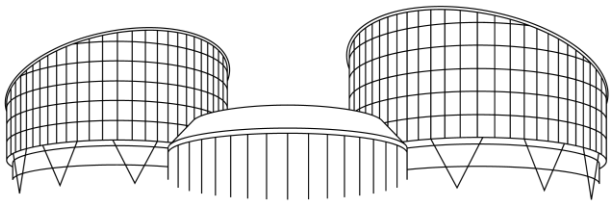

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF MCKEOWN v. THE UNITED KINGDOM

(Application no. 6684/05)

JUDGMENT

STRASBOURG

11 January 2011

FINAL

11/04/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of McKeown v. the United Kingdom**,**

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

Ljiljana Mijović, *President*,
Nicolas Bratza,
David Thór Björgvinsson,
Ján Šikuta,
Päivi Hirvelä,
Ledi Bianku,
Mihai Poalelungi, *judges*,
and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 7 December 2010,

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

PROCEDURE

1. The case originated in an application (no. 6684/05) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a British national, Mr Clifford George McKeown ("the applicant"), on 4 February 2005.

2. The applicant was represented by Mr C.R.P. Monteith, a lawyer practising in Portadown, Northern Ireland, assisted by Mr A. Kane Q.C., counsel. The United Kingdom Government ("the Government") were represented by their Agent, Ms E. Willmott of the Foreign and Commonwealth Office.

3. The applicant alleged that his trial for terrorism related offences was unfair because of the way the courts in Northern Ireland had approached the question of non-disclosure of prosecution papers to the defence on grounds of public interest immunity.

4. On 17 March 2008 the President of the Chamber to which the case had been allocated decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1959. He is currently detained at HMP Maghaberry, Northern Ireland.

A. The applicant's arrest

6. At about 10 p.m. on 29 March 2000 the applicant was seen by police driving a Renault 11 car along Lake Road, Craigavon, Northern Ireland with a second person, M., in the front passenger seat. Police officers followed the car and saw items being thrown from it. These were subsequently recovered and found to be firearms. The car was stopped and searched. Two black balaclavas, dark woollen gloves and one round of ammunition were found in the car, together with a blue plastic container containing petrol.

7. The applicant's case was that he had simply given M. a lift and that he knew nothing about the articles that he had brought into the car. Following his arrest, the applicant was interviewed by police. He was shown a number of the items that had been found in the Renault car and he said that, apart from the blue plastic container, he had never seen them before. He told police that at about 9.30 p.m. on the night of his arrest, he had been asked by M. to take him to Lurgan, Northern Ireland. He claimed that he had initially refused, telling M. that every time he left the house, "the police were on to" him. He was persuaded by M., however, and they went to the car, M. carrying a bag that the applicant was unable to describe. As they were driving to Lurgan they were intercepted by police cars. The applicant asserted that he had been entrapped. He was sure that someone had sent M. to his home with the guns because he had no doubt that the police did not arrive by chance to stop his car.

8. The applicant was arraigned on 8 June 2001 and pleaded not guilty to one count of possession of firearms and ammunition with intent and one count of possessions of articles for a purpose connected with terrorism. A defence statement was served on his behalf on 12 June 2001. It contained the following:

> "The defendant believes that he may have been entrapped by a person known to him working with the police either for the purpose of incriminating this defendant or his co-defendant. In consequence he requires disclosure of all information and material touching upon this issue and informing the state of knowledge of the police prior to the stopping and arrest of the defendant and all such material shall be disclosed because failure to do so would mean unfairness to the defendant and would be in breach of Article 6 of the European Convention."

B. The pre-trial disclosure proceedings

9. On 21 September 2001, the prosecution informed the applicant that it would apply *ex parte* for an order preventing disclosure. In non-jury trials in Northern Ireland, such an application is made to a judge other than the trial judge. That judge is designated by the Lord Chief Justice of Northern Ireland and is referred to as the "disclosure judge" (see domestic law and practice below).

10. The applicant opposed the *ex parte* hearing of the prosecution's application by the disclosure judge. Having heard argument from counsel for the applicant and the prosecution, *inter alia* on the compatibility of an *ex parte* hearing with Article 6 of the Convention and the relevant case-law of the European Court of Human Rights, the disclosure judge, in an *ex tempore* judgment, found that it was proper to hear the application *ex parte*. He stated that while this Court's case-law suggested that *ex parte* applications without any notice to the defence were problematic, the present case was an *ex parte* application with notice. He stated:

> "... the European Court has certainly not forbidden that procedure. It doesn't seem to me that I would be empowered to overrule the [relevant domestic legislation] on the basis of the findings of the European Court up to the moment, but the Court will do if this case reaches it, maybe another matter, but I would propose to hear the [prosecution's] application at present."

11. On 18 February 2002, the disclosure judge allowed the prosecution's application for non-disclosure. He outlined this Court's judgments in *Rowe and Davis v. the United Kingdom* [GC], no. 28901/95, §§6 60-62, ECHR 2000-II and *Jasper v. the United Kingdom* [GC], no. 27052/95, 16 February 2000 and continued:

> " ... I have to consider, in the light of the defence of entrapment advanced on behalf of the accused, whether the material which is the subject of the application is such that it might be of assistance to the defence or in any way undermines any part of the prosecution case; whether in those circumstances it is necessary in the public interest to order non-disclosure and further, if disclosure is not to be provided, what steps are appropriate to protect the interests of the accused and ensure the fairness of the trial.
>
> My reason for conducting an *ex parte* hearing are as follows: in order to determine whether the material is such that the public interest requires its non-disclosure I must see the material and consider the evidence and arguments submitted by the prosecutor, and I must do so in the absence of the defendants and their representatives to protect the public interest until that decision is made.
>
> There was considerable debate in [*Rowe and Davis*] about the best way to deal procedurally with this situation. The majority took the view that it was important for the trial judge to see the material personally.
>
> That is certainly true if the material is not prejudicial to the accused and where the trial is before a judge and jury the effect of the judge seeing even prejudicial material may not be inconsistent with the fairness of the trial process.

> However, in the case [of] a non-jury trial it is obviously undesirable that prejudicial material which is not going to be part of the evidence in the case should be seen by the judge who will be tribunal of fact, especially if it is not disclosed to the defence.
>
> ...
>
> No procedure exists to ensure that an assessment of the possible value to the defence of such material other than by the prosecutor or at his request the trial judge can be made in the light of the evidence at the trial. We do not have "special counsel" to carry out such an exercise.
>
> In general the Court has to rely on the judgment and integrity of the prosecutor, who can monitor the issue of whether disclosure of such material to the trial judge may become necessary in the interests of justice.
>
> ...
>
> The considerations I applied in considering the prosecution's application were:
>
> 1. If it is compatible with the public interest then all relevant material should be disclosed;
>
> 2. All of the material for which non-disclosure is ordered and which is not prejudicial to the defendant should be available to the trial judge;
>
> 3. The prosecutor should monitor the continuing non-disclosure of potentially prejudicial material.
>
> In considering that matter it may be possible for the prosecutor to give some indication of the nature of the material to the defendant's advisors without disclosing that which it requires to keep secret so as to allow the latter to decide whether the material should be disclosed or not."

He concluded:

> "Having considered the matter *ex parte*, I have decided that in the light of the defence statement none of the material which is the subject of the application before me is such that it might reasonably be expected to undermine the case for the prosecution or to assist the accused's defence. On the evidence before me I do not anticipate any circumstances which would result in the material becoming of value to the defence. I consider that it is not in the public interest to disclose the material and have ordered accordingly. I have prepared a statement of the reasons for my decision which shall remain confidential to the prosecutor and the trial judge."

12. When the case next came before the trial judge on 17 and 19 June 2002, the applicant and his co-accused sought an adjournment of the proceedings. The trial judge indicated that he had not received the disclosure judge's ruling or the statement of reasons and did not intend to receive anything that had not been made available to the defence. He then consulted the disclosure judge who indicated that he was content that the trial judge did not see the reasons and did not require him to do so. The trial judge then suggested that one way of proceeding would be to appoint

special counsel who would be shown the material and remain throughout the trial.

13. A hearing took place on 1 August 2002 to allow the parties and counsel appearing for the Attorney-General made submissions as to whether it was appropriate either for special counsel to be appointed or for the trial judge himself to consider the undisclosed material. At that hearing, the trial judge indicated that he had by then read the ruling of the disclosure judge and the statement of reasons for his decision. The trial judge said that he considered that it was in the interests of justice that he should see the statement of reasons when the disclosure judge, in his ruling of 18 February 2002, had suggested that he should. He also stated that the statement of reasons referred to "certain items which could not in [the disclosure judge's] view prejudice the defence in any way if they were seen by me [the trial judge], but he also said that there were items which were capable of having a prejudicial effect on the trial if seen by the trial judge." He stressed that he had not himself seen the material seen by the disclosure judge.

14. The trial judge then heard submissions from the defence, prosecution and counsel for the Attorney-General. The latter argued that the question of disclosure should be referred back to the disclosure judge for his decision. Counsel for the applicant's co-accused also suggested that the trial judge recuse himself since he had seen the statement of reasons which had not been made available to the defence. The trial judge ruled that it was not appropriate for him to recuse himself. He explained that he had reconsidered his decision not to read the statement of reasons; he had come to the view that it was important for him to read the statement of reasons in case there was something in it which would be of relevance to his decision on whether to appoint special counsel or to read the undisclosed material himself. He added:

> "The fact that a judge had seen a document in a non-jury trial which has not been seen by the defence does not of necessity mean that the trial is made unfair or becomes unfair and, having seen the document and read it, I am absolutely satisfied that it does not create any reason why I should no longer act as the trial judge in this case."

The trial judge also found that the disclosure judge was best equipped to know what procedural safeguards could be put in place as to the non-disclosed material, including whether it was appropriate to appoint special counsel, since he knew the nature of that material. He therefore referred the matter back to the disclosure judge.

15. The matter came before the disclosure judge on 13 September 2002. In an *ex tempore* judgment he ruled:

> "There is no further safeguard that I am aware of that would be of any assistance, that one could conceive would be of any assistance at this stage, and I would not regard the case as requiring the appointment of special counsel...

> The present reality is that I cannot foresee any circumstance in which the undisclosed material, that is the material undisclosed to the trial judge, would be of assistance to the defence. But it may be that the defence may advance a proposition or raise an issue that might by remote possibility make that so, and I think if the Crown concedes that that is the position then the Crown should make the matter known to the trial judge and consideration could be given then to referring back to me."

The disclosure judge said there were two types of material involved. The first could not assist the applicant because it was adverse to him. The second related to police procedures, was general in nature and content, and did not relate directly to the applicant.

C. The trial

16. At the applicant's trial it was established that ten police officers, in three cars, were on patrol in the general area of Lurgan and Craigavon at the time the car was intercepted. Those police officers who had attended a briefing at Mahon Road Station said that they were told that there was intelligence that loyalist paramilitaries were in possession of a firearm in the Lurgan/Craigavon area. One crew had travelled from Belfast, and they said they did not arrive in time for the briefing but they were told by radio that loyalist paramilitaries had obtained access to weapons. It emerged during cross-examination, based on logs obtained on disclosure, that at 10 p.m. a message was sent to control to the following effect:

> "...a vehicle acting suspiciously at Parkmore, VRM - DDZ 1039, blue/green Renault 11."

The information passed by control to the three patrol cars was recorded as:

> "... blue/green Renault car acting suspiciously in the Craigavon area."

No reference was made to the registration number, or "Parkmore" in the controller's message to the patrols. The case made on behalf of the applicant at trial was that the reason that the controller did not pass to those on the ground the registration number of the Renault and information as to the place where it was last seen, was that this was an operation in which police were already in position waiting for the applicant's car to appear. All police officers to whom this suggestion was made denied it.

17. On 8 October 2002, during the cross-examination of one police officer, counsel for the applicant also argued that, in order to advance the defence of entrapment, further disclosure was required. The trial judge replied:

> "Counsel for the prosecution has heard what you have got to say. If he feels that there is information that would assist you I have no doubt he will go back to [the disclosure judge] and ask him about it, but beyond that I can't go."

18. At the conclusion of the case for the prosecution the trial judge was invited to rule that there was no case for the applicant to answer and to stay the proceedings on the grounds of entrapment. The trial judge rejected both applications. As to the former, he concluded that the circumstantial evidence was such that a jury properly directed could be satisfied, to the requisite standard of proof, that the applicant was in voluntary possession by actual or potential control of the items that were in the car when the police began their pursuit with knowledge of what was kept or controlled. There was a clear inference to be drawn that from the nature of the items that were thrown from the car and those that were found in it after it came to a halt that the applicant was in possession of the firearms in connection with terrorist activities.

As to the latter, after referring to the case of *R. v. Looseley* (see paragraph 33 below), the trial judge ruled:

> "Although, as was suggested in cross examination the police may have been in possession of more information than was revealed at the trial I did not find any evidence to suggest that the conduct of the police could in any way affront the public conscience and I therefore declined to stay the proceedings."

19. When the trial resumed, the applicant did not give evidence and no other evidence was called on behalf of the defence. On 12 November 2002 the applicant was convicted by the trial judge, without a jury, of two offences: possession of firearms and ammunition with intent, contrary to Article 17 of the Firearms (NI) Order 1981; and possession of articles for a purpose connected with terrorism, contrary to section 32(1) of the Northern Ireland (Emergency Provisions) Act 1996. The trial judge found that taking the circumstantial evidence and the inferences to be drawn from it and, using as support adverse inferences to be drawn from the applicant's silence when questioned by the police and his failure to give evidence, he was satisfied of the applicant's guilt of the two offences beyond reasonable doubt.

20. The applicant was sentenced to concurrent terms of imprisonment of twelve years and two years respectively. His co-accused, M., had pleaded guilty on the opening day of the trial and was sentenced to nine years' imprisonment for the offence of possession of firearms and ammunition with intent and to two years' imprisonment concurrent for the offence of having articles for a purpose connected with terrorism.

D. The Court of Appeal judgment

21. The applicant appealed against his conviction on both charges. On 28 October 2004, the Court of Appeal in Northern Ireland unanimously dismissed the appeal. The non-disclosed material was not considered by the Court of Appeal before it gave judgment. Instead, it considered the House of Lords ruling in *R. v. H and C* [2004] A.C. 134 (see paragraph 32 below) and

reviewed this Court's judgments in *Rowe and Davis* and *Jasper*, both cited above; *Fitt v. the United Kingdom* [GC], no. 29777/96, ECHR 2000-II; *Edwards and Lewis v. the United Kingdom*, nos. 39647/98 and 40461/98, 22 July 2003 and *Dowsett v. the United Kingdom*, no. 39482/98, ECHR 2003-VII.

22. In respect of *Edwards and Lewis*, having quoted paragraphs 57-59 of the Court's judgment, the Court of Appeal observed:

> "The fact specific nature of the cases is apparent from these passages. The trial judges had to deal directly with the defence of entrapment and the material produced to them may well have sounded on that issue. Moreover there was plainly prejudicial material in the evidence that the judges saw but which was denied to the defence. Not only were the defence put at a disadvantage because they could not contribute to the assessment that the judges were making but, in Edwards' case, prejudicial material was put before the judge as well."

23. It went on to state that from the relevant case-law of this Court the following principles could be recognised:

> "Full disclosure of any material held by the prosecution which weakens the prosecution case or strengthens that of the defendant should be made.
>
> Minimum derogation from this golden rule is permissible where full adherence would create risk of serious prejudice to an important public interest.
>
> The judge dealing with an application for non-disclosure must have a full understanding and appreciation on an ongoing basis of all the issues in the trial and in particular the nature of the defence.
>
> The appointment of special counsel will always be exceptional. It should not be ordered unless the trial judge is satisfied that no other course will adequately meet the over-riding requirements of fairness to the defendant."

24. In applying those principles to the applicant's case, it found that the applicant's defence of entrapment was well known to the trial judge, the prosecution, and the disclosure judge and no other issue had been identified that might sound on the question of disclosure. The disclosure judge had been unable to envisage any circumstances in which the non-disclosed material could assist the defence either by enhancing the case that was being made for the applicant or by undermining or weakening the prosecution case. Furthermore, it agreed with the disclosure judge that there had been no need for special counsel to be appointed and there was nothing to indicate that the material characterised by the disclosure judge as wholly irrelevant to the applicant's defence might have suddenly become relevant. It rejected the applicant's contention that the disclosure judge should have obtained a daily transcript of the trial and examined it for any sign of material that might have assisted the applicant's case; this was not a case where a daily transcript would have been warranted as no new line of defence ever emerged that might have prompted a reconsideration of the disclosure judge's decision that the material did not assist the applicant.

25. On the availability of the disclosure judge's statement of reasons to the trial judge, the Court of Appeal found:

> "The trial judge did not read the statement of reasons given by the disclosure judge before the first hearing on the question of disclosure. The circumstances in which he considered these before the second hearing on this issue are not entirely clear. In general, where material is not to be released to a defendant, it will be inappropriate for the trial judge in a non-jury case to see it. In the present case the trial judge made clear that he had not seen any material that was adverse to the [applicant] and [counsel for the applicant] did not dispute this statement. In the particular circumstances of the present case, therefore, the trial judge's consideration of this material has not brought about any unfairness to the appellant and we do not consider that this rendered his conviction in any way unsafe."

26. The Court of Appeal further rejected the applicant's argument that the trial judge had given insufficient weight to the entrapment theory. The Court of Appeal noted that it had been the central plank of the applicant's defence and had been thoroughly explored not only in cross-examination of the witnesses but in extensive canvassing of the various "coincidences" relied on by the applicant: the trial judge had had the advantage of hearing the witnesses give evidence about these matters and had the opportunity to assess them as they gave their explanations as to the circumstances in which they came to be involved with the applicant.

27. After dismissing the appeal, the Court of Appeal, on 19 November 2004, also refused to certify a point of law of general importance or grant leave to appeal to the House of Lords.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal trials in Northern Ireland

28. In Northern Ireland, under section 75 of the Terrorism Act 2000, trials on indictment can be conducted by so-called "Diplock courts" (courts without a jury) if the indictment is for a "scheduled offence" (one of the offences listed in Schedule 9 to the same Act). The trial then takes place before a judge sitting alone who hears all the evidence and reaches a verdict. He or she is also responsible for conducting the trial and pronouncing sentence if the defendant is found guilty. The judge must give a reasoned verdict if he convicting the defendant.

B. Disclosure

29. Disclosure in criminal cases is regulated by Part 1 of the Criminal Procedure and Investigations Act 1996 ("the 1996 Act") and the Crown

Court (Criminal Procedure and Investigations Act 1996) (Disclosure) Rules (Northern Ireland) 1997 ("the 1997 Rules").

Section 3 of the 1996 Act regulates primary disclosure by the prosecution. Section 3(1)(a) provides that the prosecution must disclose to the defence any material which, in the opinion of the prosecutor, might undermine the prosecution case against the accused. Primary disclosure is followed, where appropriate, by the accused providing a defence statement under section 5(5). This triggers secondary disclosure by the prosecution under section 7(2)(a) which provides that the prosecutor must disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might be reasonably expected to assist the accused's defence as disclosed by the defence statement.

Section 8 of the 1996 Act allows the accused to apply to the court for an order that the prosecutor provide undisclosed material. Section 9(2) requires the prosecutor to keep under review whether disclosure is required.

Sections 3(6), 7(5), 8(5) and 9(8) of the 1996 Act provide that material must not be disclosed under the foregoing provisions to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it.

Section 14A (covering procedures for trial on indictment for scheduled offences) provides that the accused may apply to the court to review its decision to order non-disclosure on grounds of public interest. Under section 15 (which applies to trials conducted before a judge and jury) where a court has made a non-disclosure order it must keep under review the question whether it is still not in the public interest to disclose material affected by its order. It must do so without the need for an application but the accused may apply to the court for a review of that question.

30. Rule 2 of the 1997 Rules regulates an application made under section 3(6), 7(5), 8(5) or 9(8) of the 1996 Act. There are three types of application under Rule 2:

(a) An application by the prosecutor to the judge, to be determined at an *inter partes* hearing. The accused receives notice of the application and details of the nature of the material to which the application relates.

(b) An *ex parte* application by the prosecutor to the judge, of which notice is given to the accused. The accused does not receive information on the nature of the material to which the application relates.

(c) An *ex parte* application by the prosecutor to the judge of which the accused receives no notice.

The application in the present case was of the kind described in (b) above.

Under Rule 2(5)(a), where the offence in question is a scheduled offence (and thus to be tried by a court without a jury) the application shall be heard by a judge designated by the Lord Chief Justice (known as "the disclosure judge"). Rule 3(5) provides that where an application is made under Rule

2(2) the hearing shall be *ex parte* and only the prosecutor shall be entitled to make representations to the court. By Rule 4(2) the court (the disclosure judge) is obliged to state reasons for making an order and a record of that statement must be made. Under Rule 9(2) where a hearing is held in private the court may specify conditions governing the keeping of the record of its statement of reasons made in pursuance of Rule 4(2).

In respect of applications by the defence made under sections 14 and 15, Rule 5 provides that they shall be *inter partes* and the accused and the prosecutor shall be entitled to make representations to the court. However, under Rule 5(9), the prosecution can apply to the court for leave to make representations in the absence of the accused; the court may for that purpose sit in the absence of the accused and his legal representative.

C. "Special counsel"

31. The relevant domestic law and practice on the appointment of special counsel (also known as special advocates) are set out in *Edwards and Lewis v. the United Kingdom* [GC], nos. 39647/98 and 40461/98, ECHR 2004-X at paragraphs 43-45.

D. *R. v. H and C* [2004] 2 A.C. 134

32. *R. v. H and C* the House of Lords considered the compatibility of applications for non-disclosure on grounds of public interest immunity. It held that procedures for dealing with such applications would not be in violation of Article 6 provided they were operated with "scrupulous attention" to certain governing principles and with continuing regard to the proper interests of the defendant. The governing principles were as follows:

> "35. If material does not weaken the prosecution case or strengthen that of the defendant, there is no requirement to disclose it. For this purpose the parties' respective cases should not be restrictively analysed. But they must be carefully analysed, to ascertain the specific facts the prosecution seek to establish and the specific grounds on which the charges are resisted. The trial process is not well served if the defence are permitted to make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good. Neutral material or material damaging to the defendant need not be disclosed and should not be brought to the attention of the court. Only in truly borderline cases should the prosecution seek a judicial ruling on the disclosability of material in its hands. If the material contains information which the prosecution would prefer that the defendant did not have, on forensic as opposed to public interest grounds, that will suggest that the material is disclosable. If the disclosure test is faithfully applied, the occasions on which a judge will be obliged to recuse himself because he has been privately shown material damning to the defendant will, as the Court of Appeal envisaged (paragraphs 31 and 33(v)), be very exceptional indeed.

36. When any issue of derogation from the golden rule of full disclosure comes before it, the court must address a series of questions:

(1) What is the material which the prosecution seek to withhold? This must be considered by the court in detail.

(2) Is the material such as may weaken the prosecution case or strengthen that of the defence? If No, disclosure should not be ordered. If Yes, full disclosure should (subject to (3), (4) and (5) below be ordered.

(3) Is there a real risk of serious prejudice to an important public interest (and, if so, what) if full disclosure of the material is ordered? If No, full disclosure should be ordered.

(4) If the answer to (2) and (3) is Yes, can the defendant's interest be protected without disclosure or disclosure be ordered to an extent or in a way which will give adequate protection to the public interest in question and also afford adequate protection to the interests of the defence?

This question requires the court to consider, with specific reference to the material which the prosecution seek to withhold and the facts of the case and the defence as disclosed, whether the prosecution should formally admit what the defence seek to establish or whether disclosure short of full disclosure may be ordered. This may be done in appropriate cases by the preparation of summaries or extracts of evidence, or the provision of documents in an edited or anonymised form, provided the documents supplied are in each instance approved by the judge. In appropriate cases the appointment of special counsel may be a necessary step to ensure that the contentions of the prosecution are tested and the interests of the defendant protected (see paragraph 22 above). In cases of exceptional difficulty the court may require the appointment of special counsel to ensure a correct answer to questions (2) and (3) as well as (4).

(5) Do the measures proposed in answer to (4) represent the minimum derogation necessary to protect the public interest in question? If No, the court should order such greater disclosure as will represent the minimum derogation from the golden rule of full disclosure.

(6) If limited disclosure is ordered pursuant to (4) or (5), may the effect be to render the trial process, viewed as a whole, unfair to the defendant? If Yes, then fuller disclosure should be ordered even if this leads or may lead the prosecution to discontinue the proceedings so as to avoid having to make disclosure.

(7) If the answer to (6) when first given is No, does that remain the correct answer as the trial unfolds, evidence is adduced and the defence advanced?

It is important that the answer to (6) should not be treated as a final, once-and-for-all, answer but as a provisional answer which the court must keep under review.

37. Throughout his or her consideration of any disclosure issue the trial judge must bear constantly in mind the overriding principles referred to in this opinion. In applying them, the judge should involve the defence to the maximum extent possible without disclosing that which the general interest requires to be protected but taking full account of the specific defence which is relied on. There will be very few cases

indeed in which some measure of disclosure to the defence will not be possible, even if this is confined to the fact that an ex parte application is to be made. If even that information is withheld and if the material to be withheld is of significant help to the defendant, there must be a very serious question whether the prosecution should proceed, since special counsel, even if appointed, cannot then receive any instructions from the defence at all."

E. Entrapment

33. The fact that a defendant would not have committed an offence were it not for the activity of an undercover police officer or an informer acting on police instructions does not provide a defence under English law. The judge does, however, have a discretion to order a stay of a prosecution where it appears that entrapment has occurred, as the House of Lords affirmed in *R. v. Looseley*; *Attorney-General's Reference (no. 3 of 2000)* ([2001] United Kingdom House of Lords Decisions 53). In *Looseley*, Lord Nicholls of Birkenhead explained (§ 1):

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

THE LAW

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

A. The parties' submissions

34. The applicant complained that the approach of the domestic courts to the issues of public interest immunity and disclosure of evidence was inconsistent with Article 6 of the Convention, which, where relevant, reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights: ...
>
> (b) to have adequate time and facilities for the preparation of his defence; ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;"

35. The applicant submitted that the procedures in place in Northern Ireland were inadequate to comply with the requirements of Article 6 § 1. After the disclosure hearing, those procedures in reality left further consideration of issues of disclosure to the discretion of prosecution counsel. The disclosure judge's ruling of 13 September 2002 was subject to the duty of the trial judge to ensure a fair trial and the trial judge's statement on 8 October 2002 (see paragraph 17 above) had endorsed only the procedure of prosecution counsel referring issues back to the disclosure judge. Therefore, during the trial, the applicant had been precluded from access to the disclosure judge.

36. The Court of Appeal had been wrong to decide that, because no new line of defence had emerged, there was no need for the disclosure judge to have had an ongoing role in considering disclosure throughout the trial. This ongoing duty to monitor and supervise disclosure during his trial could not be fulfilled by the trial judge; he had not seen the material and could not determine its relevance to the trial as it unfolded. It could not be fulfilled by the disclosure judge because he did not participate actively in the trial. The applicant acknowledged that the disclosure judge had known that at trial the defence would allege entrapment or a "set-up" by the police. However, there was a difference between, on the one hand, the disclosure judge considering whether to order disclosure in advance of trial and with only an outline of the defence case and, on the other, disclosure being considered in the context of the actual evidence given at trial.

37. The applicant also relied on the House of Lords' judgment in *Secretary of State for the Home Department (Respondent) v. MB (FC) (Appellant)* [2007] UKHL 46, which had found that, in cases where there was undisclosed evidence against someone subject to a "control order", the use of special advocates could remedy any unfairness in the proceedings. He contended that a special advocate (also known as special counsel) ought to have been appointed in his case and the refusal to do so meant he had not been provided with a procedural safeguard that would have been sufficient to uphold his Article 6 rights.

38. Finally he relied on this Court's judgment in *Botmeh and Alami v. the United Kingdom*, no. 15187/03, 7 June 2007, where the ability of the Court

of Appeal to consider previously withheld material and further to consider its impact on the safety of the applicants' convictions had been decisive in this Court's finding of no violation of Article 6. In the present case, there was nothing to prevent the Court of Appeal considering the undisclosed material, especially when it was in the particularly advantageous position of being able to consider the actual evidence given at trial and the submissions of the defence.

39. The Government contested that argument. They submitted that the essential principles to be derived from this Court's case-law were: that Article 6 in principle required disclosure but this was not an absolute right and it could be necessary to withhold evidence to preserve the fundamental rights of another or safeguard an important public interest; any difficulties caused to the defence had to be adequately counter-balanced by the procedures followed by the judicial authorities; a failure to disclose material to a trial judge could be remedied by appeal proceedings; and the Court, in considering whether there had been a violation of Article 6, paid close attention to the facts of a particular case and the issues raised by the defence.

40. In the present case, the decision of the disclosure judge to hear the prosecution's *ex parte* application for non-disclosure had been made after a full *inter partes* hearing. At the *inter partes* hearing the disclosure judge had invited the applicant and his co-accused to provide him with information as to the nature of their defence. In his ruling of 13 September 2002 the disclosure judge had also made it clear that he would be prepared to reconsider the question of disclosure in light of the defence case as it had been presented. The applicant had not given evidence and no other evidence was called on behalf of the defence. This was significant because the prosecution case was based on depositions which had been served on the defence in advance of trial and which had been seen by the disclosure judge. The sole issue in the case always had been whether the applicant had been in possession of the items in question when the police began their pursuit of the vehicle or whether he had been entrapped (or, more accurately, "set-up") by the police. The disclosure judge had full regard to the applicant's right to a fair trial and fully understood the nature of the defence case; he had found that there was nothing relevant in the non-disclosed material. The defence case at trial was the same and nothing was advanced that might have prompted reconsideration of disclosure. The position at the end of the trial was no different from the position as it had been before the disclosure judge. It was incorrect to suggest, as the applicant had, that further disclosure was in the hands of the prosecution; the defence too could have applied for review of the decision not to order disclosure under section 14A of the 1996 Act. Further safeguards, such as providing the disclosure judge with daily transcripts, were not necessary as they would only have catered for the speculative possibility that a new line of defence may have emerged. In

light of the disclosure judge procedure, the applicant's trial was fair even though special counsel had not been appointed; as the disclosure judge had found (and the Court of Appeal had agreed) the appointment of special counsel had not been necessary. The Government therefore submitted that the case bore a strong similarity to *Jasper* and *Fitt*, both cited above; *Edwards v. the United Kingdom*, 16 December 1992, Series A no. 247-B; and *I.J.L. and Others v. the United Kingdom*, nos. 29522/95, 30056/96 and 30574/96, ECHR 2000-IX. In those cases no violation of Article 6 had been found on the basis that the question of disclosure in each case had been determined by a court fully apprised of the issues and after hearing detailed submissions from the defence.

41. There was no need for the Court of Appeal to have considered the undisclosed material because the first-instance procedures had complied with Article 6. Moreover, counsel for the applicant before the Court of Appeal had not invited it to consider the material and so it had never been suggested that the Court of Appeal was required to remedy a deficiency which had occurred at first instance. This Court had referred to the ability of the Court of Appeal to remedy defects in disclosure at first instance, for example in *Atlan v. the United Kingdom*, no. 36533/97, 19 June 2001; *Edwards*, *Dowsett*, and *Botmeh and Alami*, all cited above. However, in the Government's submission, the Court had never suggested that the Court of Appeal should consider undisclosed material in appeal proceedings when there has been no discernible error in the course of first-instance proceedings. The Government reiterated that the essential point was that the factual position as considered by the disclosure judge had not changed and there was no basis for suggesting that wholly irrelevant material had become relevant.

B. Admissibility

42. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

C. Merits

43. The Court notes the present case is one of a series of applications against the United Kingdom where it has been called upon to examine the compatibility of non-disclosure of evidence in criminal proceedings with Article 6 § 1 of the Convention. The principles applicable to the duty to disclose relevant evidence in criminal proceedings were set out by the Grand Chamber in *Rowe and Davis v. the United Kingdom*, cited above, §§ 60-63, as follows:

> "It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party ... In addition Article 6 § 1 requires, as indeed does English law ..., that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused ...
>
> However, ... , the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused ... . In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. 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 ... .
>
> 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 European 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."

44. In considering whether those procedures provided sufficient counterbalance in each case, the Court has examined both the trial and appeal stages of proceedings. The reason for doing so is that, as the Court has repeatedly stated in respect of Article 6, its task is to ascertain whether the proceedings in their entirety were fair (see *Edwards*, cited above, § 34).

45. At the trial stage, the role of the trial judge is of critical importance. For example, in *Rowe and Davis*, cited above, the Court found a violation of Article 6 § 1 on the basis that evidence, which could have been used to undermine the credibility of a key prosecution witness, was withheld by the prosecution from both the defence and the trial judge at first instance, its non-disclosure on grounds of public interest immunity subsequently being ordered by the Court of Appeal following an *ex parte* hearing. The Court did not consider that this procedure before the appeal court was sufficient to remedy the unfairness caused at the trial by the absence of any scrutiny of the withheld information by the trial judge. Unlike the latter, who saw the witnesses give their testimony and was fully versed in all the evidence and issues in the case, the judges in the Court of Appeal were dependent for their understanding of the possible relevance of the undisclosed material on transcripts of the Crown Court hearings and on the account of the issues

given to them by prosecuting counsel. In addition, the trial judge would have been in a position to monitor the need for disclosure throughout the trial, whereas the Court of Appeal judges made their determination *ex post facto*.

Equally, in *Atlan*, cited above, the prosecution had repeatedly denied during the first-instance trial that they had any evidence in their possession concerning the man whom the applicants accused of having been an informer who had falsely implicated them. Shortly before the hearing of the appeal, the prosecution informed the defence that, contrary to their earlier statements, there was some undisclosed material. The Court of Appeal, following an *ex parte* hearing, ruled that this evidence could remain undisclosed on grounds of public interest immunity. The Court found a violation of Article 6 § 1 on the grounds that, as it had held in *Rowe and Davis*, the trial judge had been better placed than the appeal court judges to decide whether or not the non-disclosure of material evidence would be prejudicial to the defence, and might, moreover, have chosen a different form of words for his summing up to the jury had he seen the evidence in question.

In *Dowsett v. the United Kingdom*, no. 39482/98, ECHR 2003-VII, the prosecution on its own initiative decided not to disclose material evidence to the defence at trial. Some of this evidence was subsequently released before the appeal hearing, but the Court found a violation of Article 6 § 1 because some material evidence continued to be withheld on grounds of public interest immunity, and was not even placed before the Court of Appeal in an *ex parte* procedure. At paragraph 50 of its judgment, the Court reiterated the importance of placing material relevant to the defence before the trial judge for his ruling on questions of disclosure at the time when it could serve most effectively to protect the rights of the defence.

By contrast, in *Jasper* and *Fitt*, cited above, where the prosecution placed all material evidence which it intended to withhold before the trial judge, no violation was found. The Court considered it significant that the trial judge in each case provided an important safeguard in that it was his duty to monitor throughout the trial the fairness or otherwise of the evidence being withheld. The need for disclosure was at all times under assessment by him (see paragraph 56 of the *Jasper* and paragraph 49 of the *Fitt* judgment).

46. Where the trial judge is not able to rule on the disclosure issue, the lack of fairness at first instance can be remedied on appeal only where the Court of Appeal orders full, or virtually full, disclosure to the defence. Thus the Court found no violation of Article 6 in *Edwards* and *I.J.L. and Others*, both cited above, because, although the prosecution did not disclose material evidence at the trial, there was full disclosure to the defence before the appeal hearing and the Court of Appeal considered the impact of the new material on the safety of the conviction and did so in the light of detailed argument from the applicant's lawyers. The same conclusion was

reached in *Botmeh and Alami*, cited above, where undisclosed material in the hands of the United Kingdom Security Service had not been made available to the prosecution or trial judge. The undisclosed material had been first considered by the Court of Appeal in an *ex parte* hearing, a summary of the material had then been disclosed to the applicants well in advance of the appeal hearing and the applicants had been able to make submissions on the basis of it. The Court of Appeal had also been able to observe that there was nothing of significance before it that had not been placed before the trial judge (paragraph 43 of the judgment) and had been able to consider the impact of the new material on the safety of the applicants' convictions (paragraph 44 of the judgment).

47. Finally, even where the necessity of disclosure is determined by the trial judge, the requirements of Article 6 will not necessarily be satisfied. For example, in *Edwards and Lewis*, cited above, each applicant complained that he had been entrapped into committing the offence by one or more undercover police officers or informers, and asked the trial judge to consider whether prosecution evidence should be excluded for that reason. In each case the judge, who subsequently rejected the defence submissions on entrapment, had already seen prosecution evidence which might have been relevant to the issue. In Mr Edwards' case, the evidence produced to the trial judge and Court of Appeal in *ex parte* hearings included material suggesting that Mr Edwards had been involved in drug dealing prior to the events which led to his arrest and prosecution. During the course of the criminal proceedings, the applicant and his representatives were not informed of the content of the undisclosed evidence and were thus denied the opportunity to counter this allegation, which might have been directly relevant to the conclusions of the trial judge and another judge who considered the matter that the applicant had not been charged with a 'State-created crime' (a requirement of entrapment). In Mr Lewis' case, the nature of the undisclosed material had not been revealed, but the Court considered that it was possible that it was also damaging to the applicant's submissions on entrapment. Under English law, where public interest immunity evidence was not likely to be of assistance to the accused, but would in fact assist the prosecution, the trial judge was likely to find the balance to weigh in favour of non-disclosure. In those circumstances, the Court did not consider that the procedure employed to determine the issues of disclosure of evidence and entrapment complied with the requirements to provide adversarial proceedings and equality of arms or incorporated adequate safeguards to protect the interests of the accused. It therefore found a violation of Article 6 § 1 in each case (see paragraph 46–48 of the Grand Chamber's judgment, reproducing and endorsing paragraphs 42–59 of the Chamber's judgment).

48. In applying those principles to the present case, the Court recognises the specific circumstances of criminal justice in Northern Ireland, the need for Diplock courts and the procedures which have evolved in a system

where the trial judge is both tribunal of fact and tribunal of law. It also considers that, subject to appropriate appellate review, the appointment of a disclosure judge would, in principle, meet the requirements of Article 6 § 1 of the Convention. In particular, the strength of the disclosure judge system is that it avoids the prejudice that would arise if the trial judge were required to consider undisclosed material yet does not leave the question of disclosure entirely to the discretion of the prosecution. The Court also notes that the disclosure judge system avoids the problem, highlighted in *Edwards and Lewis*, of the trial judge making a finding of fact on a defence submission of entrapment having already seen prosecution evidence which might be relevant to the issue.

49. In the circumstances of this particular case, as in any case involving the right to a fair trial, the Court must examine whether the safeguards provided by the disclosure judge system were applied in a manner compatible with the applicant's rights under Article 6 of the Convention.

50. As a preliminary matter, the Court notes, as did the Court of Appeal, that the circumstances in which the trial judge came to read the disclosure judge's statement of reasons are not entirely clear. However, having examined the trial judge's ruling of 1 August 2002, the Court accepts his explanation that it was appropriate for him to read the statement of reasons before hearing the parties' submissions on whether it was appropriate for special counsel to be appointed or for the trial judge to examine the undisclosed material for himself. The Court considers that this was an appropriate course of action for him to take, not least because the statement of reasons did not disclose the contents of the undisclosed material. No criticism can therefore be made of the trial judge who took care to ensure he did not see anything which might be prejudicial to the defence. Indeed, the Court observes that the applicant himself does not complain that his trial was unfair because the trial judge read the statement of reasons.

51. Instead, the essence of the applicant's complaint is that, unlike in the cases of *Jasper and Fitt*, cited above, there was no effective monitoring throughout the trial of the fairness or otherwise of the evidence being withheld. According to the applicant, the trial judge could not effectively monitor the situation since he had not seen the documents; the disclosure judge equally could not act as an effective monitor since he was not kept informed of the progress of the trial. It was only prosecuting counsel who had knowledge of both and who was in practice able to refer the matter back to the disclosure judge if he felt it necessary. This, the applicant submits, was an inadequate safeguard.

52. The Court is not persuaded by this argument for the following reasons. First, in contrast to *Rowe and Davis*, *Atlan*, and *Dowsett*, cited above, in the present case, all documents which might reasonably be expected to assist the applicant's defence and for which public interest immunity was claimed were submitted by the prosecution to the disclosure

judge. The defence were not only informed of this fact but at an *inter partes* hearing made detailed submissions on the facts of the case and on the nature of the defence case, namely that the applicant had been "set-up" by the police. At that hearing, the disclosure judge, who was fully aware of the issues in the case, concluded that none of the undisclosed material was relevant to the defence and that he did not anticipate any circumstances which would result in the material becoming of value to the defence. He noted that there were two types of material involved: the first could not assist the applicant since it was prejudicial to him; the second related to police procedures, was general in nature and content and did not relate directly to the applicant. Moreover, the disclosure judge was given an opportunity to reconsider his ruling when the case came before him to consider, *inter alia*, whether it would be necessary to appoint a special counsel. The Court notes that, after a further *inter partes* hearing, the disclosure judge reiterated that he could foresee no circumstances in which the undisclosed material would be of assistance to the defence and did not regard the case as requiring the appointment of a special counsel. Nonetheless, the disclosure judge was careful to note that, if the defence were to advance a proposition or raise an issue that might, by a remote possibility, touch on the undisclosed material and make it of use to the defence, the prosecution could be relied on to alert the trial judge with a view to referring the case back to the disclosure judge. In this connection, the Court notes that the defence case advanced at the trial was essentially that which had already been indicated to the disclosure judge. The applicant has been unable to point to any instance in the course of the trial where, as a result of any change in his defence, it would have been appropriate for the prosecution to have referred the matter to the disclosure judge. The Court further notes that there is nothing in the case-file to indicate that the applicant was hindered by the non-disclosure in his cross-examination of the numerous police witnesses with a view to establishing that he had been "set-up".

53. Second, the Court also observes that the Court of Appeal specifically considered and rejected the applicant's submission that fairness required that a special counsel should have been appointed or that a daily transcript should have been provided to the disclosure judge and examined for any sign of material that might have assisted the applicant's case. Both were found to be unnecessary to cater for the "purely speculative possibility" that a line of defence might emerge. No new line of defence had emerged and nothing had appeared that suggested that material characterised by the disclosure judge as wholly irrelevant to the applicant's defence might suddenly have become relevant. The Court considers that the Court of Appeal was justified in finding that all steps necessary to safeguard the applicant's interests in relation to disclosure were taken. In view of the clear conclusion of the disclosure judge that there was nothing in the withheld

material which could assist the defence, the Court considers that the fact that the absence of a continuous monitoring of the situation by persons other than prosecuting counsel to provide against a purely speculative possibility of a change in the situation did not result in any unfairness.

54. Finally, the Court observes that if there had been deficiencies in the disclosure regime during the course of the applicant's trial then it may well have proved necessary for the Court of Appeal to examine the undisclosed material in order to remedy any unfairness caused to him (see for example, *Edwards*; *I.J.L. and Others* and *Botmeh and Alami*, cited above). Indeed, in the rather particular circumstances of this case, it may well have been desirable for the Court of Appeal to have examined the undisclosed material in order to satisfy themselves that no unfairness had arisen during the course of the trial by reason of the non-disclosure. However, for the reasons it has given, the Court does not consider that there were any such deficiencies in the course of the applicant's trial. Consequently, the fact that the Court of Appeal did not examine the undisclosed material cannot in itself amount to a violation of Article 6 § 1. Moreover, the Court accepts the Government's submission that the applicant did not invite the Court of Appeal to examine the material and thus the Court of Appeal cannot be criticised for failing to consider the undisclosed material of its own motion.

55. In light of these conclusions, the Court considers that the criminal proceedings against the applicant, when taken as a whole, were fair. There has, therefore, been no violation of Article 6 § 1 in the present case.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 11 January 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı Deputy Registrar	Ljiljana Mijović President