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

THIRD SECTION

CASE OF ATLAN v. THE UNITED KINGDOM

(*Application no. 36533/97*)

JUDGMENT

STRASBOURG

19 June 2001

FINAL

19/09/2001

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention.

In the case of Atlan v. the United Kingdom,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr W. FUHRMANN,
Mr L. LOUCAIDES,
Sir Nicolas BRATZA,
Mrs H.S. GREVE,
Mr K. TRAJA,
Mr M. UGREKHELIDZE, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 10 October 2000 and 29 May 2001,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 36533/97) against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two French nationals, Armand Atlan ("the first applicant") and his son, Thierry Atlan ("the second applicant"), on 28 February 1997. The second applicant died in July 1998.

2. The applicants were represented before the Court by Mr H. Brown, a lawyer practising in Ruislip, Middlesex. The United Kingdom Government ("the Government") were represented by their Agent, Mr H. Llewellyn, Foreign and Commonwealth Office. On 13 October 2000 the French Government were informed of the application but they declined to intervene.

3. The applicants alleged that they had been denied a fair trial in breach of Article 6 § 1 of the Convention.

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

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

6. By a decision of 10 October 2000 the Chamber declared the application admissible and decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. On 5 July 1991, at the Crown Court at Isleworth, Middlesex, the applicants and another man, Jean-Pierre Terrasson, were convicted of illegally importing 18 kilograms of cocaine (with a street value of GBP 2-3 million) into Heathrow Airport, London, on 3 November 1990.

8. The applicants and Mr Terrasson had been under surveillance by officers of Her Majesty's Customs and Excise for some five weeks prior to their arrest on 3 November 1990. On 29 September the three men were observed travelling to Copenhagen Airport. They did not leave the airport and almost immediately after arriving they checked in their luggage and returned to Heathrow. The second applicant (henceforth, "Thierry") and Mr Terrasson travelled to Brazil on 30 September, and the first applicant ("Armand") went to Los Angeles on 1 October. The two applicants returned to London on 30 October, when Armand was observed arriving at Heathrow carrying a black suitcase. On 2 November 1990 he met Thierry (who had been in France) and Mr Terrasson (coming from Brazil) at Heathrow.

9. On 3 November 1990 a man named Willi Smolny flew from Brazil to London via Copenhagen. He had with him a black suitcase containing 18 kilograms of cocaine.

10. That morning, the applicants went to Mr Terrasson's London hotel. Thierry was seen carrying a black suitcase similar to Mr Smolny's. Shortly thereafter he and Mr Terrasson left the hotel by taxi for Heathrow, carrying the black and a grey suitcase. At the airport they boarded a flight for Copenhagen, checking in the black suitcase in Mr Terrasson's name and the grey suitcase in Thierry's name. Immediately on their arrival in Copenhagen they checked themselves on to a return flight to Heathrow. Mr Smolny was also on this flight, although there was no evidence of contact between Mr Smolny, Thierry and Mr Terrasson.

11. When the aeroplane reached Heathrow, customs officers intercepted the luggage. They found that the two black suitcases were indeed very similar. Mr Smolny's suitcase was to contain 18 kilograms of cocaine. It was almost twice as heavy as the suitcase checked in by Mr Terrasson, which had a number of identifying tags attached to it.

12. The officers put the two suitcases back with the other luggage from the flight which passed for collection on to the carousel. One of the officers saw Thierry take Mr Smolny's suitcase from the carousel and put it onto Mr Terrasson's trolley. Mr Terrasson took this suitcase through the green, "nothing to declare", channel at customs. Thierry also collected the grey

suitcase, which he took through the green channel. The other black suitcase, which had been checked on to the flight by Mr Terrasson, was not collected from the carousel.

13. Mr Terrasson and Thierry were arrested by customs officers. Armand, who had not been on the flight or at the airport, was arrested later that day at the home of a relative in South London. All three men were interviewed and denied any knowledge of or participation in the offence. Armand said that he was an emerald and diamond dealer in England for a short time on his way to Antwerp. He claimed not to know Mr Terrasson and stated that he did not know anything about his son's trip to Copenhagen. Thierry said that he had previously travelled to Copenhagen in connection with the purchase of some jewels, but said that he had made the most recent trip to see a girlfriend. He also denied knowing Mr Terrasson, until customs officers told him that Mr Terrasson's credit cards had been found in the grey suitcase. Thierry then conceded that he had had a brief encounter with Mr Terrasson in Copenhagen. Mr Terrasson denied knowing either of the applicants or Mr Smolny. He said that he had travelled alone to Copenhagen, taking with him a black suitcase, to meet a married woman friend. He was unable to meet her because her husband was home, so he returned immediately to London. He claimed to have taken his own, not Mr Smolny's, black suitcase from the carousel. Mr Smolny was arrested later in Zurich. He said in interview that he had been instructed by a man called Mr Morgan to bring the black suitcase, which he believed to contain antiques, from Sao Paolo to Heathrow and to leave it on the luggage carousel.

14. In January 1991 "old-style" committal proceedings (requiring the prosecution witnesses to give oral evidence) were held at the Uxbridge Magistrates Court. Under cross-examination by the defence counsel, the customs case-officer claimed that the only relevant evidence held by the prosecution which had not been disclosed to the defence was two tapes of interviews with the applicants' South London relatives, two or three interpreters' statements and some material taken from the house where Armand had been arrested.

15. At the trial, which started in May 1991, the prosecution case was that Armand had organised the importation, using Mr Smolny as the courier from Brazil to Copenhagen and London, and that he had instructed Mr Terrasson, with Thierry as "minder", to collect Mr Smolny's suitcase at Heathrow as if in mistake for his own. There was no forensic, photographic or video evidence to substantiate the prosecution case, which relied to a large extent on the accounts given by customs officers of what they had observed.

16. All four defendants pleaded not guilty and gave evidence. The applicants maintained that Armand worked principally as a jewel trader, but that he did not keep written records because he systematically avoided

paying taxes and duties in Brazil. The illegality of his jewel trading had motivated their lies during their initial interviews with customs officers. The applicants' defence centred around a dispute between Armand and a rival jewel trader based in Brazil called Rudi Steiner. They stated that Armand had paid Mr Steiner USD 200,000 in advance for diamonds, which Mr Steiner had failed to deliver to the applicants as agreed in Copenhagen on three occasions: 28 August, 29 September and 3 November 1990. On this last occasion, since, as before, Mr Steiner did not appear, Thierry and Mr Terrasson, who had gone together to collect the diamonds, returned immediately to Heathrow, where Thierry removed Mr Terrasson's, not Mr Smolny's, suitcase from the carousel. The applicants contended that Mr Steiner was an informer for Customs and Excise. They claimed that, in order to avoid repaying his debt and for fear that the applicants would discredit him amongst other Brazilian traders following the non-delivery of the diamonds, he had arranged falsely to implicate them in the importation of cocaine. However, they had no evidence to connect Mr Steiner to Mr Molny's suitcase full of drugs or to substantiate the suggestion that he was a Customs and Excise informer.

17. Under cross-examination the customs officers involved in the case refused either to confirm or deny whether or not they had used an informer. No evidence relating to an informer or to Rudi Steiner was served on the defence or put before the judge.

18. In his summing up the judge summarised the defence by saying, *inter alia*:

> "...Steiner had long since either directly or through the Brazilian authorities informed British Customs and Excise that Armand Atlan and Thierry Atlan and Mr Terrasson were preparing to smuggle cocaine to England, and in that way had induced the Customs and Excise here to mount a prolonged and labour-intensive observation of those three men.
>
> On the Saturday, 3rd of November, Steiner sprang his trap. He got Morgan to send Smolny off with the suitcase ... with the drugs in it, believing it, of course, to be antiques and works of art.
>
> He got Armand Atlan to believe that it was worthwhile going for the third time to Copenhagen for a delivery of the diamonds and he notified Customs of the itinerary of the various people which was to be foreseen from these arrangements, and that is how the incident you have heard about on the afternoon of that day and indeed the observations of that day, came about.
>
> It follows from that account – if it is an accurate one – that Mr Steiner had some luck: firstly, Terrasson had a suitcase just like Morgan's. Possibly someone had observed Terrasson's suitcase and given a very exact description to Morgan or Steiner and they were able to get a duplicate.
>
> It would be difficult for Steiner to ask the British Customs and Excise about Terrasson's suitcase for that purpose, you may think, without revealing that he himself was engaged in setting them up.
>
> You may think that British Customs and Excise in Britain would agree – you may want to consider whether they would agree to co-operate on that basis in framing an innocent group of foreigners of good character at the behest of an unknown Brazilian businessman like Steiner. ...

> Just consider in your mind what it would be like to try and induce the British Customs Service, even as an English subject, to co-operate with you in such a way. ...
>
> [I]t is worth just looking at the costs to Mr Steiner if Mr Atlan's story is right ... to see what was in it for Mr Steiner.
>
> His costs: he provided initially some samples [of diamonds] worth seven or eight thousand ... US dollars. ... He lost the cost of sending [his representative] diagonally across the world and back [with the sample] with a bit of time in a hotel. ...
>
> He lost the cost of Mr Smolny's fare in the Euro-class Sao Paolo/Copenhagen/London return, and he lost the cost of Mr Smolny's London hotel ... .
>
> [T]he case is that he lost all those things and whatever is the cost of 18 kilograms of 90 plus percent pure cocaine in Brazil.
>
> No doubt that cost is very, very much less than it would be in London, but ... you may think that 18 kilograms of high quality cocaine like that would cost a substantial sum, albeit nowhere near three million pounds, in the providing country.
>
> I put those bits and pieces of information together because it is not altogether obvious when one just runs through the story that that is what the information amounts to, but you may think it does, and it may be relevant to considering the likelihood of somebody behaving in the way Mr Steiner is said to have done."

19. On 5 July 1991 the jury, by a majority of ten to one, convicted the applicants and Mr Terrasson of importing the cocaine. Mr Smolny was acquitted. On 12 October 1991, after an inquiry by the judge under the Drug Trafficking Proceedings Act 1986, Armand was sentenced to eighteen years' imprisonment and a confiscation order of GBP 1,918,489.60 with a further ten years' imprisonment to be served in default of payment. Thierry and Mr Terrasson both received sentences of thirteen years' imprisonment and Thierry was also ordered to pay a confiscation order of GBP 6,140.66 or serve a further six months in prison.

20. On 8 August 1991 the first applicant applied for leave to appeal against conviction. On 8 November 1991 the single judge refused his application. The first applicant renewed it before the Full Court of Appeal and the second applicant applied directly to that Court for leave to appeal against conviction. On 8 February 1994 a summary of the case was prepared by the Criminal Appeal Office.

21. In spring 1994 the applicants learned from the French press (*Libération*) that a Swiss undercover police officer, Commissioner Cattaneo, had written a report, called "the Mato Grosso Report", concerning his 1991 investigation into drug trafficking between Brazil and Europe. In early 1995 the applicants' solicitor obtained a copy of the report. It mentioned Rudi Steiner, describing him as one of three regular informers of the Brazilian, Danish and French police. He was said to have an interest in stolen jewels and a long-term involvement in the traffic from Brazil to Europe of large quantities of cocaine, which he was able freely to obtain from the Brazilian police. In a letter dated 4 December 1995, the Swiss Federal Police Office informed the applicants' solicitors that the report was the property of the Tessin cantonal police and that in 1991 a meeting was held at Federal Police headquarters in Bern concerning the Mato Grosso

investigation but that it was not possible to provide any further information in this connection. The applicants provided a copy of the report to the prosecution, which declined to confirm or deny its authenticity or the truth of its contents, and repeated that there was no undisclosed material relevant to the issues at trial.

22. The applicants added a further ground of appeal coupled with an application for leave to call fresh evidence. They maintained that the Mato Grosso Report substantiated their suggestion at trial that Mr Steiner had access both to stolen jewels and cocaine and that he had an established relationship with law enforcement agencies in Europe. In their submission, the fact that the jury had not had before it evidence relating to these matters, and the fact that the judge, ignorant of the true facts, had characterised Mr Steiner in his summing up as an unknown Brazilian businessman, rendered their convictions unsafe.

23. On or about 19 October 1995 the prosecution informed the defence that, contrary to earlier statements, unserved unused material did in fact exist, which the prosecution wished to place before the Court of Appeal in the absence of the applicants or their lawyers. The prosecution then applied *ex parte* to the Court of Appeal for a ruling whether it was entitled, on grounds of public interest immunity, not to disclose this material. The applicants objected to the holding of an *ex parte* hearing, in writing on 27 November 1995 and orally before the Court of Appeal on 7 December 1995, submitting *inter alia* that the court was a tribunal of both fact and law and could be adversely influenced by material which was wrong or inaccurate.

24. The Court of Appeal dismissed the objections and heard the prosecution's *ex parte* application. It decided not to rule on the application unless or until such time that, having considered the applicants' application to introduce new evidence, it became necessary to do so.

25. The hearing of the applications for leave to appeal against conviction and to bring new evidence commenced on 18 December 1995. The Court of Appeal indicated its view that the Mato Grosso Report would not be admissible in evidence because, *inter alia*, its author could not be found to vouch for its accuracy and be cross-examined on its contents.

26. At the applicants' request the hearing was adjourned on 19 December 1995 and legal aid was granted to enable their solicitor to travel to Italy where, it was believed, Rudi Steiner was in custody awaiting trial on a charge of smuggling cocaine. However, the Italian authorities were unwilling to assist the applicants without the backing of a formal letter of request from a competent authority. The applicants therefore applied to the Court of Appeal for a letter requesting the Italian authorities to give their solicitor access to the criminal proceedings there. On 10 June 1996 a different constitution of the Court of Appeal ruled that in principle it had jurisdiction to issue such a letter of request. On 19 July 1996, however, the

originally constituted court decided that the applicants' proposed request to the Italian authorities was too wide-ranging and, even if more restrictively drawn, unlikely to elicit information which would be either admissible or of assistance in the appeal. It therefore decided that it was not in the public interest to issue a letter of request, and adjourned the case until after the conclusion of Mr Steiner's trial in Italy in the Autumn of 1996. In the event, however, Mr Steiner was released on bail and his whereabouts were unknown at the time of the applicants' appeal hearing in February 1997.

27. The applicants' solicitor was able to obtain a number of documents relating to the Italian proceedings, including transcripts of interviews with Mr Steiner, arrest warrants and a list of his previous convictions. He was also able to obtain a statement from Commissioner Cattaneo, the Swiss police officer who had prepared the Mato Grosso Report. In his statement the Commissioner confirmed the authenticity of the report. He stated that he had been introduced to Mr Steiner by a Danish police officer and had become Mr Steiner's "handler", passing information to the British authorities during the investigation into the applicants. According to the Commissioner's statement, his British "contact" had been a customs officer named Martin Crago, whom he had contacted at the British Embassy in Brasilia. He believed that Mr Steiner had spoken to Mr Crago several times and had sought payment for information he had given him. The Commissioner concluded by indicating that he would be willing to appear as a witness in the Court of Appeal.

28. On 10 January 1997 the applicants added a further ground of appeal, alleging that the prosecution had failed to make full disclosure of the evidence in its possession concerning Mr Steiner, and that the lack of full disclosure rendered their convictions unsafe.

29. The day before the hearing of the appeal, Commissioner Catteneo informed the defence lawyers that his superiors in the Swiss Police Force had refused him authorisation to attend. The applicants' counsel suggested to the Court of Appeal that this decision might have resulted from communication between British Customs and Excise and the Swiss authorities, but there is no evidence in support of this. Mr Crago was called by the defence to give evidence. He denied that he had been Commissioner Cattaneo's contact and declined to answer any question about Mr Steiner.

30. On 16 February 1997, after hearing the applicants' application to admit new evidence and holding an *ex parte* hearing in the absence of the defence lawyers, the Court of Appeal ruled that justice did not require disclosure by the Crown of the public interest immunity evidence. The applicants and their lawyers were not permitted to be present when the court delivered its judgment on disclosure.

31. On 20 February 1997 the court dismissed the application for leave to appeal. It observed:

"Little, if any, of the material [put before the Court of Appeal by the applicants' counsel] would have been admissible at the trial. That is not only because it is largely hearsay and unspecific as to events and dates, but simply because much of it is wholly irrelevant to the central issue in this case, namely whether British Customs and Excise officers conspired with Steiner to 'frame' the Atlans.

However, in considering all the information put before us, we have not been able to avoid taking a view of its effect if, and to the extent that it were admissible and credible, on the outcome of this appeal, that is, whether ... it '[might] afford any ground for allowing the appeal'. We have tested that by assuming for the purpose:

(1) that Steiner ... was charged in Italy, with others, on a charge of smuggling a large quantity of cocaine from South America to Italy in February 1995;

(2) that his role in the importation of the drug to Italy is said to have been as a participating informer to the Italian police;

(3) that since at least 1980 he had been concerned in the smuggling of large quantities of cocaine from Brazil to Europe;

(4) that for many years before the November 1990 importation of cocaine he had been an informer to various law enforcement agencies in Europe, though there is nothing to suggest that he had any contact with the United Kingdom Customs and Excise before that importation;

(5) that at the time of the November 1990 importation he had access to large quantities of cocaine in Brazil at little or no cost;

(6) that he had provided information to a European law enforcement agency which led to the United Kingdom Customs and Excise observations of the Atlans before the November 1990 importation; and

(7) that, as alleged by Armand at the trial, Steiner may have had a grudge against him arising out of some previous dealing between them. ...

[Prosecuting counsel] suggested that the only way Steiner could have been sure of achieving such an end would have been to persuade the officers to 'plant' the drug on, or falsely attribute it to, Thierry or Terrasson. Such a conspiracy between Steiner and the officers would have been hard for them to organise to an assured outcome. ... [H]ow could they have organised it so that Terrasson had a suitcase almost identical to that of Smolny? And what possible motive or reason could the officers have had to lend themselves to such a disgraceful enterprise whether Steiner was a known informer or not?

In the Court's view, there is force and hard logic in those submissions. There are also a number of other questions indicating the impossibility of the Atlans' defence. Why, if they thought they were to collect diamonds from Steiner, not drugs, did Thierry and Terrasson immediately check their luggage onto the return flight without apparently enquiring by telephone why he had not turned up or whether he had been delayed? Why did Smolny and the two of them make no contact in Copenhagen and ignore each other on the plane to Heathrow? Why did Thierry and Terrasson separate as Terrasson boarded a taxi at Heathrow with the case containing the cocaine? Why did the Atlans tell so many lies on arrest and in interview about their activities together before the flight to Copenhagen and about the reason for it? Why did Thierry lyingly state that he had travelled on his own on the return flight to Copenhagen and that he did not know Terrasson? Why did they later give wholly different accounts in evidence at their trial? Why did Smolny make indirect telephone contact with someone on Armand's telephone number in Brazil on the day of the importation?

In the Court's view, none of its assumptions, some of which go well beyond the new information relied upon by the Atlans, detracts in any way from the overwhelming strength of the prosecution case identified in those various questions or provides any material support for the possibility of a conspiracy between the Customs and Excise officers and Steiner or anyone else to 'frame' the Atlans. The jury, by its

verdict, clearly rejected Thierry and Terrasson's suggestion of it. Although Armand did not then suggest such a conspiracy, it was his only possible line of defence, though, for the reasons we have given, a wholly unrealistic one.

[Prosecuting counsel's] submission, which echoes considerations voiced by the judge to the jury in the summing up, provides a logical and complete answer to the complaint based on Steiner's alleged role as an informer and drug smuggler. If the jury had had before it information matching our assumptions, it might have led them to conclude that Steiner may have provided some information, direct or indirect, to the United Kingdom Customs and Excise, but it could not have left them with any doubt as to the Atlans' knowing and deliberate involvement in the importation of cocaine into the United Kingdom. The evidence against them, which had been thoroughly and robustly tested at the trial, was overwhelming: the Customs and Excise officers' observation of their various and highly expensive international air flights, for which there was no plausible explanation or documentation suggesting any legitimate business; the officers' observation of their movements and meetings in London and of the two strange return trips to and from Copenhagen; their various handling of what was to become Terrasson's suitcase used for the switch; their lies on arrest and in interview. All that activity pointed only to their involvement in the high value and high risk activity of drug smuggling, not some black market dealing in gems under Brazilian law. Whatever Steiner's possible role as an informer, the Atlans' guilty participation in cocaine smuggling is clear. ..."

II. RELEVANT DOMESTIC LAW AND PRACTICE

32. At common law, the prosecution has a duty to disclose any earlier written or oral statement of a prosecution witness which is inconsistent with evidence given by that witness at the trial. The duty also extends to statements of any witnesses potentially favourable to the defence.

33. In December 1981 the Attorney-General issued Guidelines, which did not have the force of law, concerning exceptions to the common law duty to disclose to the defence certain evidence of potential assistance to it ([1982] vol. 74 Criminal Appeal Reports p. 302: "the Guidelines"). The Guidelines attempted to codify the rules of disclosure and to define the prosecution's power to withhold "unused material". Under paragraph 1, "unused material" was defined as:

"(i) All witness statements and documents which are not included in the committal bundle served on the defence; (ii) the statements of any witnesses who are to be called to give evidence at the committal and (if not in the bundle) any documents referred to therein; (iii) the unedited version(s) of any edited statements or composite statement included in the committal bundles."

Under paragraph 2, any item falling within this definition was to be made available to the defence if "it has some bearing on the offence(s) charged and the surrounding circumstances of the case".

According to the Guidelines, the duty to disclose was subject to a discretionary power for prosecuting counsel to withhold relevant evidence if it fell within one of the categories set out in paragraph 6. One of these categories (6(iv)) was "sensitive" material which, because of its sensitivity,

it would not be in the public interest to disclose. “Sensitive material” was defined as follows:

> “... (a) it deals with matters of national security; or it is by, or discloses the identity of, a member of the Security Services who would be of no further use to those services once his identity became known; (b) it is by, or discloses the identity of an informant and there are reasons for fearing that the disclosure of his identity would put him or his family in danger; (c) it is by, or discloses the identity of a witness who might be in danger of assault or intimidation if his identity became known; (d) it contains details which, if they became known, might facilitate the commission of other offences or alert someone not in custody that he is a suspect; or it discloses some unusual form of surveillance or method of detecting crime; (e) it is supplied only on condition that the contents will not be disclosed, at least until a subpoena has been served upon the supplier – e.g. a bank official; (f) it relates to other offences by, or serious allegations against, someone who is not an accused, or discloses previous convictions or other matters prejudicial to him; (g) it contains details of private delicacy to the maker and/or might create risk of domestic strife.”

According to paragraph 8, “in deciding whether or not statements containing sensitive material should be disclosed, a balance should be struck between the degree of sensitivity and the extent to which the information might assist the defence”. The decision as to whether or not the balance in a particular case required disclosure of sensitive material was one for the prosecution, although any doubt should be resolved in favour of disclosure. If either before or during the trial it became apparent that a duty to disclose had arisen, but that disclosure would not be in the public interest because of the sensitivity of the material, the prosecution would have to be abandoned.

34. Subsequent to the applicants’ trial in 1992, but before the appeal proceedings in 1997, the Guidelines were superseded by the common law. In *R. v. Ward* ([1993] vol. 1 Weekly Law Reports p. 619) the Court of Appeal dealt with the duties of the prosecution to disclose evidence to the defence and the proper procedure to be followed when the prosecution claimed public interest immunity. It stressed that the court and not the prosecution was to be the judge of where the proper balance lay in a particular case, because:

> “... [When] the prosecution acted as judge in their own cause on the issue of public interest immunity in this case they committed a significant number of errors which affected the fairness of the proceedings. Policy considerations therefore powerfully reinforce the view that it would be wrong to allow the prosecution to withhold material documents without giving any notice of that fact to the defence. If, in a wholly exceptional case, the prosecution are not prepared to have the issue of public interest immunity determined by a court, the result must inevitably be that the prosecution will have to be abandoned.”

35. In *R. v. Davis, Johnson and Rowe* ([1993] vol. 1 Weekly Law Reports p. 613), the Court of Appeal held that it was not necessary in every case for the prosecution to give notice to the defence when it wished to claim public interest immunity, and outlined three different procedures to be adopted. The first procedure, which had generally to be followed, was for

the prosecution to give notice to the defence that they were applying for a ruling by the court and indicate to the defence at least the category of the material which they held. The defence then had the opportunity to make representations to the court. Secondly, however, where the disclosure of the category of the material in question would in effect reveal that which the prosecution contended should not be revealed, the prosecution should still notify the defence that an application to the court was to be made, but the category of the material need not be disclosed and the application should be *ex parte*. The third procedure would apply in an exceptional case where to reveal even the fact that an *ex parte* application was to be made would in effect be to reveal the nature of the evidence in question. In such cases the prosecution should apply to the court *ex parte* without notice to the defence.

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

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (d) OF THE CONVENTION

36. The applicants complained that they were deprived of a fair trial, in breach of Article 6 §§ 1 and 3 (d), which state:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal; ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights: ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ..."

37. The Government acknowledged that the applicants' case was similar in some respects to that of Rowe and Davis v. the United Kingdom (judgment of 16 February 2000), in that the trial preceded the Court of Appeal's judgments in *R. v. Ward* and *R. v. Davis, Johnson and Rowe,* and no consideration was given by the trial judge to the material which was the subject of the public interest immunity consideration in the Court of Appeal. However, in the Government's submission these similarities did not lead to the conclusion that the applicants' Article 6 rights had been violated, since the facts of the applicants' case could be distinguished on a number of grounds:

First, while the nature of the evidence for which the prosecution claimed public interest immunity was unknown, it could not be assumed that it was relevant to the applicants' defence at trial. This followed from the fact that the Court of Appeal expressly linked the resolution of the disclosure and fresh evidence issues, and then decided that there was nothing in the fresh evidence which rendered the convictions unsafe. Secondly, the applicants only produced the Mato Grosso Report after the trial. To the extent that the disclosure issues were raised by the report, therefore, it would not have been possible for the trial judge to deal with them. Thirdly, the Court of Appeal held over the disclosure question pending submissions on and a resolution of the application to enter fresh evidence. The court therefore had a full understanding of the issues based on submissions from both prosecution and defence counsel. Finally, it was to be noted that the Court of Appeal considered the issues before it on the basis of a series of assumptions which were favourable to the defence.

38. The applicants submitted that the Court's Rowe and Davis judgment was designed to avert the very injustice which occurred in their case. The trial judge was in the best position to weigh the public interest in non-disclosure against the rights of the defence. Moreover, the prosecution's failure to disclose evidence to the judge led him to misdirect the jury on vital factual issues, namely the role played by Mr Steiner, which was central to the defence case. Although the applicants were only able to produce the Mato Grosso Report after their trial, the facts contained in it must have been known to the prosecution at the time of the trial, but no disclosure was made and the prosecution witnesses refused to answer any questions about Mr Steiner. The applicants' representatives were not in a position to assist the Court of Appeal in determining the question of public interest immunity, because they were excluded from the disclosure procedure before the Court of Appeal.

39. The Court recalls that the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial set out in paragraph 1 (see the above-mentioned Rowe and Davis judgment, § 59). In the circumstances of the case it finds it unnecessary to examine the applicants' allegations separately from the standpoint of paragraph 3 (b) and (d), since they amount

to a complaint that the applicants did not receive a fair trial. It will therefore confine its examination to the question whether the proceedings in their entirety were fair (ibid.).

40. The Court further recalls that in its above-mentioned Rowe and Davis judgment it held that while Article 6 § 1 requires in principle that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused, it may in some cases be necessary to withhold certain evidence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1. Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (ibid., §§ 60-61).

41. In cases where evidence has been withheld from the defence on public interest grounds, it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them. Instead, the Court's task is to ascertain whether the decision-making procedure applied in each case complied, as far as possible, with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused (ibid., § 62).

42. The applicants' defence at trial was that they had been falsely implicated in the importation of cocaine by a man known to them as Rudi Steiner, whom they believed to be a Customs and Excise informer. No evidence relating to an informer or to Mr Steiner was served on the defence or put before the judge and under cross-examination the customs officers involved in the case refused either to confirm or deny whether or not they had used an informer or heard of Mr Steiner. Before and during the trial the prosecution had asserted that there was no further unused material evidence in their possession which had not been served on the defence (see paragraphs 14 and 17 above).

43. However, over four years after the applicants' conviction and prior to the hearing of their appeal following discovery by the defence of new evidence about Mr Steiner's activities, the prosecution informed them that, contrary to earlier statements, unserved, unused material did in fact exist. Following an *ex parte* hearing, the Court of Appeal decided that it was not necessary to disclose this evidence to the applicants (see paragraphs 23-24 and 30-31 above).

44. It is clear to the Court, and the Government do not seek to dispute, that the repeated denials by the prosecution at first instance of the existence of further undisclosed relevant material, and their failure to inform the trial judge of the true position, were not consistent with the requirements of Article 6 § 1 (see the above-mentioned Rowe and Davis judgment, § 63).

45. The issue before the Court is whether the *ex parte* procedure before the Court of Appeal was sufficient to remedy this unfairness at first instance.

Although the nature of the undisclosed evidence has never been revealed, the sequence of events raises a strong suspicion that it concerned Mr Steiner, his relationship with British Customs and Excise, and his role in the investigation and arrest of the applicants. It is true that the applicants did not have the Mato Grosso Report at the time of their trial in the Crown Court. However, their allegations concerning Mr Steiner were central to their defence, and they expressly asked the prosecution if they had any undisclosed, unused material relevant to this issue. For the reasons set out in the above-mentioned Rowe and Davis judgment, the Court considers that the trial judge is best placed to decide whether or not the non-disclosure of public interest immunity evidence would be unfairly prejudicial to the defence (ibid., § 65). Moreover, in this case, had the trial judge seen the evidence he might have chosen a very different form of words for his summing up to the jury.

46. In conclusion, therefore, the prosecution's failure to lay the evidence in question before the trial judge and to permit him to rule on the question of disclosure deprived the applicants of a fair trial.

It follows that there has been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. 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

48. The first applicant claimed that the breach of Article 6 had denied him the opportunity effectively to conduct his defence and was directly relevant to his conviction. He claimed non-pecuniary damages in respect of the ten years he had spent in prison of GBP 125,000 to GBP 200,000, together with pecuniary damages resulting from his conviction of GBP 2 million.

49. The Government submitted that the applicants were convicted of serious offences on the basis of strong evidence and that no causal connection could be established between the alleged violation of the Convention and the damage claimed.

50. The Court is unable to speculate as to whether the applicants would have been convicted had the violation not occurred. It considers that the finding of a violation constitutes in itself sufficient just satisfaction for any pecuniary or non-pecuniary damage which the applicants may have suffered (see the above-mentioned Rowe and Davis judgment, § 70).

B. Costs and expenses

51. The applicant claimed the legal costs of the Convention proceedings, including solicitors' costs of GBP 13,832.44 (exclusive of value added tax, "VAT"), and two counsels' fees of GBP 8,125 (plus VAT) and GBP 8,824.45 (plus VAT) respectively.

52. The Government submitted that the costs claimed were excessive and that it had been quite unreasonable and unjustified to instruct two counsel in addition to incurring substantial solicitors' costs. They considered that GBP 10,000 in total for counsels' fees, together with GBP 7,000 for solicitors' costs, in both cases inclusive of VAT, would be reasonable.

53. Making an assessment on an equitable basis, the Court awards to the applicants the sum of GBP 15,000.00, plus any VAT which may be payable.

C. Default interest

54. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7.5 % per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

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

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

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 Article 44 § 2 of the Convention, GBP 15,000 (fifteen thousand pounds sterling) for costs and expenses, plus any value-added tax that may be chargeable;

(b) that simple interest at an annual rate of 7.5 % shall be payable from the expiry of the above-mentioned three months until settlement;

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

Done in English, and notified in writing on 19 June 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President