Bearbeiter: Karsten Gaede
Zitiervorschlag: EGMR Nr. 39482/98, Urteil v. 24.06.2003, HRRS-Datenbank, Rn. X

EGMR Nr. 39482/98 - Urteil vom 24. Juni 2003 (Dowsett v. Großbritannien)

Recht auf ein faires Verfahren (rechtliches Gehör; Waffengleichheit; Akteneinsicht; Offenlegung aller relevanten Beweismittel; Vorbereitung der Verteidigung; Verwirkung; effektiver Schutz der Verteidigungsrechte; Tatrichter; öffentliches Interesse; Heilung; Abgrenzung zum Ausnahmefall Edwards; Beweislast: zustimmendes Sondervotum Bratza / Costa).

Art. 6 Abs. 1 Satz 1, Abs. 3 lit. b EMRK; Art. 20 Abs. 3 GG; Art. 103 Abs. 1 GG; § 147 StPO

Leitsätze des Bearbeiters

1. Die Garantien des Absatzes 3 stellen spezifische Ausprägungen des Rechts auf ein faires Verfahren nach Art. 6 Abs. 1 EMRK dar.

2. Es ist ein grundlegendes Erfordernis des Rechts auf ein faires Verfahren, dass in Strafverfahren rechtliches Gehör sowie Waffengleichheit zwischen den Strafverfolgungsbehörden und der Verteidigung zu gewähren sind. Das rechtliche Gehör bedeutet im Strafverfahren, dass sowohl der Anklage als auch der Verteidigung die Gelegenheit gegeben werden muss, von den Tatsachen und Verfahrensbeiträgen, die von der jeweils anderen Verfahrenspartei in das Verfahren eingebracht worden sind, Kenntnis zu nehmen und diese zu kommentieren. Zudem erfordert Art. 6 Abs. 1 EMRK, dass die Strafverfolgungsbehörden alle in ihrem Besitz befindlichen und für das Verfahren bedeutenden den Angeklagten belastenden oder begünstigenden Beweismittel offen legen.

3. Das Recht auf Offenlegung der relevanten Beweismittel ist jedoch kein absolutes Recht. Es kann erforderlich sein, bestimmte Beweismittel vor der Verteidigung zurückzuhalten, um grundlegende Rechte anderer Bürger oder wichtige öffentliche Interessen zu schützen. Auch in diesem Fall sind jedoch nur solche Einschränkungen zulässig, die strikt verhältnismäßig sind. Zudem ist es zur Gewährung eines fairen Verfahrens des Angeklagten erforderlich, dass etwaige infolge der Einschränkungen auftretende Schwierigkeiten für die Verteidigung hinreichend durch das folgende Verfahren der Rechtspflege ausgeglichen werden.

4. In den Fällen, in denen Beweise zurückgehalten worden sind, ist es nicht die Aufgabe des EGMR, zu entscheiden, ob die Zurückhaltung verhältnismäßig war, da -grundsätzlich - die nationalen Gerichte die vor ihnen ausgebreiteten Beweise würdigen. Der EGMR hat vielmehr zu sichern, dass das Entscheidungsverfahren über die Zurückhaltung in jedem einzelnen Fall so weit wie möglich mit den Erfordernissen des rechtlichen Gehörs und der Waffengleichheit übereinstimmt und adäquate Schutzvorkehrungen für die Interessen des Angeklagten vorhält.

5. Ein Verfahren, in dem die Anklage selbst versucht, die Bedeutung der zurückgehaltenen Informationen für die Verteidigung einzuschätzen und die Rechte der Verteidigung gegenüber dem öffentlichen Interesse abzuwägen, genügt dem Art. 6 EMRK dabei nicht. Hinreichend kann ein Entscheidungsverfahren nur dann sein, wenn ein nicht an die Ergebnisse eines zuvor entscheidenden Gerichts gebundener Richter über die Zurückhaltung entscheidet, der auch die Würdigung in Bezug auf die gesamten übrigen Beweise vornehmen kann. Die Einschätzung durch den Tatrichter selbst stellt dabei den effektivsten Schutz der Verteidigungsrechte dar. Ein Rechtsmittel, das diesen Anforderungen nicht genügt, führt keine Heilung herbei. Unterlässt der Angeklagte, ein solches Rechtsmittel einzulegen, tritt keine Verwirkung ein.

THE FACTS

A. The Crown Court trial 3

10. On 22 March 1989 in Norwich Crown Court the applicant was convicted of the murder of Christopher Nugent and sentenced to life imprisonment. 4

11. Mr Nugent had been the applicant's business partner. He was shot and killed at their business premises on 15 December 1987 by Stephen Gray, who left the scene of the crime in a car driven by Gary Runham. 5

12. Runham and Gray were arrested in January 1988 and the applicant was arrested in February 1988. He was charged with murder jointly with Runham, Gray and two other men who had allegedly provided money to pay for the killing of Christopher Nugent. 6

13. The Crown's case was that the applicant had paid Runham and Gray 20,000 pounds sterling (GBP) to kill Nugent, because Nugent knew too much about the applicant's involvement in mortgage fraud. 7

14. The applicant's defence was that he had hired Runham and Gray to break one of Nugent's limbs in order to put him out of action for a few weeks while the applicant effected his transfer to another branch of the firm. He alleged that he had paid Runham and Gray GBP 7,500 for the assault, but that after Gray had killed Nugent, Gray blackmailed the applicant into paying him more money. The applicant claimed that he would have had no motive for killing Nugent, since the latter was himself involved in the frauds being perpetrated through the business. The applicant submitted, however, that his representatives felt unable to pursue this line of argument satisfactorily because of lack of evidence of Nugent's dishonesty; the jury were asked to accept the applicant's word alone on this issue. 8

15. Runham and Gray pleaded guilty to murder. Gray gave evidence for the prosecution against the applicant concerning the alleged murder conspiracy. The two alleged co-conspirators, who according to the prosecution had, together with the applicant, paid for Nugent to be murdered, were acquitted. 9

B. Post-trial disclosure 10

16. Following his conviction the applicant complained to the Police Complaints Authority ("PCA") about Suffolk Constabulary's refusal to disclose material evidence. After investigation, in a letter to the applicant of 30 October 1992, the PCA reported that it could not support any allegation of perversion of the course of justice but had found various instances of negligence. 11

17. According to the applicant, in July 1993 he was informed that there were seventeen boxes of hitherto undisclosed material. The applicant contended that some of this evidence would have supported his defence that he had had no need to murder Nugent to ensure his silence since it showed that the latter was also deeply involved in the frauds perpetrated through the business. The applicant claimed that some of the material from the seventeen boxes was disclosed to him in the week prior to his appeal hearing, while other material from the boxes remains undisclosed. 12

18. According to the Government, the evidence which was not disclosed at first instance, but which was disclosed prior to the applicant's appeal, fell into two categories. The first type of evidence derived from the Holmes computer system used by the police officers conducting the murder inquiry to store and cross-reference all the information obtained in the course of the inquiry. The computer data included documents known as "Messages" which recorded information when first received by an officer, and documents known as "Actions" which recorded the steps to be taken by an officer in response to a Message and the result of any such further inquiry. At the time of the trial, the prosecution took the view that the computer system was being used as a tool for the police investigation and that the data contained in it was not subject to disclosure under the Attorney General's Guidelines (see below), although any witness statements or exhibits obtained in response to a Message or Action should be, and were, disclosed as "unused material". 13

19. The Government submitted that, following the applicant's conviction, and in the light of developments in the common law duty of disclosure (see below), the prosecution reviewed their position and decided that the data stored on the computer system did amount to disclosable material. Prior to the applicant's appeal, therefore, the prosecution disclosed the Messages and Actions held by the police. Some 4000 Actions were disclosed, of which the applicant referred to one in support of his appeal. 14

20. In the Government's submission, the second category of evidence undisclosed at first instance related to the parallel investigation into mortgage fraud by a number of people including the applicant and Nugent. At an early stage the prosecution decided to keep the murder and fraud investigations separate and that there was no duty under the 15

Guidelines to disclose the material gathered in the fraud inquiry to the defendant charged with murder. Following the applicant's conviction and the development of the common law, the prosecution reconsidered their decision and, prior to the applicant's appeal, made full disclosure of the material obtained in the fraud inquiry.

C. Undisclosed material 16

21. Prior to the hearing before the Court of Appeal, the prosecution served on the applicant a schedule indicating what material was still being withheld following the review of the prosecution's duty of disclosure. In respect of some of the items in the schedule, the reason given for non-disclosure was "legal and professional privilege"; in respect of other items it was "public interest immunity"; and in respect of certain other items, for example document no. 580, no reason was given to explain the decision to include the document in the list of withheld evidence. Counsel for the defence was in contact with the prosecution concerning possible further disclosure. A letter dated 23 March 1994 from the Branch Crown Prosecutor indicated that a number of documents, including no. 580, were on the list of withheld material. 17

22. One of the documents on the Schedule (no. 580) subsequently came into the applicant's possession. It is a letter, dated 12 April 1988, from a firm of solicitors acting for Gray to Detective Chief Inspector Baldry of the Suffolk Constabulary, which reads as follows: 18

"Further to our several discussions concerning Mr Gray, you will of course be aware that I did visit him in Leicester Prison on 26 March.

He has requested a transfer either to Brixton Prison or Wormwood Scrubs if this is at all possible and I should be grateful if you would let me know whether there is any possibility of Mr Gray receiving a transfer.

Secondly I now understand that apparently Mr Gray understands that you would be willing to support him receiving a straight term of life imprisonment and an Application for early parole.

Obviously I have explained to Mr Gray the position concerning sentencing but perhaps you would set out your position so far as possible concerning these matters.

Thirdly I understand that Mr Gray's wife is to be produced at fortnightly intervals to Leicester Prison for visits and perhaps again you could clarify the position.

I look forward to hearing from you..."

D. Appeal 19

23. The hearing of the applicant's appeal took place on 28 and 29 March 1994. Non-disclosure of evidence at trial, particularly evidence discovered in the parallel mortgage fraud investigation, was one of the applicant's grounds of appeal to the Court of Appeal, but no mention was made of document no. 580 or of the other documents which continued to be withheld by the prosecution. The applicant also relied on the fact that the trial judge had omitted to direct the jury that a person may lie for reasons unconnected with guilt of the offence charged (a "Lucas" direction), and that the fact that during interviews with the police the applicant had denied all knowledge of any plot to harm Nugent, did not mean that he had been involved in his murder. 20

24. Dismissing his appeal on 29 March 1994, the Court of Appeal remarked that in the course of his summing up the judge had not suggested that the applicant's lies could amount to corroboration of the other evidence, and had reminded the jury of defence counsel's submissions in relation to the applicant's lies. Although the summing up should have included a "Lucas" direction, no miscarriage of justice had occurred. On the question of non-disclosure the court observed: 21

"... As the trial was conducted, Nugent's dishonesty was made perfectly plain to the jury. The appellant himself had admitted being dishonest, and had said in the course of his evidence that Nugent was party to all the dishonest resorts to which he had lent himself in making false representations and forging documents. Accordingly it was fully before the jury that Mr Nugent was dishonest. ...

We have been taken through various parts of the evidence ... and we are quite satisfied that ... Mr Nugent's involvement in the deep dishonesty of this business was fully canvassed before the jury. ... Accordingly, although ... the stricter regime of prosecution disclosure which now prevails might well have required further disclosure than was actually made, we do not consider that this ground is one which has any substance in regard to the outcome of the case. ..."

The Court of Appeal concluded: 22

"There was overwhelming evidence that the appellant initiated a plot against the victim Nugent. There was likewise strong evidence that he had indicated what he wanted was to get rid of Nugent. The money actually paid, and indeed even the sum mentioned by the appellant was in our view out of proportion to a plot simply to 'duff up' the victim. Moreover, on analysis such a plot made no sense. Each member of this court is of the clear opinion, despite the blemishes in an otherwise impeccable summing-up, that no miscarriage of justice has actually occurred. ..."

E. The alleged significance of document no. 580 23

25. The applicant believed that an inducement was promised by the prosecuting authorities to Gray in exchange for his testifying against the applicant. In addition to the above letter, which the applicant claimed supports his hypothesis, he referred to the fact that his tariff of imprisonment (that is, the period to be served before review by the Parole Board) under the life sentence had been set at twenty-five years, but was subsequently reduced to twenty-one years. Runham, who had provided the murder weapon and drove the get-away car, received a tariff of sixteen years. Gray, who had shot and killed Nugent, had his tariff set at eleven years and was released in 1999. In April 1999 the Home Office wrote to 24

Runham, refusing to reduce his tariff:

"The Secretary of State holds Stephen Gray to be as culpable as you are, even though he fired the murder weapon and you did not. When the tariff was set for Stephen Gray, the then Secretary of State took into account that he had, like you, pleaded guilty to murder but had in addition been '... a very important witness for the prosecution'. ..."

26. The Government denied that any inducement was offered to Gray. Under cover of a letter dated 27 June 2001, they sent to the Court undated statements from three senior officers in the Suffolk Constabulary who had been involved in the murder investigation.

(a) The Statement of Chief Superintendent Green states:

"I have seen a copy of the letter dated 12 April 1988 from Ennions, Solicitors ... to my then colleague, Mr Baldry. I can confirm that this letter is genuine and was recorded as Document D-580 during the course of the investigation into the murder of Mr Nugent.

I have no recollection of this letter after thirteen years and I cannot remember ever discussing it with Mr Baldry. At no time was I ever involved in any debate regarding the issue of Mr Gray receiving a 'straight term of life imprisonment and an application for early parole'.

I can confirm that I did not offer Mr Gray any form of inducement to give evidence against Mr Dowsett or other defendants. To the best of my recollection, Gray's motives were that he was simply attempting to 'clear his plate' by telling the whole truth about the circumstances of the case, whilst at the same time ensuring that Dowsett and others faced their share of the responsibility for the crime. I do recall that Mr Gray hoped that his honesty at the trial would one day assist him to make a successful application for parole.

I would like to emphasise that I spent six days with Mr Gray at Winchester Prison during the preparation of his statement and can categorically state that all one hundred and one pages of the document were written with Mr Gray's consent and without any form of inducement."

(b) The statement of Detective Chief Inspector Baldry, now retired, reads:

"This murder happened in 1987 and is not now fresh in my memory.

However I do remember clearly that I gave no indications to interviewing officers or to Gray himself that in return for his support we would aid an application for a shorter sentence. Gray was a very dangerous murderer who I considered enjoyed carrying out his 'murder' contract with Mr Dowsett. This matter was so grave that no such undertaking could honestly have been given.

I do remember that Gray at one time was on hunger strike in prison and that we helped his wife to visit him in Prison. How this help was given I do not remember - it may have been in the role of carrying messages to and from."

(c) Detective Chief Inspector Abrahams, also now retired, said in his statement:

"Concerning the letter Document No D580 I can categorically state that I did not personally offer Gray any inducement or arrangement relating to his sentence. Nor did I have any discussions with his legal representative with regard to his sentence. Equally, I did not instruct any of my subordinate officers including the interview team questioning Gray so to do.

As far as I am aware Gray throughout his detention and taped questioning was dealt with in accord with the Police and Criminal Evidence Act.

I have been unaware of this letter until now but I am sure Chief Inspector Mike Baldry (now retired) may be of some help to you.

I would point out that Gray was arrested at Mildenhall Police Station on 23 January 1988 after which the murder management team was joined by Mr Christopher Yule of the Crown Prosecution Service-Ipswich, who advised on all legal aspects of the case. He was later joined by Mr (now Sir and a High Court Judge) David Penry-Davey QC and Mr David Lamming of Counsel, who advised on what was to be a complex case not only involving murder, conspiracy to murder but also large scale mortgage fraud.

I am not aware that any representations were made to the trial judge concerning any reduction in Gray's tariff. If this had been the case then the application would have had to be made through prosecuting counsel.

For your information I include below some relevant dates and points that you may already be aware of in relation to the murder, but I think they are worth emphasising:

15 Dec 87 Christopher Nugent found murdered at his business premises that he owned with his partner Dowsett.

23 Jan 88 Gray gave himself up at Mildenhall Police Station and admits the offence naming Dowsett, Runham and others as part of a murder conspiracy.

26 Jan 88 Gary Runham arrested for the murder. He admits the offence naming Dowsett, Gray and others. Runham did the groundwork in planning Nugent's murder and propositioned Gray at a later stage to do the actual killing.

1 Feb 88 Dowsett and others arrested for the murder.

17 Feb 88 I was withdrawn from the everyday management of the inquiry and returned to Force Headquarters. DCI Baldry took over this role.

Dec 88 Gray and Runham appear at Crown Court plead guilty to the murder and are sentenced to life imprisonment.

Jan 89 Gray agrees to become a witness for the prosecution and Detective Inspector Green (now Chief Superintendent) obtains a witness statement.

30 Jan 89 Trial of Dowsett and others commences. ...

Gray appeared as a prosecution witness. Runham did not. The jury unanimously found Dowsett guilty of murder and he was sentenced to life imprisonment.

Prosecution witness O'Dowd gave evidence to the fact that Dowsett admitted the murder to him and stated that Dowsett had said that 'If Abrahams gets too close then he'll get the same' (or words to that effect).

16 Dec 90 Dowsett made a formal complaint against me, other officers and Mr Yule (CPS) that we perverted the course of justice in relation to his trial. The matter was investigated by an outside Police Force and was found by the DPP [Director of Public Prosecutions] and the PCA to be totally unsubstantiated.

Dowsett latter appealed against his conviction to the Court of Appeal but the Judges were unanimous in their judgment to disallow his application.

The above is to the best of my recollection. I do not know what tariffs were set by the Judge in his sentencing of all three defendants but I assume credit was given for Gray and Runham's guilty pleas."

…

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 6 § 3 (b)

34. The applicant alleges that the proceedings before the Crown Court and the Court of Appeal, taken together, violated his rights under Article 6 §§ 1 and 3 (b) of the Convention, which state as relevant:

"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; ..."

A. The parties' submissions 32

1. The applicant 33

35. The applicant submitted that non-disclosure of evidence which was acknowledged to be relevant and material undermined the right to a fair trial and in particular the principles of equality of arms and the rights under Article 6 § 3 (b) to adequate facilities for the preparation of the accused's defence. Where as in this case evidence was withheld by the prosecution at trial and on appeal, without approval of any judicial authority, there was no safeguard against abuse and the procedure was plainly incompatible with Article 6. Though it was their duty to do so, the prosecution made no application at trial or appeal *ex parte* to obtain the courts' ruling on the withheld items. The defence could not be criticised in the circumstances for not pressing for the Court of Appeal to conduct a review. In any event, the procedure in *R. v. Keane* (see paragraph 32 above) whereby it was for the prosecution to assess whether evidence was material or relevant was inadequate as it provided no basis on which the defence could properly scrutinise or challenge its assessment. He invited the Court to reconsider the arguments for special counsel to review undisclosed material. 34

36. In this case, there was evidence not disclosed at trial but disclosed on appeal and evidence neither disclosed at trial or on appeal, such as document no. 580. The Court of Appeal acknowledged that the withholding of the material was unsatisfactory but went on *ex post facto* to substitute their view for that of the jury. He denied that document no. 580 was disclosed by the prosecution before the appeal, and referred to his own counsel's recollection and to a letter from the Branch Crown Prosecutor dated 23 March 1994, refusing the disclosure of a number of documents, including no. 580, as "withheld material". Document no. 580 had been sent to him anonymously in prison in late 1997 and was relevant to the issue of Gray's credibility as a prosecution witness. He contended that there might be other material evidence which remained undisclosed. He relied upon the Court's judgment in *Rowe and Davies v. the United Kingdom* ([GC], no. 28901/95, ECHR 2000-II), where it was emphasised that the trial court, and not the prosecution, should be the ultimate judge on questions of disclosure of evidence. 35

2. The Government 36

37. The Government submitted that the proceedings taken as a whole were fair and in accordance with Article 6 § 1. They contended, relying *inter alia* on *Edwards v. the United Kingdom* (judgment of 16 December 1992, Series A no. 247-B), that the prosecution's failure at first instance to disclose the actions and messages held on the Holmes Computer System and the materials gathered during the fraud inquiry did not deprive the applicant of a fair trial because this material was disclosed in time for the hearing in the Court of Appeal. His representatives could have asked for an adjournment if they had thought it necessary in order fully to consider the newly disclosed evidence. 37

38. The Government further submitted that, prior to the hearing in the Court of Appeal, the prosecution served on the applicant a schedule indicating what material had been withheld from disclosure following the review by the prosecution of its duty of disclosure. The schedule included documents nos. 375, 572, 573, 580, 590, 614, 620 and 625. In the event, the prosecution did not place this material before the Court of Appeal or apply for an *ex parte* hearing to decide whether or not it should be disclosed. Instead, the prosecution applied a test of "materiality" similar to that set out by the Court of Appeal in *R. v. Keane* (see above), and concluded that the items in question were not "material" and thus did not have to be disclosed or placed before the court. The applicant's counsel could have discussed this point with the prosecution before the appeal hearing and, if necessary, could have applied to the Court of Appeal for a review of the prosecution's decision and for disclosure of any of the documents listed in the schedule. 38

39. The Government could not explain how document no. 580 came into the applicant's possession, but considered that it must have been disclosed to the applicant by the prosecution shortly before the appeal hearing in March 1994, as the prosecution continued to reassess their duty of disclosure in the light of developments in the common law. The schedule marked by junior prosecution counsel showed that this document had been ticked for disclosure, and on a later schedule it no longer appeared as being withheld. Disclosure was the only sensible explanation for the applicant's possession of the letter. 39

B. The Court's assessment 40

40. As the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial set out in paragraph 1 (see *Edwards v. the United Kingdom,* cited above, p. 34, § 33), the Court has not examined the applicant's allegations separately from the standpoint of paragraph 3 (b). It has addressed the question whether the proceedings in their 41

entirety were fair (*ibid*., pp. 34-35, § 34).

41. 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 (see *Brandstetter v. Austria,* judgment of 28 August 1991, Series A no. 211, pp. 27-28, §§ 66-67). In addition Article 6 § 1 requires, as indeed does English law (see paragraphs 27-33 above), that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused (see the *Edwards* judgment cited above, p. 35, § 36). 42

42. 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 to keep secret police methods of investigation of crime, which must be weighed against the rights of the accused (see, for example, *Doorson v. the Netherlands,* judgment of 26 March 1996, *Reports of Judgments and Decisions* 1996-II, p. 470, § 70). 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 (for example, *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, *Reports* 1997-III, p. 712, § 58). 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 (see the *Doorson* judgment cited above, p. 471, § 72, and the *Van Mechelen and Others* judgment cited above, p. 712, § 54). 43

43. 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 (see the *Edwards* judgment cited above, pp. 34-35, § 34). 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. 44

44. The Court observes that this case has strong similarities to the case of *Rowe and Davis v. the United Kingdom* (cited above). As in that case, during the applicant's trial at first instance the prosecution decided, without notifying the judge, to withhold certain relevant evidence on grounds, *inter alia*, of public interest. Such a procedure, whereby the prosecution itself attempts to assess the importance of concealed information to the defence and weigh this against the public interest in keeping the information secret, cannot comply with the above-mentioned requirements of Article 6 § 1; nor is it in accordance with the principles recognised in the English case-law from the Court of Appeal's judgment in *R. v. Ward* onwards (see paragraphs 30 et seq. above). 45

45. While at the commencement of the applicant's appeal, prosecution counsel disclosed some previously withheld material, it notified the defence that certain information remained undisclosed, without however revealing the nature of this material. Unlike the *Rowe and Davis* case however, the Court of Appeal did not proceed itself to review the remaining material in an *ex parte* hearing. 46

46. As regards the material disclosed by the prosecution prior to the appeal, the so-called "Actions" and the fraud inquiry materials, the Court observes that the applicant was able to make use of it to support his arguments before the Court of Appeal and that the Court of Appeal was assisted by defence counsel in its assessment of the nature and significance of this material in reaching its conclusion as to whether or not the applicant's conviction should stand. This procedure was, in the Court's view, sufficient to satisfy the requirements of fairness as regards the late disclosed material (see *Edwards*, cited above, §§ 36-37). 47

47. There is a dispute between the parties as to whether one particular item, document no. 580, which contained material possibly relevant to discrediting Gray, was in fact disclosed to the defence shortly before the appeal (see paragraphs 22, 36 and 39 above). The Government on the one hand pointed to the prosecution schedules which they interpreted as indicating that document no. 580 had been removed from the list of withheld material and asserted that disclosure was the only sensible explanation for the applicant's possession of the document; the applicant on the other hand provided a letter from his counsel stating that the prosecution did not provide the defence with the document and put forward his own account of being sent the document anonymously. There was also a letter from the prosecution dated 23 March 1994, some five days before the appeal hearing, which indicated that document no. 580 continued to be withheld from the defence. There is therefore unambiguous evidence showing that the letter concerned had not been disclosed by the eve of the appeal hearing and only indirect, circumstantial evidence that the prosecution might 48

have changed its mind at the last moment. The Court is not persuaded therefore that the Government have shown that this letter, relevant to the applicant's defence, was made available to his counsel in time for use at the appeal. This finding is not however essential to the reasoning in this case as in any event it is not in dispute that other documents were not disclosed at this time, on the basis *inter alia* of the prosecution's assessment that public interest immunity attached to them.

48. The Government have pointed out that the applicant could himself have requested the Court of Appeal to review this material. This is no doubt true and might in theory have resulted in the court overruling the prosecution's view and making further documents available at the appeal. However, the Court recalls that in its aforementioned judgment in *Rowe and Davis* (§ 65) it did not consider that the review 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: 49

"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 first-instance judge would have been in a position to monitor the need for disclosure throughout the trial, assessing the importance of the undisclosed evidence at a stage when new issues were emerging, when it might have been possible through cross-examination seriously to undermine the credibility of key witnesses and when the defence case was still open to take a number of different directions or emphases. In contrast, the Court of Appeal was obliged to carry out its appraisal *ex post facto* and may even, to a certain extent, have unconsciously been influenced by the jury's verdict of guilty into underestimating the significance of the undisclosed evidence."

49. In this case in deciding whether the material in issue should be disclosed, the Court of Appeal would neither have been assisted by defence counsel's arguments as to its relevance nor have been able to draw on any first hand knowledge of the evidence given at trial. An application to the Court of Appeal in those circumstances could not be regarded as an adequate safeguard for the defence. 50

50. In conclusion, therefore, the Court re-iterates the importance that material relevant to the defence be placed before the trial judge for his or her ruling on questions of disclosure, namely, at the time when it can serve most effectively to protect the rights of the defence. This aspect of the case can be distinguished from that of *Edwards* cited above, where the appeal proceedings were adequate to remedy the defects at first instance since by that stage the defence had received most of the missing information and the Court of Appeal was able to consider the impact of the new material on the safety of the conviction in the light of detailed and informed argument from the defence (p. 35, §§ 36-37). 51

51. In light of the above, the Court finds no reason to examine the applicant's argument that the procedure set out in *R. v. Keane* fails to satisfy the requirements of Article 6 in placing an obligation on prosecution counsel only to place material it considers relevant before the court for its ruling on disclosure, or to re-visit the arguments militating in favour of special counsel reviewing undisclosed material as an additional safeguard (for example, *Fitt v. the United Kingdom* [GC], no. 29777/96, §§ 30-33, ECHR 2000-II). 52

52. It follows that the applicant did not receive a fair trial and that there has been a violation of Article 6 § 1 of the Convention. 53

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION 54

… 55

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention in conjunction with Article 6 § 3 (b) of the Convention; 56

… 57

CONCURRING OPINION OF JUDGE SIR NICOLAS BRATZAJOINED BY JUDGE COSTA

I fully share the conclusion and reasoning of the Chamber that there has been a violation of Article 6 § 1 of the Convention in the present case. I only wish to add a few supplementary remarks because of the importance of the issues raised by the case and, more particularly, the question whether the appeal proceedings were adequate to remedy the lack of fairness at first instance. 58

As is noted in the judgment, the facts of the case bear a strong resemblance to those examined by the Grand Chamber in the case of *Rowe and Davis v. the United Kingdom* ([GC], no. 28901/95, ECHR 2000-II), in which documents had similarly been withheld by the prosecution at trial on the grounds of the public interest, without notification to the trial 59

judge. At the commencement of the appeal in that case, the prosecuting Counsel had notified the defence that certain materials had been withheld, without however revealing the nature of the material in question. On two separate occasions, the Court of Appeal had reviewed the undisclosed evidence and, following *ex parte* hearings with the benefit of submissions from the Crown but in the absence of the defence, had ruled in favour of non-disclosure.

60 For the reasons set out in paragraph 65 of the judgment (quoted in paragraph 48 of the present judgment), the Grand Chamber held that such a procedure was insufficient to remedy the unfairness caused at the trial by the absence of any scrutiny of the withheld information by the trial judge. The Court emphasised that, unlike the trial judge who saw the witnesses give their testimony and who 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 relevance of the undisclosed material on the transcript of the Crown Court hearing and on the account of the issues given to them by the prosecution in the hearings.

61 The Court went on in the following paragraph to distinguish the case of *Edwards v. the United Kingdom* (judgment of 16 December 1992, Series A no. 247-B) on the grounds that at the appeal stage in that case the defence had received most of the information which had been missing at trial and the Court of Appeal was able to consider the impact of the new material on the safety of the conviction in the light of detailed and informed argument from the defence.

62 In the present case, following the review of the prosecution's duty of disclosure, full disclosure was made before the hearing of the applicant's appeal of two categories of documents but other documents continued to be withheld from disclosure. As appears from the judgment, these documents were listed in a schedule. In respect of some of the items in the schedule, the reason for non-disclosure was stated to be "legal and professional privilege" and, in respect of other items, "public interest immunity"; in respect of certain other items in the schedule (including document no. 580) no reason was given for the non-disclosure of the document.

63 In contrast to what occurred in the *Rowe and Davis* case, the prosecution made no application to the Court of Appeal to rule on the question whether the material listed in the schedule had been legitimately withheld. Equally, however, as pointed out by the Government, the defence did not apply to the Court of Appeal to review the material, the consequence of which application might have been either that the prosecution consented to further disclosure or that further disclosure was ordered by the Court of Appeal itself.

64 The central question is whether this omission on the part of the defence to use a procedure which offered the possibility of obtaining the release of the documents serves to distinguish the case from *Rowe and Davis*. In my view, it does not. It seems to me that where material is withheld from the defence on grounds of public interest immunity the burden must in principle lie on the prosecution to place it before the Court for a ruling on whether it is properly withheld. The onus cannot rest on the defendant to take steps to compel disclosure. This is more particularly so where, as in the present case, the existence of the material is not made known to the defence until the appeal proceedings. In such a case the deficiencies at first instance are only capable of being cured if the material in question is disclosed to the defence by the prosecution in advance of the hearing of the appeal or if the material has been placed before the Court of Appeal by the prosecution and the court has ruled in favour of its non-disclosure in proceedings in which the procedural rights of the defendant are fully protected.