göç v. Turkey* [GC], no. 36590/97, §§ 35-37, ECHR 2002-V; *Perna v. Italy* [GC], no. 48898/99, §§ 23-24, ECHR 2003-V; and *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 109, ECHR-2007-IV). Thus the Grand Chamber may only examine the case in so far as it has been declared admissible; it cannot examine those parts of the application which have been declared inadmissible. Therefore, if an applicant before the Grand Chamber raises a complaint which has been declared inadmissible by the Chamber, this complaint will be declared outside the scope of the case before the Grand Chamber (see, *inter alia*, *Sisojeva and Others v. Latvia* [GC], no. 60654/00, §§ 61-62, ECHR 2007-I).

54. Furthermore, under Article 35 § 4 of the Convention the Grand Chamber may dismiss applications it considers inadmissible "at any stage of the proceedings". Thus, even at the merits stage the Court may reconsider a decision to declare an application admissible if it concludes that it should have been declared inadmissible for one of the reasons given in the first three paragraphs of Article 35 of the Convention (see, *inter alia*, *Azinas v. Cyprus* [GC], no. 56679/00, § 32, ECHR 2004-III).

55. In these circumstances the Grand Chamber has jurisdiction to examine only the merits of the case as declared admissible by the Chamber in its judgment of 2 November 2010. This means, in particular, that the applicant's complaints concerning the outcome of the civil proceedings before the administrative courts cannot be examined as they were declared inadmissible as being lodged out of time.

56. In conclusion, the Grand Chamber has jurisdiction to examine only whether the criminal conviction of the applicant for misuse of office infringed his rights under Articles 8 and 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

The Government's preliminary objection

1. The Government's submissions

57. By way of a preliminary objection, the Government contended that the applicant's complaint fell outside the scope of Article 8 of the Convention and should therefore be declared incompatible with the Convention *ratione materiae*.

58. More specifically, they contested that a criminal conviction could constitute an interference with the right to respect for private life under Article 8, unless there were special circumstances in a particular case calling for a different conclusion (see, for example, *Laskey, Jaggard and Brown*

v. the United Kingdom, 19 February 1997, *Reports of Judgments and Decisions* 1997-I).

59. Furthermore, recalling that the applicant was convicted of a crime related to his professional duties as a public official, the Government contended that the applicant had failed to show how such a conviction had affected his "private life" or any other aspects of Article 8, in order for his complaint to fall within the ambit of the said Article.

2. The applicant's submissions

60. The applicant first claimed that he had a right under Article 8 of the Convention not to impart confidential information and that this right had been breached by his criminal conviction.

61. He also contended that his moral integrity, his reputation and his honour had been affected by the conviction to a degree falling within the scope of Article 8, and that he had suffered personally, socially, psychologically and economically. On this last point, he had lost income because he had been dismissed by the Norwegian Institute of Public Health and because he could have written at least five books during the time that had been taken up by the case.

62. The applicant submitted that the national authorities had put him in the impossible dilemma of having either to breach his promise of secrecy to the participants in the study by complying with the Administrative Court of Appeal's judgments, which in his opinion was wrong, or to refuse to comply with the said judgments and run the risk of being convicted for misuse of office. He chose to keep his promise of secrecy and received massive support for that decision from numerous renowned and highly respected scientists.

3. The Chamber's decision

63. In its judgment of 2 November 2010 the Chamber left open whether the applicant's complaint fell within the scope of Article 8 and whether there had been an interference with his right to respect for his "private life", because even assuming that there had been an interference, it found that there had been no violation of the provision concerned.

4. The Grand Chamber's assessment

64. The Court recalls that the applicant was a public official researcher exercising public authority at a public institution, namely the University of Gothenburg. He was not the children's doctor or psychiatrist and he did not represent the children or the parents. In their judgment convicting the applicant, the criminal courts found him guilty of misuse of office from 14 August 2003 to 7 May 2004 because he had refused to make the research material belonging to the University of Gothenburg available in compliance

with the final judgments of the Administrative Court of Appeal. The criminal courts did not, however, decide on whether K and E should have had access to the research material before it was destroyed in May 2004, because that question had already been determined by the Administrative Court of Appeal in its judgments of 6 February and 11 August 2003. Whether or not the latter judgments breached a right under Article 8 of the Convention not to impart confidential information, as the applicant claims, falls outside the scope of the Grand Chamber's jurisdiction (see paragraphs 53-56 above).

65. It therefore remains to be examined whether the applicant's criminal conviction for misuse of office, on account of having disregarded his duties as a public official, amounted to an interference with his "private life" within the meaning of Article 8 of the Convention.

66. The concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can therefore embrace multiple aspects of the person's physical and social identity. Article 8 protects in addition a right to personal development, and the right to establish and develop relationships with other human beings and the outside world (see, for example, *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 66, ECHR 2008).

67. The applicant maintained that the criminal conviction in itself affected the enjoyment of his "private life" by prejudicing his honour and reputation. The Court reiterates in this regard that Article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence (see, *inter alia*, *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, § 49, ECHR 2004-VIII, and *Mikolajová v. Slovakia*, no. 4479/03, § 57, 18 January 2011).

68. The applicant also contended that the criminal conviction had adversely affected his moral and psychological integrity and that he had suffered personally, socially, psychologically and economically. The Court observes that the protection of an individual's moral and psychological integrity is an important aspect of Article 8 of the Convention. It notes, however, that there is no Convention case-law in which the Court has accepted that a criminal conviction in itself constitutes an interference with the convict's right to respect for private life. The Court does not ignore that such a criminal conviction may entail personal, social, psychological and economic suffering for the convicted person. In the Court's view, though, such repercussions may be foreseeable consequences of the commission of a criminal offence and can therefore not be relied on in order to complain that a criminal conviction in itself amounts to an interference with the right to respect for "private life" within the meaning of Article 8 of the Convention.

69. The Court is aware that Article 8 of the Convention was found applicable to convictions in *Laskey, Jaggard and Brown* (cited above).

Nevertheless, in that case the applicants complained that their convictions were the result of an unforeseeable application of a provision of the criminal law to their consensual sado-masochistic activities between adults. The Court expressed doubt as to whether those activities fell entirely within the notion of "private life" in the particular circumstances of that case, but saw no reason to examine the issue of its own motion since that point was not disputed by the parties (*Laskey, Jaggard and Brown*, § 36).

70. In the present case, the applicant was convicted of misuse of office in his capacity as a public official, pursuant to Chapter 20, Article 1 of the Penal Code (*Brottsbalken*). His conviction was not the result of an unforeseeable application of that provision and the offence in question has no obvious bearing on the right to respect for "private life". On the contrary, it concerns professional acts and omissions by public officials in the exercise of their duties. Nor has the applicant pointed to any concrete repercussions on his private life which were directly and causally linked to his conviction for that specific offence.

71. Moreover, the applicant has not further defined or elaborated on the nature and extent of his suffering connected to the criminal conviction. He did point out, though, that he had found himself in a dilemma and that he had chosen to refuse to comply with the judgments of the Administrative Court of Appeal, with the risk that he would be convicted of misuse of office. This confirms, in the Court's opinion, that the applicant's conviction and the suffering it may have entailed were foreseeable consequences of his having committed the criminal offence.

72. The applicant also contended that he had lost income because he was dismissed by the Norwegian Institute of Public Health and could have written at least five books during the time taken up by the case. To the extent that this is to be understood as a claim that the applicant's conviction affected the enjoyment of his "private life" because of its bearing on his professional activities (see, among other authorities, *Turán v. Hungary*, no. 33068/05, 6 July 2010; *Sidabras and Džiautas* (cited above); *Halford v. the United Kingdom*, 25 June 1997, *Reports* 1997-III; and *Niemietz v. Germany*, 16 December 1992, Series A no. 251-B), the Court considers this form of economic suffering to be a foreseeable consequence of the commission of a criminal offence by the applicant in respect of which Article 8 cannot be relied on (see paragraph 68 above).

73. At any rate, the Court observes that the criminal conviction of the applicant had no negative bearing on his maintaining his position as professor and head of the Department of Child and Adolescent Psychiatry at the University of Gothenburg. Furthermore, even if the applicant's allegation that he was dismissed by the Norwegian Institute of Public Health is an established fact, the Court notes that the applicant failed to show that there was any causal link between the conviction and the dismissal. Moreover, the applicant's claim that he had lost income from at least five

books which he had planned to write, but had been unable to because his time was taken up by the case, remains wholly unsubstantiated. Finally, according to the applicant, he had support from numerous renowned and highly respected scientists who agreed with the conduct for which he was convicted. There is therefore no indication that the impugned conviction had any repercussions on the applicant's professional activities which went beyond the foreseeable consequences of the criminal offence for which he was convicted.

74. In conclusion, the Court finds, in light of the facts of the present case, that the applicant's rights under Article 8 of the Convention have not been affected. Accordingly, this provision does not apply in the instant case and the Government's preliminary objection must be upheld.

III. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

The Government's preliminary objection

1. The Government's submissions

75. By way of a preliminary objection, the Government contended that the applicant's complaint fell outside the scope of Article 10 and therefore should be declared incompatible with the Convention *ratione materiae*.

76. They disputed that a right to negative freedom of expression could apply in the context of a criminal conviction of a public official for failure as an employee to assist in disclosing official documents as ordered by a court of law.

77. The Government noted in this regard that there was no case-law supporting the view that the right to receive information set out in Article 10 should be interpreted as including a general right of access to case files and other documents held by public authorities, especially if these were not of a general character. Thus, it was difficult to conclude that its negative counterpart, namely the right to refuse access to official documents, could be considered to enjoy the protection of Article 10.

78. Nor did the Government find that the applicant's situation could be compared to that of journalists protecting their sources or that of lawyers protecting the interest of their clients (see, for example, *Goodwin v. the United Kingdom*, 27 March 1996, *Reports* 1996-II, and *Niemietz*, cited above).

2. The applicant's submissions

79. In the applicant's view, he had a negative right within the meaning of Article 10 of the Convention not to impart the disputed research material.

80. He pointed out that he had given a promise of confidentiality to the participants in the research and had attempted to protect their integrity, in spite of being ordered by a court to reveal the confidential data. For that he had been convicted and punished, a situation very similar to that in the *Goodwin* case (cited above). He also found that his situation could be compared to the duty of confidentiality by which lawyers were bound.

3. The Chamber's decision

81. In its judgment of 2 November 2010 the Chamber left open whether the applicant's complaint fell within the scope of Article 10 and whether there had been an interference with his right to freedom of expression, because even assuming that there had been an interference, it found that there had been no violation of the invoked provision.

4. The Grand Chamber's assessment

82. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly. Moreover, Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed (see among other authorities, *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06, 28957/06, 28959/06 and 28964/06, § 53, 12 September 2011).

83. The right to receive and impart information explicitly forms part of the right to freedom of expression under Article 10. That right basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him (see, for example, *Leander v. Sweden*, 26 March 1987, § 74, Series A no. 116, and *Gaskin v. the United Kingdom*, 7 July 1989, § 52, Series A no. 160).

84. In the present case the applicant was not prevented from receiving and imparting information or in any other way prevented from exercising his "positive" right to freedom of expression. He argued that he had a "negative" right within the meaning of Article 10 to refuse to make the disputed research material available, and that consequently his conviction was in violation of Article 10 of the Convention.

85. The Court observes that case-law on the "negative" right protected under Article 10 is scarce. Referring to *K. v. Austria* (16002/90,

Commission Report of 13 October 1992, § 45), the former Commission stated in *Strohal v. Austria* (no. 20871/92, Commission decision of 7 April 1994) that "the right to freedom of expression by implication also guarantees a "negative right" not to be compelled to express oneself, that is, to remain silent". Article 10 was also invoked in *Ezelin v. France* (judgment of 26 April 1991, Series A no. 202, § 33) where the Court stated that a refusal to give evidence was an issue "which in itself does not come within the ambit of Articles 10 and 11 ...".

86. The Court does not rule out that a negative right to freedom of expression is protected under Article 10 of the Convention, but finds that this issue should be properly addressed in the circumstances of a given case.

87. It notes that in the present case it was the Department of Child and Adolescent Psychiatry of the University of Gothenburg which carried out the research from 1977 to 1992. The project was originally set up and started by other researchers, but the applicant subsequently took over responsibility for completing the study. The material belonged to the University and was stored at the Department of Child and Adolescent Psychiatry of which the applicant was head. Accordingly, the material consisted of public documents subject to the principle of public access under the Freedom of the Press Act and the Secrecy Act. That entailed, among other things, that secrecy could not be determined until a request for access was submitted, and it was impossible in advance for a public authority to enter into an agreement with a third party exempting certain official documents from the right to public access (see paragraphs 43 and 44). Nevertheless, in his letter of 17 February 1984 to the parents of the children participating in the research project, the applicant stated, *inter alia:* "All data will be dealt with in confidentiality and classified as secret. No data processing that enables the identification of your child will take place. No information has been provided previously or will be provided to teachers about your child except that when starting school she/he took part in a study undertaken by Östra Hospital, and its present results will, as was the case for the previous study three years ago, be followed up." In a later, undated, letter to the participants, the applicant submitted: "Participation is of course completely voluntary and as on previous occasions you will never be registered in public data records of any kind and the data will be processed in such a way that nobody apart from those of us who met you and have direct contact with you will be able to find out anything at all about you."

88. In its judgment of 8 February 2006 convicting the applicant, the Court of Appeal held that "[these] assurances of confidentiality given to the participants in the study go further, at least in some respects, than the Secrecy Act permits" and that "there is no possibility in law to provide greater secrecy than follows from the Secrecy Act or to make decisions on issues concerning confidentiality until the release of a document is requested. It follows therefore that the assurances of confidentiality cited

above did not take precedence over the law as it stood or a court's application of the statutes". Equally important, in the period referred to in the indictment, namely from 11 August 2003 to 7 May 2004, it was no longer the secrecy legislation that was to be interpreted by the criminal courts but rather the judgments of the Administrative Court of Appeal, which had settled once and for all the question of whether and on what conditions the documents were to be released to K and E.

89. The Court of Appeal also found that the nature of the international declarations agreed on by the World Medical Association was not such that they took precedence over Swedish law. In this regard it is noteworthy that the applicant in the present case was not mandated by the participants in the research and that, as a consequence, he was not bound by professional secrecy as if he were their doctor or psychiatrist, or by virtue of the Helsinki Declaration adopted by the World Medical Association's General Assembly.

90. Moreover, the national courts dismissed the applicant's allegation that his assurances of confidentiality to the participants had been a requirement of the Ethics Committee of the University of Gothenburg for approving the research project. Nor has the applicant submitted any convincing evidence to that effect before this Court.

91. Accordingly, the applicant was not prevented from complying with the judgments of the Administrative Court of Appeal by any statutory duty of secrecy or any order from his public employer. Rather, his refusal to make the research material available was motivated by his personal belief that for various reasons the outcome of the judgments of the Administrative Court of Appeal was wrong.

92. Taking these circumstances into account, the Court considers that the crucial question can be narrowed down to whether the applicant, as a public employee, had an independent negative right within the meaning of Article 10 of the Convention not to make the research material available, although the material did not belong to him but to his public employer, the University of Gothenburg, and despite the fact that his public employer – the university – actually intended to comply with the final judgments of the Administrative Court of Appeal granting K and E access to its research material on various conditions, but was prevented from so doing because the applicant refused to make it available.

93. In the Court's view, finding that the applicant had such a right under Article 10 of the Convention would run counter to the property rights of the University of Gothenburg. It would also impinge on K's and E's rights under Article 10, as granted by the Administrative Court of Appeal, to receive information in the form of access to the public documents concerned, and on their rights under Article 6 to have the final judgments of the Administrative Court of Appeal implemented (see, *mutatis mutandis*, *Loiseau v. France* (dec.) no. 46809/99, ECHR 2003-XII, extracts; *Burdov*

v. Russia, no. 59498/00, § 34, ECHR 2002-III; and *Hornsby v. Greece*, judgment of 19 March 1997, § 40, Reports 1997-II).

94. Accordingly, the Court cannot endorse the applicant's view that he had a "negative" right within the meaning of Article 10 to refuse to make the research material belonging to his public employer available, thereby denying K and E their right to access to it as determined by the Administrative Court of Appeal.

95. It appears that the applicant also maintained that his complaint fell within the ambit of Article 10 of the Convention because his situation was similar to that of journalists protecting their sources. The Court notes, however, that the pertinent case-law on this subject concerns journalists' positive right to freedom of expression (see, *inter alia*, *Goodwin* (cited above); *Fressoz and Roire v. France* [GC], no. 29183/95, ECHR 1999-I; and *Roemen and Schmit v. Luxembourg*, application no. 51772/99, ECHR 2003-IV). Moreover, the information diffused by a journalist based on his or her source generally belongs to the journalist or the media, whereas in the present case the research material was considered to belong to the University of Gothenburg, and thus to be in the public domain. The disputed research material was therefore subject to the principle of public access to official documents under the Freedom of the Press Act and the Secrecy Act, which specifically allowed for the public, and the media, to exercise control over the State, the municipalities and other parts of the public sector, and which in turn contributed to the free exchange of opinions and ideas and to the efficient and correct administration of public affairs. By contrast, the applicant's refusal in the present case to comply with the judgments of the Administrative Court of Appeal, by denying K and E access to the research material, hindered the free exchange of opinions and ideas on the research in question, notably on the evidence and methods used by the researchers in reaching their conclusions, which constituted the main subject of K's and E's interest. In these circumstances the Court finds that the applicant's situation cannot be compared to that of journalists protecting their sources.

96. Finally, in so far as the applicant contended that his complaint fell within the scope of Article 10 of the Convention because his situation was comparable to that of lawyers protecting information obtained in confidence from their clients, the Court reiterates that the relevant case-law thereon, including access to correspondence with legal advisers, concerns Article 8 of the Convention (see, for example, *Niemietz*, cited above, and *Foxley v. The United Kingdom*, no. 33274/96, 20 June 2000). In any event, referring to its finding above (paragraph 89), the Court notes that since the applicant had not been mandated by the research participants as their doctor, he had no duty of professional secrecy towards them. Moreover, the applicant was never asked to give evidence and there are no elements indicating that, had he complied with the Administrative Court of Appeal's judgments, there would have been repercussions on other proceedings as

may be the case when a lawyer's professional secrecy has been disregarded (see *Niemietz*, § 37 and *Foxley*, § 50, both cited above). In these circumstances the Court finds that the applicant's situation cannot be compared to that of a lawyer bound by a duty of professional secrecy vis-à-vis his clients.

97. In conclusion, the Court finds, in light of the facts of the present case, that the applicant's rights under Article 10 of the Convention have not been affected. Accordingly, this provision does not apply in the instant case and the Government's preliminary objection must be upheld.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that Article 8 of the Convention does not apply in the instant case;

2. *Holds* that Article 10 of the Convention does not apply in the instant case.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 3 April 2012.

Erik Fribergh Registrar	Nicolas Bratza President

Supreme Court

Kennedy *v* Charity Commission (Secretary of State for Justice and others intervening)

[on appeal from **Kennedy *v* Information Commissioner and another (Secretary of State for Justice intervening)**]

[2014] UKSC 20

2013 Oct 29, 31;
2014 March 26

Lord Neuberger of Abbotsbury PSC, Lord Mance, Lord Clarke of Stone-cum-Ebony, Lord Wilson, Lord Sumption, Lord Carnwath, Lord Toulson JJSC

Freedom of information — Disclosure — Exempt information in relation to inquiries — Charity Commission instituting series of inquiries into affairs of charity — Journalist requesting information concerning inquiries — Whether exemption from disclosure extending beyond conclusion of inquiries or persisting merely for duration of inquiries — Whether Convention right to freedom of expression engaged — Whether exemption to be read down to secure compatibility with Convention rights — Whether relevant that disclosure potentially available under other statutory or common law powers — Charities Act 1993 (c 10), ss 1B, 1C, 1D, 1E (as inserted by Charities Act 2006 (c 50), s 7) — Human Rights Act 1998 (c 42), s 3, Sch 1, Pt I, art 10 — Freedom of Information Act 2000 (c 36), ss 32(1)(2), 63(1), 78

A journalist made requests to the Charity Commission, a public authority, under section 1 of the Freedom of Information Act 2000[1] for disclosure of information relating to statutory inquiries which it had carried out into the affairs of a particular charity. The Charity Commission refused the request on the basis of the absolute exemption from the duty to disclose provided by sections 2(2) and 32(2) of the 2000 Act, which it regarded as continuing beyond the conclusion of the relevant inquiry. The journalist complained to the Information Commissioner, who upheld the Charity Commission's refusal. The Information Tribunal dismissed the journalist's appeal. On the journalist's further appeal the judge in the High Court, dismissing the appeal in relation to the bulk of the documents, held inter alia that the section 32(2) exemption applied to information contained in documents "placed" in the custody of the person conducting the inquiry "for the purposes of the inquiry", provided that the information was held by the relevant public authority only by virtue of being contained in those documents, and that the exemption continued to apply until the expiry of the 30-year period prescribed for the duration of that exemption by sections 62(1) and 63(1) of the 2000 Act. The Court of Appeal affirmed the judge's construction of section 32(2) of the 2000 Act but stayed the journalist's appeal in order to obtain a determination from the First-tier Tribunal, as successor to the Information Tribunal, as to whether that provision should be read down, pursuant to section 3 of the Human Rights Act 1998[2] and article 10 of the Convention for the

[1] Freedom of Information Act 2000, s 1(1): "Any person making a request for information to a public authority is entitled— (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him."
S 2(2): see post, para 16.
S 32: see post, para 17.
S 63(1): see post, para 30.
S 78: "Nothing in this Act is to be taken to limit the powers of a public authority to disclose information held by it."

[2] Human Rights Act 1998, s 3(1): "So far as it is possible to do so, primary and subordinate

Protection of Human Rights and Fundamental Freedoms, so that the exemption from disclosure of information ended on the termination of the particular statutory inquiry. The tribunal concluded that the Charity Commission's refusal to disclose the requested information by applying the absolute exemption under section 32(2) of the 2000 Act amounted to an interference with the journalist's right to freedom of expression guaranteed by article 10 of the Convention. On the restored appeal, and on the Charity Commission's cross-appeal from the tribunal's decision, the Court of Appeal concluded that it was bound by recent authority to hold that article 10.1 of the Convention was not engaged where a public authority, consistently with domestic legislation governing the disclosure of information, refused a request for access to information, even though the request was made by a journalist in the role of a social watchdog, and that, accordingly, the conventional interpretation of section 32(2) prevailed so as to provide an absolute exemption from disclosure of information which persisted beyond the conclusion of the statutory inquiry.

On the journalist's appeal and on the question whether disclosure of information held exempt under the 2000 Act might be disclosed under the Charities Act 1993, as amended[3], informed by general common law principles—

Held, (1) that section 32 of the Freedom of Information Act 2000 treated an inquiry in a similar way to court and arbitration proceedings, subjecting all three to the same absolute exemption from disclosure under that Act; that, applying the ordinary common law rules of interpretation and in the light of section 63(1) of the Act, the critical phrase "for the purposes of the inquiry" in section 32(2)(b) qualified the immediately preceding words and referred to the purpose for which the relevant documents had been placed in the custody of, or created by, the person conducting the inquiry, rather than the reason why they were being held by the public authority; that the exemption, therefore, did not cease abruptly at the end of the inquiry but continued after it was concluded until the documents became historical records at the end of the 30-, or by amendment 20-, year period (post, paras 10, 24–34, 101, 102–104, 152, 171–172, 200, 221).

(2) Dismissing the appeal (Lord Wilson and Lord Carnwath JJSC dissenting), that the 2000 Act did not provide an exhaustive scheme for disclosure; that the effect of sections 32(2) and 78 was not that there was an absolute prohibition on disclosure of information held by persons conducting an inquiry, but that any question of disclosure should be addressed outside the 2000 Act and under other statutory rules and or common law powers which were preserved by section 78; that attention was therefore to be directed to the Charities Act 1993, as amended, construed in the light of common law principles, and, if that Act entitled the journalist to disclosure or put him in a position no less favourable than that which should be provided by article 10, there could be no basis for use of the interpretative provision in section 3 of the 1998 Act to read down section 32, nor of the power in section 4 of the 1998 Act to make a declaration of incompatibility; that, even if the 1993 Act appeared not to satisfy fully any rights which the journalist might have under article 10, the focus would be on whether that Act could be read down so as to cater for such rights and not on remodelling section 32 of the 2000 Act by section 3 of the 1998 Act to provide them; and that, accordingly, section 32(2) was not to be read down to have a meaning contrary to that clearly intended by Parliament, nor was there any basis for a declaration of incompatibility, and the journalist's claim under the 2000 Act therefore failed (post, paras 6–8, 10, 35–42, 101, 106, 137, 139–140, 150, 152, 155–156).

British Broadcasting Corpn v Sugar (No 2) [2012] 1 WLR 439, SC(E) considered.

Per Lord Neuberger of Abbotbury PSC, Lord Mance, Lord Clarke of Stone-cum-Ebony, Lord Sumption and Lord Toulson JJSC. (i) Under, in particular, sections 1B

legislation must be read and given effect in a way which is compatible with the Convention rights."

Sch 1, Pt I, art 10: see post, para 23.

[3] Charities Act 1993, ss 1B, 1C, 1D, 1E, as inserted: see post, para 22.

to 1E of the Charities Act 1993, as substituted, the Charity Commission's objectives of increasing public trust and enhancing accountability link in with its function of disseminating information and its duty to ensure that its regulatory activities should be proportionate, accountable, consistent and transparent. Those requirements are comparable with any which might arise under article 10 of the Convention. The real issue will be whether the public interest in disclosure is outweighed by public or private interests mirroring those identified in article 10.2. This is reinforced by the importance of openness of proceedings and reasoning under general common law principles. The meaning and significance attached to the provisions of the 1993 Act, as amended, is underpinned in the present context by the common law presumption in favour of openness. The exercise of the Charity Commission's powers will be subject to judicial review and the courts will adopt a high standard of review to any decision not to disclose information where there is a genuine public interest in the information, requested for important journalistic purposes, in respect of an inquiry on which the Charity Commission has published reports (post, paras 43–56, 109–132, 136, 157).

R (Guardian News and Media Ltd v City of Westminster Magistrates' Court (Article 19 intervening) [2013] QB 618, CA considered.

(ii) Article 10 of the Convention does not contain a right to receive information from public authorities. The "direction of travel" identified in recent decisions of sections of the European Court of Human Rights in favour of a broader approach is not sufficient to justify departure from the principles established by the Grand Chamber of that court in its decisions on that article (post, paras 57–101, 144–148, 154).

Leander v Sweden (1987) 9 EHRR 433, *Guerra v Italy* (1998) 26 EHRR 357 and *Roche v United Kingdom* (2005) 42 EHRR 599, GC applied.

Társaság a Szabadságjogokért v Hungary (2009) 53 EHRR 130 not applied.

Decisions of the Court of Appeal [2011] EWCA Civ 367; [2012] EWCA Civ 317; [2012] 1 WLR 3524, CA affirmed.

The following cases are referred to in the judgments:

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Ambrose v Harris [2011] UKSC 43; [2011] 1 WLR 2435, SC(Sc)

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA

Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109; [1988] 3 WLR 776; [1988] 3 All ER 545, HL(E)

Attorney General v Leveller Magazine Ltd [1979] AC 440; [1979] 2 WLR 247; [1979] 1 All ER 745, HL(E)

British Broadcasting Corpn v Sugar (No 2) [2010] EWCA Civ 715; [2010] 1 WLR 2278; [2011] 1 All ER 101, CA; [2012] UKSC 4; [2012] 1 WLR 439; [2012] 2 All ER 509, SC(E)

Claude-Reyes v Chile (unreported) 19 September 2006, Inter-American Court of Human Rights

Crampton v Secretary of State for Health (unreported) 9 July 1993; [1993] CA Transcript No 824, CA

Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co [2004] EWCA Civ 314; [2005] QB 207; [2004] 3 WLR 533; [2004] 4 All ER 746, CA

Derbyshire County Council v Times Newspapers Ltd [1993] AC 534; [1993] 2 WLR 449; [1993] 1 All ER 1011, HL(E)

Doherty v Birmingham City Council (Secretary of State for Communities and Local Government intervening) [2008] UKHL 57; [2009] AC 367; [2008] 3 WLR 636; [2009] 1 All ER 653, HL(E)

Gaskin v United Kingdom (1989) 12 EHRR 36

A *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557; [2004] 3 WLR 113; [2004] 3 All ER 411, HL(E)
Gillan and Quinton v United Kingdom (2010) 50 EHRR 1105
Gillberg v Sweden (2012) 34 BHRC 247, GC
Guerra v Italy (1998) 26 EHRR 357
Hazell v Hammersmith and Fulham London Borough Council [1992] 2 AC 1; [1991] 2 WLR 372; [1991] 1 All ER 545, HL(E)
B *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167; [2007] 2 WLR 581; [2007] 4 All ER 15, HL(E)
IBA Healthcare Ltd v Office of Fair Trading [2004] EWCA Civ 142; [2004] ICR 1364; [2004] 4 All ER 1103, CA
Independent News and Media Ltd v A [2010] EWCA Civ 343; [2010] 1 WLR 2262; [2010] 3 All ER 32, CA
Kay v United Kingdom (2010) 54 EHRR 1056
C *Kenedi v Hungary* (2009) 27 BHRC 335
Leander v Sweden (1987) 9 EHRR 433
Lonrho Ltd v Shell Petroleum Co Ltd [1980] 1 WLR 627, HL(E)
Lund v Brazil (unreported) 24 November 2010, Inter-American Court of Human Righs
Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening) [2010] UKSC 45; [2011] 2 AC 104; [2010] 3 WLR 1441; [2011] PTSR 61; [2011] 1 All ER 285, SC(E)
D *Matky v Czech Republic* (Application No 19101/03) (unreported) given 10 July 2006, ECtHR
Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v Austria (Application No 39534/07) (unreported) given 28 November 2013, ECtHR
Poplar Housing and Regeneration Community Association Ltd v Donoghue [2001] EWCA Civ 595; [2002] QB 48; [2001] 3 WLR 183; [2001] 4 All ER 604, CA
R v Commission for Racial Equality, Ex p Hillingdon London Borough Council [1982] AC 779; [1982] 3 WLR 159, HL(E)
E *R v Ministry of Agriculture, Fisheries and Food, Ex p First City Trading* [1997] 1 CMLR 250
R v Ministry of Defence, Ex p Smith [1996] QB 517; [1996] 2 WLR 305; [1996] ICR 760; [1996] 1 All ER 257, CA
R v Secretary of State for Health, Ex p Eastside Cheese Co [1999] 3 CMLR 123, CA
R v Secretary of State for the Home Department, Ex p Bugdaycay [1987] AC 514; [1987] 2 WLR 606; [1987] 1 All ER 940, HL(E)
F *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)* [2007] UKHL 26; [2008] AC 153; [2007] 3 WLR 33; [2007] 3 All ER 685, HL(E)
R (Gentle) v Prime Minister [2008] UKHL 20; [2008] AC 1356; [2008] 2 WLR 879; [2008] 3 All ER 1, HL(E)
R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court [2010] EWHC 3376 (Admin); [2011] 1 WLR 1173; [2011] 3 All ER 38, DC; *(Article 19 intervening)* [2012] EWCA Civ 420; [2013] QB 618; [2012] 3 WLR 1343; [2012] 3 All ER 551, CA
G *R (Persey) v Secretary of State for the Environment, Food and Rural Affairs* [2002] EWHC 371 (Admin); [2003] QB 794; [2002] 3 WLR 704, DC
R (Q) v Secretary of State for the Home Department [2003] EWCA Civ 364; [2004] QB 36; [2003] 3 WLR 365; [2003] 2 All ER 905, CA
R (Sinclair Collis Ltd) v Secretary of State for Health [2011] EWCA Civ 437; [2012] QB 394; [2012] 2 WLR 304, CA
H *R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening)* [2010] UKSC 29; [2011] 1 AC 1; [2010] 3 WLR 223; [2010] 3 All ER 1067, SC(E)
R (Sturnham) v Parole Board [2013] UKSC 23; [2013] 2 AC 254; [2013] 2 WLR 1157; [2013] 2 All ER 1013, SC(E)

R (Ullah) v Special Adjudicator [2004] UKHL 26; [2004] 2 AC 323; [2004] 3 WLR 23; [2004] 3 All ER 785, HL(E)
R (Wagstaff) v Secretary of State for Health [2001] 1 WLR 292, DC
Rabone v Pennine Care NHS Trust (INQUEST intervening) [2012] UKSC 2; [2012] 2 AC 72; [2012] 2 WLR 381; [2012] PTSR 497; [2012] 2 All ER 381, SC(E)
Roche v United Kingdom (2005) 42 EHRR 599, GC
Scott v Scott [1913] AC 417, HL(E)
Secretary of State for the Home Department v AF (No 3) [2009] UKHL 28; [2010] 2 AC 269; [2009] 3 WLR 74; [2009] 3 All ER 643, HL(E)
Shapovalov v Ukraine (Application No 45835/05) (unreported) given 31 July 2012, ECtHR
Smith v Ministry of Defence (JUSTICE intervening) [2013] UKSC 41; [2014] AC 52; [2013] 3 WLR 69; [2013] 4 All ER 794, SC(E)
Smith and Grady v United Kingdom (2000) 31 EHRR 620
Társaság a Szabadságjogokért v Hungary (2009) 53 EHRR 130
Thesing, Bloomberg Finance LP v European Central Bank (ECB) (Case T-590/10) [2013] 2 CMLR 202, EGC
Thomas v Bridgend County Borough Council [2011] EWCA Civ 862; [2012] QB 512; [2012] 2 WLR 624; [2012] PTSR 441, CA
United States v Amodeo (1995) 71 F 3d 1044
Vodafone 2 v Revenue and Customs Comrs [2009] EWCA Civ 446; [2010] Ch 77; [2010] 2 WLR 288; [2010] Bus LR 96, CA
Youth Initiative for Human Rights v Serbia (Application No 48135/06) (unreported) given 25 June 2013, ECtHR

The following additional cases were cited in argument:

A v United Kingdom (2009) 49 EHRR 625, GC
ABC Ltd v Y (Practice Note) [2010] EWHC 3176 (Ch); [2012] 1 WLR 532; [2011] 4 All ER 113
AH (Sudan) v Secretary of State for the Home Department (United Nations High Comr for Refugees intervening) [2007] UKHL 49; [2008] AC 678; [2007] 3 WLR 832; [2008] 4 All ER 190, HL(E)
Abdurahman v United Kingdom (Application No 40351/09) (unreported) given 17 September 2010, ECtHR
Abrams v United States (1919) 250 US 616
Access Info Europe v Council of the European Union (Case T-233/09) (unreported) 22 March 2011, EGC
Al-Adsani v United Kingdom (2001) 34 EHRR 273, GC
Al-Khawaja v United Kingdom (2009) 49 EHRR 1; (2011) 54 EHRR 807, GC
Al-Skeini v United Kingdom (2011) 53 EHRR 589, GC
All Party Parliamentary Group on Extraordinary Rendition v Information Comr [2012] 1 Info LR 258
Allsop v North Tyneside Metropolitan Borough Council [1992] ICR 639, CA
Animal Defenders International v United Kingdom (2013) 57 EHRR 607; 34 BHRC 137, GC
Antigua Power Co Ltd v Attorney General of Antigua and Barbuda [2013] UKPC 23, PC
Atkinson v United Kingdom (1990) 67 DR 244
Attorney General of The Gambia v Momodou Jobe [1984] AC 689; [1983] 3 WLR 174, PC
Axel Springer AG v Germany (2012) 55 EHRR 183, GC
B (A Child) (Care Proceedings: Threshold Criteria), In re [2013] UKSC 33; [2013] 1 WLR 1911; [2013] 3 All ER 929, SC(E)
BVerfg 2 B v R 1481/04; 14 October 2004
Banković v Belgium (2001) 44 EHRR SE75

A *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1999] 1 AC 266; [1998] 2 WLR 860; [1998] 2 All ER 778, HL(NI)
Bellinger v Bellinger (Lord Chancellor intervening) [2003] UKHL 21; [2003] 2 AC 467; [2003] 2 WLR 1174; [2003] 2 All ER 593, HL(E)
Bloomsbury International Ltd v Sea Fish Industry Authority [2011] UKSC 25; [2011] 1 WLR 1546; [2011] 4 All ER 721, SC(E)
Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland (2005) 42 EHRR 1, GC
B *Brown v Stott* [2003] 1 AC 681; [2001] 2 WLR 817; [2001] 2 All ER 97, PC
Browne of Madingley (Lord) v Associated Newspapers Ltd [2007] EWCA Civ 295; [2008] QB 103; [2007] 3 WLR 289, CA
Burnip v Birmingham City Council [2012] EWCA Civ 629; [2013] PTSR 117; [2012] LGR 954, CA
Carson v United Kingdom (2010) 51 EHRR 369, GC
C *Centro Europa 7 Srl v Italy* (Application No 38433/09) (unreported) given 7 June 2012, GC
Cobain v Information Comr (unreported) 8 February 2012, First-tier Tribunal
Common Services Agency v Scottish Information Comr [2008] UKHL 47; [2008] 1 WLR 1550; [2008] 4 All ER 851, HL(Sc)
Dagg v Canada (Minister of Finance) [1997] 2 SCR 403
Dammann v Switzerland (Application No 77551/01) (unreported) given 25 April 2006, ECtHR
D *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69; [1998] 3 WLR 675, PC
Demir v Turkey (2008) 48 EHRR 1272, GC
Department for Business, Enterprise and Regulatory Reform v Information Comr (unreported) 28 April 2009, First-tier Tribunal
E v Chief Constable of the Royal Ulster Constabulary (Northern Ireland Human Rights Commission intervening) [2008] UKHL 66; [2009] AC 536; [2008] 3 WLR 1208; [2009] 1 All ER 467, HL(NI)
E *EM (Lebanon) v Secretary of State for the Home Department (AF (A Child) intervening)* [2008] UKHL 64; [2009] AC 1198; [2008] 3 WLR 931; [2009] 1 All ER 559, HL(E)
Environmental Foundation Ltd v Urban Development Authority of Sri Lanka (Case 47/2004) (unreported) 28 November 2005, Supreme Court (Sri Lanka)
Flinkkilä v Finland (Application No 25576/04) (unreported) given 6 April 2010, ECtHR
F *Flood v Times Newspapers Ltd* [2012] UKSC 11; [2012] 2 AC 273; [2012] 2 WLR 760; [2012] 4 All ER 913, SC(E)
Flux v Moldova (No 7) (Application No 25367/05) (unreported) given 24 November 2009, ECtHR
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G (Adoption: Unmarried Couple) In re [2008] UKHL 38; [2009] AC 173; [2008] 3 WLR 76, HL(E)
G *G v Wikimedia Foundation Inc* [2009] EWHC 3148 (QB); [2010] EMLR 364
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H *Goodwin v United Kingdom* (2002) 35 EHRR 447, GC
Grupo Interpres SA v Spain (1997) 89B DR 150
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MA (Somalia) v Secretary of State for the Home Department [2010] UKSC 49; [2011] 2 All ER 65, SC(E)
MT (Algeria) v Secretary of State for the Home Department [2009] UKHL 10; [2010] 2 AC 110; [2009] 2 WLR 512; [2009] 4 All ER 1045, HL(E)
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Mamatkulov v Turkey (2005) 41 EHRR 494, GC
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Minister of Home Affairs v Fisher [1980] AC 319; [1979] 2 WLR 889; [1979] 3 All ER 21, PC
Mitchell v Information Comr (unreported) 10 October 2005, Information Tribunal
Mizzi v Malta (2006) 46 EHRR 529
Mosley v United Kingdom (2011) 53 EHRR 1011
Mustafa v Sweden (2008) 52 EHRR 803
National Labour Relations Board v Robbins Tire and Rubber Co (1978) 437 US 214
Neulinger v Switzerland (2010) 54 EHRR 1087, GC
Office of Communications v Morrissey [2011] UKUT 116 (AAC), UT
Office of Government Commerce v Information Comr (Attorney General intervening) [2008] EWHC 774 (Admin); [2010] QB 98; [2009] 3 WLR 627
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A *Pepper v Hart* [1993] AC 593; [1992] 3 WLR 1032; [1993] ICR 291; [1993] 1 All ER 42, HL(E)
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B *Pretty v United Kingdom* (2002) 35 EHRR 1
R v A (No 2) [2001] UKHL 25; [2002] 1 AC 45; [2001] 2 WLR 1546; [2001] 3 All ER 1, HL(E)
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R v Director of Public Prosecutions, Ex p Kebilene [2000] 2 AC 326; [1999] 3 WLR 972; [1999] 4 All ER 801, HL(E)
C *R v Horncastle* [2009] UKSC 14; [2010] 2 AC 373; [2010] 2 WLR 47; [2010] 2 All ER 359, SC(E)
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S (Minors) (Care Order: Implementation of Care Plan), In re [2002] UKHL 10; [2002] 2 AC 291; [2002] 2 WLR 720; [2002] 2 All ER 192, HL(E)
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B *United States Depot of Justice v Reporters Committee for Freedom of the Press* (1989) 489 US 749
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C *Weems v United States* (1910) 217 US 349
Westminster City Council, In re [1986] AC 668; [1986] 2 WLR 807; [1986] 2 All ER 278, HL(E)
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X v Austria (2013) 57 EHRR 405, GC
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D *Zana v Turkey* (1997) 27 EHRR 667

APPEAL from the Court of Appeal

On 8 June 2007 the applicant, Dominic Kennedy, a journalist, requested, pursuant to section 1 of the Freedom of Information Act 2000, that certain information be supplied to him by the Charity Commission, relating to
E inquiries conducted by it into the affairs of a charitable organisation. The commission refused the request, applying an absolute exemption purportedly deriving from section 32(2) of the 2000 Act. The applicant complained to the Information Commissioner, who, on 9 September 2008, issued a decision notice rejecting the complaint. The applicant appealed to the Information Tribunal under section 57 of the 2000 Act. By a decision promulgated on 14 June 2009, the tribunal (Judge John Angel, Jacqueline
F Blake and Marion Saunders) upheld the decision notice, save in relation to a small number of documents.

The applicant appealed. By a decision dated 19 January 2010, Calvert-Smith J sitting in the Administrative Court of the Queen's Bench Division [2010] EWHC 475 (Admin); [2010] 1 WLR 1489, dismissed the appeal.

By an appellant's notice dated 9 February 2010 and pursuant to
G permission given by the Court of Appeal (Rimer J) on 30 June 2010 the applicant appealed on the ground that the judge had erred in interpreting section 32(2) of the 2000 Act as conferring (i) a blanket exemption from disclosure that continued for 30 years after a statutory inquiry had closed, regardless of content, the harmlessness of disclosure and of the public interest in disclosure, and (ii) exemption in respect of documents held by a public authority prior to the commencement of a statutory inquiry. On
H 12 May 2011, the Court of Appeal (Ward, Jacob and Etherton LJJ) [2011] EWCA Civ 367; [2012] 1 WLR 3524 stayed the appeal and remitted the case, pursuant to CPR r 52.10(2)(b), to the same panel of the tribunal for determination of the question whether section 32(2) of the 2000 Act should in the circumstances be read down pursuant to section 3 of the Human

Rights Act 1998 and article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, so that the exemption which it provided from disclosure of information ended on the termination of the relevant statutory inquiry.

By a decision dated 18 November 2011 the First-tier Tribunal (General Regulatory Chamber) (Information Rights), replacing the Information Tribunal, found that the commission's refusal to disclose the information requested by the applicant amounted to an interference with his right to freedom of expression guaranteed by article 10 of the Convention.

On the restored appeal the applicant pursued the grounds on which permission had been granted, but with particular emphasis on the applicability of article 10 of the Convention. By way of cross-appeal the commission challenged the First-tier Tribunal's decision of 18 November 2011, on the ground, inter alia, that the tribunal had erred in law in finding that there was a clear and cogent line of jurisprudence in the European Court of Human Rights which had recently developed the scope of the right to receive information beyond the earlier decisions of that court. On 8 February 2012 the court (Ward LJ) ordered that (i) the Information Commissioner be permitted to make written submissions in respect of the remainder of the appeal; and (ii) the Secretary of State for Justice be joined as an intervener to the remainder of the appeal and be permitted to make oral and written submissions in respect of it. On 20 March 2012, the Court of Appeal (Ward, Etherton LJJ and Sir Robin Jacob) [2012] EWCA Civ 317; [2012] 1 WLR 3524 dismissed the appeal, allowed the cross-appeal and gave the applicant permission to appeal.

The applicant appealed. The questions for the the Supreme Court's determination, as set out in the statement of facts and issues agreed between the parties, were, inter alia, (1) whether applying common law principles of construction to section 32(2) of the Freedom of Information Act 2000, once an inquiry had ended information given to or created by the inquiry remained exempt information thereunder for a further 30 years; (2)(i) if so, whether that reading of section 32(2) constituted an interference with the applicant's rights under article 10.1 of the Convention, (ii) if so, whether that interference was justified under article 10.2, and (iii) if not, whether section 3 of the Human Rights Act 1998 required the exemption in section 32(2) of the 2000 Act to be read and given effect so as to fall away on the inquiry ending.

The Secretary of State for Justice, the Information Commissioner and Media Legal Defence Initiative and Campaign for Freedom of Information intervened in the appeal.

The facts are stated in the judgment of Lord Mance JSC.

Philip Coppel QC and *Andrew Sharland* (instructed by *Bates Wells & Braithwaite LLP*) for the applicant.

James Eadie QC, Karen Steyn and *Rachel Kamm* (instructed by *Legal Adviser, Charity Commission*) for the Charity Commission.

James Eadie QC, Karen Steyn and *Rachel Kamm* (instructed by *Treasury Solicitor*) for the first intervener

Ben Hooper (instructed by *Legal Director, Information Commissioner's Office, Wilmslow*) for the second intervener.

A *Richard Clayton QC* and *Christopher Knight* (instructed by *Solicitor, Media Legal Defence Initiative and Campaign for Freedom of Information*) for the third intervener.

The court took time for consideration.

26 March 2014. The following judgments were handed down.

B

LORD MANCE JSC (with whom **LORD NEUBERGER OF ABBOTSBURY PSC** and **LORD CLARKE OF STONE-CUM-EBONY JSC** agreed)

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C D E

Introduction

1 Information is the key to sound decision-making, to accountability and development; it underpins democracy and assists in combatting poverty, oppression, corruption, prejudice and inefficiency. Administrators, judges, arbitrators, and persons conducting inquiries and investigations depend on it; likewise the press, NGOs and individuals concerned to report on issues of public interest. Unwillingness to disclose information may arise through habits of secrecy or reasons of self-protection. But information can be genuinely private, confidential or sensitive, and these interests merit respect in their own right and, in the case of those who depend on information to fulfil their functions, because this may not otherwise be forthcoming. These competing considerations, and the balance between them, lie behind the issues on this appeal.

F G

2 This appeal concerns the relationship between the Charity Commission, a public authority responsible for inquiries in relation to which it requires information from third parties, and the press, concerned to understand and report on the Charity Commission's performance of its role. It also concerns the relationship between the Freedom of Information Act 2000 ("the FOIA") and the statutory and common law position regarding the disclosure of information outside the scope of the FOIA.

H

3 The FOIA provides a framework within which there are rights to be informed, on request, about the existence of, and to have communicated,

information held by any public authority. But the framework is not all-embracing. First, these rights do not apply at all in cases which are described as "absolute exemptions" (see sections 2(1)(a) and 2(1)(b)) and are subject to a large number of other carefully developed qualifications. Second, as the other side of this coin, section 78 of the FOIA specifies that nothing in it "is to be taken to limit the powers of a public authority to disclose information held by it".

4 In the present case, Mr Kennedy, an experienced journalist with *The Times*, has been long concerned to investigate and understand more about three inquiries conducted under the Charities Act 1993 by the Charity Commission in relation to an appeal ("The Mariam Appeal") founded by Mr George Galloway MP in 1998 and operated until 2003. He views the two brief reports by the Charity Commission on these inquiries as leaving significantly unclear the basis on which the commission conducted the inquiries, the information on which it acted, its communications with other public authorities and its conclusions. On 8 June 2007 he made corresponding requests for disclosure of documentation by the Charity Commission under the FOIA.

5 In response, the Charity Commission points to an absolute exemption contained in section 32(2) of the FOIA. This exempts the Charity Commission from any duty to disclose any document placed in its custody or created by it for the purposes of an inquiry which it has in the public interest conducted in the exercise of its functions. The Charity Commission submits that this exemption lasts until the document is destroyed—or, if the document is one that ought to be publicly preserved, that it lasts for up to 30 (or in future 20) years under the Public Records Act 1958, section 3 as amended for the future by the Constitutional Reform and Governance Act 2010, section 45(1).

6 Section 32 is a section dealing with information held by courts and persons conducting an inquiry or arbitration. Its intention was not that such information should not be disclosed. Its intention was to take such information outside the FOIA. Any question as to its disclosure was to be addressed under the different and more specific schemes and mechanisms which govern the operations of and disclosure by courts, arbitrators or persons conducting inquiries. With regard to the Charity Commission the relevant scheme and mechanism is found in the Charities Act 1993, as amended by the Charities Act 2006 (since replaced by the Charities Act 2011), the construction of which is informed by a background of general common law principles. In the present case, the focus has, however, been on the FOIA as if it were an exhaustive scheme. The argument has been, in effect, that, unless a prima facie right to disclosure can be found in the FOIA, United Kingdom law must be defective, and in breach of what is said to be the true interpretation of article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. But that misreads the statutory scheme, and omits to take into account the statutory and common law position to which, in the light of sections 32 and 78 in particular, attention must be addressed.

7 The Court of Appeal thus correctly held in *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening)* [2013] QB 618 that it was "quite wrong to infer from the exclusion" by section 32 of court documents from the FOIA that "Parliament

A thereby intended to preclude the court from permitting a non-party to have access to such documents if the court considered such access to be appropriate under the open justice principle": para 74. That was a case concerning court documents, but the same general point applies to inquiry documents: section 32 is no answer to any power which the holder of an inquiry may have to disclose, or which the court may have to order disclosure in respect of, inquiry documents outside section 32.

B

8 In the present case, Mr Kennedy's claim to disclosure by the Charity Commission has only ever been pursued by reference to the FOIA. At the outset, before it referred to section 32, the Charity Commission did on 4 July 2007 explain in a little detail the factors which it saw as relevant to any issue of disclosure. It said:

C

> "There is a strong public interest in the commission being able to carry out its functions which is expressly recognised by the [FOIA] in section 31(2)(f)–(h). Section 31 exempts from disclosure information which, if released, would prejudice the commission's functions in protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration, protecting the property of charities from loss or misapplication and recovering the property of
>
> D charities. The commission relies very much on the co-operation of and liaison with a variety of third parties in undertaking these functions and routine disclosure of regulatory communication between the commission and these parties would adversely affect the commission in its work.
>
> "The competing public interest is for transparency of the decisions and reasons for them so as to promote public confidence in charities. This is tempered by the need for confidentiality in the exchange of information.
>
> E In my view, at this time, balance of the public interest weighs more strongly with securing the commission's ability to carry out its functions efficiently and therefore lies in withholding the information."

Outside the FOIA, and in particular if this had been the response given to a claim for disclosure under the commission's Charities Act powers and

F duties, the response could have been tested by judicial review on ordinary public law principles. Instead, Mr Kennedy's claim was and has only ever been put on the basis that the FOIA must be construed or remodelled so as to give him a claim under that Act.

9 In these circumstances, the issues directly arising on this appeal are limited. The first is whether section 32(2) contains, as a matter of ordinary construction, an absolute exemption which continues after the end of an

G inquiry. Mr Philip Coppel QC representing Mr Kennedy submits that it does not. That failing, he relies, second, on what he describes as a current "direction of travel" of Strasbourg case law for a proposition that article 10 of the Convention imposes a positive duty of disclosure on public authorities, at least towards "public watchdogs" like the press, in respect of material of genuine public interest, subject to the exemptions permitted by

H article 10.2. On that basis, and in the light of the duty in section 3 of the Human Rights Act 1998 to interpret primary legislation "so far as it is possible to do so . . . in a way which is compatible with the Convention rights", he submits that section 32 should be read down so that the absolute exemption ceases with the end of the relevant inquiry. Alternatively, taking up a point put by the court, he submits that the absolute exemption should

from that moment be read as a qualified exemption (requiring a general balancing of the competing public interests), along the lines provided by section 2(2)(b) of the FOIA. Thirdly, all those submissions failing, he submits that the court should make a declaration of incompatibility in respect of section 32(2). Fourthly, however, despite the limitations in the way in which the case has been presented, it will, for reasons already indicated, be appropriate and necessary to consider the statutory and common law position outside the scope of the FOIA. As I have stated, the effect of section 32 is not to close those off, but rather to require attention to be directed to them.

10 In a judgment dated 20 March 2012 differing from the First-tier Tribunal, the Court of Appeal accepted that section 32 applied and dismissed Mr Kennedy's claim accordingly. The present appeal is brought against that dismissal. For reasons contained in paras 24–42, Mr Kennedy's appeal falls in my opinion to be dismissed, even if Mr Kennedy's case on the scope of article 10 is to be accepted at its highest. But, for completeness, I consider article 10 in paras 43–100, while para 101 states my overall conclusions on the issues argued.

The background in more detail

11 The bulk of the information which Mr Kennedy seeks is to be found in documents prepared by other public authorities or private persons or bodies for the purposes of the Charity Commission inquiry. The information requested also includes some pre-existing documents and communications between the Charity Commission, other public authorities, other entities and Mr Galloway himself. The information is all of potential public interest. The First-tier Tribunal accepted this in a report dated 18 November 2011 made at the Court of Appeal's request in this case. The First-tier Tribunal was not however concerned with the question, which it left entirely open, whether the information should in the public interest be disclosed—it decided that section 32 should be read down so as to cease to apply after the end of the inquiry, *because* the rights and interests of the Charity Commission and others co-operating with it in the inquiry would be "fully protected by the suite of other exemptions in Part II of FOIA". The information also concerns a high-profile and, to use Mr Kennedy's word, controversial MP. It concerns a public appeal on behalf of an organisation which the commission (confirming Mr Kennedy's prior suspicions) found to be a charity which should have been, but was not, registered and operated under the Charities Act 1993 as amended. Investigations by Mr Kennedy himself led to the first Charity Commission inquiry in June 2003. This was in turn followed by a second inquiry in November 2003 and (in the light of reports published by the UN Independent Inquiry Committee and US Senate Committee on Homeland Security and Governmental Affairs' Permanent Sub-committee on Investigations in October 2005) a third inquiry in December 2005.

12 The report on the first and second inquiries confirmed Mr Kennedy's belief that appeal moneys had been used by Mr Galloway on travel and political campaigning to end the sanctions against Iraq and found that other moneys had been received by other trustees as unauthorised benefits in the form of salary payments. Mr Kennedy maintains that these uses of funds

A were contrary to Mr Galloway's original stated aim that appeal funds would be used first to treat Miss Mariam Hamza and thereafter to treat other Iraqi children also suffering from leukaemia, and that the inquiries, when holding that such use fell within or advanced the charity's purposes, failed properly to address this aspect. He also maintains that, in closing the inquiries without taking or proposing further action, the Charity Commission showed a lack of interest in investigating what had become of the appeal funds.

B **13** The report on the third inquiry found that the source of some of the appeal funds consisted in moneys paid in connection with contracts which breached the UN sanctions against Iraq. This occurred in circumstances where one trustee (Mr Zureikat) knew and "Mr Galloway may also have known of the connection", a statement which Mr Kennedy understandably wishes to probe. Mr Galloway denounced this report, as containing C "sloppy, misleading and partial passages" which could have been cleared up, "if the commission had bothered to interview me during the course of its inquiry". But a commission spokesman subsequently informed Mr Kennedy that Mr Galloway, although giving written answers to questions posed, had failed to take up an offer of a meeting. Mr Kennedy wishes to follow up this discrepancy.

D **14** More generally, Mr Kennedy says that the very brief and unspecific nature of the two commission reports and the conclusions reached, basically to leave matters as they were, raise questions about the manner in which the Charity Commission performed one of its central functions.

15 The Charity Commission, supported by the Secretary of State for Justice as well as by the Information Commissioner as interveners, maintains that Mr Kennedy's requests relate to information which enjoys absolute E exemption from disclosure under section 32 read with section 2(3) of the FOIA. Other possible heads (such as sections 27, 31, 40, 41 and 42: see paras 17 to 21 below), on which the Charity Commission would, if necessary, have resisted disclosure of some or all of the material sought under the FOIA, have not therefore been adjudicated upon. As noted in para 11 above, the First-tier Tribunal was not instructed to, and did not, F address the question whether the information should be disclosed on a balancing of the relevant public and private interests under such heads. Mr Kennedy has in fact refined his requests so as expressly to disclaim any wish to see information received from or given to a foreign state or international organisation as well as any information in respect of which the House of Commons claims exemption under section 34.

G *The statute law*

16 Section 1 of the FOIA provides a general right to request, be informed of the existence of and have communicated information held by a public authority, but the right has effect subject to sections 2, 12 and 14. Section 2 provides:

H "(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that— (a) the information is exempt information by virtue of a provision conferring absolute exemption, or (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

Section 12 enables limits to be set to the costs which public authorities are bound to incur in complying with any request for information, and different amounts may be set in relation to different cases. Section 19 requires every public authority to adopt, maintain, review and publish information about its scheme for the publication of information.

17 Part II (sections 21 to 44) lists a series of classes of exempt information, some absolute, some not. Section 2(3) lists the sections in Part II which are to be regarded as conferring absolute exemption. Among these is section 32:

> "(1) Information held by a public authority is exempt information if it is held only by virtue of being contained in— (a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter, (b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or (c) any document created by— (i) a court, or (ii) a member of the administrative staff of a court, for the purposes of proceedings in a particular cause or matter.
>
> "(2) Information held by a public authority is exempt information if it is held only by virtue of being contained in— (a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration, or (b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration."

18 Other classes of absolutely exempt information include: under section 21, information reasonably accessible to the applicant otherwise than under the Act; under section 23, information directly or indirectly supplied by or relating to the Security and Secret Intelligence Services, the Government Communications Headquarters, the special forces and a list of tribunals and other authorities associated with security matters; under section 34, information where necessary to avoid an infringement of the privileges of either House of Parliament; and, under section 41, information obtained by the public authority from any other person (including another public authority), where the disclosure of the information to the public would constitute a breach of confidence actionable by that or any other person.

19 Part II makes further provision for exempt (but not absolutely exempt) information, viz: under sections 24 to 26, information required for safeguarding national security and potentially prejudicial to the British Islands or any colony's defence; under sections 27 and 28, information potentially prejudicial to the United Kingdom's international relations, and relations between the devolved administrations; under section 29, for information potentially prejudicial to the United Kingdom's and any such administration's economic interests, and under section 35, information relating to the formulation of government policy and the effective conduct of public affairs.

20 Section 31 concerns information, not absolutely exempt, described as relating to law enforcement:

> "(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice— (a) the prevention or detection of crime,

A (b) the apprehension or prosecution of offenders, (c) the administration of justice, (d) the assessment or collection of any tax or duty or of any imposition of a similar nature, (e) the operation of the immigration controls, (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained, (g) the exercise by any public authority of its functions for any of the purposes specified in B subsection (2), (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of C the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.

"(2) The purposes referred to in subsection (1)(g) to (i) are— (a) the purpose of ascertaining whether any person has failed to comply with the law, (b) the purpose of ascertaining whether any person is responsible for D any conduct which is improper, (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise, (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on, (e) the purpose of ascertaining the cause E of an accident, (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration, (g) the purpose of protecting the property of charities from loss or misapplication, (h) the purpose of recovering the property of charities, (i) the purpose of securing the health, safety and welfare of persons at work, and (j) the purpose of protecting persons other than F persons at work against risk to health or safety arising out of or in connection with the actions of persons at work."

21 Sections 40 (a part absolute exemption under section 2(3)(f)) and 42 (a non-absolute exemption) provide:

"40(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant G is the data subject.

"(2) Any information to which a request for information relates is also exempt information if— (a) it constitutes personal data which do not fall within subsection (1), and (b) either the first or the second condition below is satisfied."

"42(1) Information in respect of which a claim to legal professional H privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."

22 The Charity Commission was at the material times subject to the Charities Act 1993 (since replaced by the Charities Act 2011). The 1993 Act (as amended by sections 7, 12, 75(1) of, paragraph 2 of Schedule 5

to and paragraphs 102 and 104 of Schedule 8 to, the Charities Act 2006) provided:

"1B(1) The commission has the objectives set out in subsection (2).

"(2) The objectives are—

"1 The public confidence objective.

"2 The public benefit objective.

"3 The compliance objective.

"4 The charitable resources objective.

"5 The accountability objective.

"(3) Those objectives are defined as follows—

"1 The public confidence objective is to increase public trust and confidence in charities.

"2 The public benefit objective is to promote awareness and understanding of the operation of the public benefit requirement.

"3 The compliance objective is to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities.

"4 The charitable resources objective is to promote the effective use of charitable resources.

"5 The accountability objective is to enhance the accountability of charities to donors, beneficiaries and the general public."

"1C(1) The commission has the general functions set out in subsection (2).

"(2) The general functions are—

"1 Determining whether institutions are or are not charities.

"2 Encouraging and facilitating the better administration of charities.

"3 Identifying and investigating apparent misconduct or mismanagement in the administration of charities and taking remedial or protective action in connection with misconduct or mismanagement therein.

"4 Determining whether public collections certificates should be issued, and remain in force, in respect of public charitable collections.

"5 Obtaining, evaluating and disseminating information in connection with the performance of any of the commission's functions or meeting any of its objectives.

"6 Giving information or advice, or making proposals, to any minister of the Crown on matters relating to any of the commission's functions or meeting any of its objectives."

"1D(1) The commission has the general duties set out in subsection (2).

"(2) . . . 4 In performing its functions the commission must, so far as relevant, have regard to the principles of best regulatory practice (including the principles under which regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed)."

"1E(1) The commission has power to do anything which is calculated to facilitate, or is conducive or incidental to, the performance of any of its functions or general duties."

"8(1) The commission may from time to time institute inquiries with regard to charities or a particular charity or class of charities, either generally or for particular purposes, but no such inquiry shall extend to

A any exempt charity except where this has been requested by its principal regulator.

"(2) The commission may either conduct such an inquiry itself or appoint a person to conduct it and make a report to the commission."

"(6) Where an inquiry has been held under this section, the commission may either— (a) cause the report of the person conducting the inquiry, or such other statement of the results of the inquiry as the commission thinks B fit, to be printed and published, or (b) publish any such report or statement in some other way which is calculated in the commission's opinion to bring it to the attention of persons who may wish to make representations to the commission about the action to be taken."

"10A(1) Subject to subsections (2) and (3) below, the commission may disclose to any relevant public authority any information received by the C commission in connection with any of the commission's functions— (a) if the disclosure is made for the purpose of enabling or assisting the relevant public authority to discharge any of its functions, or (b) if the information so disclosed is otherwise relevant to the discharge of any of the functions of the relevant public authority.

"(2) In the case of information disclosed to the commission under section 10(1) above, the commission's power to disclose the information D under subsection (1) above is exercisable subject to any express restriction subject to which the information was disclosed to the commission.

"(3) Subsection (2) above does not apply in relation to revenue and customs information disclosed to the commission under section 10(1) above; but any such information may not be further disclosed (whether under subsection (1) above or otherwise) except with the consent of the E Commissioners for Her Majesty's Revenue and Customs.

"(4) Any responsible person who discloses information in contravention of subsection (3) above is guilty of an offence . . .

"(5) It is a defence for a responsible person charged with an offence under subsection (4) above of disclosing information to prove that he reasonably believed— (a) that the disclosure was lawful, or (b) that the information had already and lawfully been made available to the public." F

"(7) In this section '*responsible person*' means a person who is or was— (a) a member of the commission, (b) a member of the staff of the commission, (c) a person acting on behalf of the commission or a member of the staff of the commission, or (d) a member of a committee established by the commission."

G **23** Article 10 (Freedom of expression) of the Human Rights Convention scheduled to the Human Rights Act 1998 reads:

"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. H

"2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the

protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The construction of section 32 of the FOIA

24 The first issue identified in para 9 above turns on whether the phrase in section 32(1) FOIA "for the purposes of proceedings in a particular cause or matter" and in section 32(2) "for the purposes of the inquiry or arbitration" represents a current or an historical condition for absolute exemption. More fully, do the relevant purposes relate to the time at which the request for disclosure is made and the document is held by the court or by the inquiry or arbitrator(s), as the case may be? Or do they relate to the earlier time at which the document was (in the case of a court) filed with or otherwise placed in its custody or served on or by the relevant public authority or created by a member of the court's administrative staff or (in the case of an inquiry or arbitration) placed in the custody of, or created by, the person conducting the inquiry or arbitration? The Court of Appeal held the latter: the absolute exemption exists by reference to historical, rather than current, purposes.

25 Mr Coppel accepts that there can be no distinction in this respect between section 32(1) and section 32(2). The concession was in my opinion plainly correct. The phrases relating to the relevant purposes are similarly placed and must on the face of it have been intended to attach to the same point in time.

26 The practical impact of the phrases is, of course, somewhat different in each case. In the case of a court, the rules of court and (in the case of superior courts) the exercise of the court's inherent jurisdiction mean that the court can at any time during or after the conclusion of proceedings hear and adjudicate on applications for the release or disclosure of documents held in court or by court staff. The court will undertake a broad exercise, balancing the factors for and against public disclosure of court documents. In the case of an arbitration, there is a strong contractual presumption in favour of confidentiality and against non-disclosure. But this may be overridden by a court where necessary to protect a party's rights against a third party or in other exceptional circumstances where justice requires: see e g *Ali Shipping Corpn v Shipyard Trogir* [1999] 1 WLR 314; *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co* [2005] QB 207.

27 In contrast, in the case of an inquiry by a public authority like the Charity Commission, the position depends on the type of inquiry and the relevant statutory provisions under which it is held. A public authority which has held an inquiry may not of course continue to function or exist; the inquiry documents may then be held by a relevant ministry within whose sphere the inquiry took place, and the relevant ministerial powers would then arise for consideration. But it is unnecessary to consider this situation in this case. Here the Charity Commission continues to exist, and was at the relevant time subject to the Charities Act 1993 as amended (since replaced by the Charities Act 2011). I shall consider the implications of this below. For present purposes, however, what is important is that section 32 treats all

A such inquiries in similar fashion to court and arbitration proceedings; all are subject to the same absolute exemption from disclosure under the FOIA.

28 Coming therefore directly to the interpretation under ordinary principles of section 32, the critical phrase ("for the purposes of . . .") is repeated in relation to and placed at the end of each head of documents identified. It follows and, read naturally, qualifies each such head: that is, in the case of a court, "any document filed . . . or otherwise placed . . ." or B "served" or "created" and, in the case of an inquiry or arbitration, "any document placed . . ." or "created". To read the phrase as referring back to the initial words of each subsection "Information held . . ." is, literally, far-fetched. Had that been meant, the draftsman could and would surely have simplified each subsection, by inserting the phrase once only in each subsection, immediately after the words "Information held . . ." or, less C neatly, after the words "if it is held . . ." The comma which appears in each of paragraphs (a) and (b) of subsection (2) is explained by the interposition in those subsections of the words "conducting an inquiry or arbitration" between "placed in the custody of a person" and the phrase "for the purposes of the inquiry or arbitration". It makes clear that the last phrase qualifies "placed" or "created" and not "conducting". In the absence of any equivalent words to "conducting an inquiry or arbitration" in subsection (1), D no such comma was necessary or appropriate.

29 As to the more general merits of the rival constructions, a conclusion that, immediately after the end of any court proceedings, arbitration or inquiry a previously absolute exemption ceases to have effect would, for the reason set out in para 6 above, run contrary to the general scheme of section 32, particularly obviously so in relation to court and arbitration E proceedings, but also in relation to inquiries. It would furthermore create an evident internal anomaly within the FOIA. The information would cease to enjoy any form of exemption under section 32 as soon as the court proceedings, inquiry or arbitration ended. From that moment, the information would not even enjoy the benefit of a balancing of the public interest in disclosure against other interests provided by section 2(2)(b). F Further, no ordinary principle of construction could lead to a reading whereby the continuing absolute exemption provided by section 32 was converted into an ordinary exemption within section 2(2)(b) with effect from the close of the relevant court proceedings, arbitration or inquiry. Other sections, notably section 31 (law enforcement), section 40 (personal information) and section 41 (information provided in confidence), would afford only limited grounds for refusing disclosure (in contrast to the general G position otherwise applicable to, at least, court and arbitration documents: see para 26 above).

30 Some assistance, marginal rather than decisive, as to Parliament's likely understanding when it enacted section 32 is to be found in Part VI of the FOIA. Under section 62(1), a record becomes a "historical record" at the end of 30 years (or now by amendment 20 years) beginning with the year of its creation. Under section 63(1): "Information contained in a historical H record cannot be exempt information by virtue of section 28, 30(1), 32, 33, 35, 36, 37(1)(a), 42 or 43." The natural inference is that it was contemplated that information falling within section 32 would continue to be exempt for 30 years. It is unlikely that the reference to section 32 was included simply to cover the possible existence of documents from court,

arbitration or inquiry proceedings rivalling in length those in *Jarndyce v Jarndyce* or cases where a court, arbitration or inquiry considers documents themselves over 30 years old. A

31 Attention was drawn to the Inquiries Act 2005, which has since 2005 modified the application of section 32 in relation to some inquiries, though not those of the type undertaken by the Charity Commission. It enables ministers to set up formal, independent inquiries relating to particular events which have caused or have potential to cause public concern, or where there is public concern that particular events may have occurred. Not all inquiries fall into this category and there is no statutory requirement on a minister to use the 2005 Act even if they do. Where it is used, section 41(1)(b) provides for rules dealing with "the return or keeping, after the end of an inquiry, of documents given to or created by the inquiry", while section 18(3) provides that section 32(2) of the FOIA does not apply in relation to information contained in documents passed to and held by a public authority pursuant to rules made under section 41(1)(b) of the 2005 Act. On this formulation section 32(2) would still apply to documents created by the person conducting the 2005 Act inquiry: see section 32(2)(b). But documents placed in the inquiry's custody for inquiry purposes would potentially be disclosable under the FOIA. B C D

32 Section 19(1)(3) of the 2005 Act contain the Act's own regime enabling restrictions to be imposed by the relevant minister or the chairman of the inquiry on disclosure or publication of evidence or documents given, produced or provided to an inquiry, where conducive to the inquiry fulfilling its terms of reference or necessary in the public interest. Section 19(4) specifies particular matters which are to be taken into account when considering whether any and what restrictions should be imposed. They reflect potentially competing interests naturally relevant to any such decision: on the one hand, the allaying of public concern and, on the other, any risk of harm or damage, by disclosure or publication; confidentiality; impairment of the efficiency or effectiveness of the inquiry; and cost. Restrictions so imposed may continue in force indefinitely: section 20(5), but this is subject to a provision that, "after the end of the inquiry, disclosure restrictions do not apply to a public authority . . . in relation to information held by the authority otherwise than as a result of the breach of any such restrictions": section 20(6). E F

33 The scheme of the Inquiries Act 2005 was therefore deliberately different from that which, as a matter of straightforward construction, applies under the FOIA in respect of a Charity Commission inquiry. As a matter of law, the position under the 2005 Act cannot affect the proper construction of the earlier FOIA in relation to Charity Commission inquiries. Nor, pace Lord Wilson JSC's views in para 193, can Parliament's passing in 2005 of the Inquiries Act throw any light on what section 32 of the FOIA was intended to achieve regarding inquiries in 2000—when the 2005 Act was never conceived, let alone enacted. But, even if this were not so, the contrast would reinforce, rather than undermine, the conclusion reached regarding Charity Commission inquiries. Further, the contrast does not of itself mean that the position in relation to Charity Commission inquiries is unsatisfactory. It is, I repeat, necessary to look at the entire picture, which means not looking only at section 32 of the FOIA, but looking G H

A also at the statutory and common law position in respect of Charity Commission inquiries apart from section 32.

34 In summary, as a matter of ordinary common law construction, the construction is clear: section 32 was intended to provide an absolute exemption which would not cease abruptly at the end of the court, arbitration or inquiry proceedings, but would continue until the relevant
B documents became historical records; that however does not mean that the information held by the Charity Commission as a result of its inquiries may not be required to be disclosed outside section 32 under other statutory and/or common law powers preserved by section 78 of the FOIA.

Is article 10 of the Convention relevant when construing section 32?

C 35 It is at this point that Mr Coppel, on behalf of Mr Kennedy, submits that, if the position on ordinary principles of construction is as stated in the previous paragraph, then section 32(2) must be read down to comply with article 10; in particular, that on that basis section 3 of the 1998 Act requires the exemption provided by section 32 to be read as ending at the same moment as the court, arbitration or inquiry proceedings, so that it only covers documentation held currently for the purposes of such proceedings.
D A possible variant of this submission (though not one which Mr Coppel actually explored) might be that the exemption should end at that moment only in the case of inquiry proceedings, while continuing thereafter in the case of court and arbitration proceedings. Further, if such reading down is not possible, Mr Coppel submits that a declaration of incompatibility is called for. I cannot accept any of these submissions. First, to move directly
E to article 10 is, as I have already indicated, mistaken. Section 32 leaves open the statutory and common law position regarding disclosure outside the FOIA, and that directs attention to the Charities Act. If the Charities Act entitles Mr Kennedy to disclosure or puts him in a position no less favourable regarding disclosure than that which should, in Mr Coppel's submission, be provided under article 10, then there can be no basis for submissions that section 32 requires reading down in the light of or is
F inconsistent with article 10.

36 Second, even if the Charities Act, read by itself, appeared on its face not fully to satisfy any rights to information which Mr Kennedy may enjoy under article 10, it does not follow that the fault lies in section 32, or that section 32 can or should be remoulded by the courts to provide such rights. On the contrary, in view of the clarity of the absolute exemption in
G section 32, the focus would be on the Charities Act and it would be necessary to read it as catering for the relevant article 10 rights. As will appear from what I say later (in paras 43–56 below) about the language of the Charities Act, there would be no difficulty about doing this. Lord Wilson JSC doubts whether such a scheme would even comply with the Convention, going so far as to suggest that it would not be "prescribed by law": para 199. I cannot
H accept this, and it would I believe have some remarkable (and far reaching) consequences.

37 One obvious problem about Lord Wilson JSC's approach is that his treatment of the Charities Act scheme is inconsistent with his treatment of court documents. In his paras 175 and 192, Lord Wilson JSC holds up the position regarding court documents as a model. On his own analysis of the

Charities Act position, the scheme regarding disclosure of court documents ought to be regarded as even less compliant with the principle that any such scheme must be "in accordance with law". The court's discretion regarding documents not on the court file is not channelled by any published objectives, functions and duties comparable to those present in the Charities Act. The court is simply guided by the general principle of open justice and must act in accordance with any applicable Convention rights.

38 This inconsistency leads into another more basic objection to Lord Wilson JSC's approach, one of general importance to the role of the Convention rights in the United Kingdom. The development of common law discretions, to meet Convention requirements and subject to control by judicial review, has become a fruitful feature of United Kingdom jurisprudence. It is illustrated at the highest level by cases like *Doherty v Birmingham City Council (Secretary of State for Communities and Local Government intervening)* [2009] AC 367, paras 55, 70, 84–84 and 133–135—welcomed by the European Court of Human Rights in *Kay v United Kingdom* (2010) 54 EHRR 1056, para 73—and by *Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening)* [2011] 2 AC 104, para 73. In those cases the House of Lords and Supreme Court modelled a common law discretion to meet the needs of article 8. No distinction can be drawn in the present context between the general nature of articles 8 and 10, each specifying prima facie rights in substantially over-lapping terms in their respective paragraphs 1 subject to qualifications identified in their paragraphs 2. On Lord Wilson JSC's approach this development of common law discretions to meet Convention requirements would be vulnerable to the reproach that there was no specific scheme—nothing which could count as "prescribed by law". There are, of course, situations in which, for reasons of consistency or accountability, the manner in which a discretion will be exercised needs to be spelled out in some form. But that is not so in the present context, as Lord Wilson JSC's own endorsement of the position regarding court and arbitration documents indicates.

39 Third, Mr Coppel seeks to meet the points made in paras 35 and 36 above by a submission that the FOIA must be regarded as the means by which the United Kingdom gives effect to any article 10 right which Mr Kennedy has; that it covers the field and confers a general entitlement to access to recorded information held by public authorities, while preserving limited other statutory rights under sections 21, 39 and 40 through which access is also routed; and that, if the FOIA fails in this way to give effect to any article 10 right or does so inappropriately, it interferes with the right and must be read down. But there is no basis for this submission—there is no reason why any article 10 rights which Mr Kennedy may have need to be protected by any particular statute or route. Far from the FOIA being the route by which the United Kingdom has chosen to give effect to any rights to receive information which Mr Kennedy may have, it is clear that the United Kingdom Parliament has determined that any such rights should be located and enforced elsewhere. That is the intended effect of section 32, read with section 78. To recapitulate: in view of the clarity of the absolute exemption in section 32 and the provisions of section 78, the focus must be on the Charities Act; and if (contrary to conclusion in paras 57–100 below) Mr Kennedy has prima facie rights which are engaged

A under article 10.1, then it would be necessary to read the Charities Act compatibly with and as giving effect to such rights; and, further, there would be no difficulty about doing this. As I read his judgment (paras 225–233, especially para 229), Lord Carnwath JSC does not disagree with any of these points. The difficulty he identifies is not that for which Mr Coppel argued (as set out in para 227 of Lord Carnwath JSC's
B judgment) and not that the Charities Act cannot be read to give effect to any article 10 rights. It is that this appears to him a less advantageous approach than one which re-writes the FOIA, section 32 in particular: see his paras 231–233. However, it is not a court's role to discard the scheme established by Parliament, simply because it may (in Lord Carnwath JSC's view) involve a "more cumbersome" means of enforcing Convention rights than Parliament has established elsewhere.

C **40** Fourth, I do not consider that article 10 would prove to add anything or anything significant to such rights to disclosure as could be enforced under the Charities Act without reference to article 10. I explain why below (in paras 43–56). I also note in this connection (para 49) that Lord Carnwath JSC himself is influenced in his interpretation of the scope of article 10 by the view that it "accords with recognised principles of domestic
D law" (his para 218).

41 Fifth, and for good measure, even if all these points are put on one side, I would not have accepted Mr Coppel's submission that section 32 could or should in some way be read down in the light of article 10. Reading down section 32(2) so that it ceased to apply at the end of any inquiry would mean that the public interest test applicable under
E section 2(2)(b) of the FOIA would not apply. Section 2(2) as a whole only applies to information which is exempt. If article 10 were to mean that section 32(2) should be read down so as to cease to apply after an inquiry closes, then section 2(2) would at that point also cease to apply to the relevant information. A belated submission was made (after a post-hearing question from the court raised the point) that both sections 2(2) and 32(2)
F might be manipulated, so that after the close of an inquiry the previous absolute exemption provided by section 32 would become a qualified exemption within section 2(2)(b). That too would depart from the statutory scheme, and run contrary to the grain of the legislation. It follows that, even if it were to be held (contrary to my conclusions) that Mr Kennedy has article 10 rights which are not catered for in any way, the most that could be contemplated would be a general declaration of
G incompatibility.

Conclusion

42 It follows from the above that Mr Kennedy's claim, which has been made and argued on the basis that section 32 of the FOIA can and should be read down to have a meaning contrary to that which Parliament clearly
H intended, must fail. It also follows from the above that no basis exists for any declaration of incompatibility with article 10 of the Convention. In the succeeding paragraphs I will however consider, obiter though it may be, the position regarding Mr Kennedy's actual remedies with regard to first the Charities Act and then article 10.

The Charities Act 1993

43 The provisions of the Charities Act 1993, set out in para 22 above, identify the Charity Commission's objectives, functions and duties in terms which make clear the importance of the public interest in the operations of both the commission and the charities which it regulates. The first ("public confidence") objective given to the commission is "to increase public trust and confidence in charities", while the fifth and last is "to enhance the accountability of charities" to, inter alia, the general public. The commission's general functions include "obtaining, evaluating and disseminating information in connection with the performance of any of its functions or meeting any of its objectives". As its first general duty, "the commission must, in performing its functions, act in a way (a) which is compatible with its objectives, and (b) which it considers most appropriate for the purpose of meeting those objectives"; and, as its fourth such duty, "in performing its functions, [it] must, so far as relevant, have regard to the principles of best regulatory practice (including the principles under which regulatory activities should be . . . accountable . . . [and] transparent . . .)".

44 The significance of these objectives, functions and duties is not affected by the specific provision in section 8(6), whereby the commission has a choice in which of two ways it publishes the report of the person conducting an inquiry or a statement of the results of the inquiry. The choice must be made in the light of the commission's objectives, functions and duties. Similarly, the significance of those objectives, functions and duties is not affected by the power given in section 10A(1) to disclose to any other public authority information received in connection with the commission's performance of its functions. Section 10A addresses situations in which disclosure is made for purposes not in the performance of the commission's own functions. It does not touch the breadth of the commission's own objectives, functions and duties.

45 The Charity Commission's objectives of increasing public trust and confidence in charities and enhancing the accountability of charities to the general public link directly into its function of disseminating information in connection with the performance of its functions and its duty to have regard to the principle that regulatory activities should be "proportionate, accountable, consistent and transparent". Its objectives, functions and duties are in their scope and practical application in my view comparable to any that might arise under article 10, taking Mr Coppel's most expansive interpretation of the scope of that article. Mr Coppel recognises that, if article 10 is engaged and imposes on public authorities, at least towards "public watchdogs", a duty of disclosure in respect of information over which such public authorities have an "information monopoly", the duty involved is no more than a prima facie duty, subject to qualifications as envisaged by article 10.2. In fulfilling its objectives, functions and duties under the 1993 Act, including by conducting and publicising the outcome of any inquiry it holds, the commission must in my opinion direct itself along lines which are no less favourable to someone in Mr Kennedy's position seeking information in order to scrutinise and report on the commission's performance. On either basis, the real issue will be whether the public interests in disclosure are outweighed by public or private interests mirroring those identified in article 10.2. This is reinforced by the

A importance attaching to openness of proceedings and reasoning under general common law principles in the present area, which constitutes background to the correct interpretation and application of the Charities Act.

46 Since the passing of the Human Rights Act 1998, there has too often been a tendency to see the law in areas touched on by the Convention solely in terms of the Convention rights. But the Convention rights represent a B threshold protection; and, especially in view of the contribution which common lawyers made to the Convention's inception, they may be expected, at least generally even if not always, to reflect and to find their homologue in the common or domestic statute law. Not surprisingly, therefore, Lord Goff of Chieveley in *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 282–284 and the House in *Derbyshire County Council v Times* C *Newspapers Ltd* [1993] AC 534, 551E both expressed the view that in the field of freedom of speech there was no difference in principle between English law and article 10. In some areas, the common law may go further than the Convention, and in some contexts it may also be inspired by the Convention rights and jurisprudence (the protection of privacy being a notable example). And in time, of course, a synthesis may emerge. But the natural starting point in any dispute is to start with domestic law, and it is D certainly not to focus exclusively on the Convention rights, without surveying the wider common law scene. As Toulson LJ also said in the *Guardian News and Media* case, para 88:

> "The development of the common law did not come to an end on the passing of the Human Rights Act 1998. It is in vigorous health and flourishing in many parts of the world which share a common legal E tradition."

Greater focus in domestic litigation on the domestic legal position might also have the incidental benefit that less time was taken in domestic courts seeking to interpret and reconcile different judgments (often only given by individual sections of the European Court of Human Rights) in a way which that court itself, not being bound by any doctrine of precedent, would not F itself undertake.

47 In the present case, the meaning and significance which I attach to the provisions of the Charities Act is in my view underpinned by a common law presumption in favour of openness in a context such as the present. In this respect, court proceedings and inquiries have more in common with each other than they do with arbitration proceedings between parties who G have contracted to resolve issues between them on the well-understood assumption that their proceedings will be private and confidential. Starting with court proceedings, common law principles of open justice have been held to require the disclosure to a newspaper for serious journalistic purposes of documents placed before a judge and referred to in open court, absent good reasons to the contrary: see *R (Guardian News and Media Ltd)* H *v City of Westminster Magistrates' Court* [2013] QB 618. The proceedings in issue there were for extradition to the United States of two British citizens on corruption charges, the documents were affidavits, witness statements and correspondence, and the newspaper wanted to see them in order to understand the full course of the proceedings, and to report on them in order to stimulate "informed debate about the way in which the justice system

deals with suspected international corruption and the system for extradition of British subjects to the USA": para 76. The Court of Appeal held that the principle of open justice applicable to court proceedings required disclosure of the documents sought, unless outweighed by strong countervailing arguments, which, in the event, it also held was not the case.

48 The present appeal concerns not proceedings before a court, but an inquiry conducted by the Charity Commission in relation to a charity, and the inquiry proceedings were not conducted in public. We are not being asked to say that that was wrong, or that court and inquiry proceedings are subject to the same principles of open justice. I agree with Lord Carnwath JSC (paras 243 and 244) that court and inquiry proceedings cannot automatically be assimilated in this connection. Had the issue been whether the inquiry proceedings should be conducted in public, we would have had to look at cases such as *Crampton v Secretary of State for Health* (unreported) 9 July 1993; [1993] CA Transcript No 824, *R (Wagstaff) v Secretary of State for Health* [2001] 1 WLR 292 and *R (Persey) v Secretary of State for the Environment, Food and Rural Affairs* [2003] QB 794, which suggest that it is always very much a matter of context. At one end of the spectrum are inquiries aimed at establishing the truth and maintaining or restoring public confidence on matters of great public importance, factors militating in favour of a public inquiry. But many inquiries lie elsewhere on the spectrum. The present appeal concerns a different issue: to what extent should the commission disclose further information concerning inquiries on which it has already published reports under section 8(6) of the Charities Act 1993, and in relation to which Mr Kennedy has raised significant unanswered questions of real public interest? We are concerned with a situation where both the Charities Act and the Charity Commission in publishing its report under the Act recognise that the public has a legitimate interest in being informed about the relevant inquiries. That must mean "properly informed". The Charity Commission recognised that this was a case for public reports, and such reports must account properly to the public for the conduct and outcome of the inquiries.

49 Here, Mr Kennedy has shown that important questions arise from the inquiries and reports relating not only to the subject matter and outcome of the inquiries, but also to the Charity Commission's conduct of the inquiries. The proper functioning and regulation of charities is a matter of great public importance and legitimate interest. The public interest in openness in relation to these questions is demonstrated positively by the objectives, the functions and, importantly, the duties given to and imposed on the Charity Commission under the Charities Act. The present request for further disclosure is made by a journalist in the light of the powerful public interest in the subject matter to enable there to be appropriate public scrutiny and awareness of the adequacy of the functioning and regulation of a particular charity. It is in these circumstances a request to which the Charity Commission should in my opinion accede in the public interest, except so far as the public interest in disclosure is demonstrably outweighed by any countervailing arguments that may be advanced. I do not read Lord Carnwath JSC's and my judgments as differing in any essential respect on these points. Although (for reasons given in the next section of this judgment: paras 57–96 below) I cannot share his conclusion that the "direction of travel" of Strasbourg case law has now reached its destination,

A I do however note his view that "no reason has been put forward for regarding that approach as involving any fundamental departure from domestic law principles": para 219.

50 The countervailing arguments that can be envisaged against disclosure of particular information will of course differ in nature and weight, according to whether one is considering court or inquiry documents, and in the latter case according to the nature of the inquiry. A Charity Commission inquiry is likely to depend on information being provided by third parties. The commission has powers to require the provision of accounts, statements, copies of documents and the attendance of persons to give evidence or produce such documents: section 8(3) of the Charities Act 1993. But it may depend on co-operation and liaison with third parties and the gathering of confidential information. In the present case, some of the information sought may also be sensitive information bearing on matters of national security or international affairs, although Mr Kennedy has restricted his request in this respect: para 15 above. All such considerations can and would need to be taken into account, as the Charity Commission in its letter dated 4 July 2007 (para 8 above) identified, but they are no reason why the balancing exercise should not be undertaken. Again, if one makes an assumption that disclosure could in principle be required under article 10, there is no reason to think that it would be on any basis or be likely to lead to any outcome more favourable from Mr Kennedy's viewpoint. The same considerations would fall to be taken into account, the same balancing exercise performed and there is no basis for thinking that the outcome should or would differ.

51 I do not therefore agree with Jacob LJ's comment in the Court of Appeal (para 48) that Parliament must "simply [have] overlooked that a court has machinery for the release of documents subsequent to (or indeed during) legal proceedings whereas an inquiry or arbitration does not" and that that "may well have been a blunder which needs looking at". That overlooks the statutory scheme of the FOIA and the Charities Act. It also fails to give due weight to the courts' power to ensure disclosure by the Charity Commission in accordance with its duties of openness and transparency. Again, I find it difficult to think that there would be any significant difference in the nature or outcome of a court's scrutiny of any decision by the commission to withhold disclosure of information needed in order properly to understand a report issued after a Charities Act inquiry, whether such scrutiny be based solely on the Charity Commission's objectives, functions and duties under the Charities Act or whether it can also be based on article 10, read in the width that Mr Coppel invites. The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called *Wednesbury* principle: see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223. The nature of judicial review in every case depends on the context. The change in this respect was heralded by Lord Bridge of Harwich said in *R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC 514, 531 where he indicated that, subject to the weight to be given to a primary decision-maker's findings of fact and exercise of discretion, "the court must . . . be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is

in no way flawed, according to the gravity of the issue which the decision determines". A

52 This was taken up by Court of Appeal in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554, a pre-Human Rights Act case, where Sir Thomas Bingham MR accepted counsel's proposition that "The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above" (viz, within the range of responses open to a reasonable decision-maker). The European Court of Human Rights still concluded that the courts had in that case set the level of scrutiny too low on the particular facts: *Smith and Grady v United Kingdom* (2000) 31 EHRR 620. The common law has however continued to evolve. As Lord Phillips of Worth Matravers MR said in *R (Q) v Secretary of State for the Home Department* [2004] QB 36, para 112: B C

> "The common law of judicial review in England and Wales has not stood still in recent years. Starting from the received checklist of justiciable errors set out by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, the courts, as Lord Diplock himself anticipated they would, have developed an issue-sensitive scale of intervention to enable them to perform their constitutional function in an increasingly complex polity. They continue to abstain from merits review—in effect, retaking the decision on the facts—but in appropriate classes of case they will today look very closely at the process by which facts have been ascertained and at the logic of the inferences drawn from them." D

53 In *IBA Healthcare Ltd v Office of Fair Trading* [2004] ICR 1364, in a judgment with which I agreed, Carnwath LJ said, at paras 90–92: E

> "90. . . . the [Competition Appeal Tribunal] was right to observe that their approach should reflect the 'specific context' in which they had been created as a specialised tribunal (paras 220); but they were wrong to suggest that this permitted them to discard established case law relating to 'reasonableness' in administrative law, in favour of the 'ordinary and natural meaning' of that word (para 225). Their instinctive wish for a more flexible approach than *Wednesbury* would have found more solid support in the textbook discussions of the subject, which emphasise the flexibility of the legal concept of 'reasonableness' dependent on the statutory context (see *de Smith*, para 13-055ff 'The intensity of review'; cf *Wade and Forsyth*, p 364ff, 'The standard of reasonableness'; and the comments of Lord Lowry in *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696, 765ff). F G
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> "91. Thus, at one end of the spectrum, a 'low intensity' of review is applied to cases involving issues 'depending essentially on political judgment' (*de Smith*, para 13-056-7). Examples are *R v Secretary of State, Ex p Nottinghamshire County Council* [1986] AC 240, and *R v Secretary of State, Ex p Hammersmith and Fulham London Borough Council* [1991] 1 AC 521, where the decisions related to a matter of national economic policy, and the court would not intervene outside of 'the extremes of bad faith, improper motive or manifest absurdity' (per Lord Bridge of Harwich, at pp 596–597). At the other end of the H

A spectrum are decisions infringing fundamental rights where unreasonableness is not equated with 'absurdity' or 'perversity', and a 'lower' threshold of unreasonableness is used: 'Review is stricter and the courts ask the question posed by the majority in *Brind*, namely, "whether a reasonable Secretary of State, on the material before him, could conclude that the interference with freedom of expression was justifiable." ' (*de Smith* para 13-060, citing *Ex p Brind* [1991] 1 AC 696, 751, per Lord Ackner).

B "92. A further factor relevant to the intensity of review is whether the issue before the tribunal is one properly within the province of the court. As has often been said, judges are not 'equipped by training or experience, or furnished with the requisite knowledge or advice' to decide issues depending on administrative or political judgment: see *Ex p Brind* [1991] 1 AC 696, 767, per Lord Lowry. On the other hand where the question is the fairness of a procedure adopted by a decision-maker, the court has been more willing to intervene. Such questions are to be answered not by reference to *Wednesbury* unreasonableness, but 'in accordance with the principles of fair procedure which have been developed over the years and of which the courts are the author and sole judge'. (*R v Panel on Take-overs and Mergers, Ex p Guinness plc* [1990] 1 QB 146, 184, per Lloyd LJ)."

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54 More recently, the same process was carried further by emphasising that the remedy of judicial review is in appropriate cases apt to cover issues of fact as well as law—see the cases referred to in para 38 above. As Professor Paul Craig has shown (see e g "The Nature of Reasonableness" (2013) 66 CLP 131), both reasonableness review and proportionality involve considerations of weight and balance, with the intensity of the scrutiny and the weight to be given to any primary decision maker's view depending on the context. The advantage of the terminology of proportionality is that it introduces an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages. There seems no reason why such factors should not be relevant in judicial review even outside the scope of Convention and EU law. Whatever the context, the court deploying them must be aware that they overlap potentially and that the intensity with which they are applied is heavily dependent on the context. In the context of fundamental rights, it is a truism that the scrutiny is likely to be more intense than where other interests are involved. But that proportionality itself is not always equated with intense scrutiny was clearly identified by Lord Bingham of Cornhill CJ in *R v Secretary of State for Health, Ex p Eastside Cheese Co* [1999] 3 CMLR 123, paras 41–49, which Laws and Arden LJJ and Lord Neuberger of Abbotsbury MR cited and discussed at paras 21, 133 and 196–200 in *R (Sinclair Collis Ltd) v Secretary of State for Health* [2012] QB 394, a case in which the general considerations governing proportionality were treated as relevantly identical under EU and Convention law: paras 54, 147, 192–194. As Lord Bingham explained, at para 47, proportionality review may itself be limited in context to examining whether the exercise of a power involved some manifest error or a clear excess of the bounds of discretion—a point taken up and amplified in the *Sinclair Collis* case, at paras 126–134 and 203 by Arden LJ and by

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Lord Neuberger MR; see also *Edward & Lane on European Union Law* (2013), para 2.32.

55 Speaking generally, it may be true (as Laws J said in a passage also quoted by Lord Bingham from *R v Ministry of Agriculture, Fisheries and Food, Ex p First City Trading* [1997] 1 CMLR 250, 278–279) that "*Wednesbury* and European review are two different models—one looser, one tighter—of the same juridical concept, which is the imposition of compulsory standards on decision-makers so as to secure the repudiation of arbitrary power". But the right approach is now surely to recognise, as *de Smith's Judicial Review*, 7th ed (2013), para 11-028 suggests, that it is inappropriate to treat all cases of judicial review together under a general but vague principle of reasonableness, and preferable to look for the underlying tenet or principle which indicates the basis on which the court should approach any administrative law challenge in a particular situation. Among the categories of situation identified in *de Smith* are those where a common law right or constitutional principle is in issue. In the present case, the issue concerns the principles of accountability and transparency, which are contained in the Charities Act and reinforced by common law considerations and which have particular relevance in relation to a report by which the Charity Commission makes to explain to the public its conduct and the outcome of an inquiry undertaken in the public interest.

56 The Charity Commission's response to a request for disclosure of information is in the light of the above circumscribed by its statutory objectives, functions and duties. If, as here, the information is of genuine public interest and is requested for important journalistic purposes, the Charity Commission must show some persuasive countervailing considerations to outweigh the strong prima facie case that the information should be disclosed. In any proceedings for judicial review of a refusal by the Charity Commission to give effect to such a request, it would be necessary for the court to place itself so far as possible in the same position as the Charity Commission, including perhaps by inspecting the material sought. Only in that way could it undertake any review to ascertain whether the relevant interests had been properly balanced. The interests involved and the balancing exercise would be of a nature with which the court is familiar and accustomed to evaluate and undertake. The Charity Commission's own evaluation would have weight, as it would under article 10. But the Charity Commission's objectives, functions and duties under the Charities Act and the nature and importance of the interests involved limit the scope of the response open to the Charity Commission in respect of any particular request. I therefore doubt whether there could or would be any real difference in the outcome of any judicial review of a Charity Commission refusal to disclose information, whether this was conducted under article 10, as Mr Coppel submits that it should be, or not.

Article 10 in detail

57 In the light of the conclusions which I have already expressed, the answer to the question whether or not Mr Kennedy's claim to disclosure by the Charity Commission engages article 10 cannot affect the outcome of this appeal. But I shall consider this question (I fear at some length) for

A completeness and in deference to the detailed citation of authority and submissions we have heard on it.

58 On its face, article 10 is concerned with the receipt, holding, expression or imparting of thoughts, opinions, information, ideas, beliefs. It is concerned with freedom to receive information, freedom of thought and freedom of expression. It does not impose on anyone an obligation to express him- or itself or to impart information. The Charity Commission submits B that this represents the correct analysis. Mr Kennedy submits that the Strasbourg case law has taken a direction of travel, towards a destination which should now be regarded as reached. Mr Kennedy's case is that article 10.1 confers a positive right to receive information from public authorities, and, it follows, a correlative obligation on public authorities to impart information, unless the withholding of the information can be and is C justified under article 10.2. If this right and obligation is not general, then (he submits) it is at least a right and obligation which arises or exists in any sphere which a state has chosen to regulate by a Freedom of Information Act 2000.

59 The Strasbourg jurisprudence is neither clear nor easy to reconcile. In *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269, para 98, Lord Rodger of Earlsferry, said famously: "Argentoratum locutum: D iudicium finitum—Strasbourg has spoken, the case is closed." In the present case, Strasbourg has spoken on a number of occasions to apparently different effects. Further, a number of these occasions are Grand Chamber decisions, which do contain apparently clear-cut statements of principle. But they are surrounded by individual section decisions, which appear to suggest that at least some members of the court disagree with and wish to move on from the Grand Chamber statements of principle. If that is a correct reading, then it E may be unfortunate that the relevant sections did not prefer to release the matter before them to a Grand Chamber. It is not helpful for national courts seeking to take into account the jurisprudence of the European Court of Human Rights to have different section decisions pointing in directions inconsistent with Grand Chamber authority without clear explanation.

60 Whatever the reason for the present state of authority in Strasbourg, F we have, without over-concentrating on individual decisions, to do our best to understand the underlying principles, as we have done in previous cases: see, for instance, in relation to the meaning of jurisdiction under article 1: *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)* [2008] AC 153, *R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening)* [2011] 1 AC 1 and *Smith v Ministry of Defence (JUSTICE intervening)* [2014] AC 52; to G the scope of the operational duty to safeguard life under article 2: *Rabone v Pennine Care NHS Trust (INQUEST intervening)* [2012] 2 AC 72; and to the circumstances in which and basis on which damages should be awarded to prisoners the need for whose further detention was not promptly reviewed following the expiry of their tariff period: *R (Sturnham) v Parole Board* [2013] 2 AC 254.

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The early Strasbourg case law

61 The present appeal in fact represents the second time in two years that this Court has had to consider Strasbourg jurisprudence in this area. The first was in *British Broadcasting Corpn v Sugar (No 2)* [2012] 1 WLR

439 decided on 15 February 2012. However Mr Coppel submits that Strasbourg case law has further developed, even since then.

62 *Sugar* was a case where it could be said that Mr Sugar's claim to access BBC information was potentially in conflict with the BBC's own freedom of journalistic expression. But that is not material when considering whether Mr Sugar's claim even engaged article 10. Lord Brown of Eaton-under-Heywood JSC gave his reason for a negative answer on that point in some detail in paras 86–102, with which I expressly agreed in para 113. (Lord Wilson JSC, while not disagreeing, was less categorical on the point in para 58, so that the reasoning on it cannot be regarded as part of the ratio.)

63 Lord Brown JSC identified four Strasbourg cases as establishing that, in the circumstances before the Strasbourg court in each of such cases, article 10 involved no positive right of access to information, nor any obligation on the state to impart such information. The four cases were *Leander v Sweden* (1987) 9 EHRR 433, *Gaskin v United Kingdom* (1989) 12 EHRR 36, *Guerra v Italy* (1998) 26 EHRR 357 and *Roche v United Kingdom* (2005) 42 EHRR 599. In *Leander* Mr Leander sought information about national security concerns about him which had led to him being refused a permanent position in a naval museum. The claim was addressed primarily to article 8 (right to personal life), under which the withholding of information was held justified. Under article 10 the court said simply, at para 74:

> "The court observes that the right to freedom to receive information basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the government to impart such information to the individual."

I do not subscribe to the view taken by Lord Wilson JSC (para 178) that this was the answer to "a narrow, ostensibly a pedantic, question of the sort against which the court in Strasbourg often sets its face". The Grand Chamber did not see the matter in such terms. It was giving a serious answer to an important question, which defines the role of the Convention in this area. The Convention establishes fundamental standards, but there are limits to the ideal systems on which it insists, and the Grand Chamber was making clear that article 10 does not go so far as to impose a positive duty of disclosure on member states at the European level.

64 In *Gaskin*, para 52, the court held a refusal of access to personal information about a person's childhood as a foster child unjustified under article 8, and rejected any claim under article 10 "in the circumstances of the [present] case" for essentially the same reason as it had in *Leander*, which it followed.

65 In *Guerra*, para 53, the Grand Chamber consisting of 20 judges (including the present President) held that it was a breach of article 8 to fail to supply the applicants with environmental information (even though this had not been requested) relating to their exposure to chemical emissions from a nearby factory. But, it said of article 10:

> "The court reiterates that freedom to receive information, referred to in paragraph 2 of article 10 of the Convention, 'basically prohibits a

A government from restricting a person from receiving information that others wish or may be willing to impart to him' [see the *Leander v Sweden* judgment . . .] That freedom cannot be construed as imposing on a state, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion."

Only a minority of seven of the 20 judges added as a coda that there might B under some different circumstances prove to be a positive obligation on a state to make available information to the public.

66 In *Roche* the claimant sought disclosure of records of gas tests at Porton Down in which he had participated 20 years before and to which he now attributed certain medical conditions. The Grand Chamber held that article 8 gave him a positive right to such information, but said of article 10:

C "172. The court recalls its conclusion in *Leander v Sweden* . . . para 74 and in *Gaskin* . . . para 52 and, more recently, confirmed in *Guerra* . . . para 53, that the freedom to receive information 'prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him' and that that freedom 'cannot be construed as imposing on a state, in circumstances such as those of the D present case, positive obligations to . . . disseminate information of its own motion'. It sees no reason not to apply this established jurisprudence."

67 Thus far, the Strasbourg case law supports the Charity Commission's submission that article 10 does not give positive rights to require, or positive obligations to make, disclosure of information. Three of E the cases (*Leander*, *Gaskin* and *Roche*) concerned private information, in respect of which the court held that such a right could arise under article 8. In all these cases, the court did not go on to leave open the position under article 10 or to say that it raised no separate question. Rather, it made clear that no right arose in the circumstances under article 10.

68 A claim for disclosure by a defendant of private information held regarding the claimant starts from a strong basis. If such a claim can only be F put under article 8, there is no obvious reason to suppose that a claim for other non-private information is generally possible under article 10.

69 As to the fourth case, *Guerra*, the emissions were toxic in a manner breaching article 8, the information about them was not itself private or personal, and the complaint about non-disclosure was initially only made under article 10. The case is therefore direct authority as to the continuing G application of the principle stated in *Leander* to non-personal information under that article. The applicants' successful claim under article 8 was added before the court (paras 41 and 46), and was not made on the basis that the environmental information in question was private or personal, but on the basis that withholding it from the applicants prevented them from assessing the risks they ran by continuing to live where they did: para 60.

70 It is also of particular interest to note that in summarising the legal H position under article 10 in *Roche*, quoted in para 66 above, the Grand Chamber deliberately omitted the word "collect" which was present in the original of the passage which it cited from its prior decision in *Guerra*. The Grand Chamber was thus making clear that, even where the information was readily available for disclosure, there was no general duty to disclose.

71 Mr Kennedy relies however on a number of subsequent cases as establishing, first, a different direction of travel, and, now, he submits, a different end point. The first three, *Matky v Czech Republic* (Application No 19101/03) (unreported) 10 July 2006, *Társaság a Szabádsagjogokért v Hungary* (2009) 53 EHRR 130, *Kenedi v Hungary* (2009) 27 BHRC 335, were considered by Lord Brown of Eaton-under-Heywood JSC in *Sugar* and I can do no better than quote his analysis of them, with which I agreed in that case, at para 113. He said [2012] 1 WLR 439:

> "90. I come then to the first of the trilogy of cases on which the appellant so strongly relies: the *Matky* case. The complainant there was seeking, against the background of a general right to information under the Czech legal system, access to documentation concerning the construction of a new nuclear power station and in particular was challenging a requirement of the domestic legislation (article 133 of the Building Act . . .) that a request for information had to be justified. The court accepted that the rejection of his request constituted an interference with the complainant's right to receive information. But it held that the decision could not be considered arbitrary, recognised that 'contracting states enjoy a certain margin of appreciation in this area' . . . and unanimously rejected the complaint as manifestly ill-founded.
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> "91. The *Matky* case seems accordingly an unpromising foundation on which to build any significant departure from what may be called the *Roche* approach to the freedom to receive information protected by article 10.
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> "92. Nevertheless, in *Társaság* (the second in the appellant's trilogy of cases) it was to the *Matky* case that the Second Section of the court referred as (the sole) authority for the proposition that, the *Leander* line of authority notwithstanding, 'the court has recently advanced towards a broader interpretation of the notion of "freedom to receive information" and thereby towards the recognition of a right of access to information'. In *Társaság* the court upheld a complaint by the Hungarian Civil Liberties Union that a refusal by the Constitutional Court to grant them access to an MP's pending complaint as to the constitutionality of certain proposed amendments to the Criminal Code breached its article 10 right to receive information. The government having accepted that there had been an interference with the applicant's article 10 rights, Mr Eicke relies in particular on the following passage in the court's judgment: '[The court] considers that the present case essentially concerns an interference—by virtue of the censorial power of an information monopoly—with the exercise of the functions of a social watchdog, like the press, rather than a denial of a general right of access to official documents . . . Moreover, the state's obligations in matters of freedom of the press include the elimination of barriers to the exercise of press functions where, in issues of public interest, such barriers exist solely because of an information monopoly held by the authorities' (Para 36).
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> "93. The *Kenedi* case, the third in the trilogy of cases, was decided just four months after the *Társaság* case, also by the Second Section of the court (including six of the same seven judges who had decided the *Társaság* case). The applicant there was a historian specialising in the

A functioning of the secret services of dictatorships. Although a succession of domestic court judgments had held him to be entitled to access to various documents for research purposes, the ministry had refused to disclose them. Once again, hardly surprisingly in this case, the government conceded that there had been an interference with the applicant's article 10 rights. The court 27 BHRC 335, para 45, had no B difficulty in finding in the result a violation of article 10: 'the court cannot but conclude that the obstinate reluctance of the respondent state's authorities to comply with the execution orders was in defiance of domestic law and tantamount to arbitrariness.' "

The conclusion in BBC v Sugar

C **72** Lord Brown JSC 's conclusion in relation to the impact of the trio of cases relied on by the claimant in *Sugar* was [2012] 1 WLR 439, para 94:

"In my judgment these three cases fall far short of establishing that an individual's article 10.1 freedom to receive information is interfered with whenever, as in the present case, a public authority, acting consistently with the domestic legislation governing the nature and D extent of its obligations to disclose information, refuses access to documents. Of course, every public authority has in one sense 'the censorial power of an information monopoly' in respect of its own internal documents. But that consideration alone cannot give rise to a prima facie interference with article 10 rights whenever the disclosure of such documents is refused. Such a view would conflict squarely with the *Roche* approach. The applicant's difficulty here is not that Mr Sugar E was not exercising 'the functions of a social watchdog, like the press.' (Perhaps he was.) *The Jewish Chronicle* would be in no different or better position. The applicant's difficulty to my mind is rather that article 10 creates no general right to freedom of information and where, as here, the legislation expressly limits such right to information held otherwise than for the purposes of journalism, it is not interfered with F when access is refused to documents which *are* held for journalistic purposes."

73 Some points are worth underlining in relation to the *Társaság* case 53 EHRR 130. First, the Second Section's reference to the court having "recently advanced towards a broader interpretation of the notion of 'freedom to receive information' " was, firstly, weakly based: see Lord G Brown JSC's analysis at para 92, secondly, clearly aspirational and tentative and, thirdly, not part of the essential reasoning for the court's decision—this is evident from the fact that the court began its next para 36 with the words "In any event . . ."

74 Second, in point of fact, the Hungarian Government accepted in the *Társaság* case that article 10 was engaged (para 18), and it was on that basis that the court went straight to the question whether "there has been an H interference" and in that connection said that "even measures which merely make access to information more cumbersome" may amount to interference: para 26. Third, in introducing its decision on the question which thus arose whether the interference with this admitted right was justified, the Second Section used the dramatic metaphor of "the censorial power of an

information monopoly": para 36. The context helps understand why such dramatic language was appropriate. Disclosure of the information requested had been refused by the domestic courts on the ground that this was essential to protect "personal data". But, as the court noted, the claimant had expressly restricted his application to "information . . . without the personal data of its author": para 37. In addition, the court found, it was "quite implausible that any reference to the private life of the MP, hence to a protected private sphere, could be discerned from his constitutional complaint". In short, the domestic courts had arrived at a decision to refuse disclosure which was not sustainable under domestic law. The breach of article 10 followed this.

75 *Kenedi* 27 BHRC 335 was also a case where there had been a breach of a domestic law duty of disclosure, in that case by the executive failing to give effect to court orders. Again, the breach of article 10 followed.

Further Strasbourg case law

76 Since the Supreme Court's decision in *Sugar*, there have been four further Strasbourg decisions on which Mr Kennedy relies as requiring a different analysis to that adopted in Lord Brown JSC's judgment. They are *Gillberg v Sweden* (2012) 34 BHRC 247, *Shapovalov v Ukraine* (Application No 45835/05) (unreported) given 31 July 2012, *Youth Initiative for Human Rights v Serbia* (Application No 48135/06) (unreported) given 25 June 2013 and, finally, *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v Austria* (Application No 39534/07) (unreported) 28 November 2013. The last (for economy, "the *Österreichische* case") was decided after the oral hearing of the present appeal and the court received written submissions on it. All four cases were concerned with information which was not personal.

77 *Gillberg* was an unusual case. Under the Swedish equivalent of the FOIA, Professor Gillberg was ordered by the Administrative Court of Appeal to allow the claimants (K, a sociologist, and E, a paediatrician) to have access for research purposes to a file belonging to Gothenburg University but held by Professor Gillberg. He refused such access, the file was instead destroyed by three of his colleagues, and he was prosecuted. He claimed that the Administrative Court and criminal proceedings breached his rights under articles 8 and 10. The Grand Chamber repeated that:

> "83. The right to receive and impart information explicitly forms part of the right to freedom of expression under article 10. That right basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him (see, for example, *Leander v Sweden*, para 74, and *Gaskin v United Kingdom*, para 52).
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> "84. In the present case the applicant was not prevented from receiving and imparting information or in any other way prevented from exercising his 'positive' right to freedom of expression. He argued that he had a 'negative' right within the meaning of article 10 to refuse to make the disputed research material available, and that consequently his conviction was in violation of article 10 of the Convention."

78 As to this suggested negative right, the court expressed no view, saying merely:

> "86. The court does not rule out that a negative right to freedom of expression is protected under article 10 of the Convention, but finds that this issue should be properly addressed in the circumstances of a given case."

Turning on this basis to the actual issue and circumstances, the court said:

> "92. . . . the court considers that the crucial question can be narrowed down to whether the applicant, as a public employee, had an independent negative right within the meaning of article 10 of the Convention not to make the research material available, although the material did not belong to him but to his public employer, the University of Gothenburg, and despite the fact that his public employer—the university—actually intended to comply with the final judgments of the Administrative Court of Appeal granting K and E access to its research material on various conditions, but was prevented from so doing because the applicant refused to make it available.
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> "93. In the court's view, finding that the applicant had such a right under article 10 of the Convention would run counter to the property rights of the University of Gothenburg. It would also impinge on K's and E's rights under article 10, as granted by the Administrative Court of Appeal, to receive information in the form of access to the public documents concerned, and on their rights under article 6 to have the final judgments of the Administrative Court of Appeal implemented."

79 *Gillberg* is therefore a case in which the court reiterated with approval the general principle identified in *Leander*. At the same time, however, it suggested in the second sentence of para 93 that domestic rights to receive information could give rise to an entitlement under article 10.

80 *Shapovalov* is to like effect. A Ukrainian journalist claimed that he had (contrary to the Ukranian Information Act 1992) been refused access by administrative authorities during the 2004 elections to certain information and meetings. He relied on article 6 because the Ukrainian courts had wrongly failed on procedural grounds to consider the merits of his complaints. The court upheld that complaint. He also relied on article 10 because of the administrative authorities' interference with his access. The Government made no submissions on the merits of this complaint, but the court rejected it on the ground that there was no evidence of interference with his performance of his journalistic activity. Again, the case was one where there was a domestic right to information.

81 In *Youth Initiative* the complaint concerned a refusal by the Serbian intelligence agency to provide the complainant with information as to how many people had been the subject of electronic surveillance by the agency. The Serbian Information Commissioner—whose role was to ensure the observance of the Serbian Freedom of Information Act 2004: para 25—had decided that this should be disclosed. The Serbian Government objected that article 10 did not guarantee a general right of access to information and the applicant did not anyway need the information. The Second Section rejected these objections with references to *Társaság*, "recalling" "that the notion of 'freedom of information' embraces a right of access to

information" (para 20), and stating that the applicant NGO was "exercising a role as a public watchdog of similar importance to that of the press" and warranted "similar Convention protection to that afforded to the press": para 20.

82 On the merits, after referring to the Serbian Information Commissioner's order, the Second Section held that there had been an interference, analogous to that in the *Társaság* case: para 24. In para 25 the court noted that the Information Commissioner had decided that the information should be provided and found the intelligence agency's assertion that it did not hold the information "unpersuasive in view of the nature of that information (the number of people subjected to electronic surveillance by that agency in 2005) and the agency's initial response" (viz, to rely on a public interest exception in the Serbian Act of 2004, which the Information Commissioner had not accepted as justifying non-disclosure).

83 The *Youth Initiative* case is, therefore, another in a line of cases where the European Court of Human Rights has recognised a complaint under article 10 of the Convention following from a failure to give effect to a domestic right to disclosure of information. In the context of EU law, we were also referred to a comparable complaint in *Thesing, Bloomberg Finance Ltd v European Central Bank (ECB)* [2013] 2 CMLR 202. There the General Court was concerned with the right to access documents provided by article 1 of Decision 2004/258/EC. The applicant sought to rely on article 11 of the Charter of Fundamental Rights (mirroring in this respect article 10 of the Convention) and on the Strasbourg case law, including *Társaság*, *Kenedi* and *Gillberg*. They failed because the General Court held that the ECB had been entitled to invoke an exception contained in article 4 of Decision 2004/258/EC. The decision therefore adds nothing of present relevance.

84 Finally, in the *Österreichische* case, all agricultural and forest land transactions in Austria required approval by local and regional authorities (in the Tyrol, the Tyrol Real Property Transactions commission), the aim being to preserve land for agriculture and forestry and avoid the proliferation of second homes. The application association was formed to promote sound agricultural and forest property ownership and sought from the Tyrol commission (in anonymised form and against reimbursement of costs) all decisions it had issued since 1 January 2000. It relied on the Tyrol Access to Information Act and submitted that the commission's decisions concerned civil rights within article 6 of the Convention, and should therefore be made public: para 8. The commission based its refusal on submissions that the decisions were not information within the Act, but decisions on the basis of legal arguments, comparable to giving legal advice, as well as on an exemption in the Act for situations where excessive resources would be required to provide the information sought.

85 The Austrian Constitutional Court rejected the association's complaint. It held first that neither under article 10 nor under Austrian law was there any positive duty of states to collect and disseminate information of their own motion. Secondly, it accepted the commission's case that the compilation, anonymisation and disclosure of paper copies of decisions over a period of some years fell outside any duty to disclose information under the Act and would excessively impinge on the commission's performance of its duties. Thirdly, it added that, in so far as the applicant might "implicitly" be

A relying on article 6, the Strasbourg case law did not guarantee the right to obtain anonymised decisions over a lengthy period, and Austrian law only required access to the judgments delivered by the highest courts which dealt with important legal issues.

86 Before the European Court of Human Rights, First Section, the application was addressed under the heading of article 10. But the applicant's case was that "decisions of judicial bodies such as the B commission should be publicly accessible" (para 28) and that "interests in the rule of law and due process argued in favour of making decisions by judicial authorities available to the public": para 29. The Austrian Government's case was, first, that article 10 imposes no positive obligation on a state to collect and disseminate information itself, second, that a refusal to provide anonymised copies of all decisions over a lengthy period did not C in any event constitute an interference with rights under article 10, and, third, that a right to be provided with such decisions could not be inferred from article 6: para 31. Finally, it also argued that, if article 10 was engaged, the refusal was justified, as serving legitimate aims (protection of confidential information and preservation of the commission's proper functioning).

D 87 The First Section's judgment is surprising in the nature and brevity of its treatment of the issue whether there was an interference under article 10.1. Essentially, the First Section did no more than cite previous jurisprudence (including *Társaság)* establishing the social "watchdog" role of the press and other non-governmental organisations like the applicant gathering information, and then added: "Consequently, there has been an interference with the applicant association's right to receive and to impart E information as enshrined in article 10.1 of the Convention (see *Társaság* . . . para 28; see also *Kenedi* . . . para 43)". This reasoning fails to address any of the statements of general principle found in *Leander*, *Guerra*, *Roche* and *Gillberg*. It does not indicate why the First Section thought those statements inapplicable, whether it was suggesting some alternative general principle applicable to social watchdogs, or whether (perhaps) it was acting on the basis that, despite the Austrian Constitutional Court's contrary view, there F was a domestic right to the information which it was entitled to recognise, even though the Austrian Constitutional Court had wrongly failed to do so (see e g the Grand Chamber's apparent reasoning in *Gillberg*: paras 75–76 above).

88 The First Section's silence when considering article 10.1 is the more surprising when one comes to its reasoning under article 10.2. Here (in G para 41) the First Section does refer expressly to the principle in *Leander* that "In the specific context of access to information, the court has held that the right to receive information basically prohibits a government from preventing a person from receiving information that others wished or were willing to impart", as well as to the principle in *Guerra* that "the right to receive information cannot be construed as imposing on a state positive obligations to collect and disseminate information of its own motion". But H those were decisions under article 10.1. Yet the First Section deals with them only under article 10.2, and goes on to say that in *Társaság* "the court noted that it had recently advanced towards a broader interpretation of the notion of the 'freedom to receive information' and thereby towards the recognition of a right of access to information". Quite apart from the fact that

"advances" do not always achieve their goal, the First Section did not address the weakness of the basis and reasoning of the statement in *Társaság* (para 69 above), or the fact that it was no more than a Section decision to be compared with a considerable number of weighty Grand Chamber decisions, or any way in which the general Grand Chamber statements might be reconciled with *Társaság*.

89 Later in its reasoning on justification, the First Section (in para 46) said:

> "Given that the commission is a public authority deciding disputes over 'civil rights' within the meaning of article 6 of the Convention . . . which are, moreover, of considerable public interest, the court finds it striking that none of the commission's decisions was published, whether in an electronic database or in any other form",

and that consequently much of the commission's anticipated difficulty in providing copies of numerous decisions over a lengthy period was generated by its own choice. On that basis, it concluded that the commission's "complete refusal to give [the applicant] access to any of its decisions was disproportionate" (para 47) and held that there had been a violation of article 10. So one explanation of the *Österreichische* case may be that the implicit finding of violation of article 6 was critical.

Analysis of position under article 10

90 What to make of the Strasbourg case law in the light of the above is not easy. One possible view is the various Section decisions open a way around the Grand Chamber statements of principle in circumstances where domestic law recognises or the European Court of Human Rights concludes that it should, if properly applied, have recognised, a domestic duty on the public authority to disclose the information. The *Österreichische* case might perhaps be suggested to fit into this pattern, though it does not appear to have represented any part of the First Section's thinking. Alternatively, the *Österreichische* case may be regarded as a special case, influenced by what were, on the First Section's reasoning, the commission's clear breaches of article 6.

91 That said, the logic is not very apparent of a principle according to which the engagement of article 10.1 depends on whether domestic law happens to recognise a duty on the relevant public authority to provide the information. To deal at this point with an argument raised by Mr Clayton, it is in procedural law entirely understandable that, even though the Convention confers no right to have a domestic appeal, where a domestic right of appeal is in law provided, then it must comply with article 6. But that is because the existence of the domestic right of appeal necessarily means that there are further proceedings to which article 6 applies. Here, if article 10 involves no duty on a public authority to disclose information, no reason appears why the existence of a domestic duty should mean any more than that the domestic legislator has chosen to go further than the Convention. No reason appears why the additional duty which the domestic legislator chose to introduce should necessarily become or engage an article 10.1 duty of disclosure.

A **92** However, putting aside the point made in para 90, if the explanation of the Section decisions is that they turn on the existence of a domestic duty to disclose, then I think it unlikely that they could affect the outcome of any request addressed by Mr Kennedy to the Charity Commission under the Charities Act. Either there is no domestic duty of this nature, in which case article 10.1 does not, on the basis of the Grand Chamber decisions, give rise to one. Or there is a domestic duty of this nature, in which case article 10.1 B seems to me unlikely to add anything to it in the present case—since I have already concluded that the Charity Commission's domestic statutory duties should offer a path to disclosure no less favourable to a journalist such as Mr Kennedy than any available under article 10. If, alternatively, the explanation of the *Österreichische* case is that it turned on the existence of breaches of article 6, no such breaches have been relied on in this case, but, C for reasons already indicated, I do attach significance to the importance of the principles of accountability and transparency as they apply to reports of inquiries under the Charities Act, and I consider that the Act, read in the light of these principles, is likely to go at least as far as any reliance which could have been placed by Mr Kennedy on article 6, or article 10 as informed by article 6, could have taken him.

D **93** Mr Coppel argues for a more radical analysis than I have discussed in paras 88 to 90. He argues that the Section decisions show that a right to receive information can arise under article 10, without any domestic right to the information. If necessary, he accepts a restriction of the right to a member of the press like Mr Kennedy or any other social watchdog. It is true that, in *Társaság* and *Youth Initiative*, where the complainants were interested NGOs, the court used language stressing the vital role of such E social watchdogs, likening them to the press. But, as Lord Brown JSC noted in *Sugar* at para 94, the occupation of such a role cannot sensibly represent any sort of formal pre-condition, before breach of a domestic duty of disclosure engages article 10.1. Many organisations and individuals, including those seeking information for research or historical or personal or family purposes, may have legitimate and understandable interests in enforcing a domestic right to information. In reality, therefore, Mr Coppel's F more radical argument resolves itself into a submission that a general duty to disclose is engaged under article 10.1 by any claim based on public interest. On that basis, however, the statements of principle in the Grand Chamber decisions are history.

94 Had it been decisive for the outcome of this appeal, I would have considered that, in the present unsatisfactory state of the Strasbourg G case law, the Grand Chamber statements on article 10 should continue to be regarded as reflecting a valid general principle, applicable at least in cases where the relevant public authority is under no domestic duty of disclosure. The Grand Chamber statements are underpinned not only by the way in which article 10.1 is worded, but by the consideration that the contrary view—that article 10.1 contains a prima facie duty of disclosure of all matters of public interest—leads to a proposition that no national regulation H of such disclosure is required at all, before such a duty arises. Article 10 would itself become a European-wide freedom of information law. But it would be a law lacking the specific provisions and qualifications which are in practice debated and fashioned by national legislatures according to national conditions and are set out in national Freedom of Information statutes.

95 Mr Coppel recognised that the logic of his case is that article 10 must involve a general duty of disclosure such as mentioned in paras 93–94, irrespective of the existence of any freedom of information legislation. But he contends that, where such legislation exists, it should be the vehicle for any rights contained in article 10. The Media Legal Defence Initiative and the Campaign for Freedom of Information, interveners before the Supreme Court, suggest a more nuanced analysis, according to which article 10 should only be treated as engaged once a state has enacted a domestic freedom of information statute providing a general right of access to information and so "occupied the field". Then and only then could article 10 be deployed to check and control whether the right of access corresponded with that which, they submit, is required by article 10.

96 I see no basis for either Mr Coppel's or the interveners' half-way approach. I start from the position that there is no reason why any article 10 rights must be found and satisfied in and only in the FOIA. They may be satisfied by a scheme which operates in some situations under the FOIA and in others under the principles which govern the conduct of courts, arbitration tribunals and those holding inquiries outside the FOIA. Secondly, and for similar reasons, references to a "general right of access" and to "occupying the field" are unhelpful metaphors in relation to areas which the FOIA deliberately exempts. The only relevant sense in which the exemptions provided by the FOIA are touched by that Act is that they are exempted from its operation. It would be no different if the Act had been framed to cover specific situations which did not cover the present. I would add that, on either approach, it would seem that article 10 would operate as a general control on the appropriateness of exemptions in the FOIA. This becomes even more striking once one realises that it would also extend to other absolute exemptions provided by the FOIA. These include information directly or indirectly supplied by or relating to the Security and Secret Intelligence Services, the Government Communications Headquarters, the special forces and a list of tribunals and other authorities associated with security matters: see para 18 above.

General international legal principles

97 Mr Coppel also submitted that general international legal principles and other instruments supported an interpretation of article 10 as introducing a positive right to receive and a correlative duty to impart information. He referred, inter alia, to:

(i) article 19 of the Universal Declaration of Human Rights 1948, providing:

> "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers";

(ii) article 19 of the International Covenant on Civil and Political Rights ("ICCPR"), adopted 1966 and in force in 1976, providing:

> "1. Everyone shall have the right to hold opinions without interference.

A "2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice";

(iii) article 13(1) of the Inter-American Convention on Human Rights ("IACHR"), adopted 1969 and in force 1978, providing:

B "Everyone has the right of freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice."

98 The Inter-American Court of Human Rights has in its jurisprudence interpreted article 13(1) as conferring a positive right to receive and a C positive duty to impart information: *Claude-Reyes v Chile* (unreported) 19 September 2006, IACHR followed in *Lund v Brazil* (unreported) 24 November 2010, IACHR. There is a particularly full examination of this aspect in paras 75–107 of *Claude-Reyes v Chile*. At para 77, the court found that

D "by expressly stipulating the right to 'seek' and 'receive' 'information,' article 13 of the Convention protects the right of all individuals to request access to state-held information, with the exceptions permitted by the restrictions established in the Convention."

The word "seek" is one which appears in all three international instruments cited in the preceding paragraph, and not in article 10 of the European Convention on Human Rights agreed in 1950. As Clayton and Tomlinson E note in their work *The Law of Human Rights*, 2nd ed (2009), vol 1, para 15.03, article 10 "defines the right in language which is weaker than that of article 19" of the ICCPR. Various academic commentators have suggested that the difference should not be regarded as material. But it is worth noting that the original draft of article 10 prepared by the Committee of Experts provided a right "to seek, receive and impart information ideas", F and that, in the light of its presence in the prior Universal Declaration of Human Rights, some significance must attach to the subsequent omission of the word from article 10.

99 The IACHR in *Claude-Reyes v Chile*, para 81, also referred to prior recommendations of the Council of Europe's Parliamentary Assembly and Committee dating back to 1970, 1982 and 1998, advocating, for example, a G duty on public authorities to "make available information on matters of public interest within reasonable limits" and expressing "the goal of the pursuit of an open information policy". But the present issue is not whether these are appropriate general aspirations, but whether article 10 contains a concrete decision to give general effect to them at an international level enforceable without any more specific measure and without any controlling qualifications and limitations at that level. The European Court of Human H Rights' case law, analysed above, does not to my mind support this.

Ullah—"no more, but certainly no less"

100 Against the possibility of the Supreme Court concluding that the Strasbourg case law does not clearly or sufficiently lead in the direction

invited by Mr Kennedy's case, Mr Richard Clayton QC for The Media Legal Defence Initiative and The Campaign for Freedom of Information invited us to strike out alone. He submitted that the case could be a suitable one in which to revisit the approach associated with the words "no more, but certainly no less" used by Lord Bingham in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, para 20 in relation to national courts' duty to keep pace with Strasbourg case law. I would decline that invitation. I see no basis for differing domestically from the Grand Chamber statements about the scope of article 10 and no need to expand the domestic article 10 rights, having regard to the domestic scheme of the Charities Act.

Overall Conclusions

101 The only claim that Mr Kennedy has made is for disclosure under section 32. He has pursued this claim as a matter of common law interpretation and, in the alternative, on the basis that section 32 must be read down in the light of article 10 of the Convention. Alternatively, he has claimed a declaration that section 32 is incompatible with article 10. My conclusions are in summary that:

(i) Mr Kennedy's case is not entitled to succeed on the claims he has pursued by reference to section 32 of the FOIA: see in particular paras 34, 35–41 and 42 above.

(ii) But that is not because of any conclusion that he has no right to the disclosure sought: see paras 35–41.

(iii) He fails in the claims he had up to this point made because (a) the scheme of section 32 read in this case with the Charities Act 1993 is clear (paras 34 and 35–40), and (b) the route by which he may, after an appropriate balancing exercise, be entitled to disclosure, is not under or by virtue of some process of remodelling of section 32, but is under the Charities Act construed in the light of common law principles (paras 40 and 43–52) and/or in the light of article 10 of the Human Rights Convention (paras 36–39), if and so far as that article may be engaged (as to which see paras 55–98).

(iv) Construed without reference to article 10, the Charities Act should be read as putting Mr Kennedy in no less favourable position regarding the obtaining of such disclosure than he would be in on his case that article 10 by itself imposes on public authorities a general duty of disclosure of information: paras 40, 43–52.

(v) I do not consider that article 10 does contain so general a duty (paras 97–98), but, in the circumstances, that conclusion is academic.

LORD TOULSON JSC (with whom **LORD NEUBERGER OF ABBOTSBURY PSC** and **LORD CLARKE OF STONE-CUM-EBONY JSC** agreed)

102 The first issue concerns the construction of section 32(2) of FOIA, leaving aside the Human Rights Act 1998 and the European Convention. The section has been set out by Lord Mance JSC at para 17. The issue was succinctly summarised by Mr Philip Coppel QC in his written case as being whether the phrase "for the purposes of the inquiry or arbitration" in section 32(2)(a) is to be interpreted as linked to the immediately preceding words "placed in the custody of a person conducting an inquiry or arbitration" or as linked to the opening words of the subsection

A "information held by a public authority." Whichever construction is right, the same must apply to section 32(1) and to section 32(2)(b). I agree with Lord Mance JSC and the courts below that the first interpretation is right.

103 As Lord Mance JSC says, it is the more natural reading. If the alternative construction were right, most of the language of paragraphs (a) and (b) would be otiose. The drafter could have stated much more simply that information held by a public authority is exempt information if it is held
B only for the purposes of an inquiry or arbitration.

104 I agree also that this conclusion is reinforced by the provision in section 63(1), set out by Lord Mance JSC at para 30, that information contained in a "historical record" cannot be exempt information by virtue of section 32. A document does not become a historical record until 20 years (originally 30 years) have passed from the year of its creation: section 62(1).
C It is unreal to suppose that this provision was aimed at the remote possibility of an inquiry continuing for more than 30 years or involving documents more than 30 years old. The strong inference is that a document provided to or created by a person conducting an inquiry or arbitration is to remain within the section 32 exemption until the end of the specified period.

105 If his argument on the first issue failed, Mr Coppel submitted that
D section 32(2) should be "read down" so as to cease to apply on the conclusion of the inquiry or arbitration, pursuant to the requirements of the Human Rights Act 1998 and article 10 of the European Convention.

106 This is a more difficult issue. The difficulty arises in part because the argument for Mr Kennedy began on a wrong footing by Mr Coppel submitting that without FOIA the Charity Commission would have no power to provide Mr Kennedy with information of the kind which he seeks.
E The Charity Commission and the Secretary of State disagree and draw attention to the statement in section 78 that nothing in the Act is to be taken to limit the powers of a public authority to disclose information held by it. I am clear that they are right on this point.

107 Every public body exists for the service of the public, notwithstanding that it may owe particular duties to individual members of
F the public which may limit what it can properly make public. The duties of a hospital trust to a patient are an obvious example. There may also be other reasons, apart from duties of confidentiality, why it would not be in the public interest or would be unduly burdensome for a public body to disclose matters to the public, but the idea that, as a general proposition, a public body needs particular authority to provide information about its activities to the public is misconceived.

G 108 In this case there is an important additional dimension. We are concerned with a public body carrying out a statutory inquiry into matters of legitimate public concern. Over several decades it has become increasingly common for public bodies or sometimes individuals to be given statutory responsibility for conducting such inquiries. They are part of the constitutional landscape.

H 109 Subject to any relevant statutory provisions, a judicial body has an inherent jurisdiction to determine its own procedures: *Attorney General v Leveller Magazine Ltd* [1979] AC 440. The same applies to a public body carrying out a statutory inquiry.

110 It has long been recognised that judicial processes should be open to public scrutiny unless and to the extent that there are valid countervailing

reasons. This is the open justice principle. The reasons for it have been stated on many occasions. Letting in the light is the best way of keeping those responsible for exercising the judicial power of the state up to the mark and for maintaining public confidence: *Scott v Scott* [1913] AC 417; *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening)* [2013] QB 618.

111 Before discussing the question whether and to what extent the same principle is applicable in relation to statutory inquiries, it is relevant to understand the reasoning in *Guardian News* (about which Lord Carnwath JSC has made some observations in para 235 of his judgment), particularly since one of the arguments concerned section 32 of FOIA. The case concerned documents which were provided to a district judge before the hearing of extradition proceedings, but which were not read out in court although some of them were referred to by counsel. The Divisional Court held that the judge had no power to allow the press to have access to the documents: [2011] 1 WLR 1173. Part of its reasoning (at paras 53–54) was that FOIA had put in place a regime for obtaining access to documents held by public authorities and that it would be strange if a request for information which was specifically exempted under the Act could be made at common law or under article 10.

112 The Court of Appeal took a different approach. It started with the proposition that open justice is a principle at the heart of our system of justice and vital to the rule of law. It explained why it is a necessary accompaniment of the rule of law (at para 1). Society depends on the judges to act as guardians of the rule of law, but who is to guard the guardians and how can the public have confidence in them? In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse.

113 For that proposition the court cited *Scott v Scott* and other authority. The principle has never been absolute because it may be outweighed by countervailing factors. There is no standard formula for determining how strong the countervailing factor or factors must be. The court has to carry out a balancing exercise which will be fact-specific. Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the material in advancing that purpose and, conversely, any risk of harm which access to the documents may cause to the legitimate interests of others. (See *Guardian News*, at para 85.)

114 There may be many reasons why public access to certain information about the court proceedings should be denied, limited or postponed. The information may be confidential; it may relate to a person with a particular vulnerability; its disclosure might impede the judicial process; it may concern allegations against other persons which have not been explored and could be potentially damaging to them; it may be of such peripheral, if any, relevance to the judicial process that it would be disproportionate to require its disclosure; and these are only a few examples.

115 The court held in *Guardian News* that the open justice principle applies, broadly speaking, to all tribunals exercising the judicial power of the state. (The same expression is used in section 32(4)(a) of FOIA, which defines a court as including "any tribunal or body exercising the judicial power of the state".) The fundamental reasons for the open justice principle

A are of general application to any such body, although its practical operation may vary according to the nature of the work of a particular judicial body.

116 In contrast with the view expressed by the Divisional Court about the exemption of court documents from the provisions of FOIA, the Court of Appeal considered that the exclusion was both unsurprising and irrelevant. Under the Act the Information Commissioner is made responsible for taking
B decisions about whether a public body should be ordered to produce a document to a party requesting it. The Information Commissioner's decision is subject to appeal to a tribunal, whose decision is then subject to the possibility of further appeals to the Upper Tribunal and on to the Court of Appeal. It would be odd if the question whether a court should allow access to a document lodged with the court should be determined in such a roundabout way. However, there was a more fundamental objection to the
C Divisional Court's approach, which is relevant also in the present case.

117 As the Court of Appeal said (at paras 73–74), although the sovereignty of Parliament means that the responsibility of the courts for determining the scope of the open justice principle may be affected by an Act of Parliament, Parliament should not be taken to have legislated so as to limit or control the way in which the court decides such a question unless the
D language of the statute makes it plain beyond possible doubt that this was Parliament's intention.

118 It would therefore be quite wrong to infer from the exclusion of court documents from FOIA that Parliament intended to preclude the court from permitting a non-party to have access to such documents, if the court considered such access to be proper under the open justice principle. The Administrative Court's observation that no good reason had been shown
E why the checks and balances contained in the Act should be overridden by the common law was to approach the matter from the wrong direction. The question, rather, was whether the Act demonstrated unequivocally an intention to preclude the courts from determining in a particular case how the open justice principle should be applied.

119 In the present case we have been referred to Hansard, which shows
F that the Government positively intended not to interfere with the court's exercise of the power to determine what information should be made available to the public about judicial proceedings, and that it viewed statutory inquiries in the same way as judicial proceedings. I do not consider this to be relevant or admissible for the purposes of construing section 32, which is unambiguous; but it is relevant background material when considering whether questions of disclosure of information about statutory
G inquiries are properly a matter for the courts, applying the common law.

120 During the Committee stage in the House of Commons, amendments were moved which would have converted the blanket exemptions in section 32(1)(2) into qualified exemptions (applicable if disclosure under the Act would be likely to cause prejudice to the judicial proceedings, inquiry or arbitration), but they were withdrawn after the
H minister, Mr David Lock MP, explained the Government's objection to them (Hansard, Standing Committee B, 25 January 2000, cols 281–282):

> "Essentially this is an issue of separation of powers. The courts control the documents that are before them and it is right that our judges should decide what should be disclosed . . ."

"Although the courts are not covered by the Bill, according to it court records may be held on a court's behalf by public authorities . . . Statutory inquiries have a status similar to courts, and their records are usually held by the department that established the inquiry.

"The clause therefore ensures that the courts can continue to determine what information is to be disclosed, and that such matters are decided by the courts and fall within their jurisdiction, rather than the jurisdiction of this legislation. Of course, it is not to be assumed that such information will not be disclosed merely because the Bill will not require it to be disclosed. Such information is controlled by the courts, which constitute a separate regime. The courts have their own rules, and they will decide if and when court records are to be disclosed. The government do not believe that the Freedom of Information Bill should circumvent the power of the courts to determine their disclosure policy. The issue is the separation of powers, and the jurisdiction to determine the information that courts should provide will be left to the courts themselves. In a court case, it is for judges and courts to determine when it is appropriate for court records to be disclosed."

121 Should the principle of openness as a general matter be held to apply to statutory inquiries? This involves two linked considerations: whether it is right that judicial proceedings and statutory inquiries should be regarded as analogous for this purpose or, to put it another way, whether the reasons for the judicial process to be open to public scrutiny apply similarly to statutory inquiries; and whether the court in answering that question would be crossing onto territory which should be left to Parliament.

122 An "inquiry" is defined for the purposes of section 32 by subsection (4)(c) as meaning any inquiry or hearing held under any provision contained in, or made under, an enactment. Although such inquiries and hearings may vary considerably in nature and scope, it is fair to describe the conduct of them as a quasi-judicial function. That doubtless explains why Parliament considered their status to be similar, as the minister stated in the passage cited above, and the treatment of the records of judicial proceedings and records of statutory inquiries in section 32(1)(2) is materially identical.

123 Just as Parliament by excluding courts and court records from the provisions of the Act did not intend that such records should be shrouded in secrecy, but left it to the courts to rule on what should be disclosed, so in the case of a statutory inquiry Parliament decided to leave it to the public body to rule on what should be disclosed, balancing the public interest in its decision being open to proper public scrutiny against any countervailing factors, but the exercise of such power must be amenable to review by the court.

124 The considerations which underlie the open justice principle in relation to judicial proceedings apply also to those charged by Parliament with responsibility for conducting quasi-judicial inquiries and hearings. How is an unenlightened public to have confidence that the responsibilities for conducting quasi-judicial inquiries are properly discharged?

125 The application of the open justice principle may vary considerably according to the nature and subject matter of the inquiry. A statutory inquiry may not necessarily involve a hearing. It may, for example, be conducted through interviews or on paper or both. It may involve

information or evidence being given in confidence. The subject matter may be of much greater public interest or importance in some cases than in others. These are all valid considerations but, as I say, they go to the application and not the existence of the principle.

126 In each case it is necessary to have close regard to the purpose and provisions of the relevant statute. Lord Mance JSC is therefore right to place the emphasis which he has on the provisions of the Charities Act, particularly in paras 43–45 of his judgment. No useful purpose would be served by my repeating or paraphrasing his analysis of those provisions. As he says at the end of para 45 and the beginning of para 47, the meaning and significance which he attaches to those provisions (and with which I agree) are consistent with and indeed underpinned by common law principles.

127 Lord Carnwath JSC has drawn attention to the absence of direct authority for applying common law principles to a body like the Charity Commission which "is the creature of a modern statute, by which its functions and powers are precisely defined"; but the supervision of inquiries by the courts is a product of the common law, except in so far as there is a relevant statutory provision.

128 Such enactments may go into greater or less detail about how an inquiry is to be conducted. The Inquiries Act 2005 contains detailed provisions about the conduct of an inquiry under that Act. Other Acts which provide for inquiries may be less detailed. To the extent that an enactment contains provisions about the disclosure of documents or information, such provisions have the force of law. But to the extent that Parliament has not done so, it must be for the statutory body to decide questions of disclosure, subject to the supervision of the court. I do not see the absence of a prior statement by the courts that in general the principle of openness should apply, subject to any statutory provisions and subject to any countervailing reasons, as a convincing reason for not saying so now. Principles of natural justice have been developed by the courts as a matter of common law and do not depend on being contained in a statutory code. As with natural justice, so with open justice.

129 The power of disclosure of information about a statutory inquiry by the responsible public authority must be exercised in the public interest. It is not therefore necessary to look for a particular statutory requirement of disclosure. Rather, the question in any particular case is whether there is good reason for not allowing public access to information which would provide enlightenment about the process of the inquiry and reasons for the outcome of the inquiry.

130 I do not understand there to be any disagreement between the members of the court about the desirability that information about statutory inquiries should be available to the public, unless there are reasons to the contrary. The disagreement is about the proper means of achieving that result. Lord Carnwath JSC would achieve it by reference to article 10 and by reading section 32(2) in a manner contrary to Parliament's intention. For my part, I see no reason why the courts should not regard inquiry documents as having similar status to court documents, as Parliament intended, and applying similar principles. That approach is not undemocratic and does not usurp the function of Parliament.

131 Lord Wilson JSC considers that Parliament cannot have thought about what it was doing in enacting section 32(2) and that the subsection

needs to be read down in order for the UK to be in compliance with article 10. It sometimes happens that the only sensible inference to be drawn regarding a legislative provision is that there was an oversight in the drafting process, but that is not the case here (as Hansard confirms). Parliament could, if it chose, have dealt with the question of access to inquiry documents in a different way, but in my judgment we should respect the fact that it chose to deal with them in the same way as court documents. The result is entirely workable; the common law is fully capable of protecting sufficiently whatever rights under article 10 Mr Kennedy may have.

132 Given that a decision by a public authority about disclosure of information or documents regarding a statutory inquiry is capable of judicial review, what should be the standard of review? The normal standard applied by a court reviewing a decision of a statutory body is whether it was unreasonable in the *Wednesbury* sense (i e beyond rational justification), but we are not here concerned with a decision as to the outcome of the inquiry. We are concerned with its transparency. If there is a challenge to the High Court against a refusal of disclosure by a lower court or tribunal, the High Court would decide for itself the question whether the open justice principle required disclosure. *Guardian News* provides an example. I do not see a good reason for adopting a different approach in the case of a statutory inquiry, but the court should give due weight to the decision and, more particularly, the reasons given by the public authority (in the same way that it would to the decision and reasons of a lower court or tribunal). The reason for the High Court deciding itself whether the open justice principle requires disclosure of the relevant information is linked to the reason for the principle. It is in the interests of public confidence that the higher court should exercise its own judgment in the matter and that information which it considers ought to be disclosed is disclosed.

133 The analysis set out above is based on common law principles and not on article 10, which in my view adds nothing to the common law in the present context. This is not surprising. What we now term human rights law and public law has developed through our common law over a long period of time. The process has quickened since the end of World War II in response to the growth of bureaucratic powers on the part of the state and the creation of multitudinous administrative agencies affecting many aspects of the citizen's daily life. The growth of the state has presented the courts with new challenges to which they have responded by a process of gradual adaption and development of the common law to meet current needs. This has always been the way of the common law and it has not ceased on the enactment of the Human Rights Act 1998, although since then there has sometimes been a baleful and unnecessary tendency to overlook the common law. It needs to be emphasised that it was not the purpose of the Human Rights Act that the common law should become an ossuary.

134 In the present case the inquiries which the Charity Commission conducted, under section 8 of the Charities Act 1993, into the operations of a charity formed by Mr George Galloway MP were of significant public interest. At the end of the inquiries the commission published its conclusions, but the information provided as to its reasons for the findings which it made and, more particularly, did not make, was sparse. As a

journalist, Mr Kennedy had good cause to want to probe further. It is possible that the Charity Commission may have had reasons for not wishing to divulge any further information, but such is the course which the proceedings have taken that it is impossible to tell at this stage.

135 I regard it as unfortunate that Mr Kennedy's request for further information was based solely on FOIA. I have considerable disquiet that Mr Kennedy has been unable to learn more about the Charity Commission's inquiries and reasons for its conclusions, and I should like, if possible, for there to be a proper exploration whether the Charity Commission should provide more. I am clear that this could be done through the common law, but it cannot be done through FOIA unless section 32(2) can properly be circumvented. I agree with Lord Mance JSC that if article 10 applies in the present case, it is fulfilled by the domestic law. (It should generally not be difficult to tell whether the information sought is within section 32(2) because the statutory definition of an inquiry is clear. However, if for any reason the applicant was in doubt, he could ask the public authority to say whether it contended that the information was within section 32(2) and to explain its reason for saying so. If so, the public authority could not then complain about the applicant following the route of judicial review.)

136 Lord Carnwath JSC considers that article 10 would afford the advantage to Mr Kennedy that article 32(2) could be read down and Mr Kennedy would then have a simpler and cheaper mechanism for trying to obtain the information which he seeks. That supposes that judicial review is not an adequate remedy. In my view it is. It was the remedy used in *Guardian News* and would be the remedy in any case where there is a challenge to a refusal of disclosure of information by a court below the level of the High Court or by a tribunal. I do not see it as inappropriate for the same remedy to be available in relation to a statutory inquiry.

137 There are other reasons why I consider that it would be wrong to read down section 32(2) in the way for which Mr Kennedy contends. First, it would go against the grain of FOIA to override section 32(2) in circumstances which Parliament considered the matter should be for the courts and where there is a remedy through the courts. Secondly, to read down section 32(2) in the manner proposed would have other undesirable consequences. Mr James Eadie QC rightly pointed out that under the construction proposed section 32(2) would not be reduced from an absolute exemption to a qualified exception, subject to a general public interest test (such as would be applied by a court), but would cease to have effect altogether at the end of the inquiry. Section 2 brings in a public interest test where there is a relevant exemption, but it is not a ground of exemption in itself. The only exemptions which would apply would be other specific exemptions in the Act but they do not cover all the ground which would be covered by a public interest test.

138 For example, inquiry records or court records may include material detrimental to a person's reputation which the court or inquiry did not investigate on grounds of relevance. A court would have an obvious discretion not to order the disclosure of such material. In *Guardian News* [2013] QB 618 the court referred in paras 65–66 to a decision of the Court of Appeals for the Second Circuit (Winter, Calabresi and Cabranes CJJ) in *United States v Amodeo* (1995) 71 F 3d 1044 in which this point was

discussed. The approach of the US court was summarised by the Court of Appeal at para 66:

> "The court commented that many statements and documents generated in federal litigation actually have little or no bearing on the exercise of judicial power because 'the temptation to leave no stone unturned in the search for evidence material to a judicial proceeding turns up a vast amount of not only irrelevant but also unreliable material'. Unlimited access to every item turned up in the course of litigation could cause serious harm to innocent people. The court conclude that the weight to be given to the presumption of access must be governed by the role of the material at issue in the exercise of judicial power and the resultant value of such information to those monitoring the federal courts."

139 An English court would be expected to perform a similar exercise, but I cannot see how the Information Commissioner would be able to do so if section 32(2) were read down in the way for which Mr Coppel contends. That is because the specific exemptions in FOIA do not give the Information Commissioner such a broad power.

140 In short, the common law approach, which I consider to be sound in principle, runs with the grain of FOIA; it does not involve countermanding Parliament's decision to exclude inquiry documents from the scope of the Act; and it is consistent with the judgment of Parliament that in this context statutory inquiries should be viewed in the same way as judicial proceedings. It also produces a more just result, because a court is able to exercise a broad judgment about where the public interest lies in infinitely variable circumstances whereas the Information Commissioner would not have such a power.

141 On a point of detail, the parallel which Mr Coppel drew with inquiries under the Inquiries Act 2005 does not assist him. He pointed out that under section 18(3) of the Inquiries Act, the exemption from FOIA under section 32(2) ceases to apply when the chairman at the end of the inquiry passes the inquiry documents to the relevant public department under the Inquiry Rules 2006 (SI 2006/1838), rule 18(1)(b).

142 Mr Coppel argued that it was an unjustifiable anomaly that section 32(2) of FOIA should remain in force after the conclusion of other public inquiries. This argument seemed attractive at first, but it fails to take account of other relevant provisions of the Inquiries Act. Under section 19 the chairman may impose a restriction order on the disclosure or publication of any evidence or documents given to an inquiry. The section sets out the matters to which the chairman must have regard in deciding whether to make such an order, including any risk of harm or damage which may be avoided or reduced by the order. Under section 20, such a restriction continues in force indefinitely, subject to provisions of that section which include a power given to the relevant minister to revoke or vary the order after the end of the inquiry. In short, full provision is made for public interest considerations.

143 In view of the approach which I have taken, I can deal shortly with the Strasbourg decisions on which Mr Coppel has relied. They have been comprehensively analysed by Lord Mance JSC.

144 Since this court reviewed the Strasbourg jurisprudence on article 10 in *British Broadcasting Corpn v Sugar (No 2)* [2012] 1 WLR 439, there have been four further Strasbourg decisions on which Mr Coppel relies: *Gillberg v Sweden* (2012) 34 BHRC 247, *Shapovalov v Ukraine* (Application No 45835/05) (unreported) given 31 July 2012, *Youth Initiative for Human Rights v Serbia* (Application No 48135/06) (unreported) given 25 June 2013 and *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v Austria* (Application No 39534/07) (unreported) given 28 November 2013. In the last of those cases, the First Section (at paragraph 41) highlighted among the court's earlier decisions *Társaság a Szabadságjogokért v Hungary* (2009) 53 EHRR 130, observing that the court had advanced from cases like *Leander v Sweden* (1987) 9 EHRR 433 "towards a broader interpretation of the notion of the 'freedom to receive information' and thereby towards a recognition of a right of access to information". It drew a parallel in this context with the case law on the freedom of the press and the need for "the most careful scrutiny . . . when authorities enjoying an information monopoly interfered with the exercise of the function of a social watchdog."

145 What is so far lacking from the more recent Strasbourg decisions, with respect, is a consistent and clearly reasoned analysis of the "right to receive and impart information" within the meaning of article 10, particularly in the light of the earlier Grand Chamber decisions. Mr Coppel submits that the court's "direction of travel" is clear, but the metaphor suggests that the route and destination are undetermined. If article 10 is to be understood as founding a right of access to information held by a public body, which the public body is neither required to provide under its domestic law nor is willing to provide, there is a clear need to determine the principle or principles by reference to which a court is to decide whether such a right exists in a particular case and what are its limits.

146 To take the latest case, *Österreichische Vereinigung* concerned information about decisions of a commission described as a judicial body (at para 28). In considering whether there had been an interference with the applicant's rights under article 10, the court said that the applicant association had a watchdog role similar to that of the press, that it was involved in the legitimate gathering of information of public interest and that there had consequently been an interference with its right to receive and impart information under article 10: paras 34–36. In considering whether the interference was justified, the court considered it striking that the commission was a public authority deciding disputes over civil rights but that none of its decisions was published in any form. The court concluded that its complete refusal to give access to any of its decisions was disproportionate: paras 46–47. On one interpretation the scope of the decision is extremely broad. Most information held by a public authority will be of some public interest, and article 10 would apply to any of it if a journalist, researcher or public interest group wanted access in order to generate a public debate, unless the authority could justify withholding it under the imprecise language of article 10.2. Alternatively, the case could be seen more narrowly as essentially a case about open justice.

147 Like Lord Mance JSC (at para 88) I cannot see the logic of using the existence of a duty of disclosure in domestic law as a platform on which to erect a duty under article 10, as distinct from article 6. As to the more

radical suggestion that article 10 gives rise to a prima facie duty of disclosure of any information held by a public body which the applicant seeks in order to promote a public debate, this is flatly contradictory to the Grand Chamber decision in *Leander*. As Lord Mance JSC has commented, it would amount to a European freedom of information law established on an undefined basis without the normal checks and balances to be expected in the case of freedom of information legislation introduced by a state after public consultation and debate.

148 If the *Leander* principle is to be abrogated, or modified, in favour of an interpretation of article 10 which makes disclosure of information by a public body in some circumstances obligatory, it seems to me with respect that what the new interpretation would require is a clear, high level exegesis of the salient principle and its essential components.

149 It is, however, unnecessary to say more in this case, because I see nothing in the Strasbourg jurisprudence which is inconsistent with what I have said regarding English domestic law.

150 I agree with the conclusions of Lord Mance JSC and I would dismiss this appeal for the same reasons. Like him, I emphasise that this conclusion does not mean that English courts lack the power to order a public body which has carried out a statutory inquiry into matters of public interest to provide such access to a journalist as may be proper for the exercise of their "watchdog" function, taking into account the relevant circumstances.

151 It would be open to Mr Kennedy now to make a fresh request to the Charity Commission on the basis of this judgment. It would then be for the Administrative Court to consider any objection by the Charity Commission based on delay, but in considering such objection the court would need to take into account all the circumstances. Mention was briefly made in argument about the three month time limit imposed under CPR r 54.5(1), but that is after the grounds for the application have arisen, which would be after any refusal of Mr Kennedy's request. There could of course be argument that he should have made his first request on a different basis (as I would hold). Whether that should bar the claim from proceeding would be a matter for the court considering the application, but on the facts as they presently appear it would seem harsh that the claim should be barred not because of any delay on Mr Kennedy's part in seeking the information but because of legal uncertainty about the correct route.

LORD SUMPTION JSC (with whom **LORD NEUBERGER OF ABBOTSBURY PSC** and **LORD CLARKE OF STONE-CUM-EBONY JSC** agreed)

152 I agree that this appeal should be dismissed, for the reasons given by Lord Mance and Lord Toulson JJSC.

153 The Freedom of Information Act 2000 was a landmark enactment of great constitutional significance for the United Kingdom. It introduced a new regime governing the disclosure of information held by public authorities. It created a prima facie right to the disclosure of all such information, save in so far as that right was qualified by the terms of the Act or the information in question was exempt. The qualifications and exemptions embody a careful balance between the public interest considerations militating for and against disclosure. The Act contains an

A administrative framework for striking that balance in cases where it is not determined by the Act itself. The whole scheme operates under judicial supervision, through a system of statutory appeals.

154 The right to receive information under article 10 of the Human Rights Convention has generated a number of decisions of the European Court of Human Rights, which take a variety of inconsistent positions for reasons that are not always apparent from the judgments. The more B authoritative of these decisions, and the ones more consonant with the scheme and language of the Convention, are authority for the proposition that article 10 recognises a right in the citizen not to be impeded by the state in the exercise of such right of access to information as he may already have under domestic law. It does not itself create such a right of access. Other decisions, while ostensibly acknowledging the authority of the principle set C out in these cases, appear to point towards a different and inconsistent view, namely that there may be a positive obligation on the part of the state to impart information under article 10, and a corresponding right in the citizen to receive it. However if (contrary to my view) there is a Convention right to receive information from public authorities which would not otherwise be available, no decision of the European Court of Human Rights suggests that D it can be absolute or exercisable irrespective of the public interest. Accordingly, since disclosure under the Freedom of Information Act depends on an assessment of the public interest, it is difficult to discern any basis on which the scheme as such can be regarded incompatible with the Convention, whichever of the two approaches is correct. Of course, the Strasbourg court may decide that the statutory scheme is compatible, but that particular decisions under it are not. But this case is concerned with the E compatibility of the scheme, not the particular decision.

155 The basis on which it is suggested that the scheme may not be compatible is that section 32, if it is to be construed as applying beyond the duration of the inquiry, is an absolute exemption more extensive than anything required to avoid disrupting the actual conduct of the inquiry. If this criticism is to carry any weight, what the critics have to say is that the F application of section 32 forecloses any examination of the public interest in disclosure. But such a criticism would plainly be misconceived. The exemptions in the Act are of two kinds. There are, first of all, exemptions which reflect Parliament's judgment that the public interest requires information in some categories never to be disclosable under the Act. Exemptions of this kind include those under section 23 (information supplied by or relating to bodies dealing with national security), section 34 G (information whose disclosure would infringe Parliamentary privilege) and section 41 (information received by a public authority under a legally enforceable confidence). The second category of exemption in the Act comprises cases where the Act does not need to provide for access to the information because there are other means of obtaining it on appropriate conditions for the protection of the public interest. Such exemptions include those in section 21 (information available by other means) and the section H with which we are presently concerned, section 32, dealing with information held by a court or by virtue of having been supplied to an inquiry or arbitration,

156 The point about section 32 is that it deals with a category of information which did not need to be covered by the Act, because it was

already the law that information in this category was information for which there was an entitlement if the public interest required it. Leaving aside the rather special (and for present purposes irrelevant) case of documents held by virtue of having been supplied to an arbitration, the relevant principles of law are to be found in rules of court and in the powers and duties of public authorities holding documents supplied to an inquiry, as those powers and duties have been interpreted by the courts and applied in accordance with general principles of public law. It cannot plausibly be suggested that this corpus of law fails to meet the requirements of article 10 of the Convention that any restrictions on the right recognised in article 10.1 should be "prescribed by law". Its continued operation side by side with the statutory scheme under the Freedom of Information Act is expressly preserved by section 78 of that Act. This section overtly recognises that the Act is not a complete code but applies in conjunction with other rules of English law dealing with disclosure.

157 Much of the forensic force of the appellant's argument arises from the implicit (and occasionally explicit) assumption that there could be no proper reason in the public interest for denying Mr Kennedy the information that he seeks. Therefore, it is suggested, the law is not giving proper effect to the public interest because it is putting unnecessary legal or procedural obstacles in Mr Kennedy's way. I reject this suggestion. It is true that there is a legitimate public interest in the disclosure of information relevant to the performance of the Charity Commission's inquiry functions, and to this inquiry in particular. But the Charity Commission has never been asked to disclose the information under its general powers. It has only been asked to disclose it under a particular statute from which the information in question is absolutely exempt. This is not just a procedural nicety. If the commission had been asked to disclose under its general powers, it would have had to consider the public interest considerations for and against disclosure which were relevant to the performance of its statutory functions under the Charities Act. Its assessment of these matters would in principle have been reviewable by the court. In fact, it has never been called on to carry out this assessment, because Mr Kennedy chose to call for the information under an enactment which did not apply to the information which he wanted.

158 We cannot know what the decision of the Charity Commission would have been if they had been required to exercise their powers under the Charities Act. We know nothing about the contents or the source of the information in the documents held by the commission, or the basis on which it was obtained, apart from the limited facts which can be inferred from its report, the schedule of documents and the evidence in these proceedings. Because this appeal is concerned only with the effect of section 32, and the Convention so far as it bears on section 32, none of this material has been relevant and we have not seen it.

159 It cannot necessarily be assumed that if Mr Kennedy had asked for disclosure under the Charity Commission's general powers, the resulting decision would have been favourable to him. It might or might not have been. No one has disputed that section 32 applies in this case if the exemption for which it provides extends beyond the duration of the inquiry. We are therefore presumably concerned with information which the commission holds only by virtue of its having been given to the Charity Commission for the purposes of the inquiry. That information presumably

A emanates from persons or bodies who are not themselves public authorities. Otherwise it would have been disclosable by those authorities under other provisions of the Freedom of Information Act. While other statutory qualifications or exemptions might have in that event been relevant, section 32 would not have been. The information is therefore likely to have been supplied to the commission by private entities or possibly by foreign public authorities, and supplied "only" for the inquiry, not for any other purpose. The inference from the commission's report is that a significant part of it came from foreign entities, and therefore could not have been obtained under the commission's power to requisition information under section 9 of the Charities Act. In its letter of 4 July 2007, the commission showed that it was well aware of the "public interest . . . for transparency of the decisions and reasons for them, so as to promote public confidence in charities." But it considered at that time that its dependence on the co-operation of third parties in carrying out its inquiry meant that that particular public interest was outweighed by the competing public interest in its being able to discover the relevant facts. The importance of encouraging voluntary co-operation with an inquiry by those possessing relevant information is a recognised public interest which may be highly relevant to the question whether it should be further disclosed: see *Lonrho Ltd v Shell Petroleum Co Ltd* [1980] 1 WLR 627, 637–638 (Lord Diplock). The statements made in the commission's letter may or may not prove to be its final position. But the point made there cannot be brushed aside.

LORD WILSON JSC

160 In April 2003, shortly before he became its Investigations Editor, Mr Kennedy wrote an article for *The Times* about the Mariam Appeal ("the appeal") which had been founded in 1998 by Mr George Galloway and which had recently closed down. In 2003 Mr Galloway was a high-profile Member of Parliament, as he is again today. He had for many years been an outspoken critic of the economic sanctions imposed by the United Nations on the regime of Saddam Hussein in Iraq. He had contended that one of their consequences had been to deprive Iraqi citizens of necessary medical treatment. The objects of the appeal, as stated in its constitution, had been to provide medical assistance to the Iraqi people, to highlight the causes of an epidemic of cancer in Iraq and to arrange for the medical treatment outside Iraq of certain Iraqi children. The appeal had been named after Mariam Hamza, a young Iraqi girl who was suffering from leukaemia.

161 In his article in April 2003 Mr Kennedy alleged that money donated by the public to the appeal had been improperly used to fund visits by Mr Galloway to Iraq and elsewhere and to support political campaigns against the UN sanctions and against Israel. A reader of the article seems to have referred it to the Attorney General, who, as an officer of the Crown, has a long-standing role as the protector of charities. The Attorney referred it on to the Charity Commission ("the Commission").

162 In 2003 the Commission was governed by the Charities Act 1993 ("the 1993 Act"), which was later amended by the Charities Act 2006 and which has now been replaced by the Charities Act 2011. The commission has five objectives, of which the first is to increase public trust and confidence in charities, the third is to promote compliance by charity trustees with their legal obligations of control and management and the fifth

is to enhance the accountability of charities to donors, beneficiaries and the general public: section 1B(2) of the 1993 Act, as amended. The commission has five general functions, of which the third includes the investigation of apparent misconduct in the administration of charities and the fifth includes the dissemination of information in connection with the performance of its other functions and the pursuit of its objectives: section 1C(2). The commission has six general duties, of which the fourth is that, in performing its functions, it should have regard to the principles of best regulatory practice, including those of accountability and transparency: section 1D(2).

163 The commission also has power to institute an inquiry with regard to a particular charity: section 8 of the 1993 Act. In June 2003 it instituted an inquiry into the application of the money raised by the appeal between March 1998 and April 1999. In November 2003 it instituted a second inquiry into the application of the money raised by the appeal throughout its years of operation. The two inquiries were combined.

164 In June 2004, pursuant to its power under section 8(6)(a) of the 1993 Act, the Commission published its statement of the results of the two inquiries. In the statement, which was very short, it expressed the following conclusions:

(a) that the objects of the appeal had been charitable and that, in the light of the size of its income, it should have been registered with the Commission as a charity but that the founders of the appeal had acted on legal advice to the contrary and so were unaware that they had created a charity;

(b) that, apart from members of the public, the major donors to the appeal had been the United Arab Emirates, someone in Saudi Arabia and a Jordanian citizen, namely Mr Zureikat;

(c) that Mr Galloway had confirmed that the appeal did not produce profit and loss accounts or balance sheets;

(d) that the Commission had been unable to obtain all the financial records of the appeal;

(e) that Mr Galloway had explained that, when in 2001 the chairmanship of the appeal had been transferred from himself to Mr Zureikat, he had sent the records to him in Jordan and Iraq and was unable to retrieve them;

(f) that Mr Galloway had assured it that all moneys received by him out of the funds of the appeal had related to expenses incurred by him when he had been chairman of it;

(g) that two of the trustees had received salaries out of appeal funds in breach of trust but that their work had been of value to the appeal and no one had acted in bad faith in that regard, with the result that the Commission would not be taking steps to recover the salaries;

(h) that funds had been used to further political activities, in particular the campaign against the sanctions, but that the activities had been ancillary to the purposes of the appeal in that the trustees might reasonably have considered that they might secure treatment for sick children; and

(i) that, not only because the appeal had closed down but also because the political activities had been ancillary to its purposes and its records had been difficult to obtain, it was not proportionate for the Commission to pursue its inquiries further.

165 Mr Kennedy did not immediately seek information about the statement published in June 2004. Later, however, he sought information designed to elucidate issues, raised by the statement, in relation to the way in

A which the funds of the appeal had been deployed (with particular reference to para 5(d), (e), (g) and (h) above) and to the way in which the Commission had conducted its inquiries (with particular reference to para 5(h) and (i) above).

166 The UN Oil-for-Food Programme, which ran from 1996 to 2003, enabled the Iraqi state to sell oil in return for payments made into an account controlled by the UN from which Iraq was entitled to draw only for the B purchase of food and other humanitarian-related goods. In 2005 reports by the UN and by the US Senate concluded that the programme had attracted improper payments of commissions to, or at the direction of, members of the Iraqi government by Iraqi companies keen to be allowed to participate in sales either of the oil or of the humanitarian-related goods; and that the appeal had received donations which represented some of these improper C payments. Thus in December 2005 the Commission instituted a third inquiry into the appeal under section 8 of the 1993 Act. In June 2007 it published a statement of the results of this inquiry under section 8(6). In the statement, which was even shorter than the first, the Commission said that it had examined a large body of sensitive evidence obtained from international sources. It added that it had directed the five known members of the executive committee of the appeal, whom it took to be its trustees, to answer D questions and that, while the three members resident in the UK (including Mr Galloway) had done so, the two resident abroad (including Mr Zureikat) had not done so. The commission then proceeded to express the following conclusions:

(a) that the funds known to have been paid into the appeal totalled £1,468,000, of which Mr Zureikat had donated over £448,000;

E (b) that, of the funds donated by Mr Zureikat, about £300,000 represented his improper receipt of commissions referable to the Oil-for-Food programme;

(c) that Mr Galloway and the other trustees resident in the UK denied all knowledge of the source of Mr Zureikat's donations;

(d) that, although unaware that they had created a charity, the trustees should have been aware that they had created a trust, which required them F to be vigilant in accepting large donations, particularly from overseas;

(e) that, in breach of their duty of care, the trustees had failed to make sufficient inquiries into the source of Mr Zureikat's donations;

(f) that Mr Galloway himself, however, "may have known of the connection between the appeal and the programme" (by which the Commission appears to have meant that, despite his denial, he may have G known the source of Mr Zureikat's donations); and

(g) that the Commission had liaised with other agencies in relation to possible illegality surrounding Mr Zureikat's donations but, in the light of the closure of the appeal in 2003 and the distribution of all its funds, it proposed to take no further action.

167 On the date of publication of this second statement Mr Kennedy made his request for information to the Commission under the Freedom of H Information Act 2000 ("the FOIA"). He considered that the statement was surprisingly short and extremely unsatisfactory. He took the view that Mr Galloway's possible misconduct in relation to the appeal was a matter of considerable public importance and that the material said to justify the serious allegations made against him had not been identified. Mr Galloway,

for his part, was equally critical of the statement. He announced that its conclusion that the appeal had received improper funds was palpably false and that parts of it were sloppy, misleading and partial and would have been corrected if the Commission had bothered to interview him. The commission later responded that Mr Galloway had declined its invitation to interview him.

168 At an early stage of the protracted litigation to which it has given rise, Mr Kennedy confined his request for information to the following four classes of documents: (a) those which explained the Commission's conclusion that Mr Galloway may have known that Iraqi bodies were funding the appeal; (b) those by which it had invited Mr Galloway to explain his position and by which he had responded; (c) those which had passed between it and other public authorities; and (d) those which cast light on the reason for the institution and continuation of each of the three inquiries.

169 All members of this court agree that, in principle, the Commission's two statements raise questions of considerable public importance and that Mr Kennedy's confined request would assist in answering them. What was the extent of the breach of duty on the part of Mr Galloway, a public figure and a Member of Parliament, in relation to the well-publicised appeal? Could the doubt about his knowledge of the source of Mr Zureikat's donations reasonably have been resolved in one way or the other? What was the reason for the Commission's apparent failure to interview Mr Galloway? Did the Commission conduct the inquiries with sufficient rigour? Were other parts of the statements, for example their treatment of his expenses and of the funding of political activities, unduly indulgent towards Mr Galloway? To the extent that they were unduly indulgent, why so?

170 In making his confined request Mr Kennedy was careful to acknowledge, first, that parts of the information sought might attract absolute exemption under the FOIA (for example to the extent that it was covered by Parliamentary privilege under section 34 or represented either personal information under parts of section 40 or information provided in confidence under section 41); and, second, that other parts of it might fall within some of the qualified exemptions set out in the FOIA and, if so, would require the weighing of the rival public interests pursuant to section 2(2). Indeed, when the Commission came to prepare a schedule of the documents held in connection with the inquiries (which it said were held in 25 lever-arch files, as well, in part, as electronically), it indicated, in relation to each document, the exemption or exemptions prescribed by the FOIA on which it proposed, if necessary, to rely. Among the indicated exemptions was one which it ascribed to every document, namely that provided by section 31 of the FOIA. The effect of section 31(1)(g), read together with section 31(2)(b)(c)(f), is to raise a qualified exemption in relation to information of which disclosure would be likely to prejudice the Commission's exercise of its functions for the purpose of ascertaining whether anyone has been guilty of improper conduct in relation to a charity or whether the circumstances justify regulatory action or for the purpose of protecting the administration of charities from mismanagement. So it is an important exemption reflective of the public interest that the Commission should function effectively. In its evidence the Commission argued that substantial disclosure to Mr Kennedy would forfeit the confidence of those who had co-operated, or might otherwise co-operate, with its inquiries and

so would prejudice the future exercise of its functions for the specified purposes. One might have anticipated lively argument on behalf of the Commission in that respect, as in others, had it to date been necessary to proceed to consider the qualified exemptions.

171 But the argument which finds favour with the majority of the members of this court is that section 32(2) of the FOIA provides an absolute exemption from disclosure—at any rate under the FOIA—of any of the information in any of the documents held in the lever-arch files, apart from that contained in about seven documents which the Commission received or created following the end of the third inquiry and which have therefore already been disclosed. The four steps in the argument are (1) that all the other information is contained in documents placed in the Commission's custody, or created by it, for the purposes of the three inquiries; (2) that the Commission holds the information only by virtue of its being so contained; (3) that, on the application to section 32(2) of conventional canons of construction, facts (1) and (2) satisfy its requirements; and (4) that the rights of Mr Kennedy under article 10 of the European Convention on Human Rights ("the ECHR") are not such as, under section 3(1) of the Human Rights Act 1998 ("the 1998 Act"), to require that, so far as possible, section 32(2) be construed differently so as to be compatible with them.

172 In my view the closest scrutiny needs to be given to the only debateable step in the argument, which is step (4). Were that step valid, the result would be that, instead of a document-by-document inquiry into the applicability of other absolute exemptions, or of qualified exemptions followed (if applicable) by the weighing of public interests under section 2(2), a blanket exemption from disclosure—under the FOIA—is thrown over the entire information. Every part of it would be exempt from disclosure—under the FOIA—irrespective of its nature; of the degree of legitimate public interest which its disclosure might generate or help to satisfy; and of the degree of harm (if any) which its disclosure might precipitate.

173 The commission stresses that the information would not be exempt from disclosure under the FOIA for ever. Following 30 years (reduced to 20 years but not in respect of a record created prior to 2013) from the year in which it was created, a record becomes a historical record, information in which is not exempt under section 32 of the FOIA: see sections 62(1) and 63(1). But, in this regard, one must also have an eye to the Public Records Act 1958. The effect of section 3(4) of the 1958 Act is that, by the end of that period of 30 years, such documents relating to the inquiries as still exist will have been transferred by the Commission to the National Archives. But not all the documents currently in the 25 lever-arch files will then still exist: for, pursuant to section 3(1) of the 1958 Act, the Commission will have arranged for the selection of the documents which in its view merit permanent preservation in the National Archives and, pursuant to section 3(6), it will have caused the remainder to be destroyed. It is unreal to suggest that, subject to any continuing exemptions, likely access to some of the information after 30 years would satisfactorily meet the public interest, which Mr Kennedy aspires to satisfy, in the conduct of a public figure in relation to a charity and in the quality of the Commission's supervision of it.

174 The suggested exemption from disclosure—at any rate under the FOIA—of the information in the Commission's documents for a generation

is even more startling when attention is paid to the law's treatment of disclosure of two other classes of documents addressed by section 32.

175 First, court records. A court is not a public authority for the purposes of the Act. But, particularly if it is or has been a party to court proceedings, a public authority is likely to hold copies of documents filed with the court, or created by the court, for the purposes of such proceedings. Information thus held by a public authority enjoys absolute exemption from disclosure: section 32(1). But the court itself will also hold copies of those documents. Thus, by way of counter-balance to the exemption from disclosure of such information if held by a public authority, there is the right of the citizen to obtain copies of specified documents from the court file (CPR r 5.4C(1)) and the power of the court to permit him to obtain copies of, in effect, all other documents on the file: rule 5.4C(2). The citizen's right and the court's power are each exercisable at any stage, whether while the proceedings are pending or following their conclusion.

176 Second, records of inquiries held under the Inquiries Act 2005 ("the 2005 Act"). Section 32(2) of the FOIA applies to information contained in documents placed in the custody of, or created by, a person conducting an inquiry held under any statutory provision: section 32(4)(c). By contrast with the Commission's inquiries, held under section 8 of the 1993 Act, inquiries are sometimes held at the direction of a minister, within terms of reference set out by him, under the 2005 Act. At the end of such an inquiry, its chairman must cause documents given to, or created by, the inquiry to be passed to, and held by, the minister: see rule 18(1)(b) of the Inquiry Rules 2006. Section 18(3) of the 2005 Act provides that section 32(2) of the FOIA does not apply in relation to information contained in documents thus passed to, and held by, the minister (being a public authority). It is true that, under section 19 of the 2005 Act, the minister and the chairman may each, prior to the end of the inquiry, impose restrictions on the disclosure of material provided to it if they consider them conducive to the fulfilment of the inquiry's terms of reference or necessary in the public interest: subsections (1), (2) and (3)(b). Importantly, however, the restrictions do not, subject to an irrelevant exception, apply to disclosure by the minister himself (or by any other public authority holding any of the material) following the end of the inquiry: section 20(6). Parliament has therefore seen fit to remove the absolute exemption under section 32(2) of the FOIA from material created or produced for an inquiry held under the 2005 Act once it has come to an end and to allow disclosure of it thereafter to be governed by the suite of qualified exemptions and of the other absolute exemptions set out in the FOIA. In opposing Mr Kennedy's appeal, the Commission has been unable to explain why the disclosure of material referable to statutory inquiries held otherwise than under the 2005 Act should apparently be governed so differently.

177 In my view the difficult question is whether Mr Kennedy has human rights apt enough and strong enough to repel the apparent obstruction of him, and therefore of his readers, by section 32(2) of the FOIA from addressing the concerns which I have identified through disclosure under that Act.

178 The right under article 10 of the ECHR is to "freedom of expression", including "freedom to hold opinions and to receive and impart information and ideas without interference by public authority". So the

A receipt of information is expressly included within the right. The right has to be "without interference by public authority". These words have given rise to a narrow, ostensibly a pedantic, question of the sort against which the court in Strasbourg often sets its face: is the public authority basically restrained from interfering only with a person's receipt of information from another private person willing to impart it (the *Leander* approach) or does the restraint extend to interference with, in other words to obstruction of, a B person's receipt of information from the public authority itself (the wider approach)? A purely textual answer, with particular concentration on the word "freedom", might favour the narrow approach. That answer would also respect the negative phraseology of the public authority's obligation, whereas the opposite answer would give rise to a positive obligation of what, subject to whatever interpretation may be placed on paragraph 2 of the C article, might prove to be of substantial proportions. Nevertheless a brief reflection on the nature of freedom of expression suggests difficulties with the narrow approach. Without freedom to receive certain information, there is no freedom to proceed to express it; and a person's freedom to express the information is likely to carry much greater value for the public if the person holding the information is unwilling to impart it to him. In his illuminating and appropriately cautious discussion of these tensions in *Freedom of* D *Speech*, 2nd ed (2005), Professor Barendt states, at p 110, that the link between freedom of expression and freedom of information is undeniable. Indeed, if efficacy is to be given to the right to freedom of expression, there is no reason to consider that information held by a public authority (whether relevant to itself or to a private person or, as in the present case, to both) is of lesser significance to it than information held by a private person. On the E contrary.

179 It is with these difficulties that the European Court of Human Rights ("the ECtHR") has recently been required to wrestle.

180 Lord Mance JSC has charted the iteration by the ECtHR in 1987 of what it described as the "basic" scope of the right to receive information under article 10 in the *Leander* case and of its reiteration in the *Gaskin*, *Guerra* and *Roche* cases (all cited by him in para 63 above). The trouble is F that, apart from that of *Guerra,* the cases were all—in some quarters controversially—subjected to principal analysis under article 8 instead of under article 10, with the result that the treatment of article 10 was extremely short. Even in the *Guerra* case it was article 8 which won the day for those living under the polluted Italian skies who had complained that their right to receive information about the attendant risks had been G violated. They had however cast their claim primarily under article 10 and so in their case there was fuller treatment of article 10 than in the other cases. It is within that fuller treatment that the first straws in the wind can be discerned. First, a majority of the European Commission on Human Rights had considered that a positive obligation on the state under article 10 to ensure a right to receive information could not be excluded in principle and, in the light of the environmental dangers, had arisen in the present case: H paras 42 and 47 of the commission's opinion, set out in para 36 of the ECtHR's judgment. Indeed that majority had gone further by suggesting that the state's obligation under article 10 was to *collect* relevant information as well as to *impart* what it already held: para 49 of its opinion. As a preface to its rejection of that opinion the ECtHR, by a majority,

recognised—but of course distinguished—cases in which the general public had a right to receive information as a corollary of the specific journalistic function of imparting information on matters of public interest; then, prior to turning to article 8, it explained its disagreement with the commission but specifically with regard to the suggested obligation "to collect and disseminate" information: para 53. In separate opinions one judge of the ECtHR agreed with the commission's analysis of the scope of article 10 and six others explained that their disagreement with it applied only to the authority's suggested obligation to *collect* information rather than to *impart* what it already held. All this was being said back in 1998.

181 From these early straws it is necessary to chart the ECtHR's incremental development of the wider approach in no less than six decisions over the last five years.

182 First, the *Társaság* case, cited by Lord Mance JSC in para 71 above. I agree with him at para 74 that its significance is lessened by Hungary's concession that article 10 was engaged. I cannot accept however that the ECtHR was setting itself up as some further Hungarian appellate court and holding only that the Court of Appeal there had misapplied its Data Act 1992. The ECtHR, at paras 35 to 38: (a) cited the *Leander* case; (b) asserted, albeit without much basis, that the court had recently advanced towards a broader interpretation of article 10; (c) distinguished the *Guerra* case on the basis that there the request had been for the state to collect information rather than to disclose what it already held; (d) held that, in requesting the constitutional court to disclose the MP's complaint, the civil liberties union was acting, like the media, as a social watchdog seeking to generate informed public debate; and (e) concluded that, in refusing the request, the constitutional court, which had a monopoly over the information, had unnecessarily obstructed that debate.

183 Second, the *Kenedi* case, also cited in para 71 above. The historian's complaint under article 10 was upheld on the basis that Hungary's protracted obstruction of his request for information about the functioning of its security service in the 1960s had not been prescribed by law. For present purposes the significance of the case lies in the ECtHR's statement, at para 43, that access to original documentary sources for legitimate historical research was an essential element of the right to freedom of expression, for which it cited the *Társaság* case.

184 Third, the *Gillberg* case, cited in para 76 above. The applicant complained that his criminal conviction for misuse of public office, namely for disobeying court orders that the material collected by his university in its study of a mental disorder should be disclosed to K and E, somehow violated his rights under article 10. The complaint was so bizarre that, in rejecting it, the Grand Chamber had no need to attend to the recent widening of the ambit of the article in aid of the generation of important debate by social watchdogs. At para 83 it set out the *Leander* approach but more significantly noted at para 93 that K and E had rights to receive the material under article 10 on which the applicant's suggested right would impinge.

185 Fourth, the *Shapovalov* case, also cited in para 76 above. The journalist complained that his rights under article 10 had been violated by Ukraine's refusal to disclose the arrangements made by its electoral commission for the controversial elections in 2004. The ECtHR rejected his complaint on the basis that, in one way and another, he had already been

given access to information about the arrangements. The significance of the decision, made by a different section of the court (over which, as it happens, the current president of the entire court was then presiding), lies in its citation (at para 68) of the *Társaság* case for the proposition that the nondisclosure of information of public interest might disable public watchdogs from playing their vital role.

186 Fifth, the *Youth Initiative* case, also cited in para 76 above. The complaint under article 10 was upheld on the basis that, in defying a domestic order to inform the applicant of the number of people subjected to electronic surveillance in 2005, Serbia's interference with its rights had not been in accordance with law. The residual significance of the ECtHR's decision lies in the attention which, underlined in a concurring opinion, it gave at para 13 to a statement in 2011, entitled General Comment No 34, of the UN Human Rights Committee that a parallel article (article 19 of the International Covenant on Civil and Political Rights) included a right of access by the media to information of public interest held by public bodies; and in the approval which, at para 20, the court gave to the assertion in the *Társaság* case of that same principle in favour of public watchdogs for the purposes of article 10.

187 And sixth, and most importantly, the *Österreichische* case, also cited in para 76 above. There, four months ago, the ECtHR reminded itself of the *Leander* approach; noted however the recognition in the *Társaság* case of the court's recent advancement towards the broader approach; observed that information could not be imparted unless it had been gathered; accepted that the purpose behind transfers of land in the Tyrol was a subject of general interest; described the applicant as a social watchdog in that regard; held that the applicant had rights under article 10 with which the refusal of the Regional Tyrol commission to disclose its decisions on appeal from the local commissions had interfered; and concluded that, although it was prescribed by Austrian law, the interference was unnecessary in that it was a blanket refusal to disclose any of the regional commission's decisions.

188 I cannot subscribe to the view that the development of article 10 which was in effect initiated in the *Társaság* case has somehow been irregular. The wider approach is not in conflict with the "basic" *Leander* approach: it is a dynamic extension of it. The judgment in the *Társaság* case is not some arguably rogue decision which, unless and until squarely validated by the Grand Chamber, should be put to one side. Its importance was quickly and generally recognised. Within a year of its delivery the European commission For Democracy through Law ("the Venice Commission") had hailed it as a "landmark decision on the relation between freedom to information and the . . . Convention" (Opinion No 458/2009 on the Draft Law Obtaining Information of the Courts of Azerbaijan, 14 December 2009); and, in giving the judgment of the Court of Appeal in *Independent News and Media Ltd v A* [2010] 1 WLR 2262, Lord Judge CJ had, at para 42, specifically endorsed that description of it. In his judgment in the *Sugar* case, cited by Lord Mance JSC at para 62 above, Lord Brown JSC, with whom Lord Mance JSC had agreed at para 113, had rejected at para 94 the proposition that, in the light in particular of the *Társaság* case, Mr Sugar had had any right under article 10 to disclosure by the BBC of a report held by it for journalistic purposes. But, as Lord

Brown JSC had proceeded to demonstrate at [2012] 1 WLR 439, paras 98–102, interference by the BBC with any possible right of Mr Sugar under article 10 had clearly been justified; and that was the basis on which, at para 58, I had associated myself with the rejection of Mr Sugar's invocation of article 10. A

189 In the light of the judgments of the ECtHR delivered following this court's decision in the *Sugar* case, in particular in the *Österreichische* case, this court should now in my view confidently conclude that a right to require an unwilling public authority to disclose information can arise under article 10. In no sense does this betoken some indiscriminate exposure of sensitive information held by public authorities to general scrutiny. The jurisprudence of the ECtHR, of which this court must always take account and which in my view it should in this instance adopt, is no more than that in some circumstances article 10 requires disclosure. In what circumstances? These will fall to be more clearly identified in the time-honoured way as, in both courts, the contours of the right are tested within particular proceedings. The evolution of the right out of "freedom of expression" clearly justifies the stress laid by the ECtHR on the need for the subject matter of the request to be of public importance. No doubt it also explains the importance attached by that court to the status of the applicant as a social watchdog; whether that status should be a pre-requisite of the engagement of the right or whether it should fall to be weighed in assessing the proportionality of any restriction of it remains to be seen. Equally references in the ECtHR to the monopoly of the public authority over the information may need to find their logical place within the analysis: thus, in the absence of a monopoly, an authority's non-disclosure may not amount to an interference. Where the article is engaged and where interference is established, the inquiry will turn to justification under paragraph 2. If refusal of disclosure has been made in accordance with an elaborate statutory scheme, such as the FOIA, the public authority will have no difficulty in establishing that the restriction has been prescribed by law; and the live argument will surround its necessity in a democratic society, in relation to which the line drawn by Parliament, if susceptible of coherent explanation, will command a substantial margin of appreciation in the ECtHR and considerable respect in the domestic courts. B C D E F

190 Irrespective of its precise contours, the right to require a public authority to disclose information under article 10 applies to Mr Kennedy's claim against the Commission. Mr Kennedy can tick all the boxes to which I have referred. I will spend no time before concluding that a blanket prohibition on his receipt of any of the information for 30 years would be disproportionate to any legitimate aim; and, but for the argument to which I must now turn, this court should proceed to consider whether, pursuant to section 3 of the 1998 Act, it is "possible" to read section 32(2) of the FOIA so as to escape any such blanket prohibition. G

191 I confess to some surprise at the solution to this appeal which the majority of the members of this court now devise. As Lord Mance JSC explains in para 6 above, their solution lies in interpreting the intention of Parliament in including the 30-year prohibition within section 32 of the FOIA as being not that the documents should necessarily be exempt from disclosure for 30 years but that their disclosure should be regulated, otherwise than under the FOIA, by the "different and more specific schemes H

A and mechanisms" which govern the operations of, and disclosure by, courts, arbitrators and persons conducting inquiries.

192 In relation to documents filed in, or created by, courts, or served in connection with proceedings in *courts*, there is no difficulty in subscribing to Lord Mance JSC's interpretation. In that, as I have explained in para 175 above, courts are not subject to the FOIA and naturally have their own B system for regulating disclosure of documents on their files, it is clearly undesirable that those seeking court documents of which copies happen to have come into the possession of public authorities should be entitled to require the latter to make disclosure under a different regime, namely the FOIA, which might prove less restrictive, or for that matter more restrictive, than it would be if made pursuant to a determination of the court. Hence subsection (1) of section 32 of the FOIA. But what was the Parliamentary C intention behind subsection (2)? How much thought can have gone into its conclusion that, in the words of the minister quoted by Lord Toulson JSC at para 120 above, "statutory inquiries have a status similar to courts" and therefore that information in inquiry documents should, by subsection (2), be swept into the exemption aptly made in subsection (1) in respect of information in court documents?

D **193** In searching for what are said to be the more specific schemes and mechanisms which govern disclosure by persons conducting inquiries (for in the present case we can ignore arbitrators), let me first address inquiries under the 2005 Act. In relation to them, there is no scheme, apart from the FOIA, which governs disclosure following the end of an inquiry. What governs their disclosure is the FOIA. In providing in section 18(3) of the 2005 Act that, when, following the end of an inquiry, the chairman passes E the documents to the minister who established it, the 30-year prohibition ceases to apply, Parliament was not recognising that the FOIA did not apply to disclosure of them. On the contrary, it was recognising that the FOIA did apply to them in every respect until that point and that, save in respect of the 30-year prohibition which beyond that point could not be justified, it should continue to apply to them. The analogous provision in section 20(6) of the F 2005 Act, namely that restrictions on disclosure imposed by the minister or the chairman prior to the end of the inquiry should not thereafter have effect, reflects the same thinking: namely that, in the abs;ence of justification for non-disclosure under the specific provisions of the FOIA, the documents then fell to be disclosed thereunder. So the regime for disclosure in respect of inquiries conducted under the 2005 Act entirely undermines the conclusion G that disclosure referable to inquiries is not to be governed by the FOIA; and of course the regime is precisely that for which Mr Kennedy contends in relation to inquiries conducted otherwise than under the 2005 Act. In para 33 above Lord Mance JSC responds that Parliament's perception in 2005 of a need to disapply the 30-year prohibition in relation to disclosure of documents following the end of inquiries conducted under the new Act sheds no light on its perception in 2000. But his observation raises two H linked questions. If Parliament had addressed the point in 2000, on what basis might its perception have been different? And, if in 2005 some other adequate scheme for disclosure was available, why did it perceive a need to disapply the prohibition and to cause disclosure to be governed by the other, specific provisions of the FOIA?

194 What, then, is suggested to be the more specific scheme and mechanism which governs disclosure by persons, such as the Commission, who conduct inquiries otherwise than under the 2005 Act? In respect of the Commission the scheme is said to lie within the 1993 Act, augmented by the common law. If so, one might expect to find it in section 8 of the 1993 Act, which defines the powers of the Commission in its conduct of inquiries and which does, at subsection (6), address a degree of publication in that regard. But it is only a report, or another statement of the results, of the inquiry which the subsection permits—or possibly obliges—the Commission to publish. The subsection does not address the disclosure of documents held by the Commission for the purpose of the inquiry. Section 10A provides for disclosure of a broader category of information by the Commission, which would no doubt include information obtained for the purposes of an inquiry; but that section provides for disclosure only to public authorities. The result is that there is no specific scheme for disclosure of such information to private citizens at all. The scheme is instead said to lie in the overall definitions of the Commission's objectives, functions and duties in sections 1B, 1C and 1D of the 1993 Act: in particular in its objective of increasing public confidence in charities (section 1B(3)1); in its general function of disseminating information in connection with the performance of its functions (section 1C(2)5); and in its duty to have regard to the need for transparency of regulatory activities in the performance of its functions: section 1D(2)(4).

195 It has never been suggested to Mr Kennedy, whether by the Commission itself in its initial responses to his request for information under the FOIA in 2007 or later through solicitors, that his request should be made otherwise than under the FOIA. On the contrary the stance of the Commission has been that the FOIA indeed governed his request and that its terms precluded accession to it. There did come a time, apparently in the Court of Appeal, when counsel for the Commission began to argue, as they have continued to argue in this court, that, when read with section 78 of the FOIA, sections IC and ID of the 1993 Act conferred a residual power on the Commission to disclose documents. But counsel have never accepted that the Commission was under any duty in this regard or that the circumstances of Mr Kennedy's request might be such as to attract exercise of the suggested power in his favour.

196 The majority of my colleagues in this court proceed to introduce the suggestion that the scheme for disclosure which they discern in sections 1C and 1D of the 1993 Act is underpinned by the common law principle of open justice which, in an eloquent judgment delivered when he was a member of the Court of Appeal, Lord Toulson JSC invoked in explaining why journalists were entitled to disclosure by a magistrates' court of witness statements and correspondence to which reference had been made at a hearing of applications for extradition orders: see *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* cited in para 47 above.

197 The result, according to the majority, is that, confronted with a request such as that of Mr Kennedy for disclosure of the material in the exercise of its functions and in the performance of its duties under sections 1C and 1D of the 1993 Act, the Commission has a duty to accede to it in the absence of persuasive countervailing considerations (Lord Mance JSC, at paras 49, 56); and that a refusal to disclose could be the subject of challenge

in the form of judicial review by a High Court judge, who should adjust the level of his scrutiny so as to accord with the principles of accountability and transparency contained in the 1993 Act: Lord Mance JSC, at para 55.

198 In my view the scheme identified by the majority for disclosure by the Commission outside the FOIA is profoundly unsatisfactory. With respect, it can scarcely be described as a scheme at all and there is certainly no example of its prior operation or other recognition of its existence. Compare it with the scheme under the FOIA which, apart from the apparent prohibition for 30 years, identifies an elaborate raft of prescribed situations in which the Commission is entitled, or subject to the weighing of rival interests may be entitled, to refuse disclosure; and under which a refusal can be countered by application to an expert, namely the Information Commissioner, who takes the decision for himself (section 50(1)) and whose decision can be challenged on points of law or even of fact by an expert tribunal (section 58(1)) and in effect without risk as to costs.

199 Although the majority of my colleagues reject Mr Kennedy's assertion that he has rights under article 10 which are engaged by his request for disclosure by the Commission, they proceed to suggest that his entitlement to disclosure otherwise than under the FOIA would be likely to be as extensive as any entitlement under article 10: Lord Mance JSC, paras 45, 50, 56, 92, 101(iv). The suggested scheme otherwise than under the FOIA is so vague and generalised that I regard the determination thereunder of any request for disclosure as impossible to predict. It may be that, in practice, the Commission and, on judicial review, the High Court judge would reach for the helpful prescriptions in the FOIA and, in effect, work in its shadow. But if, as I consider, Mr Kennedy's rights under article 10 are engaged by his request, I even have doubts whether any refusal to disclose a document otherwise than under the FOIA could be justified under paragraph 2 of the article. For restrictions on the exercise of his rights under article 10 must be "prescribed by law", which in the words of the ECtHR, "must . . . be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual—if need be with appropriate advice—to regulate his conduct": *Gillan and Quinton v United Kingdom* (2010) 50 EHRR 1105, para 76. It is possible that the so-called scheme for disclosure otherwise than under the FOIA might fail that test. Lord Mance JSC suggests at para 37 that, if that scheme failed the test, so would the scheme for disclosure of court documents at the direction of a judge: but the adequacy of a broadly discretionary power may be very different when exercised by a judge with no axe to grind rather than, albeit subject at any rate in theory to judicial review, by an executive authority requested to disclose documents which may justify criticism of it. Although on the majority's analysis of the reach of article 10 this problem does not arise, on my analysis it does arise. My doubts in this regard fortify my firm conclusion that, including in the interests of the Commission, it is important that, if possible, requests for disclosure of information obtained for the purposes of an inquiry should be determined under the FOIA, subject of course to the overarching requirement in paragraph 2 of the article that any refusal should be "necessary in a democratic society".

200 The problem is, of course, the absolute exemption from disclosure apparently cast over such information by section 32(2) until, at the expiry of 30 years, it becomes a historical record. I agree with Lord Mance JSC, for

the reasons which he gives at para 28 above, that the natural construction of the subsection is to that effect. The alternative construction is that the subsection governs only "information held . . . for the purposes of the inquiry" with the result that, once the inquiry has been concluded, the subsection no longer governs it. The alternative construction is wrong. But it is arguable. The Court of Appeal considered that, as a matter of grammar, the subsection was at least ambiguous and the alternative construction of it might even be preferable: Ward LJ [2012] 1 WLR 3524, para 21. In granting permission for the alternative construction to be argued in the present appeal, this court provisionally endorsed its arguability. In paras 223 to 233 below Lord Carnwath JSC stresses the muscularity of the power given to courts under section 3 of the 1998 Act to read primary legislation in a way which is compatible with rights under the ECHR. For the reasons which he there gives, I would read the subsection in accordance with the unnatural, alternative, construction with the result that, following the end of the Commission's inquiries, it had no effect and that, at long last, Mr Kennedy's request should begin to be appraised by reference to the application to the Commission's documents of the other, elaborate, provisions set out by Parliament in the FOIA.

201 So I would have allowed the appeal.

LORD CARNWATH JSC

Summary

202 In agreement with Lord Wilson JSC, I would allow the appeal. I would uphold the view of the Information Tribunal, supported by recent Strasbourg cases, that section 32(2) as interpreted by the Charity Commission involved a disproportionate interference with Mr Kennedy's rights under article 10; but that the section can and should be "read down" under section 3 of the Human Rights Act 1998 ("HRA") to avoid that effect. I shall comment also on the alternative "common law" or "open justice" approach, which, though now adopted by the majority, was unsupported by any of the parties before us, in my view for good reasons.

The course of the case

203 The case has had a tortuous history. It began with Mr Kennedy's request to the Charity Commission as long ago as 8 June 2007. It has arrived at the Supreme Court more than six years later, after detailed consideration by the Information Commissioner, the Information Tribunal (twice), the High Court, and the Court of Appeal (twice). During that time the parties have had to adapt their arguments to a frequently changing legal landscape. Important court decisions here and in Strasbourg have opened up new directions of thought or closed off others. These changes have continued up to and beyond the hearing in this court. After the close of the hearing, a new decision of the Strasbourg court (*Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v Austria*) has led to the need for further submissions to add to the voluminous bundles already before the court.

204 Against that difficult background, it is particularly important for us not to lose sight of what the case is about in terms of "merits". The public interest of the information sought by Mr Kennedy, and the legitimacy of his

A reasons as a journalist for seeking it, are not in dispute. Nor in my view has any convincing policy reason been put forward for a blanket exemption, as contended for by the Charity Commission. In the first Court of Appeal judgment (12 May 2011) [2012] 1 WLR 3524, para 47, Jacob LJ spoke of his reluctance to adopt the commission's construction which

> B "allows all information deployed in the inquiry to be kept secret for 30 years after the end of the inquiry, regardless of the contents of the information, the harmlessness of disclosure or even the positive public interest in disclosure."

Although like his colleagues he felt constrained by what he called "the identity of section 32(1) and section 32(2)", he commented, at para 48:

> C "Clearly and obviously Parliament was treating documents deployed in legal proceedings before a court in exactly the same way as those deployed in an inquiry. It simply overlooked that a court has machinery for the release of documents subsequent to (or indeed during) legal proceedings whereas an inquiry or arbitration does not. That may well have been a blunder which needs looking at."

D **205** At that stage the judgment had been restricted to interpretation of FOIA itself, and the arguments that had been advanced under article 10 of the Convention the court considered could not be decided on the material before it. The court took the very unusual step of remitting the case to the tribunal to report on the article 10 issue, more particularly whether section 32(2) should be read down under HRA section 3 "so that the exemption that it provides from disclosure of information ends on the E termination of the relevant statutory inquiry". The court accepted that the failure to take the point at the previous tribunal had been understandable, given that the judgments of the Strasbourg court on which Mr Coppel now relied (*Társaság a Szabadságjogokért v Hungary* (2009) 53 EHRR 130 and *Kenedi v Hungary* (2009) 27 BHRC 335) had been delivered only at or about the time of the tribunal hearing and not F reported until later. Further, the point was one of general public interest and the present case was an ideal one for it to be tested (per Ward LJ [2012] 1 WLR 3524, para 45).

206 By that time strong encouragement had been given in the Court of Appeal for the view that *Társaság* represented a significant change of direction in the Strasbourg jurisprudence. In *Independent News and Media Ltd v A* [2010] 1 WLR 2262, Lord Judge CJ noted that the decision G appeared to point the way to a wider scope for article 10, at least "where the media are involved and genuine public interest is raised": para 41. In *British Broadcasting Corpn v Sugar (No 2)* [2010] 1 WLR 2278 Moses LJ described the case as "a landmark decision on freedom *to* information" (his emphasis), showing that article 10 may be invoked "not only by those who seek to give information but also by those who seek to receive it": para 76.

H **207** That view of the recent Strasbourg case law was followed after full argument by the very experienced tribunal in its report to the Court of Appeal (fairly described by Etherton LJ [2012] 1 WLR 3524, para 26 as an "excellent, clear and comprehensive analysis"). It followed a two day hearing in October 2011, including both evidence and legal submissions. Echoing Jacob LJ they concluded that a construction of section 32(2), which

in effect allowed the state to prevent the disclosure of information for 30 years or more regardless of the nature of the information or the public interest in disclosure, amounted in the circumstances to an interference with Mr Kennedy's right to freedom of expression. That conclusion was reinforced by a detailed consideration of the classes of documents which were in issue, and the evidence they had heard on them: paras 47–54. They also held that such interference could not be justified under article 10.2. They accepted Mr Coppel's arguments that the Charity Commission's construction of section 32 produced "a paradigm of a disproportionate measure", which failed adequately to "balance the interests of society with those of individuals and groups"; that the interests of those affected were adequately protected by "the suite of exemptions in Part II of FOIA"; and that the public interest in disclosure of such information "clearly outweighs any interest in it being withheld" (paras 56–64), and that it was possible without "strained construction" to read the words of section 32(2) so that the exemption ends on the termination of the statutory inquiry: paras 71–72.

208 By the time that report had reached the Court of Appeal, it had been overtaken by the decision of this court in the *Sugar* case, handed down only a few days before the restored hearing. The Court of Appeal held that they were bound by that decision to conclude that article 10 had no application. It followed that the Convention issues on which the tribunal had been asked to report were no longer open to Mr Kennedy. It was unnecessary therefore for the Court of Appeal to consider the tribunal's conclusions on the merits of the case, assuming article 10 had applied. It is against that background that the appeal has come before this court on the issues of principle under FOIA and article 10, one issue being whether we should revisit the reasoning in the *Sugar* case in the light of later developments.

209 Notwithstanding the position forced on the Court of Appeal by the Supreme Court decision, the conclusions of the tribunal remain in my view of considerable importance to the present appeal. If we were to hold that the tribunal had been right in its conclusion that article 10 applied, its view that section 32(2) involved a disproportionate interference with that right under article 10.2 should carry great weight. In principle that was a matter of factual judgment for the expert tribunal, from which appeal to the courts lies only on grounds of illegality or irrationality. Subject to the legal issues now before us, we have heard no argument that the tribunal's conclusions on article 10.2 were not soundly based on the material before them. At the lowest they establish a strong prima facie case that, for the purposes of the Human Rights Act, the Charity Commission's approach involved a breach of Mr Kennedy's Convention rights.

The Human Rights Act 1998

210 The arguments about the scope of article 10 must be seen in their correct legal context. It is not our task to determine that issue authoritatively as a matter of Convention law. That is for the Strasbourg court. Our role is one of domestic law, as defined by the Human Rights Act. Under the Act "Convention rights", as defined by reference to articles of the

A Convention (section 1(1)), are to be given effect for certain specific purposes. They include:

(i) *Interpretation (section 3(1))*. Legislation must "so far as it is possible to do so" be "read and given effect" in a way compatible with Convention rights.

(ii) *Incompatibility (section 4)*. If a court is satisfied that a provision of
B primary legislation is incompatible with a Convention right it may make a declaration to that effect. Further action is then a matter for ministers and Parliament: section 10.

(iii) *Acts of public authorities (section 6(1))*. It is unlawful for a public authority to act in a way which is incompatible with a Convention right. If the court finds that a public authority has so acted, it has wide powers to provide an appropriate remedy: section 8.

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The relevance of the Strasbourg cases

211 In deciding the scope of Convention rights for these purposes we are not bound by Strasbourg decisions. Our duty is simply to "take (them) into account": section 2(1). The same duty applies to decisions of the former commission and of the committee of ministers. The Act does not distinguish
D for this purpose between decisions at different levels of the hierarchy. It is left to the domestic court to determine the weight to be given to any particular decision. How to do so, as Lord Mance JSC explains in para 60, has been discussed in a number of recent judgments of this court, most recently in *R (Sturnham) v Parole Board* [2013] 2 AC 254. Grand Chamber decisions, of course, generally carry greater weight, but so may a consistent
E sequence of decisions at section level, or decisions which show a clear "direction of travel".

212 There is a continuing debate as to what "taking account" means in practical terms. Under the so-called *Ullah* principle (in the words of Lord Bingham: *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, para 20): "The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less." That formulation does
F not purport to offer any guidance as to how to determine the position under the Strasbourg jurisprudence, where the particular issue before the domestic courts has not been the subject of direct decision. *Ullah* itself was such a case. It concerned the court's approach to a so-called "foreign case", that is one where it was claimed

> G "that the conduct of the state in removing a person from its territory (whether by expulsion or extradition) to another territory [would] lead to a violation of the person's Convention rights in that other territory" (per Lord Bingham, para 9).

In *Ullah* the right in question was article 9 (right to religion), which had not in that context been the subject of a decision of the Strasbourg court. But the House felt able to determine that question by reference to principles derived
H from decisions relating to other Convention rights. (See Erik Bjorge, "The Courts and the ECHR: A Principled Approach to the Strasbourg Jurisprudence" (2013) 72(2) CLJ 289, for a useful discussion of Lord Bingham's formulation in the context of the findings in the case, and of later statements by Lord Bingham, judicial and extra-judicial.)

213 In *R (Gentle) v Prime Minister* [2008] 1 AC 1356, paras 56–57, Baroness Hale of Richmond was guided by what she could "reasonably foresee" would be decided by the Strasbourg court. Similarly, in *Ambrose v Harris* [2011] 1 WLR 2435, para 88, Lord Dyson JSC looked for a "sufficiently clear indication in [the] Strasbourg jurisprudence of how the European court would resolve the question". There can, however, be no single working rule, since the nature of cases and the state of the relevant jurisprudence may vary greatly. In any event, the flexibility implied by the "taking into account" formula absolves the domestic court of the need to arrive at a definitive view of how the matter would be decided in Europe, where the current state of the jurisprudence makes that unrealistic. Other policy factors may also come into play.

214 In the present case we are faced with a novel state of affairs. Until the decision in *Társaság* (2009) 53 EHRR 130 there was an apparently settled position, confirmed by a series of Grand Chamber decision including *Leander v Sweden* (1987) 9 EHRR 433 and culminating in *Roche v United Kingdom* (2005) 42 EHRR 600, that article 10 imposed no positive obligation on the state to disclose information not otherwise available. That was hardly surprising. As Lord Mance JSC pointed out (para 98), article 10 is on its face drafted in narrower terms than the corresponding article 19 of the Universal Declaration, and other comparable provisions, which include a specific right to "seek" rather than merely "impart and receive" information.

215 Against that background *Társaság* at first sight represents an unexpected departure. It begins with a powerful affirmation of the importance of the rights of the press, but which is said to be based on the court's "consistent" practice:

> "26. The court has consistently recognised that the public has a right to receive information of general interest. Its case law in this field has been developed in relation to press freedom which serves to impart information and ideas on such matters . . . In this connection, the most careful scrutiny on the part of the court is called for *when the measures taken by the national authority are capable of discouraging the participation of the press, one of society's 'watchdogs', in the public debate on matters of legitimate public concern . . . even measures which merely make access to information more cumbersome.*
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> "27. In view of the interest protected by article 10, the law cannot allow arbitrary restrictions which may become a form of indirect censorship should the authorities create obstacles to the gathering of information. For example, the latter activity is an essential preparatory step in journalism and is an inherent, protected part of press freedom . . ." (emphasis added, citations omitted).

Having referred to the restrictive view of article 10 taken in earlier case such as *Leander v Sweden*, it continued:

> "Nevertheless, the court has recently advanced towards a broader interpretation of the notion of 'freedom to receive information'. . . and thereby towards the recognition of a right of access to information": para 35.

216 Depending on one's point of view, *Társaság* could have been seen as a "landmark decision", or as an aberration by a single Section of the court. In any event, it is difficult to see how on its own it could have led a domestic court, applying any of the tests outlined above, to adopt a different approach from that apparently established by the Grand Chamber decisions. By the time of this court's consideration of *Sugar*, notwithstanding a further decision to like effect of the same Section (*Kenedi*), the position in the view of the majority had not changed.

217 However, as explained by Lord Mance JSC, matters have now moved on. *Társaság* has been treated as authoritative in three further decisions, culminating in the very recent *Österreichische* case. Admittedly they remain decisions at Section level, which have not yet been reviewed by the Grand Chamber. But Mr Coppel can rely on them as indicating a general "direction of travel" away from a strict application of article 10, at least in cases involving journalists or other "watchdogs" seeking information of genuine public interest. He can also point to the fact that this line of approach has now been adopted by three Sections (First, Second and Fifth) involving more than 20 judges, including (in *Shapovalov*) the current President (Judge Spielmann). Headcounts can be misleading. But they appear to imply a substantial body of opinion within the court prepared to depart from the narrow principle apparently established by the Grand Chamber cases. I do not dissent from Lord Mance JSC's criticisms of some of the reasoning in these cases, but the general direction of travel, pending a contrary decision of the Grand Chamber, in my view is clear.

218 In these circumstances the domestic court has two options. It can either stand by the earlier Grand Chamber jurisprudence pending reconsideration at that level, or it can decide to follow the new approach indicated by the section decisions. In choosing between them it will bear in mind that the latter course will deprive the government itself of the chance of seeking to have the issue tested before the Grand Chamber, since the government has no separate right of petition in Strasbourg. In some cases this will be a good reason for taking the more conservative approach. However, it is not the only factor in play. Account must also be taken of the unfairness to the claimant and the interests he represents of denying or delaying an immediate domestic remedy to which he is apparently entitled under the most recent Strasbourg case law. In my view, the court may also take account of how far the new approach accords with recognised principles of domestic law. The government's wish to challenge a new direction of travel in the Grand Chamber carries less weight if that direction is one which has already been taken by domestic law.

219 In the present case, the balance in my view strongly favours the claimant. I respectfully agree with Lord Wilson JSC's analysis of the Strasbourg cases and the confident conclusions he draws from them. But even if I were not able to go so far, we can in my view "reasonably foresee" (in Baroness Hale's words [2008] AC 1356, paras 56–57) how the case would be decided in Strasbourg at least at Section level. It is enough for this purpose that the direction of travel of the recent cases gives clear support to the general approach of the First-tier Tribunal, and certainly that there is nothing in them to indicate that Strasbourg would adopt a narrower view. Further, no reason has been put forward for regarding that approach as involving any fundamental departure from domestic law principles. Indeed,

on the majority's view of the "open justice" principle, it is not a matter of "keeping pace" with Strasbourg; rather the reverse. Finally, given the importance of the case to Mr Kennedy and the public interest which he represents, it would be wrong to delay yet further the resolution of this issue to enable the case to move through the Strasbourg system, with no certainty as to whether or when it might find its way to the Grand Chamber. A

220 I therefore approach the other issues in the case on the basis that the decision of the First-tier Tribunal is in accordance with the relevant Strasbourg jurisprudence; and that there is therefore at least a strong prima facie case that, for the purposes of the Human Rights Act 1998, the Charity Commission's decision was in breach of Mr Kennedy's Convention rights. B

Construction of section 32 C

221 Can section 32 be construed so as to give effect to Mr Kennedy's article 10 rights, either (i) on ordinary principles of statutory construction or (ii) by "reading down" under HRA section 3? On (i) I have nothing to add to what Lord Mance JSC has said: paras 24–34. I agree with him, and with the Court of Appeal, that this ground of appeal must fail. On ordinary principles, having regard to the structure and context of section 32, subsections (1) and (2) must be read consistently with each other. D

222 Once section 3 is brought into play, Mr Coppel's case is more persuasive. He is right, in my view, to say that it is "possible" to read the exemption in section 32(2) itself as limited to the period of the inquiry, as indeed the tribunal held. Indeed, if one takes subsection (2) on its own, that is arguably the more natural reading. The use of the present tense appears to direct attention at the holding of documents in the custody of, or created by, the person conducting the inquiry, for that limited purpose, rather than for longer term retention once the purposes of the inquiry have ceased. That reading involves no undue violence to the wording of that subsection taken on its own. It is only when the subsection is read in the context of the section as a whole, and of its place in the legislative scheme, that conventional principles require a different view to be taken. But "possibility" is all that section 3 requires. E F

223 One suggested reason for rejecting Mr Coppel's submission is because of its effect on the relationship of section 32 with section 2. That section provides a general public interest exception to the rights of disclosure under section 1, save in the case of "absolute exemptions", in relation to which section 1 rights are excluded altogether. If section 32(2) is read down in the way proposed, it would remain a provision conferring an "absolute exemption", albeit severely limited in time, and therefore the public interest defence would have no application even after the exemption had ceased to apply. G

224 I am not convinced that this by itself is a sufficient answer under section 3. What is required is a "possible" construction. I accept that it must be "reasonably possible", so that the scheme of the legislation remains workable. But that does not necessarily require a construction which would achieve the most coherent legislative scheme, or indeed the one which the legislature intended. As the tribunal noted, section 3 is far reaching: see the valuable summary of the principles proposed by counsel in *Vodafone 2 v Revenue and Customs* [2010] Ch 77, paras 37–38. Furthermore there is no H

A reason to think that the absence of a public interest defence under section 2 would upset the balance of the statute. The tribunal was evidently satisfied that even apart from section 2 there were sufficient safeguards under the other more specific exemptions. The result would in my view be consistent with the fundamental features, or "the grain" of the legislative scheme: see *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, para 33, per Lord Nicholls of Birkenhead. As I said in *Thomas v Bridgend County Borough Council* [2012] QB 512, para 68, in relation to the operation of section 3 in the context of the Land Compensation Act 1973:

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> "The precise form of wording required to give effect to the claimants' rights is not critical: *Ghaidan v Godin-Mendoza* . . . para 35, per Lord Nicholls). The court is not required to redraft the statute with the precision of a parliamentary draftsman, nor to solve all the problems which it may create in other factual situations."

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225 The respondents have a more fundamental response to Mr Coppel's argument. Section 3 does not come into play unless the "legislation" requires adjustment to make it compatible with Convention rights. They rely on the words of Lord Woolf CJ in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48, para 75: "Unless the legislation would otherwise be in breach of the Convention section 3 can be ignored (so courts should always first ascertain whether, absent section 3, there would be any breach of the Convention)." In principle with respect that seems to me correct. There is no need to read down a single provision, if the legislation as a whole can be read and applied in a compatible way.

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226 In the present statutory context, they argue, there is no need to depart from the ordinary construction of section 32. It provides an absolute exemption only to the duty to disclose under FOIA, but it does not constrain any right to information under article 10. Assuming such a right is established, it gives rise to an independent duty enforceable under HRA section 6. FOIA section 78 in terms provides that nothing in the Act is to be taken as limiting "the powers of a public authority to disclose information held by it". Thus, in the absence of anything in the Charity Commission's own legislation which limits their power to comply with article 10, section 6 requires them to do so. They point to the commission's general functions which include "disseminating information in connection with the performance of any of [their] functions" (1993 Act section 1C); their regulatory activities must be "accountable" and "transparent" (section 1D), and they have a general power to do anything "calculated to facilitate" or "conducive or incidental to" the performance of their functions: section 1E. These general provisions, it is said, are amply sufficient to provide a legislative basis for compliance with any disclosure obligations imposed on them under the HRA.

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227 Mr Coppel's answer, as I understand it, is that general statutory powers of this kind cannot be relied on to supplant the detailed and restrictive legislative scheme of "information powers" conferred by Part II of the Act. This (by section 8) implicitly limits their power of disclosure in relation to inquiries to the making of reports under that section. He points by analogy to cases such as *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1, where it was held that the incidental powers conferred by section 111 of the Local Government Act 1972 could

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not be used to override a specific set of statutory provisions dealing with the same subject matter.

228 Mr Clayton, for the third intervener, submits that the respondent's approach is highly artificial, since there had never been any suggestion that an application under other powers would have been treated differently, and such an argument if accepted would severely limit the scope of HRA section 3. He makes the further point that, according to *Társaság* (see above), interference with article 10 may be established by measures which "merely make access to information more cumbersome". A solution which depends on enforcement through the ordinary courts is clearly "more cumbersome" than the simple, cost-free right to recourse to the Information Commissioner.

229 I have found this a difficult issue to resolve. Section 32(2) exempts the Charity Commission from duties of disclosure under FOIA, but does not exclude any obligations they may have had under other legislation. To the extent that refusal of information resulted in a breach of article 10, Mr Kennedy had his remedy by action under HRA section 6. This would not have been restricted to ordinary judicial review principles. The court would have had power to investigate the facts, to the same extent as the tribunal, and would have been able to adapt its ordinary procedures for that purpose: see *Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening)* [2011] 2 AC 104, para 28. On one view, there is no need to adapt section 32(2) when a comparable remedy was and is available to Mr Kennedy under other legislation.

230 I have come to the conclusion, however, that this is too narrow a view. It seems to me clear that the scheme established by FOIA was intended to be a comprehensive, albeit not necessarily exhaustive, legislative code governing duties of disclosure by the public authorities to which it applied. It is entitled: "An Act to make provision for the disclosure of information held by public authorities . . ." The preceding White Paper (*Your Right to Know: the Government's Proposals for a Freedom of Information Act* (Cm 3818) (1997)) stated that its purpose was to create "a general statutory right of access to official records and information" (para 1.2) and that it should have "very wide application" applying "across the public sector as a whole, at national, regional and local level": para 2.1.

231 Further it was designed to create "rights" for the public, enforceable by a simple, specialist and generally cost-free procedure, rather than simply discretionary powers enforceable by the ordinary courts only on conventional public law principles. In considering whether the "legislation" is compatible with the Convention rights for the purpose of section 3, we should direct attention to the legislative code as so established by the Act, rather than to powers or remedies which may be available from other legal sources. Furthermore, I agree with Mr Clayton that recourse to the courts, even given the flexibility allowed by the developing principles to which Lord Mance JSC refers, remains more cumbersome (and more costly) than the specialised procedures provided by the Act.

232 In so far as it is permissible to take policy considerations into account, I see advantage in an interpretation which allows such cases to be dealt with through the specialist bodies established by the Act, rather than the ordinary courts. I am impressed also by the lack of any apparent policy reason for extending the full exemption under section 32 to public inquiries

of this kind. Lord Toulson JSC (para 120) has quoted the statement made to Parliament by David Lock MP, Parliamentary Secretary: Hansard, Standing Committee B, 25 January 2000, cols 281–282. To my mind this provides no support for the majority's approach. The passage provides a readily understandable explanation of the exemption provided for court records, based on the separation of powers, and the acknowledged jurisdiction of the courts to determine what documents should be disclosed. But not so for statutory inquiries. The only explanation given is that they "have a status similar to courts, and their records are usually held by the Department that established the inquiry". The first part of that sentence begs the relevant question and the second involves a non-sequitur. It certainly gives no indication of what powers it was thought the courts would have to direct disclosure, or indeed how "separation of powers" comes into it. The minister's statement seems to me if anything to confirm Jacob LJ's view, at [2012] 1 WLR 3524, 3541, that no account had been taken of the lack of any formal machinery for the release of inquiry documents comparable to that of the courts.

233 Accordingly, I would decide this issue in favour of the claimant, and uphold the decision of the tribunal. It follows that, on the issues which have been argued before us, the appeal should succeed.

The "common law" alternative

234 On the basis of my conclusion on the points raised by the parties, the alternative approach becomes redundant. I approach it with caution, conscious that, because it is not before us for decision and was not supported by any of the parties, we have not had the advantage of full argument.

235 The foundation of this approach (and the stimulus for its introduction into the arguments before this court) lay in the judgments of the Court of Appeal in *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening)* [2013] QB 618, in which the exemption for court documents under FOIA section 32 was held not to preclude the court from permitting a non-party to have access to such documents if the court considered access appropriate under "the open justice principle": para 74.

236 I have no reason to doubt the authority of the *Guardian News* case itself as applied to the ordinary courts, with which it was concerned, although I would not wish to pre-judge any counter-arguments which may be raised in a future case in this court. (The Court of Appeal reversed the decision of a strong Divisional Court). The cases to which Toulson LJ referred were about courts. Although he treated the same principle as applying "broadly speaking . . . to all tribunals exercising the judicial power of the state" (para 70), he gave no authority for that extension. Even assuming that wider proposition is correct, the Charity Commission cannot in my view be said to be "exercising the judicial functions of the state". Indeed as Lord Toulson JSC points out, FOIA itself draws a distinction between tribunals or bodies "exercising judicial power of the state" and statutory inquiries (section 32(4)(a)(c)) Although he categorises the latter as involving a "quasi-judicial" function, he gives no further authority or explanation for the use of that somewhat imprecise and outmoded expression: see *Wade & Forsyth, Administrative Law*, 10th ed (2009),

pp 35, 407; *R v Commission for Racial Equality, Ex p Hillingdon London Borough Council* [1982] AC 779, 787 F–G, per Lord Diplock.

237 The Charity Commission is the creation of a modern statute, by which its functions and powers are precisely defined. As the heading to the relevant group of sections indicates, section 8 is part of the Charity Commission's "information powers", the primary purpose of which is to enable it to carry out its responsibilities for the supervision of charities. Its role is administrative, rather than judicial, albeit subject to ordinary public law principles of fairness and due process.

238 Furthermore, such authority as there is points against any general presumption that "open justice" principles applicable to the courts apply also to the various forms of statutory or non-statutory inquiry. The issues in an analogous context were discussed in detail by the Divisional Court in *R (Persey) v Secretary of State for the Environment, Food and Rural Affairs* [2003] QB 794. The court upheld the Secretary of State's decision that the inquiries into the 2001 outbreaks of foot and mouth disease should be held in private. Applying the approach of Sir Thomas Bingham MR in *Crampton v Secretary of State* (unreported) 9 July 1993; [1993] CA Transcript No 824, and distinguishing *R (Wagstaff) v Secretary of State for Health* [2001] 1 WLR 292, the court held that there was no legal presumption that such an inquiry should be held in public: see also *de Smith's Judicial Review*, 7th ed (2013), para 1-104. As Simon Brown LJ said [2003] QB 794, para 42: "Inquiries, in short, come in all shapes and sizes and it would be wrong to suppose that a single model—a full-scale public inquiry—should be seen as the invariable panacea for all ills."

239 The Charity Commission's powers similarly allow for inquiries "in all shapes and sizes"; they may be inquiries "with regard to charities or a particular charity or class of charities, either generally or for particular purposes": 1993 Act, section 8(1). The Act lays down no relevant requirements as to the form of the inquiries, or as to the involvement of the public. It has not been suggested that open justice principles require the inquiries themselves to be held in public, as would be the normal rule for courts.

240 Indeed this comparison, with respect, discloses a basic fallacy in the alternative approach. The foundation of the *Guardian News* decision lies in the strong constitutional principle that courts sit in public. It is no surprise that the starting point of Toulson LJ's judgment is a quotation from the great case *Scott v Scott* [1913] AC 417, in which that principle was set in stone. It is not a large step from that principle to hold that papers supplied to the judge for the purpose of an open hearing should in principle be made available to the public, absent good reasons to the contrary. For statutory inquiries, such as those conducted by the Charity Commission, there is no such underlying principle that they should sit in public. The essential foundation that is needed for application of the *Guardian News* approach is wholly absent. This is not to say that the courts might not in due course develop a more general principle of openness, applicable also to different forms of statutory inquiry. But that would involve a significant extension to the existing law—arguably a bolder leap into the unknown than the modest step we are being asked to take (after full argument) in relation to article 10.

241 In my view there is nothing in the *Guardian News* case, or any other existing authority to support the view that common law principles

A relating to disclosure of documents in the courts can be transferred directly to inquiries. It must depend on the statutory or other legal framework within which the particular inquiry is established. In the context of the Charities Act, the particular form of publicity envisaged by the Act is the publication of a report under section 8, but the commission is given a discretion as to its form.

B **242** As has been seen, I agree that the functions conferred by 1993 Act, sections 1B–1E, not only give the Charity Commission powers to provide information of the kind sought by Mr Kennedy, but also give effect to a general principle of "transparency". However, principles of transparency need to be balanced against other policy issues peculiarly within the competence of the commission, rather than the courts. For example, the commission was clearly entitled in my view (in their letter of 4 July 2007) to C give weight to the need to protect its relations with third parties on whose co-operation it relies. I find it difficult to accept the proposition that these general powers are comparable to "Mr Coppel's most expansive interpretation" of article 10. I see no fair comparison between the broad set of powers conferred by those sections, and the specific and enforceable "rights" conferred by FOIA or article 10.

D **243** Finally, I turn to Lord Mance JSC's discussion (para 51ff) of the principles which a judicial review court would apply to an application for disclosure of inquiry documents. It appears to be an important part of his reasoning that these could give a claimant in the position of Mr Kennedy remedies at least comparable to those available, on Mr Coppel's argument, under FOIA. On this topic, anything we say must be provisional, pending an appropriate application for judicial review coming before the courts. The E limits of the court's powers in such circumstances are best determined in the context of an actual case where the issue arises for decision after full argument. However, it is appropriate that I should make some comment.

244 First, it is important to be clear as to the nature of the alternative procedures which are under comparison. On the view I take of article 10 and HRA section 3, the applicant would have a right under FOIA to a two F stage process of independent, cost-free, specialist review of the Charity Commission's decision, on fact and law, first by the Information Commissioner, and then by the First-tier Tribunal: FOIA, sections 50, 58. If on the other hand I am wrong about the ability of the court to read down section 32, so that remedies under FOIA are excluded, Mr Kennedy's article 10 rights could be asserted in court by an application for judicial review under the HRA. Under the HRA, as I have said, the claimant would G have a right to full merits review by the court, again on fact and law. The court's function in such a case is to decide for itself whether the decision was in accordance with Convention rights; it is not a purely reviewing function: see *Huang v Secretary of State for Home Department* [2007] 2 AC 167, para 11, per Lord Bingham. Such proceedings for judicial review would incidentally provide an opportunity to test the scope of any related common law rights.

H **245** By contrast, under the alternative "common law" approach, which eschews reliance on article 10, the applicant would be entitled only to judicial review on conventional administrative law principles, subject to the ordinary incidents as respects fees and costs. As Lord Mance JSC points out, there is authority for a closer or more "intense" form of review (or "anxious

scrutiny") in some contexts, particularly where fundamental human rights (such as the right to life) or constitutional principles are at stake. However, even in cases to which it applies, as appears from the words of Lord Phillips MR (*R (Q) v Secretary of State for the Home Department* [2004] QB 36, para 112) cited by Lord Mance JSC (para 52), the role of the courts is often more about process than merits.

246 Lord Mance JSC also quotes my own discussion of the developing principles as I saw them in 2004, in *IBA Healthcare Ltd v Office of Fair Trading* [2004] ICR 1364, para 88ff. Ten years on that statement holds good in my view, but the jurisprudential basis for the more flexible approach, and its practical consequences in different legal and factual contexts, remain uncertain and open to debate: see *de Smith*, paras 11-086ff and the many authorities and academic texts there cited. In particular, it is at best uncertain to what extent the proportionality test, which is an essential feature of article 10.2 as interpreted by the Strasbourg court, has become part of domestic public law: see *de Smith*, paras 11-073ff.

247 For the moment, and pending more detailed argument in a case where the issue arises directly for decision, I remain unpersuaded that domestic judicial review, even adopting the most flexible view of the developing jurisprudence, can achieve the same practical effect in a case such as the present as full merits review under FOIA or the HRA.

248 In conclusion, for the reasons stated above, and in respectful disagreement with the majority, I would have allowed the appeal.

Appeal dismissed.

Diana Procter, Barrister

Neutral Citation Number: [2014] EWHC 1475 (Admin)

Case No: CO/4089/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/05/2014

Before :

MR JUSTICE GREEN

- -

Between :

R (on the application of Privacy International)	**Claimant**
- and -	
The Commissioner for HM Revenue & Customs	**Defendant**

- -
- -

Mr Dan Squires and Mr Edward Craven (instructed by **Bhatt Murphy**) for the **Claimant**
Mr George Peretz (instructed by **General Counsel to HM Revenue and Customs**) for the **Defendant**

Hearing dates: 18th and 19th March 2014

- -

Approved Judgment

Mr Justice Green :

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A. Introduction and issue

1. The issue in this case concerns the powers and duties of Her Majesty's Revenue and Customs (hereafter "HMRC") to disclose information about its export control functions to an NGO called Privacy International. That organisation has complained about the conduct of a UK company whom it is alleged has supplied "malware" to repressive regimes (*inter alia* in Bahrain and Ethiopia) which has then been used for the covert surveillance of political activists. HMRC, in a decision taken on 9th January 2012 (the "Decision letter"), stated that it had no power to provide information about its investigations to Privacy International or to any third person, including victims of foreign regimes who used the company's products for surveillance purposes. The issue arising is whether HMRC is correct to say that it has no power or duty to provide information and as to the correctness of the specific explanations it has (subsequently) given justifying that position. An important sub-issue is whether HMRC is required to inform a complainant of the decision it takes as to whether to prosecute or take no further action in respect of a complaint, bearing in mind that in principle decisions not to prosecute may be challenged by way of judicial review and that absent a communication of the decision taken and the reasons therefor a complainant will not know whether a decision has even been taken and will thereby be precluded from seeking to challenge that decision. The principal statute of relevance to this case is the Commissioners of Revenue and Customs Act 2005 ("CRCA 2005").

2. The Claimant, Privacy International, was founded in 1990. It is a UK non-governmental organisation dedicated to investigation in relation to privacy at the international level. In particular it focuses upon tackling what it perceives to be the unlawful use of surveillance. Upon occasion it gives expert evidence to parliamentary and governmental committees around the world on privacy issues. It has advised and reported to, *inter alia*, the Council of Europe, the European Parliament, the Organisation of Economic Cooperation and Development, and the United Nations. In this case it has applied for judicial review on its own behalf but also as, in effect, the champion of the interests of two political activists whom, it is submitted, were the victims of unlawful and criminal surveillance by the security forces of Bahrain and Ethiopia. The Claimant submitted that the equipment used in Bahrain and in Ethiopia by security forces was supplied illegally to those states by Gamma International in breach of export regulations applicable to that company in the United Kingdom. Privacy International submitted complaints not only of a general nature about Gamma International but also specifically in relation to the two activists that I have referred to. In order to explain fully the context to this case it is necessary to set out in some detail the position of these two activists, which I do at section C below.

3. The Defendant, HMRC, has the statutory duty to enforce the relevant export controls to the types of surveillance products which it is alleged were used against the two activists. The Claimant seeks to quash the Decision letter upon the basis that it reflects a serious misdirection of law since it is plain that in law HMRC has a power to disclose information including about ongoing investigations. Further, it is submitted that when the reasons now (belatedly) relied upon to justify the Decision are analysed they reveal not only an error of law about the very existence of a power permitting the provision of information but also a series of subsidiary errors relating to the relevance

of the criteria which should govern the exercise of the statutory discretion which the Claimant submits manifestly exists.

4. It is only fair to record that in their written and oral submissions in the course of the litigation HMRC has adopted a far more constructive approach than is evident from the Decision letter and from other correspondence arising in this case. HMRC accepts that the Decision letter was badly drafted and might not fully reflect HMRC's true position. HMRC accepts that it does have a power to provide information. In the course of the hearing Mr George Peretz, who appeared for the Defendant, also clarified HMRC's position in a way which narrowed the legal gap between the parties as to the relevance of the different criteria that might need to be evaluated in a given case. Nonetheless, important and significant differences remain arising on the facts of this case. Those differences relate also to the scope and effect of the judgment of the Supreme Court in *Kennedy v Charity Commission* [2014] UKSC 20 ("*Kennedy*") which was handed down during the course of this judicial review and which is also concerned with the principles governing the disclosure of information by public authorities.

5. Before setting out the facts relating to this application in detail it is necessary at the outset to record an important warning in relation to those facts. I have not heard from Gamma International, the company whose products are at the heart of the complaints made by the Claimant and whose conduct is alleged to amount to a criminal offence. Gamma International was not served as an Interested Party and has not therefore served evidence or made submissions whether in writing or orally. For the avoidance of doubt, therefore, nothing I say in this judgment is to be taken as reflecting any view whatsoever on my part as to the merits of the complaints lodged by the Claimant or those upon whose behalf it acts.

B. Relevant facts

(1) The initial complaint by Privacy International to BIS

6. On 12th July 2012 solicitors acting for Privacy International sent a pre-action protocol letter to the Secretary of State for Business, Innovation and Skills ("BIS") in relation to an alleged lack of progress in the implementation within the UK of export controls for surveillance equipment. At this point in time Privacy International was acting for itself and not on behalf of any natural person claiming to have been prejudiced by products manufactured and/or supplied by Gamma International. In its letter before claim it summarised the present UK legal position in relation to the Export Control Act 2002 (hereafter "ECA 2002") and the Export Control Order 2008 (hereafter "ECO 2008") which lay down a regime of control for military or specified "dual use" items. The letter proceeded to express concerns about a number of UK companies and their exports. It gave details about the activities of Gamma International which, it said, should be taken as illustrative of a wide scale problem and indicative of the need for the UK to take urgent action. It referred, in particular, to the "FinFisher" range of products which were marketed by Gamma International through promotional videos which had now fallen into the public domain following release by Wikileaks.

7. In relation to the FinFisher products the letter stated as follows:

> "Most of the FinFisher products covertly install malicious software (malware) on a user's computer or mobile phone without their knowledge by tricking the user into downloading fake updates from what appear to be legitimate sources such as Blackberry, iTunes or Adobe Flash. Once the updates are accepted by the user, the computer or mobile phone device is infected allowing full access to information held on it. One product, FinFly LAN, is marketed for use for surveillance of individuals staying in hotels. You will no doubt be aware that an Intelligence Note of 8 May 2012 prepared by the Internet Crime Centre (IC3) has indicated that:
>
> > "(r)ecent analysis by the FBI and other government agencies demonstrates that malicious actors are targeting travellers abroad through pop up windows while establishing an internet connection in their hotel room."
>
> One of the products, FinFly ISP, involves a server being inserted in the core internet network of an internet provider to facilitate "infection" of specific target personal computers. A similar product FinSpy Mobile, works in a similar way to infect mobile phones.
>
> The promotional video with images and text shows:
>
> • a simulation of an agent deploying "the FinFly ISP server into the Core Network"
>
> • "FinFly ISP [analysing] traffic for easy Target Identification"
>
> • "The Target [using] his private DSL or Dial-Up Account"
>
> • FinFly ISP [sending] a fake iTunes update to the Target System
>
> • That "the Target System is now infected with the FinSpy software"
>
> • That "the Headquarters has full access to the Target System"
>
> When an individual's device is "infected", it allows access to emails, social media messaging and Skype calls. These products also enable the entity doing the targeting to commandeer and remotely operate microphones and cameras on computers and mobile phones, thus effectively turning the targeted device into a bug which the target individual willingly and unknowingly keeps in close proximity".

8. The pre-action protocol letter went on to express concerns about the use of Gamma International products in Egypt and Turkmenistan. It then complained that

notwithstanding the grave consequences of this equipment being exported it appeared that the Secretary of State had not considered exercising relevant statutory powers to impose export controls under the relevant statutory provisions. Insofar as the Secretary of State had failed to consider exercising such powers it was submitted that this was unlawful. Under the heading "Actions now to be taken" the letter sought confirmation that the Secretary of State would immediately be imposing export controls in relation to surveillance equipment but that if such conduct was not forthcoming then reasons should be provided as to why no controls were to be put in place. In addition, the letter sought pre-action disclosure of a range of minutes of meetings, correspondence discussion papers of a general nature relating to the export of surveillance technologies and "*all minutes of meetings/correspondence with Gamma [International]*".

(2) The BIS response

9. On 8th August 2012 TSol replied on behalf of BIS. A general description of the regulatory regime in relation to the export of military and dual-use technologies was provided. Further, a description of the powers of the Secretary of State under the ECA 2002 was set out. At paragraph 13 the following was stated in relation to the position of Gamma International under the relevant export regulations:

> "13. The Secretary of State, having carried out an assessment of the FinSpy system to which your letter specifically refers, has advised Gamma International that the system does require a licence to export to all destinations outside the EU under category 5, Part 2 ("Information Security") of Annex 1 to the Dual-Use Regulation. This is because it is designed to use controlled cryptography and therefore falls within the scope of Annex 1 to the Dual-Use Regulation. The Secretary of State also understands that other products in the FinFisher portfolio could be controlled for export in the same way. Furthermore, it is likely that the same products would fall within the scope of the enhanced restrictions set out in the Syria Regulation and Iran Regulation if not already controlled under the Dual-Use Regulation as explained above, being "Remote infection equipment" specified in Part A of Annex V and Annex IV of the Syria and Iran Regulations respectively. Accordingly, insofar as you maintain that all of the surveillance equipment to which you refer is not the subject of export controls in the United Kingdom, the Secretary of State does not consider that to be correct".

10. Generally, the letter stated that in the light of matters brought to the attention of the Secretary of State he proposed to continue to engage with United Kingdom companies supplying surveillance equipment in order to clarify what equipment fell within the scope of existing controls and exports and in order to ensure that he remained informed as to the state of the relevant market. The letter reiterated the Secretary of State had already concluded that the FinSpy product was subject to export control under the provisions of the dual-use Regulation. With particular regard to the possibility of the United Kingdom adopting unilateral measures it was stated that the Secretary of State was actively considering the possibility of international and/or EU

level agreement to further restrictions upon the export of surveillance equipment and that the view of the Secretary of State was that "…*this is by some measure the better option, if regulation is required"*. The letter finally confirmed that the request was being treated as a Freedom of Information Request and that a response would shortly be provided in this regard.

11. On 9th August 2012 solicitors acting for the Claimant responded to the Treasury Solicitors. The letter noted that the Secretary of State had concluded that Gamma International systems required a licence. It then went on to pose a series of eight particular questions upon which it invited clarification.

12. On 11th September 2012 Mr Tom Smith, Head of the Export Control Organisation at the Department for Business Innovation and Skills, responded in relation to the eight questions. For present purposes it suffices to record the answers to the questions which essentially focused upon seeking further information about the Secretary of State's prior conclusion that products supplied by Gamma International fell within the purview of the export regulation regime. Mr Smith thus confirmed that Gamma International had submitted an enquiry in relation to whether certain of its goods or technology fell within any of the controlled lists in June 2012 and advice had been provided by the Export Control Organisation on 2nd August 2012. Mr Smith also confirmed that there had been no prior requests for advice on the part of Gamma International from the organisation. He explained that enforcement of export controls was the responsibility of HMRC and that BIS did not comment upon enforcement issues. He explained further that BIS did not issue licences retrospectively and in this regard stated:

> "Other than in the case of certain Open General Export Licences, where an exporter may register for use of the licence up to 30 days after the first export under that licence, an exporter must have an appropriate licence in place prior to the export of the goods. However, none of these Open General Export Licences would be appropriate for exports of the FinSpy system".

Mr Smith proceeded to confirm that Gamma International had not sought any such licences. He then stated:

> "In addition, if you or your client holds specific information on breaches of export controls by UK nationals or companies we would strongly encourage to report this information to the Customs Confidential Helpline…so that the appropriate action can be taken".

Finally, he confirmed that BIS did hold information relating to substantive discussions with Gamma International as part of the export licensing process but that pursuant to section 41(1) of the Freedom of Information Act it was exempt from disclosure because it was provided to the Department in confidence and that release would constitute a breach of confidence actionable in court. Mr Smith explained that in arriving at this conclusion he had taken into account whether disclosure of the information should be released in the public interest.

(3) The Privacy International complaint to HMRC

13. On 9th November 2012 the Claimant wrote to HMRC. The cover letter was in a form not dissimilar to that submitted previously to BIS. However, upon this occasion the Claimant focused its attention upon Gamma International and submitted a dossier of material in relation to the products of Gamma International. The opening substantive paragraph of the letter stated:

> "We write to you at the suggestion of BIS in relation to our concerns about exports by a UK company, Gamma International, of surveillance equipment in the "FinFisher/FinSpy" range to repressive regimes around the world. We believe that this equipment is being used by oppressive governments for a wide range of human rights abuses. These include not only serious breaches of the right to privacy, but also breaches of the right to free association and free expression. At the most serious end of the spectrum, we believe that Gamma's technologies are being used to gather information on individuals who are then arrested, tortured and, in some cases, executed".

14. In addition to concerns which had hitherto been expressed to BIS about the use of Gamma International products in Egypt and Turkmenistan, the Claimant now included information in relation to the use of such products in Bahrain and Ethiopia. The letter ended with a request to HMRC to revert back, within the next 14 days, outlining whether any investigation had been conducted into potential breaches of licence requirements and if so what the result of that investigation was. Further insofar as no investigation had been conducted to date there was a request that HMRC indicate the action that it would now be taking in this regard.

15. No immediate response to that letter was received. This prompted a chaser on the 21st December 2012. In this letter the Claimant referred to the fact that it had been contacted by an activist in Bahrain whom, it was submitted, had been subjected to surveillance by the Bahraini authorities. The Claimant explained that Dr Ala'a Shehabi was a British-born resident of Bahrain and a democracy advocate and economist who had received emails found to have contained FinFisher malware whilst in Manama, the capital of Bahrain. The letter explained Dr Shehabi considered that the Bahraini Government had sought to invade her privacy and to interfere with the pro-democracy and human rights work that she was undertaking. Dr Shehabi had asked the Claimant to act on her behalf in requesting a progress report and in making a request for information about HMRC's investigation. In particular the Claimant now asked for the following specific information:

> "We would suggest that HMRC follows the principles set out in the Code of Practice for Victims of Crime. We would therefore be grateful if you could confirm whether there will be any investigation into unlicensed exports by Gamma and, if not, the reasons for this. If there is an imminent or ongoing investigation, we would also be grateful for a progress report now and on at least a monthly basis thereafter. We would also be grateful for your confirmation that we will be informed if

> any person(s) are arrested, charged or summonsed, or a decision is taken that no further action will be taken and, if the latter, the reasons for this.
>
> As you will no doubt appreciate, when victims and those with a legitimate interest in the investigation of a crime receive little or no communication of the progress of an investigation, it can be a great source of distress, disappointment and frustration. Lack of information can also make those who report crime think that their case is being neglected or not being taken seriously. (See the research report by Victim Support "Left in the dark. Why victims of crime need to be kept informed"). We are sure that this is not the impression that HMRC would want to give, and we therefore look forward to a substantive response within the next 14 days"

(5) The HMRC responses

16. I turn now to consider the response of HMRC. This is set out in a series of letters between January and March 2013. For the purpose of this judgment I am treating the first in time letter from Mr Inglese dated 9th January 2013 as the Decision letter. However, there are two other responses from HMRC of direct relevance both emanating from a Mr Stuart Armstrong dated 10th January 2013 and 8th March 2013 respectively. He was the Assistant Director and Head of Customs Enforcement Policy and it was his unit within HMRC that was responsible for processing the Privacy International complaint. The position of HMRC cannot be understood save by referring to each of these letters. Finally, during the hearing Mr Peretz orally provided an update as to HMRC's position which he later reduced to writing and I have set this out in full below at paragraph [27].

(a) The Decision letter

17. I start with the Decision letter of 9th January 2013 signed by Mr Anthony Inglese CB, General Counsel and Solicitor HMRC. It is necessary not only to set out the relevant parts of this letter but also to explain how it came about. The two operative parts of the letter contain the following:

> "As you may be aware, section 18 of the Commissioners for Revenue and Customs Act 2005 imposes strict controls on the disclosure of information held by HMRC. Indeed, the starting point of this legislation is that without specific legal authority officials of HMRC may not disclose any information held by HMRC in connection with its functions (which of course include enforcement of export controls) and it is a criminal offence to reveal any information from which persons (including legal persons such as companies) might be identified. Consequently HMRC cannot comment on individual cases, and in particular we will be unable to keep you or other third parties informed of the progress of any investigations.

> However, I can say where HMRC receives information concerning possible export licence issues we consider the facts and take appropriate action. HMRC has policy responsibility for enforcing export controls and sanctions. We work in conjunction with the UK Border Agency to detect and investigate attempted or actual breaches of sanctions. Both HMRC and UKBA treat export controls and sanctions as a high priority for enforcement. We are therefore grateful to you for bringing these matters to our attention and providing us with relevant information".

18. On its face this letter suggests that the legislation governing disclosure is strict. The author takes as his "*starting point*" that without specific legal authority HMRC officials may not disclose "*any*" information held by HMRC in connection with its functions. The letter then proceeds immediately to the conclusion that HMRC could not provide any information to the Claimant. The tenor of the letter is, in my view, clearly that there are no exceptions which could *de facto* or *de jure,* apply to authorise HMRC to disclose information. This arises from the following considerations. First, the use of the word "*Consequently*" in the quotation above indicates that the author moved from an analysis of the strict legal position to the end result, namely that as a result of the strict position HMRC could not comment on individual cases and would be unable to keep the complainant informed of the progress of the investigation. The author moved from the starting point to the end conclusion without any analysis of the intermediary position whereby exceptions to the strict position are acknowledged. Secondly, the letter is drafted in generic terms articulating what, on the face of the text, appear to be broad statements of principle. Thus the author states "HMRC cannot comment on individual cases". Further it states that HMRC is unable to inform it or other third parties "of the progress of any investigations". The use of the phrase "on individual cases" and "any investigations" is a reference to the generality of the work conducted by HMRC, and not the particular facts of the present case. Thirdly, and consistent with the second point, there is no analysis of the facts of the present case and how they interrelate with section 18(2) CRCA 2005 (as to which see section D below).

(b) The subsequent explanation of the reasons for the Decision letter

19. Bearing this in mind it is now necessary to set out the context in which the letter came about. This is described in the first Witness Statement of Mr Stuart Hathaway. He is a lawyer in the Criminal and Information Law team of the Solicitors' Office of HMRC. In his statement he explained that he first became aware of the letter from the Claimant on 2 January 2013. The allegations concerning Gamma International were not something that the Solicitors' Office had previously been aware of. He made enquiries to determine whether the policy or operational teams within HMRC were aware of the allegations and was informed that the Strategic Export Referrals Team ("SERT" – led by Mr Armstrong) had received information from the Claimant about these allegations. Mr Hathaway confirmed, however, that no response had been sent to the Claimant by any other unit within HMRC so he drafted an initial response. This was put before Mr Inglese upon his return to the office from leave, and he approved and signed the letter, which was sent on 9 January 2013. In paragraph 17 of his statement Mr Hathaway stated as follows:

> "I should note that at that stage I had not been able to make contact with the investigatory team and discuss the matter with them. In the interest of making a prompt reply (the letter asked for a substantive reply within 14 days: I was conscious that it was already nearly three weeks since the letter had been sent and more than a week and a half since it had been received in our office) I thought it was not sensible to delay any longer before making a reply".

Mr Hathaway also explained that in drafting the response he took account of the relevant law applicable to disclosure in sections 18 and 19 CRCA 2005. He states that although he was well aware of the HMRC policy as set out in relevant Information Disclosure Guidance ("IDG") he did not need to refer to that guidance because he considered that the legal position was "clear" and his own legal analysis consistent with that contained within the IDG. In his statement he addressed the facts and matters that he says he took into account in relation to the three categories of information sought by the Claimant in its chaser letter of 21st December 2012.

20. The first piece of information sought by the Claimant was a confirmation whether there would be any investigation into unlicensed exports by Gamma International. In his statement Mr Hathaway simply records that the reply from Mr Inglese was that "I am able to confirm that the matters you raise are already under active review". This is not, strictly speaking, an answer to the request since a matter may be under "review" in order to determine whether there should be any investigation at all and, as was confirmed during the hearing and is routine with all regulatory agencies, an initial filter or review of a complaint is invariable and necessary to sort out those complaints that might warrant serious consideration from those which may be frivolous or vexatious. The answer does not, therefore, indicate whether there is or is not a formal investigation. In this regard Mr Hathaway also states that at that point in time, as I set out below, Mr Stuart Armstrong, the Head of Policy for SERC, was on the point of replying and did so on 10th January.

21. The second category or item of request sought by the Claimant was: "if there is an imminent or ongoing investigation, we would also be grateful for a progress report now and on at least a monthly basis thereafter". Mr Hathaway recites the content of the letter from Mr Inglese and then proceeds to set out the basis upon which he arrived at the negative conclusion. I set out below paragraphs 10-15 of the Witness Statement:

> "10. In drafting this reply I took account of the following. I considered that I could not advise HMRC that such disclosure would be for the benefit of a function of HMRC as a disclosure in reliance on section 18(2)(a) (or article 43(2) of the Export Control Order 2008) requires. It did not seem to me that, having regard to the functions of HMRC as set out in the CRCA and other enactments, disclosure for the purpose of keeping a complainant or alleged victim of an infringement informed of the progress of an investigation would fall within that section.

> 11. Nor could I see any possibility that disclosure would in this context assist any criminal investigation by HMRC into alleged breaches of export controls such that the ability to disclose under s.18(2)(d) would arise.
>
> 12. Indeed, as far as I could see, the risk was rather that disclosure would harm the investigation. If HMRC disclosed the information it would lose control of it, since there is no restriction on onwards disclosure of information disclosed under section 18(2)(d). PI presumably wished to be able to complain if in its opinion HMRC was not pursuing the matter with sufficient vigour – indeed, it seemed to me likely that, for reasons that are entirely legitimate, they had a mainly political campaigning motive for wishing to be kept informed of what was happening (a reason which could not in my view provide a basis for disclosure) – and I foresaw a risk that the material would not be confined to PI and Dr Shehabi.
>
> 13. That would in turn give rise to the following risks – first, that publicity would mean that potential suspects would be forewarned which might damage the investigation; second, that the suspects would be damaged, both personally and in their legitimate business activities, by making public the fact that they were suspected of criminal activity if in the event the investigation did not lead to anything.
>
> 14. That second consideration brings me on to a further issue which also in my view militated against disclosure could have been said to be for the purposes of a function of HMRC or of a criminal investigation. PI had referred to a specific company. Companies act through their directors and senior managers. To provide PI with regular updates of the investigation (e.g. "This month we have interviewed the directors of the company") would inevitably involve disclosure of information regarding not only an identified corporate person but also individuals who in all probability PI would also be able to identify (since directors of companies are a matter of public record, and I suspected that PI already knew who they were). Information regarding the alleged commission of an offence by an individual is 'sensitive personal data' for the purposes of the Data Protection Act 1998 and its processing (including disclosure to others) must be properly justified in order to be fair processing.
>
> 15. It will be appreciated that the 9 January letter is not claiming that there is an absolute bar on disclosure by virtue of s.18. Manifestly that is not what the section says, since it creates a whole series of exceptions under which disclosures may be made".

22. The Witness Statement sets out a series of essentially generic considerations:

i. The second sentence of paragraph 10 is a statement that the purpose of keeping a complainant or alleged victim of an infringement informed of the progress of an investigation did not fall within section 18(2)(a).

ii. The second sentence of paragraph 12 is couched in generic terms since disclosure of information by HMRC, in all cases, entails the HMRC losing "control" of that information since there is no restriction on onward disclosure of information under section 18(2)(d). As such this would be a justification, if it were valid, for never disclosing information to anyone, about anything.

iii. The third sentence of paragraph 12 operates upon a presumption that the Claimant wished to receive information for motives of political campaigning which, in Mr Hathaway's view, could not provide the basis for disclosure.

iv. In paragraph 13 Mr Hathaway refers to the risk that potential suspects would be forewarned which could damage an investigation. This is a generic consideration and is in no way said to be relevant to the position of Gamma International. Once again it is a possibility that could arise in any investigation and would also be a justification, if it were valid, for never disclosing information to anyone, about anything. It is notable that no mention is made here of the fact that it is evident from information provided by BIS that Gamma International was *already* in discussion with BIS (and quite possibly HMRC) and nothing that the Claimant could do would forewarn Gamma International of the legal issues which they were then addressing.

v. The same applies to the other point raised in paragraph 13 namely that the suspects would be damaged personally and in the context of their legitimate business interests in the event that the investigation did not lead to anything. This is a generic consideration that, were it to be valid, would apply in all cases.

vi. Paragraph 14 focuses upon the fact that the Claimant's request concerned a "specific company" which worked through individual directors. The reason given by Mr Hathaway for rejecting this request is yet again generic, namely that to answer the request HMRC would have to divulge information about individual directors or individuals which constituted "sensitive personal data for the purposes of the Data Protection Act 1998 and its processes". As to this Mr Hathaway simply says that any such disclosure must be "properly justified". But he does not go on then to assess whether on the facts of this case it would be justified.

23. In relation to the third item of information requested this concerned information about: (a) arrest; (b) charge; (c) summons; or (d) no further action decisions and the reasons therefor. In relation to this Mr Hathaway states that he is "conscious" that the reply did not deal fully with this aspect of the request. In fact in his statement he deals only with the issue of arrest as to which he states:

> "I am conscious that the reply may not have fully dealt with this aspect of the request. Certainly, for the same reasons as are set out in relation to request (b), I did not see a proper reason for promising at that stage to confirm in relation to this particular investigation that any persons had been arrested.

> Where HMRC has done this in the past, it has been so that publicity may be given to a widespread current general problem e.g. smuggling by aircrew, with a view to deterring such smuggling and encouraging public vigilance. There was at this stage no reason to think that breaches of export licensing requirements were rife, or any other reason why I could confidently predict that disclosure of any arrest would be for the purposes of an investigation or for the purposes of a function of HMRC. It therefore seemed to me to be wrong to give the commitment that HMRC were being asked to give at that stage (though of course I was not in any way ruling out the possibility that, were any arrest made, the view would at that later stage properly be taken that disclosure of that fact would serve a function of HMRC or assist the investigation".

Mr Hathaway acknowledges that he did not deal with the question of charge, summons or no further action decisions or the reasons therefor. No explanation for this omission is given. With regard to the question of arrest the suggestion that a different decision might be taken at a future point in time is oddly inconsistent with the third sentence of paragraph 10 which states in broad and sweeping terms that keeping complainants or alleged victims of an infringement informed of the progress in an investigation did not fall within section 18(2)(a) or the CRCA 2005 generally. It is also inconsistent with the Decision letter and the letter from Mr Armstrong which makes clear that HMRC would not provide updates to the Claimant.

(c) The letters from the HMRC Strategic Export Referrals Team (SERT)

24. On 10th January 2013, the day following the Decision letter, HMRC sent a further letter signed by Mr Stuart Armstrong, Assistant Director, Head of Customs Enforcement Policy. He is responsible for the Strategic Export Referral Team referred to by Mr Hathaway. This letter was addressed to the Claimant and was headed "Gamma International – Unlicensed exports of surveillance equipment". It is in the following terms:

> "I acknowledge receipt of your letter dated 9 November 2012 regarding the alleged unlicensed export of surveillance equipment by Gamma International to repressive regimes around the world. Your letter and enclosures have been forwarded to me for a response as I am the Head of Policy Strategic Export Controls.
>
> As with all information received regarding alleged strategic export control breaches, this will be assessed by our Criminal Investigators for consideration of further action.
>
> I can assure you that we take all credible allegations seriously and will consider carefully the material you have provided".

Mr Armstrong's response does not address any of the requests formulated by the Claimant. It is cast in generic terms confirming only that "*as with all information received*" it would be assessed with a view to the possibility of further action. It is

apparent that this response was sent in ignorance of the response sent by Mr Inglese. In his second Witness Statement Mr Hathaway confirms that he was unaware, when he drafted the Decision letter, that Mr Armstrong was proposing to respond separately. He states that had he been aware it is probable that the Solicitors' Office letter would have been no more than: "…that Mr Inglese understood that the relevant business unit would be responding shortly". Mr Hathaway then states:

> "Consequently I do not regard these matters of any relevance to the view I took and they did not form any part of the decision making process.
>
> My role is to give legal advice to officers of the Department when requested to do so. I have not sought to discuss these matters with the investigation team. It is no part of my role, my team's, or that of the Solicitor's Office generally to supervise or otherwise intervene in the conduct of operational matters.
>
> When I drafted the letter dated 9 January 2013 I considered whether the commissioners were entitled to disclose the information sought by Privacy International and formed the view that nothing in the letter from Privacy International gave adequate grounds to indicate that an exception to our duty of confidentiality under section 18 CRCA".

25. Mr Armstrong sent a yet further letter on 8 March 2013 to the Claimant. This was expressly sent in full knowledge of the Decision letter from Mr Inglese. Mr Armstrong states that he is writing since he is "*responsible for HMRC's enforcement of the UK's strategic export controls*". He refers to the Decision letter and then says this:

> "I must reiterate that section 8 of the Commissioners for Revenue and Customs Act (CRCA) 2005 imposes strict controls on the disclosure of information held by then HMRC. Without specific legal authority, no official of HMRC may disclose information held by the department in connection with its functions – including the enforcement of strategic export controls– that might identify specify individuals or businesses. It is a criminal offence to do so.
>
> This means that HMRC cannot comment on individual case, now are we able to keep you or other third parties informed of progress of any potential enquiries".

26. Mr Armstrong finished by emphasising that HMRC treated the enforcement of export controls as a "*priority*" and that he would pass "*all credible allegations of breaches of those controls*" to the criminal investigation team. Mr Armstrong thus construed the Decision letter as permitting of no disclosure whatsoever and justifying a stance whereby the HMRC would simply refuse to inform the Claimant or Dr Shehabi of progress. By this letter HMRC treated the Claimant and Dr Shehabi as having no different rights of access to information to any other third party.

(d) The update from HMRC

27. The final matter I would refer to is the oral update on instructions, which was then reduced to writing, provided by Mr Peretz to the Court during the hearing. It is in the following terms:

> "I am instructed that HMRC has been considering carefully whether any further information relation to the matters raised by Privacy International should be provided to the public at this stage. I can tell your Lordship that the view has been reached, after careful consideration, not to do so at this time. HMRC will however keep the matter under review and will provide the public with further information about these matters if and when it is appropriate to do so having regard to the considerations set out in section 18 CRCA. I should add that although HMRC have considered the evidence given by Dr Shehabi, Mr Kersmo and Professor Deibert, they do not consider that disclosure of any further information relating to these matters would be appropriate, at least at this stage".

The position therefore as at the present date, which is nearly 2 years after Privacy International first raised the matter and about 18 months after the complaint lodged by Privacy International, is that HMRC has no intention of providing any information, to anyone. This is notwithstanding that BIS felt able to disclose information which *prima facie* shows that the complaint is credible and serious.

C. The position of the activists: Dr Shehabi and Mr Kersmo

28. I have referred already to the position of the two political activists. In this section I set out further information about the position of each. In the context of the case the facts relating to Dr Shehabi were before the HMRC when the Decision letter was issued. However, the position of Mr Kersmo was not. Nonetheless the update statement makes clear that in relation to both activists HMRC does not at least this stage and subject to review, intend to provide any information. The significance of the facts relating to the two activists arises from the dispute between the parties as to how these individuals should be categorised, and in particular whether they fell within the definition of a "victim" or otherwise and how this analysis affected the exercise of HMRC's power (and possibly duty) to provide information about the progress of investigations to complainants.

(1) Dr Shehabi

29. With regard to Dr Ala'a Shehabi she is a Bahraini/ British national. She was a formerly a political analyst with RAND Europe and an economist with the Bahrain Institute for Banking and Finance. She is a founding member of Bahrain Watch which is a group constituted by researchers and activists with personal and academic ties to Bahrain following the turmoil and unrest arising in Bahrain in February 2011. She explained in her evidence that the purpose of Bahrain Watch was to investigate and assess the government claim that they had instituted a number of human rights and democratic reforms. She explained that she came "*from quite a strong opposition background in Bahrain*". Her father is a well known activist and is the leader of the

"Bahrain Freedom Movement". In February 2011 she says that her husband – who was wholly apolitical - was arrested she believes because of his relationship with Dr Shehabi and her father "…*in order to punish us*". She stated that he was tortured, tried and sentenced to three years imprisonment, late reduced on appeal to 18 months. Dr Shehabi's work as an academic in Bahrain was brought to an end. Then in January 2012 her husband was freed without explanation. She was later arrested in April 2012. Shortly after this she received a series of unusual emails with attachments which she came to conclude contained malware designed to act as a Trojan to infect her computer. She managed to have her computer investigated and Citizens Lab, who conducted the investigation, prepared a report identifying the attachments to the Trojan emails as containing FinSpy. In relation to the HMRC complaint she says in her evidence:

> "I understand that Privacy International has sent a dossier including information about my case to HM Revenue and Customs ("HMRC") over 4 months ago asking them to investigate what appears to be the unlawful exports in breach of export controls of a British company to regimes such as Bahrain that have very troubling human rights records. I have not been contacted by HMRC or any other state agency to enquire about the email that I have received. In so far as I am aware nor has Citizen Lab or anyone else who was involved in analysing the material from myself and others. I understand that [the Claimant] has sought clarification from HMRC about what is happening and has been told that no information can be provided. HMRC are refusing to tell us whether any investigation is being or will be conducted at all into possible criminal offences committed by Gamma International. I am very anxious to know what if any investigation is being done by HMRC. The absence of information nor any form of contact with me is simply fuelling thoughts that I have that for reasons that are completely unclear to me no investigation is being undertaken into the exports of Gamma International and no action is intended to be taken".

30. I have referred already to the fact that she was identified in the letter to HMRC of 21st December 2012: See paragraph [15] above.

(2) Mr Kersmo

31. As for Mr Kersmo he approached Privacy International in April 2013 with a request that his computer be scanned for the presence of malicious software. Mr Kersmo is an Ethiopian national who has been granted asylum in the United Kingdom. He is a member of the Executive Committee of the Ginbot 7 Movement for Justice, Freedom and Democracy, an Ethiopian opposition party in exile. Mr Kersmo had earlier been arrested and detained in Ethiopia. His wife was also formerly a politician in Ethiopia. A scan was performed and it was concluded that between 1.59am 9th June 2012 and 10.49pm 10th June 2012 FinSpy had been active on his computer. Upon examination of the computer five files were found in a location on the computer where FinFisher is known to hide and these files were identical to the five files written by FinSpy executable sent to Bahraini activists that were investigated by researchers from

Citizen Lab and reported in July 2012 in an article "Citizen Law, From Bahrain With Love: FinFisher's Spy Kit Exposed". Privacy International made a complaint to the National Cyber Crime Unit of the Metropolitan Police Service ("MPS") on 27th February 2014. This alleged that by virtue of this surveillance an offence of unlawful interception had been committed in the United Kingdom within the meaning of section 1(1) Regulation of Investigatory powers Act ("RIPA"), section 45 of the Serious Crime Act 2007 and section 8 of the Accessories and Abettors Act 1861. It was submitted that: "providing a foreign government with a tool to gain unauthorised access to computers and intercept communications via that computer qualifies as assisting in the commission of offences believing one or more will be committed within the meaning of section 45 of the Serious Crime Act 2007…". Paragraphs 21 and 22 of the Complaint to the MPS stated:

> "21. If the FinFisher product is sold to repressive regimes, Gamma is providing them with the ideal tool to commit the offences of unlawful interception of communications. Gamma is aware of the fact that the relevant government will commit such an offence, and that by selling FinFisher it provides crucial assistance in carrying out this offence. This qualifies as an offence in itself on the basis of section 45 SCA.
>
> 22. In any case it is clear that Gamma provided assistance while being aware that there was a real risk that the offence would be committed, so its assistance to a government in order to obtain unauthorised access to computer and intercept communications via that computer constitutes an offence in itself on the basis of section 8 Accessories and Abetter Act 1861".

32. On 5th March 2014 the MPS Crime Management Unit responded indicating that the crime had been assigned to a dedicated investigation officer who would be in contact shortly to discuss the details of the crime.

D. The Statutory framework

33. I turn now to set out and analyse the statutory framework which governs the existence and exercise of HMRC's obligations to disclose information. The parties disagree as to the nature and scope of the power or duty of HMRC to disclose information about HMRC investigative and prosecutorial activities. In particular they disagree as to how to categorise HMRCs margin of appreciation. In this section I set out the statutory provisions which govern the issue and then address the issue of the scope of the margin of HMRCs discretion.

34. I start by setting out HMRC's "functions" in relation to export controls since this is the pivot governing the analysis of HMRC's powers and duties. Specifically the functions of the HMRC are considered in relation to the matters raised by the Claimant's complaint to HMRC (i.e. an alleged infringement of Council Regulation 428/2009 ("the Dual-Use Regulation")). I am therefore not examining the situation in relation to general revenue collection. I have then considered the relationship between the CRCA and the Freedom of Information act 2000 ("FOIA"). I then assess the implications of this in relation to HMRC's margin of appreciation.

(1) The statutory prohibition upon disclosure

35. The starting point is the prohibition on the disclosure of information by HMRC in connection with their functions contained in section 18(1) CRCA 2005:

> "(1) Revenue and Customs officials may not disclose information which is held by the Revenue and Customs in connection with a function of the Revenue and Customs".

36. This prohibition is buttressed by section 19 which renders wrongful disclosure a criminal offence.

(2) The exceptions to the prohibition – the power to disclose under section 18(2)(a) and (d)

37. However the prohibition is not absolute and pursuant to section 18(2)(a) and (d) CRCA 2005 it:

> " does not apply to a disclosure:
>
> (a) which-
>
> (i) is made for the purposes of a function of the Revenue and Customs, and
>
> (ii) does not contravene any restriction imposed by the Commissioners,
>
> …
>
> (d) which is made of the purposes of a criminal investigation or criminal proceedings (whether or not within the United Kingdom) relating to a matter in respect of which the Revenue and Customs have functions…".

(3) The "functions" of the HMRC in relation to export control

38. An identification of the "*function*" or "*functions*" of HMRC is thus essential to an understanding of the breadth of the power of HMRC to disclose information whether generally under both section 18(2)(a) or in relation to a specific criminal investigation or proceedings under section 18(2)(d).

39. The expression "function" is defined in section 51 (Interpretation) in the following way:

> "(2) (a) 'function' means a power or duty (including a power or duty that is ancillary to another power or duty) and
>
> (b) a reference to the functions of the Commissioners or of officers of Revenue and Customs is a reference to the functions conferred

> (i) by or by virtue of this Act, or
>
> (ii) by or by virtue of any enactment passed or made after the commencement of this Act…".

40. The functions of the HMRC in relation to the matters raised by the Claimant's complaint concern an alleged infringement of "the Dual-Use Regulation". The infringement alleged by the Claimant would, if proved, be an offence under Article 35 of the Export Control Order 2008 ("ECO").

41. Article 41 ECO applies certain provisions of the Customs and Excise Management Act 1979 ("CEMA") to offences under the ECO and, in particular, contraventions of the Dual-Use Regulation:

    i) Article 41(1) provides that certain provisions of CEMA relating to "assigned matters" apply to investigations by HMRC of possible breaches of the Dual-Use Regulation;

    ii) Article 41(2) provides that, in relation to such matters, HMRC have the powers they have under section 77A of CEMA (to require the provision of information under compulsion);

    iii) Article 41(3) gives HMRC officials the power of arrest in relation to such matters that they have powers under section 138 of CEMA; and

    iv) Article 41(4) applies provisions of CEMA dealing with criminal proceedings brought by HMRC or by the Director of Revenue and Customs Prosecutions.

42. As noted above HMRC has extensive information collection powers under section 77A CEMA, which is in the following terms:

> " (1) Every person who is concerned (in whatever capacity) in the importation or exportation of goods for which for that purpose an entry is required by regulation 5 of the Customs Controls on Importation of Goods Regulations 1991 or an entry or specification is required by or under this Act shall—"
>
> (a) Furnish to the Commissioners, within such time and in such form as they may reasonably require, such information relating to the goods or to the importation or exportation as the Commissioners may reasonably specify; and
>
> (b) If so required by an officer, produce or cause to be produced for inspection by the officer—
>
> (i) At the principal place of business of the person upon whom the demand is made or at such other place as the officer may reasonably require, and
>
> (ii) At such time as the officer may reasonably require,

> any documents relating to the goods or to the importation or exportation.
>
> (2) Where, by virtue of subsection (1) above, an officer has power to require the production of any documents from any such person as is referred to in that subsection, he shall have the like power to require production of the documents concerned from any other person who appears to the officer to be in possession of them; but where any such other person claims a lien on any document produced by him, the production shall be without prejudice to the lien.
>
> (3) An officer may take copies of, or make extracts from, any document produced under subsection (1) or subsection (2) above.
>
> (4) If it appears to him to be necessary to do so, an officer may, at a reasonable time and for a reasonable period, remove any document produced under subsection (1) or subsection (2) above and shall, on request, provide a receipt for any document so removed; and where a lien is claimed on a document produced under subsection (2) above, the removal of the document under this subsection shall not be regarded as breaking the lien.
>
> (5) Where a document removed by an officer under subsection (4) above is reasonably required for the proper conduct of a business, the officer shall, as soon as practicable, provide a copy of the document, free of charge, to the person by whom it was produced or caused to be produced.
>
> (6) Where any documents removed under the powers conferred by this section are lost or damaged, the Commissioners shall be liable to compensate their owner for any expenses reasonably incurred by him in replacing or repairing the documents.
>
> (7) If any person fails to comply with a requirement under this section, he shall be liable on summary conviction to a penalty of level 3 on the standard scale.

43. In broad terms the ECO confers upon HMRC broad powers of investigation and prosecution in relation to potential contraventions of the Dual-Use Regulation. In addition The Police and Criminal Evidence Act 1984 ("PACE") s 114(2)(a) provides that:

> " … the Treasury may by order direct that any provision of … [PACE] which relates to investigations of offences conducted by police officers or to persons detained by the police shall apply, subject to such modifications as the order may specify, to investigations conducted by [HMRC] officers or to persons detained by [HMRC] officers".

44. The order currently in force made pursuant to PACE s 114(2) is the Police and Criminal Evidence Act 1984 (Application to Revenue and Customs) Order 2007 ("the PACE Order 2007"). The PACE Order 2007 extends to HMRC many of the powers conferred on the police by PACE (with some modifications) including: powers to search, to seize material, to arrest and detain suspects etc in relation to offences HMRC investigate. It also confers upon HMRC the obligation to comply with the relevant PACE Codes of Practice regulating the exercise of those police powers.

45. CRCA 2005 s 51(2) provides that a:

> "… function of [HMRC] means any power or duty (including a power or duty that is ancillary to another power or duty) conferred… by or by virtue of any enactment passed or made after the commencement of this Act".

46. Pursuant to PACE Order 2007, as well as ECO 2008, HMRC officers have most of the same powers as do the police in relation to crimes they are responsible for investigating. They therefore have essentially the same "*function*" as the police in relation to investigation and law enforcement in those areas.

47. One matter of some significance to HMRC arises from the above. It follows from this analysis that there is no discrete or freestanding function of the HMRC to provide information to third parties. This was a point that HMRC particularly wished (rightly) to emphasise. Section 18(2)(a) and (d) makes the provision of information contingent upon a connection with the specific functions arising under those sub-paragraphs.

(4) The relationship between CRCA 2005 powers of disclosure and the Freedom of Information Act 2000

48. Finally, in relation to the statutory framework the Defendant has relied upon the fact that the Freedom of Information Act 2000 ("FOIA") has been dis-applied to certain categories of information which will come into the possession of HMRC. In particular the Defendant prayed in aid section 23 CRCA 2005. This provides that revenue and customs information relating to a person the disclosure of which is prohibited by section 18)(1) CRCA 2005 is exempt information by virtue of section 44(1) FOIA:

> "23. Freedom of information
>
> (1) Revenue and customs information relating to a person, the disclosure of which is prohibited by section 18(1), is exempt information by virtue of section 44(1)(a) of the Freedom of Information Act 2000 (c. 36) (prohibitions on disclosure) if its disclosure—
>
> (a) would specify the identity of the person to whom the information relates, or
>
> (b) would enable the identity of such a person to be deduced.

> (2) Except as specified in subsection (1), information the disclosure of which is prohibited by section 18(1) is not exempt information for the purposes of section 44(1)(a) of the Freedom of Information Act 2000.
>
> (3) In subsection (1) "revenue and customs information relating to a person" has the same meaning as in section 19".

49. According to section 19(1) CRCA 2005 "revenue and customs information relating to a person" means:

> " …information about, acquired as a result of, or held in connection with the exercise of a function of the Revenue and Customs (within the meaning given by section 18(4)©) in respect of the person; but it does not ilcude information about internal administrative arrangements of Her Majesty's Revenue and Customs (whether relating to Commissioners, officers or others".

50. Section 44(1)(a) FOIA provides:

> "1. Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it—"
>
> (a) is prohibited by or under any enactment".

51. The effect of this is that "revenue and customs information relating to a person" is absolutely exempt from disclosure under FOIA: see section 2(3)(h). However, it is not exempt from disclosure under section 18(2) CRCA if and in so far as it meets the test therein. In other words whether or not disclosure is to be made is governed by the CRCA 2005 not FOIA.

(5) The margin of appreciation accorded to HMRC

52. I turn now to consider the question of the scope of HMRC's margin of appreciation or discretion. During the oral hearing a considerable amount of debate was focused upon the breadth of the power on the part of the HMRC to disclose information in a case such as the present.

53. Mr Peretz submitted that it was in effect a narrow power and he referred to the prohibitive starting point in section 18(1) CRCA 2005 and the fact that the prohibition was backed by criminal sanctions. He also argued that this was reinforced by the fact that FOIA was inapplicable to information covered by section 18 and which identifies or is capable of identifying a person. In relation to the judgment of the Supreme Court in *Kennedy* the Defendant accepted that "*there is a common law presumption of openness*". However, it was argued that one could not simply transpose the enthusiasm of the Supreme Court in *Kennedy* for transparency in relation to the Charity Commission to the very different functions of HMRC. Parliament (in the guise of section 1(B)(2)4 Charities Act 1993) had imposed upon the Charity Commission express statutory duties to have regard to the principle of accountability

and transparency in relation to regulatory activities and HMRC had no corresponding duty or function.

54. Mr Squires took a different stance. He submitted that the power to disclose in section 18(2) CRCA 2005 was in fact quite broad. He pointed out that under section 9 CRCA 2005 the Commissioners were entitled to do anything that they thought "necessary or expedient in connection with the exercise of their functions or incidental or conducive to the exercise of their powers". He also pointed out that the scope of the power was substantially affected by a wide range of different relevant considerations which would differ from case to case and that it was therefore artificial to suggest that one took a narrow starting point. He submitted that the inapplicability of FOIA was no more than a recognition that it was section 18(2) CRCA 2005 that governed disclosure not FOIA and that therefore the breadth of section 18(2) had to be examined according to its own light, and not in the reflected (and dim) light of FOIA. He also drew attention to the judgments in *Kennedy* which recognised the existence in common law of a principle of openness. In addition he pointed out that the stance adopted by HMRC in the present case was the very opposite to that it adopted in the case of *Ingenious Media Holdings* (see below) and in effect he suggested that the HMRC's position was guided by expediency not principle.

55. Some guidance as to the scope of the margin of appreciation or discretion of HMRC under section 18 is found in the judgment of the High Court in *Ingenious Media Holdings plc v HMRC* [2013] EWHC 3258 (Admin) *per* Sales J. This case concerned HMRC's revenue collection functions which are quite different to the functions in issue in this case. It is nonetheless informative in a general sense. This was an application for judicial review of a decision of HMRC, acting by Mr Hartnett, the Permanent Secretary for Tax at the relevant time, to disclose revenue related information relating to Ingenious Media and a Mr McKenna in an "off the record" briefing with two journalists from *The Times* newspaper on 14th June 2012. The journalists, Alexi Mostrous and Fay Schlesinger, published articles in *The Times* on 21st June 2012 regarding tax avoidance schemes, including film investment schemes, in which they named Ingenious Media and Mr McKenna, among others, as the promoters of such schemes. In their articles, Mr Mostrous and Ms Schlesinger drew upon and quoted statements (some of which were less than flattering) made by Mr Hartnett in the briefing regarding the Claimants. The Claimants sought declaratory relief that the disclosures made by Mr Hartnett were unlawful. On that occasion HMRC sought to justify the briefings given by the Permanent Secretary upon the basis that HMRC had a clear power to disclose information pursuant to section 18(2) CRCA 2005 and that in the exercise of that power it had a broad discretion and evaluative margin of appreciation. It submitted that providing information to journalists about investigations and particular types of schemes that it objected to and, moreover, as to the sorts of persons who were promoting such schemes was within their functions under section 18(2)(a). I shall return to this judgment later in relation to the analysis of some of the different components which it is said by the Claimant must go into the balancing exercise which HMRC is bound to undertake. For present purposes I focus upon the observations of the Judge about the margin of discretion conferred upon HMRC under section 18 in tax cases. He considered this issue from the perspective of HMRC's revenue collecting functions (not its supervisory and enforcement powers in relation to export controls) and he expressed his views upon

the margin of appreciation in the context of addressing submissions about the impact of Article 8 of the Convention:

> "64. Mr Eadie made the further submission that any interference with rights under Article 8(1) was objectively justified under Article 8(2), in that the disclosures were made for the legitimate objectives of promoting the economic well-being of the country (ensuring proper, efficient and cost-effective collection of tax) and for the protection of the rights and freedoms of others (to ensure the fair distribution of the tax burden across all tax payers); and were proportionate and necessary in a democratic society. Mr Eadie submitted that in assessing the proportionality of the disclosures made, I should accord HMRC a wide margin of appreciation, on the grounds that the area of tax is a subject of economic and social policy in relation to which such a margin of appreciation is regularly allowed for public authorities: see e.g. *James v United Kingdom* (1986) 8 EHRR 123, esp. at para. [46]; *National and Provincial Building Society v United Kingdom* (1997) 25 EHRR 127 at paras. [79]-[80]. He also again emphasised the limited nature of the disclosures made by Mr Hartnett and the fact that he understood that they were being made to only two people for very limited purposes, in an "off the record" briefing.
>
> 65. I do not agree that the margin of appreciation for HMRC in relation to judgments regarding disclosure of confidential information regarding the tax affairs of an individual is as wide as Mr Eadie suggested. Although the background of tax policy and the need for well-informed practical judgments on the ground by experienced officials about how best to promote the effective collection of tax are factors which tend to expand the ambit of the margin of appreciation which is applicable in this context, the countervailing factors to which I have referred at para. [50] above increase the weight to be given to the interests of the individual in striking the fair balance required by the ECHR, and tend to reduce the margin of appreciation to be applied. Also, the disclosures made were not direct expressions of national policy in setting levels of taxation and so forth, unlike the sort of measures in issue in the authorities referred to above. Balancing these factors leads me to conclude that the relevant margin of appreciation is neither particularly wide nor especially narrow, but in the middle ground".

56. The "countervailing features" referred to in the quotation above and said to come from paragraph [50] of the same Judgment focused upon the strength of the public interest in the tax affairs of individuals being kept secret:

> "50. The rationality standard is a flexible one, which varies in the width of the discretion allowed to a decision-maker according to the strength of the public interest and the strength of the interests of any individual affected by the decision to be taken: *R v Secretary of State for Defence, ex p. Smith* [1996] QB 517; *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61; [2009] 1 AC 453. The basic statutory rule under which HMRC operate is that set out in section 18(1) of the 2005 Act, requiring them to maintain confidentiality of information about a taxpayer's affairs. That reflects a very longstanding tradition and strong public expectation of the standards to be expected of the tax authorities, particularly in relation to information which taxpayers provide to the authorities about themselves. It also reflects a strong policy interest associated with the fair and efficient collection of taxes, namely to encourage taxpayers to be frank and open with HMRC about their affairs - undeterred by fear that the information they disclose might be released to the public - so that HMRC can make a proper and accurate assessment of the tax due from them. These features of the context in which HMRC operate tend, in my view, to narrow the scope of the discretion to be allowed to HMRC under the rationality standard in disclosing information about taxpayers outside HMRC or other responsible public bodies. Thus, for example, it would have been a matter for grave concern and close scrutiny by the court if Mr Hartnett had given the journalists (even in an "off the record" briefing) access to the full tax files of Mr McKenna and Ingenious Media, with all the private information which they had supplied to HMRC about themselves, even if he did think that such a course might help in some way with the collection of tax".

57. The Judge thus recognised that the concept of rationality was a flexible and context dependant one. Significantly, even where the decision to disclose information arose in the case of the tax affairs of individuals where there was a strong public interest in the preservation of confidentiality (and where the disclosure of information about a tax payer could engage Article 8 of the Convention - see ibid paragraph [63]) this still did not lead to a wide margin of appreciation; rather the Judge considered that it was "*neither particularly wide nor especially narrow, but in the middle ground*".

58. The Judge endorsed HMRC's submissions that disclosure to journalists was justified on the basis of four principal policy considerations which applied in the field of tax and revenue collection, which can be summarised as:

    i. *The maintenance of good and cooperative relations with the press:* This included ensuring that the public were well informed on matters of controversy relating to the tax system:

> "The efficient and effective collection of tax which is due is a matter of obvious public interest and concern. Coverage in the press about such matters is vital as a

> way of informing public debate about them, which is strongly in the public interest in a well-functioning democracy. HMRC have limited resources to devote to the many aspects of their tax collection work, and it is legitimate and appropriate for them to seek to maintain relations with the press and through them with the public to inform public debate about the tax regime and the use of HMRC's resources" (ibid paragraph [44]).

ii. *Maintaining confidence in the tax system*: This embraced the correction of false information and the suppression of false perceptions that the Revenue engaged in "cosy" deals with tax payers:

> "It is also relevant to the exercise of HMRC's functions to provide proper and accurate information to correct mis-apprehensions or captious criticism regarding the exercise of their functions (such as any misplaced suggestion that they had engaged in unduly lenient "cosy deals" with certain taxpayers), in order to maintain public confidence in the tax system. If such confidence were undermined, the efficient collection of taxes could be jeopardised, as disaffected taxpayers might withhold co-operation from the tax authorities" (ibid paragraph [44]).

iii. *Encouraging the provision of information by taxpayers and the press*: This included providing information to the press in order to encourage the press to be forthcoming with HMRC:

> "[The Permanent Secretary's] wish to encourage the journalists to share information with HMRC about tax avoidance, which could be of direct assistance to HMRC in relation to their tax collection functions by helping to inform them about where to focus their attention and investigations, was a further legitimate basis for that decision. He could rationally and lawfully take the view that the journalists would be unlikely to assist HMRC in this way unless HMRC for their part demonstrated a degree of measured frankness about the topics under discussion in return" (ibid paragraph [45]).

iv. *Deterrence*: This included providing information to convey to the public HMRC's negative views about particular types of tax scheme given that this was important to deterrence:

> "HMRC had an interest to challenge and investigate the true reasons of taxpayers for participation in such schemes, which had already been manifested by HMRC before the briefing. It was fair and appropriate

> for HMRC to seek to convey the message to the public that taxpayers who participated in such schemes could expect to have such participation rigorously scrutinised by HMRC, and thereby seek to deter taxpayers who did not have substantial and genuine commercial reasons apart from simply seeking to avoid tax from participating in the schemes in the first place" (ibid paragraph [46]).

59. A further and important point arising related to the nexus between the "function" of HMRC and the type of content of the information disseminated. As to this the Claimants in *Ingenious Media* submitted that the particular information which had been disclosed bore no sensible relation to the functions which HMRC submitted that it was serving. The Judge rejected this submission. He said that in this regard HMRC had an "evaluative judgment" to perform and that it was justified in concluding that it would be assisted by the Permanent Secretary disseminating in an "off the record" interview various pieces of information about the two Claimants and about the sorts of tax schemes that they devised in particular (see ibid paragraph [61]). At paragraph [39] Sales J asked whether there was a "rational connection" between the function and the disclosure: "In my view there was a rational connection between the function of HMRC to collect tax in an efficient and cost-effective way and the disclosures made by Mr Hartnett in the course of the briefing, and his decision to make the limited revelations that he did was based on a judgment which fell well within the lawful parameters of section 18(2)(b)".

60. The irony of the *Ingenious Holdings* case as applied in the present case is that in that case the HMRC was arguing for a broad power to disclose information based upon a relatively loose nexus between the information disclosed and the functions of the HMRC and in circumstances where they could be indiscrete and in fact disparaging about both a company (Ingenious Holdings) and an individual who promoted tax avoidance schemes. In the present case however HMRC has moved to the absolute other end of the spectrum and in the Decision letter and in subsequent correspondence denied that it has any power at all to disclose information and has adopted a narrow approach towards disclosure which ostensibly contradicts its own arguments in *Ingenious Media*.

61. As was recognised in *Ingenious Media* the scope of the margin of appreciation is context dependant. This point was recognised most recently in the judgment of the Supreme Court in *Kennedy* per Lord Mance at paragraphs [48]-[56]. In this particular case I do not consider that the margin of discretion can be uniformly categorised. As is evident from the analysis of relevant factors below in some circumstances it might be materially or even very substantially circumscribed in other cases it might be relatively broad. I am not convinced that it is wise, to seek to categorise the margin in quantitative terms (wide, middling, narrow). As I explain below the extent of HMRC's margin of discretion will vary according to the facts of each case. In some cases it might be quite wide; whilst in others it might be narrow. The outcome might differ depending upon the status of the person seeking information and the type and nature of information sought. It might also be temporally contingent in that a wide-ranging request for detailed information at the outset of an investigation (for instance when HMRC needed to preserve secrecy lest

disclosure forewarned a person who was likely to destroy evidence) might be much easier to refuse than a modest request made later on.

62. Some indication of the balance to be struck between disclosure and non-disclosure can be seen from the tenor of the judgments in *Kennedy.* In that case the Supreme Court was concerned with inquiries conducted by the Charity Commission and their relationship with judicial or quasi judicial proceedings. It was, as Mr Peretz correctly pointed out, in this particular context that the Court emphasised the high importance attached to open justice and to transparency. The present case involves legal process but at a much earlier stage. Investigations conducted by HMRC are equivalent to police investigation which might or might not lead to a prosecution. They are operations which are necessary precursors to court proceedings. This has to be borne in mind when considering the implications of *Kennedy*. Different considerations apply. When matters come to court there is a powerful presumption that they should be conducted in public and this necessarily impacts upon the availability of documents used in those proceedings. However, before the proceedings come to court, whilst investigations are ongoing, the position is not so clear cut. The police will necessarily need to keep some facts secret: the fact that they intend to conduct a search of a premises; when that will be; the address, etc. Months later, when the prosecution is underway, those same facts may well have lost any vestige of confidentiality or secrecy they ever had. They will be facts referred to quite openly in Court. Nonetheless, I do not consider that the judgments in *Kennedy* lack all relevance. The Supreme Court was at pains to point out that the common law treated openness as very important and, with all the ecessary provisos and caveats, that message can in some measure carry through into section 18(2) CRCA 2005. In *Kennedy* Lord Mance, who gave the leading judgment for the majority, introduced his judgment with the following message which goes well beyond the narrow confines of the Charity Commission:

> "1. Information is the key to sound decision-making, to accountability and development; it underpins democracy and assists in combatting poverty, oppression, corruption, prejudice and inefficiency. Administrators, judges, arbitrators, and persons conducting inquiries and investigations depend upon it; likewise the press, NGOs and individuals concerned to report on issues of public interest. Unwillingness to disclose information may arise through habits of secrecy or reasons of self-protection. But information can be genuinely private, confidential or sensitive, and these interests merit respect in their own right and, in the case of those who depend on information to fulfil their functions, because this may not otherwise be forthcoming. These competing considerations, and the balance between them, lie behind the issues on this appeal".

E. The lawfulness of the Decision: Whether to quash and remit?

63. I turn now to the issue of the lawfulness of the Decision. I address this before considering the disagreement between the parties as to the relevance to the exercise of discretion of certain individual considerations. I have concluded that the Decision was taken unlawfully and must be quashed and remitted to be taken again. This is for the following eight reasons.

(1) Point 1: Failure to obtain evidence from the relevant operational unit within HMRC.

64. The Decision was taken without there having been any recourse to the operational unit with actual responsibility for the assessment of the complaint dossier: See paragraph [19] above. The reason given by Mr Hathaway for this was that he felt that there was a pressing need to send a response to the Claimant given that Privacy International had asked for an answer within 14 days and that particular period of time had elapsed. However, this cannot be a good reason for failing to conduct the necessary investigations needed to prepare an answer to the letter. All that was required was a short holding letter to Privacy International explaining that because of the Xmas vacation it had not been possible to respond within the 14 days but that enquiries were being made and a response would be sent shortly. This was not a case where time was of the essence. It is in my judgment quite impossible to see how the Defendant could make any sort of an assessment about whether it was proper to provide information without the decision maker taking advice or guidance from the responsible operational unit that was processing the complaint. The failure to obtain this information was irrational.

(2) Point 2: Failure to have regard to the actual complaint letter and accompanying dossier of evidence.

65. The failure to obtain evidence from the relative operational unit was compounded by a further equally fundamental failing. The Decision letter was also prepared without any reference to the submissions and evidence contained within the complaint itself. Mr Hathaway set out in his statement that for reasons that remain unexplained he did not see the letter sent by Privacy International of 9th November 2012 and the accompanying dossier of evidence and information. He only saw the chasing letter of 21st December 2012. Once again it is very hard indeed to see how the Defendant could make a rational or considered judgment without any reference whatsoever to the actual complaint and the facts and matters referred to therein. The letter of 21st December 2012 to which Mr Hathaway says he was responding specifically cross refers to the letter of 9th November 2012 so that the existence of that letter was known to Mr Hathaway. Yet the Decision he drafted purports to be a response to the concerns of Privacy International and Dr Shehebi but was prepared without any knowledge of the facts. Accordingly the Decision was taken without any regard being had to either the complaint or to the views of those responsible for processing it within HMRC. This was doubly irrational.

(3) Point 3: The Decision letter contains an error of law on its face.

66. The Decision letter is drafted as an outright refusal and reflects a mistaken view of the law. The view set out in the Decision letter assumes that there is no power in section 18 CRCA 2005 to provide the information requested. This error was perpetuated in the two subsequent responses from Mr Stuart Armstrong. There is in my judgment no doubt but that in relation to HMRC's responsibility towards export control it adopted the stance that it was prohibited from answering any request. This in my judgment was obviously wrong and is inconsistent with the plain language of the CRCA 2005 and the judgment in *Ingenious Media* and the position adopted by HMRC itself in that case. Indeed, in oral argument Mr Peretz, for the Defendant, accepted that section 18(2) conferred a power on the HMRC to disclose information and also that the

circumstances that would govern the exercise of the power were both fact and context dependant. This is in sharp contrast with the terms of the Decision letter. As I have already pointed out the position in law of HMRC evolved over the course of the proceedings. But Mr Peretz urged me to assess this case upon the basis of the position as of the time the Decision was adopted ie in January 2013 and as of that date, and as reflected in the Decision letter, the Defendant took an uncompromising stance which on its face is simply inconsistent with the legislation.

(4) Point 4: The ex post facto explanations for the Decision letter should not be treated as admissible to re-write the letter

67. In this case HMRC has sought to elucidate on the reasoning set out in the Decision letter by the witness statements of Mr Hathaway and has further sought to provide the update to the Court. This highlights a quite separate problem which is that the Courts adopt a wary stance towards attempts by decision makers to adduce evidence to supplement and elucidate upon reasons given in a disputed decision. In the present case there are a number of reasons why the letter should be examined in its own light and without reference to new elucidatory evidence. The first point is that the Court permits new reasoning to elucidate decisions in rare circumstances: See eg *R v Westminster City Council ex parte Ermakov* [1996] 2 All ER 302 page 315g- 316g. In that case the Court of Appeal accepted that in certain circumstances the Court could admit evidence to elucidate or exceptionally correct or add to reasons but should be "very cautious" about doing so. Illustrations of where new evidence might be allowed included the correction of errors or where the language used in an impugned decision might lack clarity. However, the Court was hostile to the receipt of new evidence "which indicates that the real reasons were wholly different" from the actual reasoning. In *Alletta Nash v Chelsea College of Art and Design* [2001] EWHC 538 (Admin) Mr Justice Stanley Burnton (as he then was) considered the position in relation to cases where (as in the present case) there is no express statutory duty to give reasons. He identified five (to some degree overlapping) factors which needed to be assessed which focused upon (and I reformulate to meet the facts of the present case): (i) the consistency of the subsequent reasons with the original reasons; (ii) whether the new reasons were in fact the reasons of the actual decision maker; (iii) whether there was a risk that the later reasons had been composed as a retrospective justification for the earlier decision; (iv) the extent of the delay before the new reasons were advanced; and (v) whether the new reasons were advanced following the commencement of proceedings in which case they needed to be treated "especially carefully" (reasons given during correspondence should be treated "more tolerantly"). In the present case, and based upon the analysis set out above: the new reasons are inconsistent with those in the Decision letter and other emanations from HMRC; they are not the reasons set out in the Decision letter; there is a long delay between the Decision letter and the witness statement and in this respect it must be recorded that the Defendant did not respond at all to the Claimants' pre action protocol letter (which Mr Peretz candidly accepted was a "cock up"); there is a real risk that the new reasons represent an attempt to justify what is now recognised as an inadequate Decision letter. Mr Peretz argued that, when construing the Decision letter, it should be taken as "obvious" that Mr Hathaway would have been aware of the exceptions to the prohibition on disclosure (since issues of disclosure were part of his job) and that the Decision letter should be read accordingly. But whilst that might be true it would set a very dangerous precedent if a decision that was (manifestly) wrong in law on its

face could nonetheless be treated as valid upon the basis that the draftsman (who was not even the signatory or author of the Decision letter) was to be presumed to have known the correct position because some 12 months later he explained in a witness statement that in fact he was thoroughly versed in the correct legal position. In any event it is necessary to take account of the letters from Mr Armstrong and in particular that dated 8th March 2013 (referred to at paragraph [25] above) in which Mr Armstrong, this time some 2 months after the Decision letter, "*reiterates*" what he understood to be the thrust of Mr Inglese's position as set out in the Decision letter viz.: Section 18 imposes "*strict controls*" and *"this means that HMRC cannot comment on individual cases, nor are we able to keep you or other third parties informed of progress of any potential enquiries*". I infer from this that Mr Armstrong understood the Decision letter (emanating as it did from the General Counsel) to prohibit in absolute terms any disclosure to the Claimants' or indeed to anyone. This was accordingly the institutional view at the time. It is not therefore surprising that this is also how the Claimant construed the letter. In these circumstances it would in my judgment be quite wrong to construe the Decision letter other than by reference to its face value. Mr Peretz cited, by way of response to this, the judgment of the Court of Appeal in *Office of Fair Trading v IBA Health* [2004] EWCA Civ 142 in a section from the judgment of Carnwath LJ on the inadequacy of reasons. I did not however obtain much assistance from this. It concerned a decision of the OFT in a merger case under the Enterprise Act 2002 which was subject to a duty to give reasons imposed by statute. The observations of the Court in this respect concerned the placing, on an appeal, of material before the Court which was not explicitly referred to in the challenged decision. Lord Justice Carnwath concluded that it was proper on the facts of the case for the OFT to add new material in furtherance of its duty as a public authority to come to court with "all the cards face upwards on the table" (see Judgment paragraph [105]). Lord Justice Carnwath did add this (at paragraph [106]): "*While in some areas of the law the Court may need to be "circumspect" to ensure that this is not used as a means of concealing or altering the true grounds of the decision, that does not arise in this case*". See also *Timmins & A W Lymn v Gedling Borough Council* [2014] EWHC 654 (Admin) paragraph [109] – [114] where general elucidatory evidence was not taken into account in a planning law judicial review. In the present case HMRC has not sought to place substantive material before the Court of the sort being referred to in *IBA Health*. On the contrary the statement of Mr Hathaway seeks to rewrite wholesale the Decision. The present case is, with respect to Mr Peretz, far removed from *IBA Health*.

(5) Point 5: The Decision letter read in the light of the supplementary reasons still reflects an error of law; it sets out only abstract arguments and does not involve an assessment of the surrounding facts

68. Even if the Decision was to be permitted to be refashioned according to the witness statement of Mr Hathaway, it would still reveal a serious error of law. As a more or less inevitable consequence of the first and second failures identified above, the reasons given by Mr Hathaway in his statement are all generic and none actually grapple with the facts of the case. The reasons also fail to distinguish between different types of applicant for information or between different types of requests and they fail to balance the public interest in disclosure with the *actual* impact of disclosure on the investigation or upon the company being investigated. Accordingly, even if I were of the view that the Decision could be supplemented or

corrected by the evidence in the witness statement I would have been bound to have concluded that the Decision (now as refashioned by the new evidence) still reflected an error of law because it relied upon abstract reasoning divorced from the actual evidence and hence operated upon the premise that the actual facts were an irrelevance. The evaluative exercise which is called for under section 18(2) CRCA 2005 is one based not in abstractions but, on the contrary, is anchored in real life. In any given case HMRC will need to evaluate a possibly wide range of specific facts. These might include, in a case such as the present: the *precise* nature and status of the person seeking the information; the *specific* type of request being made; the *actual* sensitivity of the information in its possession which is being asked for; the *actual* risk to an investigation if individual items of information are disclosed to the applicant; whether disclosure might *in actual fact* warn Gamma International that it was or might be a "suspect" and so if the likely impact on the *actual* investigation; whether Privacy International would agree to receive information on a confidential basis (which it does in practice), etc. There are numerous specific factors which might need to be taken into consideration but by failing to do the ground work HMRC disabled itself from forming any sort of a proper view.

(6) Point 6: The update statement does not advance matters.

69. As for the update statement (see paragraph [27] above) this was a statement generated in the course of argument. In oral submissions in response to requests for clarification from me, Mr Peretz made two things clear. First, that the facts and matters contained in Mr Hathaway's first statement were the only matter of which he was aware at the time that he drafted that statement. But secondly that the facts and matters set out in that statement were *no longer* the only matters arising in relation to this case ie that there were other factors now in play. The update statement is however a bland document and it does not spell out the sorts of consideration which are presently being considered by HMRC; Mr Peretz moreover categorised it as a "neither confirm nor deny" statement. It is about as straight a forensic bat as it is possible to find and as such it provides no information on questions such as: whether HMRC has even now embarked upon any investigation; and if so, as to the stage reached; or even whether the file has been passed to the CPS or in fact has been closed and if so whether the advice of the CPS was obtained first. There is no witness statement explaining the basis upon which the update was made or who gave the instructions for its preparation. It does not even address the sorts of matters that Mr Hathaway referred to in his statement and there is no indication that there has been any form of assessment of the underlying evidence. To be fair, the update statement was not referred to the Court by Mr Peretz as a belated justification for the Decision. Ultimately it does not materially advance the analysis in this case.

(7) Point 7: The Decision letter responded to the request in the wrong letter.

70. Because of the second error above Mr Hathaway prepared a response which was ignorant of the actual request made in the complaint. Mr Peretz submitted that the Decision was reasonable in that it responded to the information request contained in the letter of 21st December 2012 and that since this was a limited request it was reasonable to respond in a limited manner. But, this argument does not withstand scrutiny for essentially two reasons. First, the letter of 9th November 2012, which was the core request, contained not only a request for specific pieces of information about the stages of the investigation it also asked for the results of the investigations to date.

It cannot be a justification for providing a limited response to say that this was all the "chaser" called for, when the substantive complaint sought a substantive response. But secondly, and in any event, the Decision letter did not even provide a comprehensive response to the requests in the chaser letter: See paragraph [23] above.

(8) Point 8: The position of HMRC generally reflects internal confusion which undermines the credibility of its response.

71. I also cannot ignore the letter of 10 January 2013 sent by Mr Armstrong (see paragraph [24] above). It emanates from Customs Enforcement Policy, which is the operational unit within HMRC responsible for processing the complaint. It purports to be a response to the letter of 9th November 2012 and, as such, is based upon the actual evidence. The letter from Mr Armstrong was sent without Customs Enforcement Policy obtaining legal advice (else of course Mr Hathaway would have known about it). The letter does not even attempt to begin to engage with the Claimant's concerns. It is also inconsistent in a significant respect with the letter from Mr Inglese. The latter states: "I am able to confirm that the matters you raise are *already* under *active* review" (my emphasis). But Mr Armstrong does not say that the matters are "*already*" under "active" review. He says that the matter "*will be* assessed by our Criminal Investigators for consideration of further action", which suggests that the matter had, at that point in time, yet to be placed under any form of consideration. This in my view is also relevant in my decision to quash the Decision. The whole episode reflects confusion between left and right hands. I can in such circumstances have no confidence that HMRC has properly addressed itself to the serious complaints advanced to it by the Claimant.

(9) Conclusion

72. For all of these reasons I have concluded that the Decision must be taken again. In this regard, and to the credit of the Defendant, whilst attempting (albeit lightly) to justify the impugned decision, in argument Mr Peretz put forward a vastly more considered and refined analysis of the HMRC's position than is evident from the letters emanating from HMRC to the Claimants and in the witness statement evidence. This was supported by two sets of written submissions following the hearing. This reflected an acceptance that the issues arising in the case are novel and complex and that it was important for the HMRC to set out its considered position rather than simply seek to defend the position recorded in earlier documents. It was for this reason that a good deal of the argument and debate focused upon, first, the framework for analysis of the scope of the HMRC's powers or duties to disclose information and, secondly, upon the considerations that were relevant to the exercise of any such power as might exist and the weight to be accorded to such factors in the evaluative process.

73. In the next section I therefore turn to an assessment of the relevance and weight of the individual considerations said to arise on the facts of the present case. This is an exercise that focuses upon the relevance, as a matter of principle, of different considerations in the exercise of HMRC's powers in relation to export control.

F. Factors relevant to the exercise of discretion I: The status of affected persons

(1) The issue

74. The first issue that I address is the dispute between the parties as to the weight that should be attached to the respective positions of natural and legal persons who might seek information from the HMRC, and to the position of natural or legal persons who might be subject to investigation by HMRC. I do this in relation to HMRCs responsibilities *vis-a-vis* export control and not therefore for tax, though HMRCs position with regard to tax does shed at least some light by way of guidance on the position HMRC should adopt in relation to export control.

75. In the Decision letter and in the subsequent letters from HMRC to the Claimant no distinction is drawn between different categories of complainant; they are all treated as having no right to receive information. This was particularly evident in the letter of 8th March 2013 (see paragraph [25] above) which was said to reiterate the position adopted in the Decision letter and adopted the stance that no distinctions would be drawn between any applicant for information. Upon this basis HMRC would not differentiate, for instance, between persons such as Mr Kersmo or Dr Shehabi and a casual enquiry from the press or even from a simply curious member of the public. They all get nothing.

76. In my view the law shows that different persons have different interests and the status of each person seeking information is a matter to which HMRC must direct itself. In the exercise of its discretion in the area of export control HMRC must take into account the nature and status of both the persons seeking information and of persons (natural and legal) who are the subject of complaints or investigations. These various actors may be many and various but would include: pressure groups, NGOs and the press; victims of crime; witnesses; general complainants; and exporters of goods and services subject to regulation and their directors and employees. In this case all of these categories are potentially engaged upon the facts. In the text below I consider the sorts of considerations which would arise in relation to these different categories of person.

(2) Pressure groups/NGO's/the press

77. The position of HMRC in the Decision letter that legitimate NGOs can submit dossiers by way of complaint but thereafter are entitled to no information by way of update is not a rational one. Pressure groups share many similarities with the press. They can act as guardians of the public conscience. As with the press their very existence and the pressure they bring to bear on particular issues and upon those who are responsible for governance of those issues, is one of the significant checks and balances in a democratic society. They have, therefore, a significant role to play. In *Kennedy* at paragraph [1] Lord Mance introduced his judgment with the paragraph cited at paragraph [62] above in which he extolled the importance of openness in government and during which he made express reference to the importance of the press and NGOs:

> "Information is the key to sound decision-making, to accountability and development; it underpins democracy and assists in combatting poverty, oppression, corruption, prejudice and inefficiency. Administrators, judges, arbitrators, and persons conducting inquiries and investigations depend upon it; *likewise the press, NGOs and individuals concerned to report on issues of public interest*".

(Emphasis added)

The role that NGOs play in enforcing legal rights in court is an acknowledged and important one. They have locus for instance to challenge in the public interest the decisions of public prosecutorial authorities not to prosecute: See paragraph [148] below. In relation to victims of crime the EU Council Directive on the role of victims of crime in criminal proceedings (discussed fully below at paragraphs 87 and 105 *et seq*) expressly contemplates that non-governmental organisations will play a significant role. Recital 62 to the Council Directive states:

> "Member States should encourage and work closely with civil society organisations, including recognised and active non-governmental organisations working with victims of crime, in particular in policymaking initiatives, information and awareness-raising campaigns, research and education programmes and in training, as well as in monitoring and evaluating the impact of measures to support and protect victims of crime. For victims of crime to receive the proper degree of assistance, support and protection, public services should work in a coordinated manner and should be involved at all administrative levels — at Union level, and at national, regional and local level. Victims should be assisted in finding and addressing the competent authorities in order to avoid repeat referrals. Member States should consider developing 'sole points of access' or 'one-stop shops', that address victims' multiple needs when involved in criminal proceedings, including the need to receive information, assistance, support, protection and compensation".

78. Guidance as to the position of pressure groups viz a viz HMRC by reference to the analogous position of the press can be found in the judgment of Sales J in the *Ingenious Media Holdings* (ibid). I have summarised the facts at paragraph [55] above. The case concerned a decision by HMRC to volunteer information to the press about certain types of scheme that it found objectionable and as to the identity of certain types of promoter whose activities HMRC also objected to. HMRC defended itself by explaining the important of its functions of being able to disseminate information to the press. With specific regard to the position of the press Sales J stated as follows:

> "44. In general, it is legitimate for HMRC to seek to maintain good and cooperative relationships with the press. The efficient and effective collection of tax which is due is a matter of obvious public interest and concern. Coverage in the press about such matters is vital as a way of informing public debate about them, which is strongly in the public interest in a well-functioning democracy. HMRC have limited resources to devote to the many aspects of their tax collection work, and it is legitimate and appropriate for them to seek to maintain relations with the press and through them with the public to inform public debate about the tax regime and the use of HMRC's resources. It is also relevant to the exercise of

HMRC's functions to provide proper and accurate information to correct mis-apprehensions or captious criticism regarding the exercise of their functions (such as any misplaced suggestion that they had engaged in unduly lenient "cosy deals" with certain tax payers), in order to maintain public confidence in the tax system. If such confidence were undermined, the efficient collection of taxes could be jeopardised, as disaffected tax payers might withhold cooperation from the tax authorities. These considerations provided good objective grounds for [the Permanent Secretary's] decision to participate in the briefing and to seek to foster the spirit of cooperation with the journalists to which I have referred.

45. [The Permanent Secretary's] wish to encourage the journalists to share information with HMRC about tax avoidance, which could be of direct assistance to HMRC in relation to their tax collection functions by helping to inform them about where to focus their attention and investigations, was a further legitimate basis for that decision. He could rationally and lawfully take the view that the journalists would be unlikely to assist HMRC in this way unless HMRC for their part demonstrated a degree of measured frankness about the topics under discussion in return.

46. In addition, I consider that [the Permanent Secretary] could lawfully and rationally take the view he did regarding cooperation and sharing information with the journalists at the briefing so as to encourage them to understand and convey to the public the negative attitude which HMRC had to participation by taxpayers in film investment schemes. HMRC and [the Permanent Secretary] were lawfully entitled to take the view that loss of tax revenue as a result of participation in film investment schemes was detrimental to the due and proper collection of taxes and that it would be desirable to seek to deter members of the public from being too ready to participate in such schemes. There was a significant question mark in relation to such schemes whether participants in them were motivated by genuine commercial calculations rather by a predominant desire to use them to avoid paying tax which would otherwise be due from them. HMRC had an interest to challenge and investigate the true reasons of tax payers for participation in such schemes, which had already been manifested by HMRC before the briefing. It was fair and appropriate for HMRC to seek to convey the message to the public that tax payers who participated in such schemes could expect to have such participation vigorously scrutinised by HMRC, and thereby seek to deter taxpayers who did not have substantial and genuine commercial reasons apart from simply seeking to avoid tax from participating in the schemes in the first place".

79. The rationale which justifies the provision of information by HMRC to the press applies in large measure to disclosure of information to pressure groups and other NGOs, such as Privacy International. Such bodies, like the press, hold Government to account, campaign on issues of public importance, act as focal points for complaints and pursue injustices. In *Ingenious Media* the Judge endorsed submissions by Counsel for HMRC that disseminations to the press served important interests which were part of HMRC's functions (see paragraph [58] above). The Judge rejected a submission on behalf of the Claimant that it was improper for HMRC to disclose information of the type in issue prior to any definitive judgment of a court holding that the schemes in issue were unlawful. On the contrary the Court concluded that it was a legitimate part of HMRC's function to express its attitude "*in relation to… questionable areas of operation of the tax code*" (ibid paragraph [47]). The Judge observed that dissemination of information of this sort facilitated HMRC which had limited resources. But he also recognised that dissemination of information to stimulate public debate was "*strongly in the public interest in a well-functioning democracy*" (ibid paragraph [44]).

80. All of these above considerations can apply, in an appropriate case, to an NGO such as the Claimant which campaigns for a particular point of view and disseminates that perspective through its electronic and paper disseminations. For the HMRC, Mr Peretz acknowledged the importance of providing information into the public domain in order to maintain and foster confidence in the operations of the HMRC in relation to export controls. Of course, both the nature and the extent of the information provided to the press and/or NGOs may depend upon the circumstances of a given case.

81. I would add two final points on this issue. First, Privacy International explained that it regularly receives information under conditions of confidentiality and adheres to limitations imposed upon it. This is, or at least may be, a relevant consideration that HMRC must address itself to. In the present case because HMRC misdirected itself, it did not address the question whether it should be prepared to divulge information to Privacy International under conditions of confidentiality. It is notable that in *Ingenious Media* the Permanent Secretary was prepared to enter into "off the record" discussions with the press and trusted them (as it turned out misguidedly). But this serves only to show that there is no rooted objection within HMRC which could justify refusing to take into account the possibility that a disclosure might be possible under conditions of agreed confidentiality. Secondly, it should be an obvious point, but the decision to disclose or not to disclose will rarely be absolute subject only to a binary "yes/no" response. HMRC will always have to consider whether, even if they object to providing the specific information requested, there may not be room to provide other or lesser information.

(3) Victims

82. The next issue concerns the status of Dr Shehabi and Mr Kersmo as "victims". The position in the Decision letter, and indeed in the update statement, is that neither will be provided any information.

83. HMRC has not attached any added significance to the position of Dr Shehabi or Mr Kersmo as "victims"; on the contrary the blanket approach adopted by HMRC did not differentiate between any particular category of person to whom information might be

provided. In this particular case HMRC rejects the Claimant's case which is that Dr Shehabi and Mr Kersmo are "victims" and that this conclusion triggers a *prima facie* duty to provide information to them about the complaints made on their behalf by Privacy International. The issue of the extent of victims' rights is hence a live one in this case and it is also an issue of wider public concern and interest.

84. It is fair to say that for HMRC this debate has, hitherto, had little day to day resonance. This is because for the overwhelming preponderance of its case load there is no discernible "victim" of an offence, at least in the traditional sense. A taxpayer who has deliberately under-declared or who has fraudulently failed to declare at all, deprives the State of funds and indirectly impoverishes the public purse. Society is a "victim" but only in the broadest sense. However, it would not be right to state that towards the outer regions of HMRC's work, for instance in relation to export control, the same is always true. Here there are individuals who are affected in a far more proximate and immediate way by conduct which is under the regulatory supervision of HMRC and which is alleged to be criminal.

85. By way of example HMRC has responsibility for enforcing the Torture Regulation (Council Regulation (EC) No. 1236/2005) the aim and object of which is to regulate, including curtailing, the export to third countries of products which could be used for "torture and other cruel inhuman or degrading treatment or punishment" (cf recital 9 and Articles 1 and 2). The Torture Regulation accordingly identifies as the subject of its attentions, *ratione personae*, exporters of such products. But the category of person designed to be protected are victims of torture or inhuman or degrading treatment (a concept well understood under Article 3 of the Convention). A violation of the Torture Regulation may mean that equipment is sold which is then used to torture an individual. In the context of the Torture Regulation a person who is tortured or subjected to inhuman or degrading treatment in a third country by virtue of a breach of regulations enforced by the HMRC is, manifestly, in an entirely different position relative to the victimless crimes committed by a taxpayer who fraudulently conceals taxable income.

86. The question of who is a "victim" is relevant in that if the complainant is a "victim" within the specific definition attributed to that term under two pieces of EU legislation then there may prima facie be a duty upon HMRC (and not just a power) to disclose various categories of information to them about the progress of an investigation, and, to provide a reasoned decision if the complaint that the victim makes is rejected.

87. In the present case debate centred upon whether Dr Shehabi or Mr Kersmo constituted "victims" within the meaning of either (a) Council Framework Decision of 15th March 2001 on the Standing of Victims in Criminal Proceedings (OJ L 82/3, 22nd March 2001); or (b) Directive 2012/29/EU of the European Parliament and of the Council of 25th October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA (OJ L 315/57, 14th November 2012). In this judgment I refer to these instruments as, "the Framework Decision" and "the Council Directive" respectively. The relevance of the debate between the parties is that if either Dr Shehabi or Mr Kersmo fell within the definition of "victim" then HMRC would be required, in law, to provide to them certain information and rights set out in the Framework Decision or the Council Directive. As such HMRC would, once the Council directive is

required to be implemented, *prima facie* be duty bound to respond; it would not simply have a power so to do.

88. So far as the relationship between the two instruments is concerned the 2001 Framework Decision is to be replaced by the 2012 Council Directive. However, Member States are only required to implement the Council Directive by 16th November 2015. In the United Kingdom the position is that the Government is in the process of considering what measures are required to be taken to implement the Council Directive; but it has not finally done so yet. However, the CPS has already sought to implement the Council Directive in the form of a "Code of Practice for Victims of Crime" (October 2013). This was presented to Parliament pursuant to section 33 of the Domestic Violence, Crime and Victims Act 2004. Footnote 1 to the Code expressly states that the Code is intended to implement certain provisions of the Council Directive. Accordingly, whilst it might be true that the Government has yet to complete its implementation exercise at least part of the Directive has already been implemented and is treated as being already in force in the United Kingdom.

89. In the text below I set out the nature and extent of the rights arising under these two instruments.

90. As to the status in law of a Framework Decision it was common ground between the parties that it is not treated as an act which has legal force by virtue of the European Communities Act 1972. The legal status of framework decisions was considered by the Supreme Court in *Ministry of Justice, Republic of Lithuania v Bucnys* [2013] UKSC 71. It is not necessary to set out the facts of that case. In his judgment Lord Mance pointed out (ibid paragraph [20]) that although the provisions of a framework decision fell out with the scope of the European Communities Act 1972 viewed: *"…as an international measure having direct effect only at an international level, the United Kingdom must still have contemplated that it would be interpreted uniformly and according to accepted European legal principles.*" Lord Mance drew attention to the recitals to the framework decision in issue as being relevant guidance as to the substantive measures of the instrument.

91. The Framework Decision was adopted to implement the conclusions of the European Council meeting in Tampere in October 1999 which stipulated that "*minimum standards should be drawn up on the protection of the victims of crimes, in particular on crime victims access to justice…*" (cf recital 3). The recitals to the Framework Decision emphasise that the protection to be provided was not confined to attending to a victim's interests only during the course of criminal proceedings but also covered measures to assist victims before and after such proceedings (cf recital 6). Recital 8 to the Framework Decision identified the issues to be harmonised:

> "The rules and practices as regards to the standing and main rights and victims to be approximated with particular regard to the right to be treated with respect for their dignity, the right to provide and receive information, the right to understand and be understood, the right to be protected at the various stages of procedure and the right to have allowance made for the disadvantages of living in a different Member State from the one in which the crime was committed".

92. Article 1 defines "victim" in a way which focuses upon the directness of the causal link between the criminal conduct and the harm sustained:

> "(a) "victim" shall mean a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, *directly* caused by acts or omissions that are in violation of the criminal law of a Member State".
>
> (emphasis added)

93. Article 1(d) defines "proceedings" in the following way:

> "(d) "proceedings" shall be broadly construed to include, in addition to criminal proceedings, all contacts of victims as such with any authority, public service or victim support organisation in connection with their case, before, during, or after criminal process."

94. Article 2 entitled "Respect and recognition" provides as follows:

> "1. Each Member State shall ensure that victims have a real and appropriate role in its criminal legal system. It shall continue to make every effort to ensure that victims are treated with due respect with the dignity of the individual during proceedings and shall recognise the rights and legitimate interests of victims with particular reference to criminal proceedings.
>
> 2. Each Member State shall ensure that victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances".

95. Article 4 is entitled "Right to receive information". It identifies two broad categories of information that victims have a right to.

96. Article 4(1) imposes an obligation upon Member States to "*ensure*" that victims have access as from their first contact with law enforcement agencies to information of relevance for the protection of their interests. The Framework Decision proceeds to identify a range of categories of information that a victim is entitled to including, inter alia, the type of services or organisations to which they can turn for support, the type of support which they can obtain, where and how they can report an offence, procedures following such a report and their role in connection with such procedures, how and under what conditions they may obtain protection, to what extent and upon what terms they have access to legal advice or legal aid or any other sort of advice, requirements for them to be entitled to compensation. The logic behind the duty to provide such information is all readily understandable especially the context of ordinary, routine, crimes.

97. Article 4(2) is in the following terms and concerns the much more specific right to a decision about the outcome of a complaint:

> "2. Each Member State shall ensure that victims who have expressed a wish to this effect are kept informed of: (a) the outcome of their complaint…"

There is nothing in the Framework Decision which accords to the recipient of information about "outcome" a right to challenge a decision not to prosecute. This, however, is a right found in the Council Directive (see below).

98. I turn now to consider whether Dr Shehabi and Mr Kersmo are "victims" within the meaning of the Framework Decision. If they are then the United Kingdom, which of course would include HMRC, must even before full implementation of the Council Directive, interpret relevant legislation in the light of the principles in the Framework Decision and this would include section 18(2) CRCS: See the principle of interpretation at paragraph [90] above.

99. There seems little doubt that Dr Shehabi is a victim of something, somewhere. HMRC submits that she was subjected to surveillance in Bahrain by the Bahraini authorities where such surveillance might or might not be a crime. The Defendant does not therefore accept that she is a "victim" in the sense used in the Framework Decision because any harm she sustained was not "directly caused" by the alleged breach of export regulations by Gamma International. Mr Peretz pointed out that the insertion of the word "directly" into the definition of "victim" in Article 1(a), was deliberate designed to limit the scope and effect of the Framework Decision. He submitted that the limitation was justified upon the basis that the Framework Decision was an instrument setting out minimum standards and guarantees. In relation to a "victim" so defined each Member State assumed extensive (and invariably costly) obligations and it was for this reason that the rights and obligations were limited to persons who had suffered harm "directly" caused by acts or omissions that are in violation of the criminal law of a Member State. He submitted that the Framework Decision by introducing the phrase "directly" recognised that there may well be categories of person who may loosely be defined as "victims" because they were *indirectly* harmed by a criminal act <u>but</u> the Framework Decision, for sound and pragmatic reasons, simply drew a line between direct and indirect victims. This was, he submitted, perfectly understandable in the context of an instrument designed to safeguard "minimum standards".

100. There can in my view be no doubt that the concept of <u>direct</u> causality was inserted intentionally into the legislation. It is notable that equivalent phraseology is found in other language versions of the Framework Decision. For example in the Italian version one finds the expression "*danni materiali causati direttamente*"; in the French version one finds the expression "*directement cause par des actes*"; and, in the Spanish version one finds the expression "*directamente causado*".

101. Mr Squires, for the Claimant, submitted that the issue of who was a victim, at least in the context of the present case, had to be viewed in two different ways. First, he submitted that a person in the position of Dr Shehabi was, when the Decision was construed purposively, precisely the sort of person who was to be categorised as a victim in the context of the Export control functions of the HMRC and the Dual-Use Regulation. Standing back from the Framework Decision, and construing it purposively, he submitted that it would be absurd not to recognise that Dr Shehabi as a "victim" in the sense used within the legislation. Secondly, but on this occasion with

particular regard to the position of Mr Kersmo, Mr Squires repositioned the focus of his analysis onto other legislative measures which, it was submitted, engaged Gamma International in liability as a secondary party and which created a direct link between harm caused to Mr Kersmo in the United Kingdom and criminality by Gamma International. In particular he drew attention to the fact that complaints had been made to the police under section 1 of the Regulation of Investigatory Powers Act 2000, section 45 of the Serious Crime Act 2007 and section 8 of the Accessories and Abettors Act 1861. The complaints alleged that Gamma International had, indeed, committed offences in the United Kingdom which were directly linked to the surveillance performed on Mr Kersmo who was thereby, in actual fact, the direct victim of an offence: See paragraphs [31] above.

102. This is by no means an easy question to answer. The arguments are in my view finely balanced. For reasons that I set out elsewhere the answer to the question is not, necessarily, pivotal to the outcome of this case. However, on balance I prefer the submissions of Mr Peretz. This is for the following two principal reasons.

103. First, the clear statement in the Framework Decision that it amounts to the creation of minimum safeguards only is significant and provides an explanation why the legislature would introduce a directness of causality limitation into the measure. The Council Directive does not purport to set out an exhaustive definition of "victim" in national or international law. It was an attempt to introduce a lowest common denominator as between the Member States. The conclusion that the definition is not all embracing of the notion of "victim" is accordingly perfectly explicable. The Framework Decision does not lay down an exhaustive code and accordingly a person who does not qualify as a "victim" within the meaning of the limited definition therein is <u>not</u> thereafter to be precluded from being a "victim" in some different domestic or international law sense. For instance the concept of victim under the Convention includes both direct and indirect victims: see ECHR Practical Guide on Admissibility Criteria (2011) Section B paragraphs [23]-[31]. It does not, therefore, prevent other arguments being advanced which lead to the conclusion that a person who is not strictly a "victim" as defined under EU law would still have to be accorded a position of significance by the HMRC when it came to determine whether to provide information to them. In other words the analysis of a complainant as a "victim" within the meaning of the Framework Decision may be of assistance to the issue arising but is not dispositive.

104. Secondly, Mr Squire's argument about purpose is ostensibly attractive. It gains some traction from the principle that the Framework Decision must be interpreted by reference to its "aims" and with a view to ensuring fulfilment of "fundamental rights" (see eg Case C-105/03 *Maria Pupino* paragraphs [56] – [59]). However, this has not led the Court of Justice to construe the Framework Decision so broadly that it collides with the natural meaning of the words. In Case C-467/05 *Dell'Orto* [2007] ECR I-5557 paragraphs [51]-[54] the Court declined to define "victims" as including legal persons in addition to natural persons. The Court said that to construe the measure broadly would contradict the express terms of the Decision. The difficulty with Mr Squires submissions is that it fails to grapple with the point that the limitation inherent in the phrase "directly" was deliberately introduced to curtail the reach of the measure and this was achieved by limiting causality. It is clear that the question of the directness of the connection between the victim and the crime was before the Council

when it adopted the Directive. This can for instance been seen from the Opinion of the European Economic and Social Committee (the "ECOSOC") (7th December 2011) which Opinion is referred to as part of the *travaux* in the Council Directive itself (cf footnote 1). This refers in paragraphs 4.3.1 – 4.3.3 to perceived problems associated with the perceived narrowness of the definition of "victim" eg that it precluded legal persons and did not embrace a sufficiently wide range of persons who supported victims beyond the immediate family. Political activists might, as a category or class, be the sorts of person whom the Directive was intended to protect. But this did not prevent the scope of the measure being limited by reference to direct causality of harm. Put another way references to broad purpose do not definitively determine the answer to the question: What is the scope of the measure?

105. I turn now to consider the position under the Council Directive and whether the conclusion differs in the new regime. The Council Directive is intended to replace the Framework Decision and it is based upon very much the same considerations. It was introduced however because experience with the Framework Decision was found not to be satisfactory. A report from the Commission pursuant to Article 18 of the Framework Decision (20th April 2009; COM(2009) 166 final) found that many Member States had not transposed the Decision and that the level of protection accorded to victims was inconsistent. Most Member States implemented through soft law measures (codes of practice etc). The Report notes that a "wide" definition of victim was given by the United Kingdom. Generally, the Commission said that its review had shown that Member States routinely purported already to respect the principles in the Framework Decision but that in practice it found many inconsistencies and omissions. The Council Directive is different to the Framework Decision in that it elaborates upon the right to receive information about the outcome of a complaint and introduces a right to challenge an adverse decision. It also recognises the need for that right to be made real and effective by the provision of reasons.

106. In its recitals it sets out at great length the importance which is attached to the protection and support of victims, including the provision of information to such persons.

107. Article 6(1)(a) of the Council Directive stipulates that Member States "shall ensure" that victims receive information about "*...any decision not to proceed with or to end an investigation or not to prosecute the offender. This is for the purpose of enabling challenges to that decision to occur*": see Article 11. Recital 26 explains that one critical function of the provision of information is to facilitate challenges to decisions not to prosecute:

> "26. When providing information, sufficient detail should be given to ensure that victims are treated in a respectful manner and to enable them to make informed decisions about their participation and proceedings. In this respect, information allowing the victim to know about the current status of any proceedings is particularly important. This is equally relevant for information to enable a victim to decide whether to request a review of a decision not to prosecute. Unless otherwise required, it should be possible to provide the information

> communicated to the victim orally or in writing, including through electronic means".

108. Recital 28 recognises that the provision of information may not be an unqualified right. This in large measure is deigned to control the flow of information whilst a trial is ongoing, but it does seems to go beyond the trial stage:

> "28. Member States should not be obliged to provide information where disclosure of that information could affect the proper handling of a case or harm a given case or person, or if they consider it contrary to the essential interests of their security".

109. Recital 29 provides:

> "29. Competent authorities should ensure that victims receive updated contact details for communication about their case unless the victim has expressed a wish not to receive such information".

110. Recitals 43 and 44 (reflected substantively in Article 11) concern the right of a victim to seek a review of a decision not to prosecute. It is drafted broadly because in different Member States the forum in which such challenges may be mounted can be very different:

> "43. The right to a review of a decision not to prosecute should be understood as referring to decisions taken by prosecutors and investigative judges or law enforcement authorities such as police officers, but not of the decisions taken by the court. Any reviews of a decision not to prosecute should be carried out by a different person or authority to that which made the original decision, unless the initial decision not to prosecute was taken by the highest prosecuting authority, against who's decision no review can be made, in which case the review may be carried out by that same authority. A right to a review to a decision not to prosecute does not concern special procedures, such as proceedings against members of parliament or government, in relation to the exercise of their official position.
>
> 44. A decision ending criminal proceedings should include situations where a prosecutor decides to withdraw charges or discontinue proceedings".

111. Article 2(1)(a) provides a definition of "victim" which whilst retaining the "directness" limitation upon "victim" from the Framework Decision nonetheless extends the definition:

> "(a) victim means:

> i) a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence;
>
> ii) family members of a person whose death was directly cause by a criminal offence and who have suffered harm as a result of that person's death".

112. It will be seen that the definition of "victim" retains the requirement of direct causality first introduced in the Framework Decision. However, it now extends the concept to include family members of a person whose death was "directly caused" by a criminal offence. It inferentially excludes, however, from the definition of "victim" family members of a person who sustained only non-fatal injuries directly caused by a criminal offence and who have suffered harm as a result of that person's injuries. The definition of "victim" thus now extends to certain persons who are at least one step removed from the immediate victim of the actual criminal conduct. The position of a person such as Dr Shehabi in relation to Gamma International appears to fall betwixt and between the two categories of victim contained in Article 2(1)(a). On one view Gamma International is one step removed from the perpetrator of a criminal act upon Dr Shehabi in Bahrain. On the other hand Dr Shehabi appears to be more proximate to the notion of "victim" than a family member of a person whose death was caused by a criminal act. She is closer or more proximate to the concept of a "victim" because she has personally been subjected to what could be illegal activity using products supplied by Gamma International.

113. Is the position under the Council Directive different to that under the Framework Decision? It could be argued, with some persuasive force, that the purpose of the extension of the definition of "victim" from the Framework Decision, was to bring within the definition those who suffered harm but who were one step removed from the criminality. On balance, and again recognising that the answer is not at all clear cut, I consider that the extension of the concept of "victim" to family members of a bereaved was a very specific and limited extension to the concept of "victim" which otherwise remains unchanged. The ECOSOC Opinion (referred to in paragraph [104] above) suggests that the extension was for narrow political reasons. To the extent that the Council Directive goes beyond the direct victim of criminal conduct it has done so in a strictly limited and circumscribed manner – the exception proves the rule.

114. How does all of this affect persons in the position of Dr Shehabi and Mr Kersmo? The answer to this is not something that I can definitively rule upon in this case. The Claimant in its complaint to the MPS on behalf of Mr Kersmo has adopted a more refined approach to causality than that it adopted in relation to Dr Shehabi earlier on in the course of the proceedings. The Claimant has now introduced a legal analysis which seeks to make Gamma International criminally liable on a basis which is wider and far more direct than that set out solely in the relevant export regulations. In so doing it seeks to create a closer nexus between the offence and the harm suffered by Dr Shehabi and Mr Kersmo.

115. HMRC has not, because it previously misdirected itself in law, grappled with the implications of the Framework Decision or the Council Directive to date. Nor has it properly addressed the new legal arguments which Privacy International has advanced

in the context of the complaint to the MPS. HMRC will have to engage in a much closer analysis of this issue when it comes to re-take the decision.

(4) Witnesses

116. I turn now to consider the position of Privacy International's claim that even if they are not victims Dr Shehabi and Mr Kersmo are witnesses who, as such, acquire rights of access to information. The MOJ in December 2013 issued "The Witness Charter – Standards of care for witnesses in the criminal justice system". The Charter is not legally binding. But it is endorsed by the CPS who are responsible for prosecuting criminal cases investigated by HMRC. Hence criminal prosecutions falling within the export control regime fall to be prosecuted by the CPS who will seek to treat witnesses in a manner consistent with the Charter. It is also to be applied by the "Police" who are defined as "…all law enforcement agencies where applicable" and HMRC investigators may fall within this extended definition. The Charter sets out a series of Standards that witnesses are entitled to expect.

117. One elementary component of the Charter is that the CPS will inform a witness of how the case is progressing. The CPS will (according to Standard 2 – which concerns "Reporting a crime or incident"): "…*explain how they are going to deal with the matter; give an indication as to how long this will take*". Standard 5 (which concerns "after a statement is given") states:

> "The police will keep you regularly updated on progress during the investigation of a serious criminal offence. If the crime is less serious, the police will provide you with contact details so you can find out what stage the investigation has reached. You will be informed upon the conclusion of the investigation (eg charge, caution). If you have given a statement to a defence lawyer, you can ask them about the progress of the case to date".

118. The Charter does not explicitly apply to HMRC but, as noted, it applies to the CPS who are responsible for prosecuting criminal cases investigated by HMRC and defines "police" as "all enforcement agencies". Nothing was put before the Court in the present case to suggest that where HMRC did have a case where there was a witness that it should not then expect to behave in a commensurate manner to that of the CPS or police, subject to the end constraints of section 18 CRCA.

119. In this case it is possible that HMRC might well need to treat Dr Shehabi and Mr Kersmo as witnesses. According to a Statement by the Secretary of State in Parliament in 2000 decisions to permit the export of products may be affected by a series of criterion which include: "*The respect for human rights and fundamental freedoms in the country of destination*". The statement continued that the Government would not "…*issue an export licence if there is a clear risk that the proposed export might be used for internal repression*". A victim of repression might be a witness to the fact that the repression was conducted using products subject to HMRCs export control. The evidence given by such persons may well be relevant to a process of investigation leading up to a decision whether or not to prosecute.

120. Once again HMRC will have to address itself to the position of witnesses when it comes to reassess the decision. It is not possible at this stage to go further than to explain how and why the status of a person as a witness might well be a relevant consideration.

(5) Complainants

121. Even if a person is a disinterested complainant, with no personal interest in a case, their status as such might still warrant some recognition. The point was advanced by HMRC in *Ingenious Media* that given limited resources HMRC had to rely in part upon complaints. The HMRC website has a discrete section entitled "Reporting Tax evasion" which promotes its confidential hot line "…for you to report somebody who is not paying their fair share of tax." In *Ingenious Media* one way of encouraging complaints was to disseminate information to them. A disinterested complainant might not be accorded the self-same rights as a victim, or witness or a person in a position comparable to the activists in the present case but that does not mean that they are necessarily denied all rights.

(6) Companies investigated

122. Last, but most certainly not least, there is the position to consider of those who are subjected to investigation. In the present case there are suggestions in Mr Hathaway's witness statement that amongst the considerations that he says were relevant were: (i) that disclosure might forewarn a "suspect" (*in casu* Gamma International); (ii) that disclosure might cause reputational harm; and (iii), that disclosure should not occur because it might contain personal and confidential matters. I will address each of these separately.

(i) Forewarning the suspect

123. To adopt a blanket prohibition upon disclosure for this reason is misconceived. There may well be cases where, because HMRC cannot control the onward dissemination of information that it provides to a third party, the provision of *any* information might risk forewarning a suspect. However, no thought was given in the present case to whether Gamma International was already aware of the complaint (which in fact seems highly probable) or whether even if it was unaware, disclosure should nonetheless be given because it would not impact upon HMRC's enquiries in any event. Gamma International is a large international company with an established reputation in supplying governments around the world. No evidence was put before me to suggest that it would not cooperate with regulatory investigations in an entirely proper manner. No consideration was apparently given by HMRC as to whether Gamma International was the sort of company who would take steps to suppress or conceal information. The problem with forewarning suspects only normally arises where a suspect is thereby enabled to suppress or conceal information or otherwise act in a manner which risks jeopardising an investigation. However, in the present case BIS had already informed Privacy International that Gamma International had been in contact with it as of June 2012 and BIS was prepared to inform the Claimant of a range of matters which, prima facie, were inculpatory and relevant to the Claimant's complaint: See the facts set out at paragraphs [9]-[12] above.

(ii) Reputation

124. In this case the HMRC treated as a sufficient generic reason to withhold information that it could impact upon the reputation of individuals or companies. To adopt this stance was unlawful. The mere fact that there *might* be *some* reputational impact could be a matter to be placed in the weighing scales but it would be exceptional that it could ever be the trumping consideration. Even if there is some reputational harm that still has to be balanced against other interests, including the public interest in transparency and disclosure.

125. In *Ingenious Media* some of the disseminations made by the Permanent Secretary were of a highly subjective and personal nature about the individuals concerned. In relation to the Second Claimant, Mr McKenna, the Permanent Secretary described him as:

> "a vain man, he is a former Deloitte partner, he's a clever guy, he's made a fortune, he's a banker and all of that but actually he's a big risk for us so we would like to recover lots of tax relief that he's generated for himself and other people. Are we winning? I would say beginning to…".

The Permanent Secretary also made the following observation which was anything but flattering about the Claimants:

> "I think we'll clean up on film schemes over the next few years. You may end up laughing at that statement because maybe we'll lose it in the courts, litigation's a hell a of a risk, but you won't find anybody here at all, even the most pro-wealthy people, and I'm not sure we've got any, who thinks film schemes are anything other than scams for scumbags".

126. Information was in this way disseminated to journalists which, self-evidently, risked impacting negatively upon the reputation of the two Claimants. Yet HMRC rigorously defended these disseminations upon public interest grounds downplaying issues as to reputation. Reputation apparently attracted nominal, if any, weight in the weighing exercise which HMRC was concerned with in that particular case. This illustrates both how and why reputation is by no means a show stopper.

127. In *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60; [2009] 1 AC 756 (analysed at paragraphs 142 et seq below) disclosure of information undoubtedly adversely affected the reputation of BAE but this was not argued as having material relevance. In *Kennedy* (*ibid)* the reputation of Mr George Galloway MP was also very much at the heart of the debate; but the fact that disclosure might harm his reputation did not warrant or attract any material sympathy.

128. It is also of some significance that in many other regulatory regimes, regulators routinely announce the existence of investigations into particular companies or individuals. This is, of course, normal in the case of criminal investigations. The provision of information about an investigation into a named person or company is, frequently, accompanied by a warning that the mere fact of an investigation (or even an arrest) does not mean that the person or company in question is necessarily in breach of the relevant law.

129. In this case HMRC has not, considered whether in relation to Gamma International specifically, there is any sensible possible reputational issue arising. This particular case is now in the public domain. It is already an issue of some public significance. BIS has confirmed to Privacy International a good deal of information about Gamma International. Prima facie, it is hard to see how or why reputational issues are of any great materiality. When BIS wrote to the Claimant about Gamma International there was no suggestion that the Claimant could not use that information as it saw fit, irrespective of whether that harmed the reputation of the company.

130. Yet again this is something HMRC will have to address when the matter is remitted.

(iii) Confidentiality of information

131. Two issues arise here. First, there is the question of non-disclosure of specific items of information said to be confidential. Secondly, there is the question whether the simple fact of an investigation should be treated as confidential and kept secret because to disclose even that fact could adversely affect the business prospects of the company concerned abroad and in due course undermine confidence in the system. The broader question of disclosure to enhance confidence in the system also arises in this case as a relevant and discrete mater and is addressed below (See Section G below). To date it has only been suggested in the most abstract of ways that confidentiality issues could arise in responding to the requests for information made by the complainant. The Decision letter was not based upon the risk of disclosing confidential information or upon the impact of such disclosures on confidence in the system. The subsequent explanation by Mr Hathaway was couched in the most general of terms. No evidence has been put before the Court to suggest that there is any real or specific issue about confidence in this particular case and indeed BIS disclosed to Privacy International inculpatory information about Gamma International's position. BIS did not impose any restriction upon how the information it disclosed could be re-disseminated. The high water mark of the Defendant's argument sought to link confidentiality with reputational harm and confidence in the system of export control and was designed to lead to the conclusion that even the very fact of an investigation should be kept secret. HMRC submitted:

- A decision not to prosecute involved a third party (the subject of the investigation) with legitimate interests in the confidentiality of its affairs and in the protection of its reputation;

- Reputational damage could be serious for an exporter for whom the mere suspicion of breach of export control could result in blacklisting by foreign governments in major export markets

- As such there was a risk, the extent of which would vary from case to case, that disclosure by HMRC of the fact of an investigation could cause such commercial or reputational damage that public confidence in HMRC's enforcement of tax or export control rules was reduced.

- In such cases, HMRC was required to take account of that risk in determining whether or not disclosure was made for the purpose of its functions and could not disclose where it reasonably concluded that disclosure would on balance harm its ability to discharge its functions. The simple fact of an investigation could therefore be confidential. This extended even to the fact that an investigation had terminated and there would be no prosecution.

- A complainant's right of access to a court to challenge a no further action ("NFA") decision was in tension with other important principles and interests, and Parliament has dealt with that tension in terms that leave no room for the Claimant's submission that HMRC must take the approach that informing the complainant outweighs every other consideration short of a serious threat to life.

The tenor of HMRCs submission is that in the field of export control concerns about exporter's economic interests and reputation may be viewed as weighing very heavily, or possibly decisively, in the evaluative scales and that therefore it was necessary to treat even the fact of an investigation as confidential. In the absence of facts against which the submission can be measured it is not possible to express other than some broad observations about this position. First, I note that HMRC accepts that each case must be viewed on its own facts; which is correct. Secondly, in principle I accept that there may be circumstances beyond a threat to life which might justify not providing a NFA decision and/or reasons. Thirdly, the case of *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60 suggests that these might be limited (see paragraphs [148] – [154] below for analysis) and puts into context the argument that the simple fact of an investigation should be treated as confidential because it might have negative repercussions on the export prospects of a company. Fourthly, at first blush the asserted link between making disclosure of the fact of an investigation and a risk to confidence in the system seems tenuous. It is hard to see why the fact that a company is being investigated for alleged breach of expert controls is materially different to an investigation into say alleged corruption or bribery where the SFO routinely announces whether it is opening an investigation and sometimes provide summaries about the facts of a case. Fifthly, this issue is at its most acute in the case of a decision to close an investigation (and hence not to report it to the CPS for them to decide whether to charge and prosecute the suspect). If the CPS decides to prosecute then the matter falls into the public domain and justice is performed in public. If, however, the decision is not taken to report to the CPS then HMRC has not explained why this should be confidential and would risk harming confidence in the system if that fact were disclosed. If it is a good decision then disclosure should enhance confidence in the rigour and objectivity of HMRC's investigative processes. If, however, it is a flawed and bad decision then a person with a proper locus should not be denied an opportunity to seek judicial review. Finally, and more generally, it is important to stress that even in investigations where confidentiality arises not every item of information about a complainant or about an investigation will be confidential. Even if some items are confidential this does not prevent HMRC disclosing other non-confidential information. And it is very far from clear that the information actually sought in this case will affect confidentially at all. This is exactly

the approach that BIS adopted. It provided such information as it was able; and withheld the other parts which it concluded were confidential: See paragraph [12] above.

G. Factors relevant to the exercise of discretion II: Securing cooperation and confidence in the system.

132. I turn now to consider more generally the issue of confidence in the system of export control. Because of the manner in which HMRC sought to link this issue to confidentiality I have addressed this in part in relation to the specific question of confidentiality (see above). However, it is of wider significance as Mr Peretz acknowledged in argument. There is no doubt but that one relevant consideration which might guide disclosure is the need to maintain confidence in the system of export control. This is necessary because HMRC must not only encourage complainants who are more likely to assist if they are confident in the HMRC responding appropriately to complaints, but they must also encourage cooperation with those subject to the regulatory regime from whom cooperation is to be expected. This is therefore a consideration which cuts both ways. In written argument submitted after the oral hearing Mr Peretz made the following point about confidence:

> "HMRC accept in principle, by analogy with the reasoning set out by Sales J in *Ingenious Media*, that the maintenance of public confidence in the system of export control assists their ability, under CEMA as applied by article 41 of the ECO, to investigate allegations of potential infringements of export control rules: if such confidence were undermined, such investigations could be hindered, for example because public co-operation was withheld from HMRC. As a result, disclosure that assists in maintaining such public confidence is capable of falling within article 43(2)(a) of the ECO or section 18(2)(a) of the CRCA.
>
> However, as HMRC have maintained consistently in evidence to the Public Accounts Committee, effective tax collection depends on individuals and businesses believing that information that HMRC hold in connection with their functions will be appropriately protected. The same point applies in relation to export control. So a particular disclosure that increased confidence in the system of export control but, in HMRC's assessment in the circumstances of the case, had the wider and more serious impact of undermining confidence that HMRC would keep sensitive information confidential, would not - overall - benefit HMRC's ability to investigate alleged infringements of any matter for which they are responsible: such a disclosure would not, therefore, fall within section 18(2)(a) of the CRCA or article 43(2)(a) of the ECO. As canvassed in oral argument, a number of other factors may also be relevant to that assessment, in any particular case".

133. There are a number of points to make. First, HMRC recognises that public confidence must reside not only in those subject to the system but also in third parties who might

be able to assist HMRC in performing its function (such as complainants). I agree. Secondly, in relation to tax collection it is important that those who submit information must be confident that the information will remain confidential. As a general proposition this also should be uncontroversial but if it is being relied upon as a generic justification for non-disclosure in all cases it may go too far. Thirdly, it is suggested that this same consideration applies to export control. If HMRC's submission here is that because it can argue that it is permissible always or invariably to withhold information in the tax arena that the same can be applied, *mutatis mutandis*, to the export control arena, then I disagree. It is by no means clear that the considerations that apply to tax cases necessarily apply in the same way to export control. There is far less reliance upon individual companies or persons being required to disgorge highly sensitive financial or personal data in the export control area. And HMRC has extensive powers to compel the production of information under section 77A CEMA 1979 (see paragraphs [40] and [41] above) backed by criminal sanction so that voluntary cooperation, whilst desirable, is not essential. In the present case the system (and I simplify) operates upon the basis of the exporter determining whether its product falls within the lists of products subject to control and then obtaining the necessary export clearances. I have no doubt that there may well be technical assessments which HMRC must make of products in order to determine whether they are dual use, for instance and they will need to receive information about sales destinations etc. There may be information which HMRC relies upon which assists them in monitoring sales to overseas prohibited destinations. A variety of sensitive information might arise. In general terms I am sceptical that a stance adopted in relation to tax can simply be translated, without more, to the system of export controls.

134. What does this add up to? It ultimately means that HMRC must examine each case on its merits. It must not start with the preconception that nothing can be disclosed for generic and abstract policy reasons. A decision to disclose may not be a binary "yes" / "no" decision; the right answer might frequently be a partial "yes". So for example if the request is simply for an update in an investigation it might be possible to answer this in a helpful way without disclosing any confidential information and thereby undermining confidence.

135. In short maintaining confidence in the system is a relevant consideration but, as with other factors, it needs to be assessed on a case by case basis and the countervailing importance of disclosure cannot be viewed as of nominal weight as case law demonstrates.

H. Factors relevant to the exercise of discretion III: The right to a No Further Action ("NFA") decision and reasons

(1) The issue

136. I turn now to a separate issue which concerns the right to communication of the decision taken whether to prosecute or not. The Claimant submits that if either actually or constructively (ie HMRC deciding to allow the file to lie fallow without it being closed) HMRC has terminated the case and thereby, in effect, rejected the complaint then it is entitled in law to know this. The basis for the argument, as it evolved in the course of the hearing, is put in three different ways:

i. First that as a matter of common law (taking due account of Article 6 of the European Convention on Human Rights) in principle a person in the position of Dr Shehabi or Mr Kersmo (and indeed the Claimant) has a right to challenge by way of judicial review a decision not to prosecute. If, in the exercise of its powers, HMRC could routinely refuse to inform a complainant as to the outcome of the complaint then that right to apply for judicial review would be rendered nugatory. The result would offend the right to access to a court recognised under the common law and under Article 6 of the Convention.

ii. Secondly, it is contended that *qua* "victim" under the relevant EU legislation on victims rights a person has a right to both general information about investigations and also a reasoned decision if there is to be no prosecution. Hence, HMRC (and/or the CPS once it has assumed responsibility for deciding whether to prosecute) is under a duty to provide information; there being no power not to do so.

iii. Thirdly, pursuant to Article 10 of the European Convention on Human Rights the Claimant is entitled to receive and/or be provided with information and in so far as section 18 CRCA is deployed to restrict the communication of this information it is, prima facie, in violation of Article 10(1) and would have to be justified under Article 10(2) (which it cannot be on the facts of this case, as set out in the Decision letter).

137. So far as the present facts are concerned HMRC has not indicated what stage its investigation has in fact reached. The update statement (see paragraph [27] above) gave nothing away whatsoever. The CPS is responsible for prosecuting violations of criminal law for which HMRC is statutorily responsible. Decisions to prosecute, or not, are hence taken by the CPS. However, that is not to say that a file might not be closed by HMRC without it ever being placed before a CPS prosecutor and if the CPS decides not to prosecute a HMRC case, clearly that will be known to HMRC.

138. In the present case, because of the dearth of information, it is therefore at least theoretically possible that the file has already been closed. Indeed, the Claimant speculated that because nothing visible has happened in approaching 2 years HMRC had been subject to behind the scenes pressure to close the file from either the company concerned, or a foreign government, or even other governmental agencies within the United Kingdom and, as such, it should be compelled to explain its position and if a decision to close the file had been taken it should be communicated to the Claimant along with the reasons therefor.

139. I emphasise that the Claimant's position is speculation. There is no evidence before me supporting that speculation. For his part Mr Peretz, on behalf of HMRC, was at pains to emphasise that it strongly valued its independence and was culturally resistant to external pressures (economic or otherwise) – it was not to be "nobbled". He explicitly accepted that HMRC expected to be accountable to the courts and that this was, in its view, an important component of maintaining public confidence in the system of tax collection and export controls that HMRC was responsible for. Further, he accepted that being accountable to the courts was important in deterring breaches of the law. Put another way: being seen to be accountable to the courts reinforced its position of independence from improper external pressure. Nonetheless, HMRC has

been unforthcoming in providing any form of clarification as to the position in this case.

140. In response to a (hypothetical) question from me as to what HMRC's position would be were it to unearth serious or embarrassing errors on its own part, Mr Peretz acknowledged that, in such a case, being accountable to a court was important to maintaining long term confidence in HMRC and in demonstrating its willingness to learn from its mistakes. He accepted that it would not inspire confidence in HMRC if it were seen to attempt to hide mistakes or conceal errors. If there was error Mr Peretz stated that there would then be "powerful arguments" in favour of disclosure. On the other side of the balance he emphasised that HMRC had a broad discretion in the evaluative exercise to be conducted under section 18 CRCA. He gave, by way of illustration only, cases where it might be proper to withhold information because to do otherwise would expose a difficulty or lacuna in legislation which could then stimulate a proliferation of tax avoidance schemes.

141. In the present circumstances I cannot wholly exclude the possibility that there are highly unusual complications to this case which HMRC properly wishes to conceal, at least at the present time. I have therefore limited my analysis to disputes between the parties which relate to the relevance and importance of the factors which HMRC will have to take into consideration when the decision is retaken and which flowed out of the unlawful Decision letter. I am not in a position to apply those criteria to the facts. It will be for HMRC subsequently to evaluate these considerations in the context of the facts as they present themselves at the time of the reconsideration.

(2) The position in common law

142. The starting point is the common law right to challenge NFA decisions. I use the expression "NFA" to include all decisions in substance not to progress a complaint and this would include actual or constructive decisions not to proceed. The right of access to a court has long been established as a right in the very forefront of constitutional rights: see eg the cases cited at Clayton & Tomlinson, "The Law of Human Rights" (2nd edition), paragraph 11.44. An aspect of access to a court is the right to know that the adverse decision (to be challenged) has in fact been taken.

143. Two well-known authorities provide an indication as to the importance attached to the common law right to be informed of adverse decisions. These are: *R v SSHD ex parte Anufrijeva* [2003] UKHL 36 ("*Anufrijeva"*); and, *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60; [2009] 1 AC 756 ("*Corner House"*).

144. The judgment in *Anufrijeva* concerned the practice of the Home Office to take decisions in asylum cases which were recorded only on internal files and to then rely upon that internal, and non-notified, decision to justify the withdraw of income support benefits to the failed asylum seeker. Lord Steyn (with whom Lord Hoffmann, Lord Millet and Lord Scott agreed) was scathing of an approach pursuant to which non-disclosure of the decision to the affected person was routine. He stated:

> "24 … In oral argument before the House counsel stated that the Secretary of State did not condone delay in notification of a decision on asylum. These were weasel words. There was no

unintended lapse. The practice of not notifying asylum seekers of the fact of withdrawal of income support was consistently and deliberately adopted. There simply is no rational explanation for such a policy. Having abandoned this practice the Secretary of State still seeks to justify it as lawful. It provides a peep into contemporary standards of public administration. Transparency is not its hallmark. It is not an encouraging picture.

25. The Court of Appeal observed about the interpretation of the regulation (para 30):

> ". . . once an asylum seeker knows that her application has been refused, and that she is not to be given leave to enter the country on any other basis, and has the reasons for those decisions, she can reasonably be expected to make a choice: either to accept the decision and leave or to stay and fight but without recourse to state benefits. But she cannot reasonably be expected to make that choice before she knows of the decisions and the reasons for them. There is nothing in the material before us to suggest that it is consistent with the declared purpose of the regulation to expect her to do so."

I would respectfully endorse this observation.

26. The arguments for the Home Secretary ignore fundamental principles of our law. Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice. That is a fundamental and constitutional principle of our legal system: *Raymond v Honey* [1983] 1 AC 1, 10G per Lord Wilberforce; *R v Secretary of State for the Home Department, Ex p Leech,* [1994] QB 198, 209D; *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115.

27. What then is the relevance of this dimension for the present case? The answer is provided by Lord Hoffmann's elegant explanation of the principle of legality in the *Simms* case. He said, at p 131 E-G:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that

> Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document".
>
> This principle may find its primary application in respect of cases under the European Convention on Human Rights. But the Convention is not an exhaustive statement of fundamental rights under our system of law. Lord Hoffmann's dictum applies to fundamental rights beyond the four corners of the Convention. It is engaged in the present case.
>
> 28. This view is reinforced by the constitutional principle requiring the rule of law to be observed. That principle too requires that a constitutional state must accord to individuals the right to know of a decision before their rights can be adversely affected. The antithesis of such a state was described by Kafka: a state where the rights of individuals are overridden by hole in the corner decisions or knocks on doors in the early hours. That is not our system. I accept, of course, that there must be exceptions to this approach, notably in the criminal field, e.g. arrests and search warrants, where notification is not possible. But it is difficult to visualise a rational argument which could even arguably justify putting the present case in the exceptional category. If this analysis is right, it also engages the principle of construction explained by Lord Hoffmann in *Simms*."

145. This judgment articulates a powerful right of access to justice and makes clear that obstacles placed in the way of the exercise of such an important and fundamental right will be scrutinised with care by the Courts. The core objection in that case was to a policy where decisions which affected a citizen could be kept secret. There were however two possible limitations to the right of access which might be relevant to the present case. First, on the facts of the case the practice of failing to notify a decision was in relation to persons who were directly affected by decisions which resulted in loss of income support. Secondly, it was recognised (cf paragraph 28) that the obligation to notify a decision might not be absolute. I now consider how these two caveats might operate in the context of export controls operated by HMRC.

146. As to the first, in the present case there is a right on the part of persons with proper locus to seek judicial review of decisions of prosecutorial authorities not to prosecute. That is a very different type of right to the financial right to income support of the failed asylum seeker in *Anufrijeva* but it is a right nonetheless and an undeniably important right. Case law has repeatedly emphasised that the decision to prosecute (or not) will be quashed only exceptionally. However, there is a consistent body of case law which shows that if the decision to prosecute is seriously flawed it will nonetheless be set aside: eg where serious evidence has been overlooked (eg *R (on the application of Joseph) v DPP* [2001] Crim LR 489); where the decision has been taken pursuant to an unlawful policy (*R v DPP ex parte C* [1995] 1 Cr. ARP R 136); or where the decision was arrived at as a consequence of fraud, corruption or bad faith (*R v DPP ex parte Kebilene* [2000] 2 AC 362).

147. The right in principle to seek judicial review becomes essentially academic in the absence of a decision notifying the interested person of the outcome of a complaint. CPS guidance on judicial review of prosecutorial decisions (2009) recognises the existence of the right and its concomitant, the importance of providing proper reasons:

> "It is essential to ensure that the reasons for decisions, and in particular public interest considerations giving rise to decisions, are documented. This record can be used if necessary, to demonstrate that the decision to prosecute was taken only a full and proper review of the case, Interested parties could also be informed of the reasons for decisions".

148. *Corner House* is one example of a pressure group exercising its right to challenge a highly sensitive decision not to prosecute. The claimants in *Corner House* were Corner House Research and Campaign Against the Arms Trade and had locus to challenge the decision not to prosecute. HMRC accepted in these proceedings that Privacy International had locus to seek judicial review of its decision and it has also acknowledged in post-hearing written submissions that persons in the position of Dr Shehabi and Mr Kersmo would, equally, have locus. This acceptance was correct: in my view Dr Shehabi and Mr Kersmo, who are both much closer to the "action" than is Privacy International, would have locus to challenge a decision not to prosecute. Whether that claim would succeed is of course an entirely different matter. But the issue here is <u>whether</u> they have a right because, if so, then for that right to be rendered nugatory by a refusal to inform risks falling foul of the constitutional right of access to a court. Accordingly, the difference in the interest of the applicant in *Anufrijeva* and the interests of the Claimant and the activists in the present case is one of form not substance. The first limitation in *Anufrijeva* does not apply in this case.

149. As to the second limitation referred to in paragraph [145] above, in my view there may be occasions where a decision not to notify a person affected by a complaint of the outcome might be justifiable. An indication of both the strength of the duty to notify NFA decision but also of the possibility of exceptions is found in *Corner House*. In 2004 the Director of the SFO commenced an investigation into allegations of corruption against BAE. One aspect of the investigation concerned an arms contract between the Government and the Kingdom of Saudi Arabia for which BAE was the main contractor. During the investigation BAE represented to the SFO that disclosure of information required by a statutory notice served upon it would adversely affect relations between the UK and Saudi Arabia and jeopardise the arms

contract. Following a variety of communications and meetings the Director of the SFO concluded that he had a duty to pursue the investigation. Subsequently an explicit threat was made by the Saudi authorities that if the investigations continued Saudi Arabia would withdraw from the existing bilateral counter-terrorism cooperation arrangements with the UK, withdraw cooperation from the UK in relation to its strategic objectives in the Middle East and end the negotiations then in train for the procurement of Typhoon aircraft. In the light of this the Director of the SFO decided that the investigation should be discontinued. In arriving at this decision, the Director obtained the advice of the Attorney General and a so-called "Shawcross" exercise was conducted pursuant to which the Attorney General sought the views of certain ministers. Having taken advice the Director concluded that continuing with the investigation would risk serious harm to UK national and international security. He decided therefore that the most controversial aspects of the investigation should be discontinued. Importantly he announced his decision in a press release the same day which stated:

> "The Director of the Serious Fraud Office has decided to discontinue the investigation into the affairs of BAE Systems plc as far as they related to the Al Yamamah defence contract with the Government of Saudi Arabia. The decision has been taken following representations that had been made both to the Attorney General and the Director of the SFO concerning the need to safeguard national and international security. It has been necessary to balance the need to maintain the rule of law against the wider public interest. No weight has been given to commercial interest or to the national economic interest".

150. The Attorney General also made a statement in Parliament the same day. He referred to the strong public interest in upholding and enforcing the criminal law, in particular against international corruption, and also to the views of the Prime Minister and Foreign and Defence Secretaries as to the public interest considerations raised by the investigation. They had, he explained to Parliament:

> "… expressed the clear view that continuation of the investigation would cause serious damage to UK/Saudi security, intelligence and diplomatic cooperation which is likely to have seriously negative consequences for the United Kingdom public interest in terms of both national security and our highest priority foreign policy in the Middle East. The heads of our security and intelligence agencies and our ambassador to Saudi Arabia shared this assessment".

151. It is notable that in *Corner House* the Director of the SFO felt it important to confirm publically that private and public commercial interests and the wider national economic interest were not treated as sufficient grounds to justify non-prosecution and these were expressly disavowed when giving reason for not proceeding with the prosecution. In the Divisional Court, in a judgment delivered by Lord Justice Moses, there was consideration of a variety of illustrations, hypothetical and otherwise, which it was contended might justify a decision not to prosecute. One such example concerned the case of Leila Khalid in 1970. She was a member of the Palestine Liberation Organisation and had been in custody following her attempt to highjack an

aeroplane. The PLO threatened to kill Swiss and German hostages unless she was released. The Attorney General at the time accepted the advice the prosecution would increase the danger to the lives of those hostages and ordered her release. Lord Justice Moses (ibid page 784 paragraphs [80]-[82]) acknowledged that the law recognised the defence of duress and in some circumstances a justification of necessity. However, he concluded that to preserve the integrity and independence of the exercise of independent judgement demanded of the Director of the SFO necessitated resistance to the pressure exerted by means of a specific threat. He concluded that the court had a responsibility to secure the rule of law and that the Director of the SFO had failed to satisfy the court that he had done all that could reasonably be done to resist the threats.

152. On appeal the House of Lords disagreed with this assessment. Lord Bingham pointed out that it was accepted that the decisions of the Director were not immune from the review of the courts but authority showed that it would be in only exceptional cases the court would interfere with decisions of the independent prosecutor and investigator: See per Lord Bingham paragraph [30]. He proceeded to state that the discretion conferred upon the Director was not unfettered:

> "He must seek to exercise his powers to promote the statutory purpose for which he has given them. He must direct himself correctly in law. He must act lawfully. He must do his best to exercise an objective judgement on the relevant material available to him. He must exercise his powers in good faith, uninfluenced by any ulterior motive, predilection or prejudice. In the present case, the claimants have not sought to impugn the Director's good faith and honesty in any way".

153. With specific regard to the external pressures imposed upon the Director, and his decision to discontinue with the prosecution, Lord Bingham concluded that the Director acted lawfully:

> "35. The evidence makes plain that the decision to discontinue the investigation was taken with extreme reluctance. As the Director put it in his second witness statement:
>
> > '11. Investigation of prosecution of serious crime is a major public interest that the SFO exists to promote. My job is to investigate and prosecute crime. The Al Yamamah investigation was a major investigation. The idea of discontinuing the investigation went against my every instinct as a prosecutor…'
>
> The Attorney General on 13 December 2006 was said to be "extremely unhappy" the implications of dropping the investigation at that stage. What determined the decision was the Director's judgment that public interest in saving British lives outweighed the public interest in pursuing BAE to conviction. It was a courageous decision, since the Director could have avoided making it by disingenuously adopting the Attorney General's view (with which he did not agree) that the

> case was evidentially weak. Had he anticipated the same consequences and made the same decision in the absence of an explicit Saudi threat it would seem the Divisional Court would have upheld the decision, since it regarded the threat as "the essential point" in the case".

154. The judgment in *Corner House* was not concerned with the logically, *a priori,* issue whether the decision to drop the prosecution could be kept secret. It was concerned with the substantive legality of the decision itself. It was not however said that the decision to discontinue was a secret or was to be treated as such simply because it was premised upon highly controversial and sensitive issues, including of a security nature. Indeed, following a very lengthy and anxious scrutiny of the facts by the law officers and ministers, both the Director of the SFO and the Attorney General made public statements announcing the decision and setting out succinct reasons for it. The judgment is not therefore support for the proposition that a NFA decision should not be promulgated and communicated to a complainant even in difficult and sensitive cases.

155. An extension of the reasoning in *Corner House* might however indicate that a decision not to even issue an NFA decision could be justified, for example if a third party threatened that it would kill hostages if a prosecution proceeded and if the fact of discontinuance were to be made public. I am not suggesting that it will always take facts which are as extreme as those referred to above to warrant a decision not to notify the NFA decision. But the case law does suggest that there would need to be some fairly unusual circumstances to warrant such a decision.

156. It is right to record that the Council Directive also alludes to possible limitations upon the provision of information in recital 28: See paragraph [108] above. Curiously, there is no express corresponding caveat in the body of the Directive itself. The nearest that one finds to a substantive reflection of recital 28 is in Article 4(2) which is in relation to the right of victims to receive information of a broad category (and which does not include NFA information). It relates primarily to the post-charge, prosecution, stage of a case. Article 4(2) provides:

> "The extent or detail of information referred to in paragraph 1 may vary depending on the specific needs and personal circumstances of the victim and the type or nature of the crime. Additional details may also be provided at later stages depending on the needs of the victim and the relevant, at each stage of the proceedings, of such details".

157. There is however no reference in Article 4(2) to security or other considerations, as set out in recital 28.

158. A further caveat to the obligation to provide information, of greater possible relevance to the case, is found in Article 6(3). I have set this out at paragraph [164] below. In that provision the obligation to provide a NFA decision (in respect of a decision not to proceed with or bring to a close an investigation or not to prosecute an offender) appears to excuse the decision maker from providing reasons which are "confidential". However nothing in Article 6 permits the decision maker to refrain for issuing the NFA decision itself.

159. In the course of oral argument both Mr Squires and Mr Peretz sought to find words which could encapsulate or describe the extent of the obligation on the HMRC to provide a reasoned decision. HMRC was reluctant to explore, as a hypothetical exercise, the scope of the exceptions. The Claimant wished to narrow the non-disclosure daylight to the maximum degree. Mr Squires suggested that it would be "wholly exceptional" not to provide such a decision. Mr Peretz cavilled at both "exceptional" and "wholly". He was prepared to go so far as to say that there is a "*strong argument for informing people of a NFA decision as a means of maintaining confidence in the system*". He accepted that disclosure is a "*key part of securing accessibility to a court and this is critical to confidence*" in the HMRC and its functions. He also accepted that the argument in favour of disclosure was "*pretty powerful*". Ultimately I am not convinced that attempts to attach a descriptive label add anything to the law. There is common ground as to the importance of the right of access to a court and the fact that in the absence of the provision of a reasoned NFA decision the right may be rendered nugatory. There was common ground that there may be exceptions to the obligation. In my view the case law largely speaks for itself and is not embellished by adjectival glosses.

160. There is a further matter which warrants brief mention. There was debate as to whether, in an organisation which deals with a vast number of complaints (predominantly in relation to tax) annually, the HMRC should have to respond to every frivolous or vexatious complaint made to it with a NFA decision. I can see the force of HMRC's point. I am cautious however in addressing matters which do not form part of the factual matrix in the present case. Here the complaints made are concerned with export controls not tax, and are serious and credible and supported with evidence. I am cautious about expressing a view about whether a species of *de minimis* rule applies in relation to export control because there was no evidence before the Court as to the scale or nature of the issue and there may be room for real divergence of views as to what is a frivolous and vexatious case.

161. Finally, in my view a decision not to issue a decision is, in my view a decisional act which is in principle capable of being subjected to judicial review. A decision maker cannot get around an obligation to provide a NFA decision by simply leaving a file dormant and unattended. See the references to the judgments of the Supreme Court in *Kennedy*: per Lord Toulson (with whom Lords Neuberger and Clarke agreed) at paragraphs [126]-[128] and [132] and Lord Sumption at paragraph [157].

162. In short, at common law there are cogent reasons in favour of decisions not to prosecute being notified to affected persons together with reasons and this would apply to the activists whose cases are before HMRC at present. I am not in this judgment addressing the position of the CPS. But many cases may be closed without a CPS review; so the issue is very far from being academic.

(3) The position under the Framework Decision and the Council Directive

163. I have already addressed these measures in the context of defining a "victim" at paragraphs [82]-[105] above. I can therefore deal briefly with the specific sub-issue of access to NFA decisions. On the basis of the Framework Decision and the Council Directive if a person is properly to be categorised as a "victim" then that person *prima facie* has a right to a NFA decision together with reasons under the terms of EU law. This is to facilitate a right of review.

164. Article 6 of the Council Directive provides:

> "Right to receive information about their case
>
> 1. Member States shall ensure that victims are notified without unnecessary delay of their right to receive the following information about the criminal proceedings instituted as a result of the complaint with regard to a criminal offence suffered by the victim and that, upon request, they receive such information:
>
> (a) any decision not to proceed with or to end an investigation or not to prosecute the offender;
>
> (b) the time and place of the trial, and the nature of the charges against the offender.
>
> 2. Member States shall ensure that, in accordance with their role in the relevant criminal justice system, victims are notified without unnecessary delay of their right to receive the following information about the criminal proceedings instituted as a result of the complaint with regard to a criminal offence suffered by them and that, upon request, they receive such information:
>
> (a) any final judgment in a trial;
>
> (b) information enabling the victim to know about the state of the criminal proceedings, unless in exceptional cases the proper handling of the case may be adversely affected by such notification.
>
> 3. Information provided for under paragraph 1(a) and paragraph 2(a) shall include reasons or a brief summary of reasons for the decision concerned, except in the case of a jury decision or a decision where the reasons are confidential in which cases the reasons are not provided as a matter of national law".

165. Article 6 thus compels disclosure without unnecessary delay of NFA decisions. This is not a power to disclose; it is a duty (hence the opening phrase in Article 6: "*Member States shall ensure*…") subject to two caveats. The first caveat is under Article 6(2)(b) which permits, in exceptional circumstances, information to be withheld where to disclose may adversely affect the "proper handling" of a case. The second caveat arises under Article 6(3) provide exceptions from the duty to give reasons where these reasons are confidential. But this applies to reasons for the decision not to the substantive NFA decision itself. In this jurisdiction if an unreasoned, negative, NFA decision was communicated and challenged the Court would nonetheless have sufficient power to determine the legality and admissibility of the actual reasoning.

166. In the present case HMRC, in the Decision letter and subsequently, did not address itself to whether Dr Shehabi or Mr Kersmo were "victims" and hence acquired rights under EU law. The analysis which occurred in Court about this issue was essentially in a vacuum. HMRC will have to address this in far greater detail when the decision is retaken. That analysis will necessarily involve addressing the arguments raised by Privacy International in its complaint to the MPS. It is however beyond the scope of this judgment to express a conclusion upon that issue. Although it was referred to as important context and factual background in this case, it was not the subject of sufficiently detailed argument for me to form any clear view either way.

(4) Article 10 ECHR

167. The third and final basis upon which the Claimant seeks to justify the disclosure of information is Article 10 of the Convention. This provides:

> "Article 10 – Freedom of expression
>
> 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 responsibilities, 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".

168. Mr Squires submitted that Article 10 was sufficiently broad to embrace the receipt of information from public authorities. In particular he submitted that it was capable of being engaged in two different ways. First, it imposed upon public authorities an obligation to provide information to third parties. Secondly, it embraced the situation whereby the State interfered with the ability of another state entity to provide information (that it wished to provide) to third parties.

169. As to the first argument Mr Squires was forced to concede in the light of the Supreme Court judgment in *Kennedy* (ibid) that the first route was not open to him. In that case the Court endorsed the prior ruling of the Court of Appeal that Article 10 did not impose a positive "freedom of information" obligation upon public authorities to provide access to documents held by the authority and which the authority did not wish to disclose (ibid per Lord Mance at [57]-[99] esp. [90]-[96]; per Lord Toulson [144]-[148] and Lord Sumption at [154]; Lords Neuberger and Clarke agreed with Lords Mance, Toulson and Sumption). This coincided with Mr Peretz's submission

and I agree that this line of argument is not at present open to the Court to adopt. I do not need to address it further.

170. As to the second argument Mr Squires cited *Leander v Sweden* (1987) 9 EHRR 433 at paragraph [74] where the Court stated:

> "The Court observes that the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information *that others wish or my be willing to impact to him*, Article 10 does not, in circumstances such as those of the present case confer on the individual a right of case to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual".
>
> (Emphasis added)

171. The principle so described involves a restriction imposed upon "*others*" by the "*Government*" limiting the ability to disseminate information. The Court of Appeal in *Kennedy* [2012] 1 WLR 3524 described a "… *well-established line of decisions of the [ECtHR] that it is an infringement of article 10 for a state to restrict a person from receiving information that others wish or may wish to impart to that person*" (ibid paragraph[13]). That line of authority, which stretches back to *Leander v Sweden* (ibid), was not questioned in the Supreme Court.

172. In his skeleton argument Mr Squires submitted:

> "The Claimant is not seeking access to documents that HMRC holds. It simply wishes to be informed by HMRC whether an investigation is taking place and if not why not. HMRC's position is that even if it would be desirable for it to provide that information, and it would wish to impart it, it is prohibited from doing so by CRCA 2005 s 18. The case therefore falls squarely within the …. "*well established* " principle referred to in *Kennedy* and *Leander,* namely that a restriction on receiving information which others may wish to impart engages Art 10".

173. The "*others*" in the quotation from *Kennedy,* it is argued, include HMRC which is restricted by Government, via section 18 CRCA 2005, from imparting information that HMRC might otherwise wish to impart. Mr Squires argued by way of illustration and elaboration of this point that it was inconceivable that the Strasbourg Court would find that the following hypothetical situation fell outside of the scope of Article 10(1): State X introduces legislation which prohibits teachers, who are state employees, from teaching that the earth was round. He submitted that here the State would be interfering with the right of teachers (the "*others*") to impart information to pupils and the right of pupils to receive information. He did not say that this would necessarily involve a violation of Article 10 but only that such a restriction was capable in principle of falling within Article 10(1) (even though this was in one sense the state restricting itself) and would therefore have to be justified under Article 10(2).

174. It was accepted that there was no authority that was precisely on point. Mr Peretz submitted that Article 10(1) did not in principle apply to a case such as the present since the "*others*" referred to are intended to catch only private parties. Article 10(1) was, he submitted, concerned with interference imposed by the state on disseminations as between private parties, not with restriction intra-state.

175. The Claimant's argument about Article 10 was advanced in the light of the Decision letter which took a black and white approach to disclosure. However, given the development in the Defendant's case much of the force of the point falls away. HMRC no longer says that section 18 is a bar upon acting in a way that it might wish to. HMRC submits that it has a discretion which it must exercise in a proper way. Accordingly, a central factual premise underlying the Claimant's argument falls away.

176. It is not necessary for me to decide this point because in view of the findings I have made earlier about the scope of section 18 and HMRCs recognition that it has the right to disseminate information under that section, there would only be daylight between section 18 and Article 10 <u>if</u> properly interpreted section 18 imposed limitations upon HMRCs ability to disclose information which left material daylight with Article 10. In my view the common law principles which govern the operation of section 18 are capable of addressing the situation adequately. For reasons I have set out above I consider that the common law provides a comprehensive set of principles which are capable of striking the balance and I cannot identify any real daylight between the common law as it applies to section 18 and Article 10.

177. Having said this I would add one observation about an aspect of the dispute between Mr Squires and Mr Peretz concerning the scope of Article 10(1) which concerns whether Article 10 applies *at all* to a situation whereby Government restricts another arm of the State from disclosing information. In my view the key to the point lies in identifying the "*state*" (as in the quotation from *Leander v Sweden)* or "*public authority* (to use the language from Article 10(1) itself). The point can be tested by using Mr Squires teacher example. If the teacher is the "state" or a "public authority" then any restriction imposed upon that teacher by the Government is an intra-"state" interference and the State is not restricting how some "*other*" person can impart information. If however the teacher is not the "state" or a "public authority" (simply by virtue of being employed by the State) then the State <u>is</u> imposing a restriction upon some "other" person (the teacher) as to how he or she should be allowed impart knowledge and learning to pupils, and this could in principle fall within Article 10(1). Although there is no authority directly on point under Article 10 there is another principle which provides some possible illumination. The Strasbourg Court has in the context of admissibility addressed the jurisdiction *ratione personae* of the Convention. For the Convention to apply *at all* there has to be some alleged violation by a Contracting State, or infringing conduct which is some way can be attributed to the State. In the Court's "Practical Guide to Admissibility Criteria" (2011) ("the Admissibility Guide") paragraph 151 the Court states:

> "Compatibility *ratione personae* requires the alleged violation of the Convention to have been committed by a Contracting State or to be in some away attributable to it".

178. For the purposes of establishing jurisdiction the Court must therefore be satisfied that the defendant is a "State". In this regard it has been held, for instance, that not every

State-owned company amounts to the "State". If it enjoys sufficient institutional and operational independence from the State then the latter will be absolved from responsibility under the Convention for the State owned company's acts and omissions: See the authorities cited in the Admissibility Guide at paragraph [154]. If one applies a test of "sufficiency of institutional and operational independence" to the teacher illustration then it is quite possible to argue that the teacher is sufficiently distant from the "State" to be treated as severable from the State and that the State is not therefore responsible for the teachers conduct. This would suggest that the teacher is an "*other*" to use the Article 10 rubric from *Leander* and *Kennedy*. However, the same conclusion might well not apply if the test were applied to HMRC. Although HMRC has some statutory autonomy it is nonetheless at the very epicentre of the "State" and a serious argument can be advanced therefore that it is non-severable from the rest of the State. If this be right then a restriction imposed upon HMRC in relation to disclosure is not a restriction imposed by the State upon an "other".

179. At the end of the day this is not a matter I feel it is sensible to express a definitive view upon. Given the marked change in HMRCs position the practical relevance of the point has largely fallen away. In my view it suffices to conclude in relation to Article 10 that, as in *Kennedy*, it is essentially otiose. The case should be resolved principally upon the basis of common law and/or (to the extent it applies) EU law.

I. The invitation to invite the HMRC to issue Guidelines

180. Mr Squires parting shot in this case was to invite me to invite or require the HMRC to issue guidelines. He submitted that the overall perception which arose from this case and from *Ingenious Media*, was that HMRC's position was developed in a reactive way and that given the ever growing acknowledgement of the need for transparent government there was a real need for HMRC to address itself in a deliberate manner to the issue of disclosure and then to make public its position in the form of guidance.

181. Mr Peretz, very politely, said that were I to make such an invitation HMRC would "consider" it. He certainly did not consider that I should require HMRC to provide guidance.

182. In fact the Court does have the power in some circumstances to make such an order. In *R (Purdy) v DPP* [2009] UKHL 45, [2010] 1 AC 345 the House of Lords considered the law relating to euthanasia. Their Lordships ultimately allowed an appeal and made as part of their order a requirement that the DPP produce guidelines on the criteria that would be applied to prosecutions in such cases. Lord Hope stated as follows:

> "54. The Code will normally provide sufficient guidance to Crown Prosecutors and to the public as to how decisions should or are likely to be taken whether or not, in a given case, it will be in the public interest to prosecute. This is a valuable safeguard for the vulnerable, as it enables the prosecutor to take into account the whole background of the case. In most cases its application will ensure predictability and consistency of decision-taking, and people will know where they stand. But that cannot be said of cases where the offence in contemplation

> is aiding or abetting the suicide of a person who is terminally ill or severely and incurably disabled, who wishes to be helped to travel to a country where assisted suicide is lawful and who, having the capacity to take such a decision, does so freely and with a full understanding of the consequences. There is already an obvious gulf between what section 2(1) says and the way that the subsection is being applied in practice in compassionate cases of that kind.
>
> 55. The cases that have been referred to the Director are few, but they will undoubtedly grow in number. Decisions in this area of the law are, of course, highly sensitive to the facts of each case. They are also likely to be controversial. But I would not regard these as reasons for excusing the Director from the obligation to clarify what his position is as to the factors that he regards as relevant for and against prosecution in this very special and carefully defined class of case. How he goes about this task must be a matter for him, as also must be the ultimate decision as to whether or not to prosecute. But, as the definition which I have given may show, it ought to be possible to confine the class that requires special treatment to a very narrow band of cases with the result that the Code will continue to apply to all those cases that fall outside it.
>
> 56. I would therefore allow the appeal and require the Director to promulgate an offence-specific policy identifying the facts and circumstances which he will take into account in deciding, in a case such as that which Ms Purdy's case exemplifies, whether or not to consent to a prosecution under section 2(1) of the 1961 Act".

183. Lord Phillips endorsed the result, viz., that the DPP should be "*required*" to issue guidelines (paragraph [1]), as did Lady Hale (paragraph [69]), Lord Brown (paragraph [88]) and Lord Neuberger (paragraph [106]).

184. I have decided to decline the invitation, even to proffer an invitation.

185. I can see that there might be practical benefit in the provision of guidance. The present case does convey the impression that HMRC lacks a consistent and considered position in this area and that its policy has been dictated more by the exigencies, course and speed of litigation than by premeditation. However, there have only been two cases which have grappled with this issue: the present case and *Ingenious Media* in different areas of HMRCs work. This is not an especially solid platform upon which to intervene. Furthermore, HMRC will probably have to consult with the CPS and their views on the issues arising are not before the Court. This, in my view, is a matter for HMRC to consider for itself without, certainly at this stage, external interference.

J. Conclusion

186. For all of the above reasons this application for judicial review succeeds. The Decision of the Defendant is quashed and it is remitted to the Defendant to be re-taken.