Bearbeiter: Karsten Gaede
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EGMR Nr. 39647/98 u. 40461/98 - Urteil vom 22. Juli 2003 (Edwards und Lewis v. Großbritannien)

Recht auf ein faires Verfahren (Tatprovokation; entrapment; Waffengleichheit; kontradiktorisches / adversatorisches Verfahren; rechtliches Gehör; Beweisrecht; Gesamtbetrachtung; verdeckte Ermittler; V-Leute; fair trial; Jasper; Fitt; Tatfrage: Jury, Tatgericht).

Art. 6 Abs. 1 Satz 1 EMRK; Art. 20 Abs. 3 GG; Art. 2 Abs. 1 GG

Leitsätze des Bearbeiters

1. Das öffentliche Interesse an einer effektiven Verbrechensbekämpfung kann die Verwertung von Beweisen, die durch eine polizeiliche Tatprovokation (entrapment) gewonnen worden sind, nicht rechtfertigen. Sie stellt einen Verstoß gegen Art. 6 Abs. 1 Satz 1 EMRK dar.

2. Es ist nicht die Aufgabe des EGMR, das Vorliegen einer Tatprovokation (entrapment) festzustellen. Wenn mögliche Beweise hinsichtlich einer Tatprovokation (entrapment) zurückgehalten werden, prüft der EGMR jedoch, ob der Einwand einer Tatprovokation (entrapment) in einer Form erhoben werden konnte, welche die Verteidigungsrechte adäquat wahrt.

3. Das Recht auf ein faires Verfahren erfordert ein kontradiktorisch (adversatorisch) ausgestaltetes Verfahren, in dem zwischen Verteidigung und Anklage Waffengleichheit besteht. Das Recht auf ein kontradiktorisches Verfahren bedeutet, dass sowohl der Anklage als auch der Verteidigung die Gelegenheit gegeben werden muss, von den Verfahrensbeiträgen der Gegenseite Kenntnis zu erhalten und diese zu kommentieren. Zusätzlich erfordert Art. 6 Abs. 1 Satz 1 EMRK, dass die Strafverfolgungsorgane der Verteidigung alle für die Anklage bedeutenden Beweismittel offen legen, die sich in ihrem Besitz befinden. Letzteres Recht kann zum Schutz wichtiger Gemeinschaftsinteressen eingeschränkt werden, soweit die Benachteiligung der Verteidigung adäquat durch das Verfahren ausgeglichen wird und die Einschränkungen strikt verhältnismäßig bleiben.

4. Beziehen sich zurückgehaltene Beweise auf Feststellungen zur Tatfrage, von der die über diese entscheidenden Personen (jury oder das Tatgericht) Kenntnis erhalten haben, oder können sie sich auf diese beziehen, kann ihnen eine so entscheidene Bedeutung zukommen, dass das vom Gerichtshof in den Entscheidungen Jasper und Fitt (mit 9:8 Stimmen) für ausreichend erklärte Entscheidungsverfahren über die Zurückhaltung von Beweismitteln unzureichend wird. Kann danach der Einwand der Tatprovokation (entrapment) nicht voll erhoben werden, kann Art. 6 EMRK verletzt sein.

THE FACTS

9. The first applicant was born in 1946 and lives in Woking. 3

10. On 9 August 1994, following a surveillance and undercover operation, he was arrested in a van in the company of an undercover police officer known only as "Graham". In the van was a briefcase containing 4.83 kilograms of 50% pure heroin. On 7 April 1995 the applicant was convicted in Snaresbrook Crown Court of possessing a Class A drug with intent to supply and was sentenced to nine years' imprisonment. 4

11. The first applicant's defence was that at the time of his arrest he believed he was taking part in a transaction to sell stolen jewellery. He alleged that his participation had been organised by a man named Geoffrey Lerway, whom he had met the previous year while both were detained on remand in Brixton Prison. According to the applicant, the week before his arrest Lerway had introduced him to a man called Jim Humphries and a man presented to him only as 5

"Martin". The day before the arrest, the applicant was contacted by Lerway and asked if he would be interested in going to Birmingham in connection with a jewellery deal in which Lerway was acting as intermediary to Martin. He would be given a cut of the purchase price. The applicant agreed that Lerway would pick him up from his home the next day.

12. The following morning he was told that the plans had changed as Martin was now coming to London. The first applicant agreed to accompany Lerway to a public house where, at approximately 12.45 p.m., a red Jaguar car and a white van drew up. The driver of the Jaguar was introduced to the applicant as "Jeff"; he was accompanied by a man and a woman, subsequently called "Terry" and "Carol". The driver of the van was introduced as "Graham". Jeff gave Lerway a briefcase containing GBP 125,000. They all then left in convoy for the Clive Hotel, Primrose Hill, where they were to meet Martin. 6

13. At the hotel, Lerway decided to stay with the money in the car and asked the applicant to see if Martin had arrived. The applicant therefore went into the hotel where he met Jim Humphries, who told him that the arrangements had changed again as Martin was now in Euston. Humphries and Lerway asked the applicant to take a taxi to Euston and ask Martin to return with him to the Clive Hotel. The applicant followed these instructions and found Martin, who told him he had to leave immediately for another meeting. Martin, having spoken to Humphries or Lerway by mobile phone, gave the applicant the key to a room in the nearby Ibis Hotel, and explained that the "goods" were in a briefcase in the room. 7

14. According to the applicant, Graham came from Primrose Hill in his van and met the applicant outside the Ibis. Graham then suggested that the applicant should accompany him up to the room and offered to give him a lift back to Primrose Hill afterwards. In the hotel room, Graham forced the lock on the case while the applicant was in the bathroom and when he came out Graham was ready to go. They returned to the van where the briefcase was opened and within moments the applicant had been arrested. 8

15. Of all the participants in the above transaction, only the applicant was arrested and charged. The applicant suspects that the other participants were undercover police officers or informers acting on police instructions, but their identities and status have never been revealed to him. In this regard he considers it relevant that at the time of the alleged dealings, Lerway was on bail to the Middlesex Crown Court in respect of a large scale conspiracy to supply cannabis. One of the conspirators was a former Flying Squad Detective. It was known to the applicant that Lerway had acted as a participating police informer in that case and it was further known that the police officers involved in the applicant's case had also investigated the conspiracy for which Lerway was on bail. The applicant believes that sentencing in Lerway's trial was deliberately postponed until 12 April 1995, some five days after the conclusion of the applicant's own trial, as a disincentive for Lerway to come forward and give evidence concerning the true nature of the transaction. 9

16. Prior to the commencement of the applicant's trial the prosecution gave notice to the defence that an application to withhold material evidence had been made *ex parte* in advance of the trial under the procedure approved in *R. v. Davis, Johnson and Rowe* (see paragraph 34 below). Judge Owen Stable QC, who considered the material in the absence of the defence, concluded that it would not assist the defence and that there were genuine public interest grounds for withholding it. This ruling was subsequently reconsidered by the trial judge, who had the benefit of a document prepared by the defence, outlining the issues in the case, as well as of the oral submissions of defence counsel. In the course of the present proceedings before the European Court, the Government revealed for the first time that the material placed before the trial judge included information indicating that the applicant had been involved in the supply of heroin before the start of the undercover operation. The subject matter of the public interest immunity evidence was not disclosed to the applicant during the domestic proceedings, either at first instance or on appeal. He denies any prior involvement in drug dealing. The trial judge, who directed himself in accordance with the approach set out by the Court of Appeal in *R. v. Keane* (see paragraph 36 below), decided that the evidence in question would not assist the defence and found genuine public interest grounds in favour of non-disclosure. 10

17. Following the ruling on disclosure, the defence made an application to the trial judge under section 78 of the Police and Criminal Evidence Act 1984 ("PACE": see paragraph 29 below) to exclude the evidence of Graham, on the basis that the applicant had been entrapped into committing the offence. These submissions were rejected. The judge held that in the course of the *ex parte* application he had heard nothing and seen no material which would have assisted the defence in their argument that evidence should be excluded under section 78 on grounds of entrapment. He continued that, if he had seen or heard any such material, he would have ordered disclosure. 11

18. Apart from the applicant, Graham was the only participant in the offence to give evidence at the trial. He testified that the applicant had made a number of incriminating statements to him when they were alone together in the van and hotel room. Although Graham claimed to have made a full note of the alleged conversations, these notes were never shown to the applicant and the applicant was not questioned in connection with their content by the investigating police 12

officers. According to the applicant it was, however, difficult for the defence to undermine Graham's credibility because his full name and other identifying details were not disclosed.

19. Following his conviction the applicant appealed to the Court of Appeal on the ground, *inter alia*, that the judge had been wrong to refuse to order disclosure. Dismissing the appeal on 18 July 1996 the Court of Appeal, having itself examined the undisclosed evidence, observed that "each one of us reached the clearest possible view that nothing in the documents withheld could possibly have assisted the defence at trial; indeed quite the reverse". 13

B. Michael Lewis 14

20. Prior to the events in question, the applicant was of good character. He had been employed as accounts director in a firm which had gone into liquidation a year earlier, and at the time of his arrest in July 1995 he was unemployed and in considerable debt. 15

21. The applicant's version of events, which he maintained from the time of his first interview with the police, was that he had been introduced to a man named "Terry" by an acquaintance, Colin Phelps, since Terry appeared interested in purchasing from the applicant some bankrupt stock. At a meeting in July 1995 Terry had started talking about counterfeit currency and had pressed the applicant to obtain some as part of the transaction. Although the applicant had never hitherto been involved with counterfeit currency, he did have a contact, "John", who was able to supply forged bank notes. 16

22. Terry went on to introduce the applicant to two men called "Jag" and "Jazz". At a third meeting on 14 July 1995, Jag turned up with "Chris", who was subsequently revealed to be an undercover police officer, and an order for a large amount of currency was placed. It appears from the transcript of covert tape recordings made during this meeting that, while the applicant was not unwilling to become involved, he was actively encouraged to do so by Jag and Chris, who pressurised him to a certain degree to supply more notes of a higher denomination than had at first been agreed. On 25 July 1995 the applicant met Chris and another undercover officer, "Ian", in a public house car park. He showed them some counterfeit notes, and was immediately arrested by uniformed officers. More counterfeit notes were found when his house was searched. 17

23. The applicant maintained that he had been entrapped by undercover police officers and/or participating informers into committing the offences. On 11 November 1996 he applied to the Crown Court judge for an order that the indictment should be stayed on the grounds that, as a result of the covert activities of undercover police officers and/or participating informers, (a) it was not possible for him to have a fair trial and (b) the moral integrity of the criminal proceedings had been impugned. He also requested the judge to order the prosecution to provide more information and documents, including information relating to the question whether Colin Phelps, "Terry" or "Tel", "Jazz" or "Jag" were participating informers or undercover police officers. 18

24. Prior to making his ruling on the defence application, the judge heard, *ex parte*, an application by the prosecution to withhold certain material evidence on grounds of public interest immunity. The judge refused to grant a stay or to order further disclosure, indicating that most of the information sought was subject to public interest immunity. He also ruled that, while it was clear that "Chris" was coaxing the applicant, there was no evidence of pressure being applied. 19

25. A second submission was then made on the applicant's behalf to exclude the evidence of undercover police officers under section 78 of PACE. However, before evidence was called from the officers in question - "Chris" and "Ian" - the defence counsel sought guidance from the judge as to the areas of cross examination which would or would not be allowed, given that certain issues relating to the investigation were covered by public interest immunity. It became apparent that most of the areas of cross examination necessary to develop the submission were not to be allowed. Accordingly, the submission was withdrawn and the applicant entered guilty pleas to the indictment on 12 November 1996. 20

26. On 20 November 1996 he was sentenced to a total of four and a half years' imprisonment. 21

27. On 28 November 1996 counsel advised that the applicant had no prospects of success in appealing against conviction, since he would have to demonstrate that the convictions were unsafe before an appeal could succeed. This would be impossible given that, on his own account, he had been motivated by money to enter into the deal to sell counterfeit currency. Counsel also expressed the view that: 22

"Had there been anything within the [public interest immunity] material which could have assisted the Defendant in 23

developing his case to exclude the evidence under s.78 PACE I am confident the Judge would have released it. In those circumstances, I advise that there are no grounds of appeal against conviction."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION 24

42. The applicants complained that they had been deprived of fair trials, contrary to Article 6 § 1 of the Convention, which provides: 25

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal..." 26

A. The arguments of the parties 27

1. The Government 28

43. The Government contended that the applicants had been given fair trials. They submitted that the principle set out in the Court's *Teixeira de Castro v. Portugal* judgment of 9 June 1998 (*Reports* 1998-IV) had been respected, in that there was no material to suggest that either applicant had been incited or procured by police officers or others on their behalf to commit an offence which he would not otherwise have committed. This was the conclusion reached by the trial judge in each case, who had considered the public interest immunity material and ruled that, since there was nothing in it that would assist the defence, it should not be disclosed. 29

44. They pointed out that in the first applicant's case, not only the trial judge, but the Court of Appeal also had examined the undisclosed evidence and held that Mr Edwards had not been disadvantaged as a result of the nondisclosure. The information placed before the trial judge and the Court of Appeal in the *ex parte* procedures suggested that the first applicant had already been engaged in the supply of heroin at the time of the undercover operation. The Government submitted that, according to the evidence given by "Graham" at the first applicant's trial, the first applicant had voluntarily, actively and knowingly involved himself in the supply of drugs. 30

45. The Government further contended that the *ex parte* procedure followed by the domestic courts in respect of both the first and second applicants afforded adequate safeguards to the defence, and that the present case was indistinguishable from *Jasper v. the United Kingdom* (cited in paragraph 40 above), where the Court found no violation of Article 6 § 1. In particular, the Government emphasised that in each of the instant cases the trial judge, who was under a duty to order disclosure if the material in question had assisted the defence case, examined the evidence having heard the submissions of defence counsel and with knowledge of the defence case on entrapment. 31

2. The applicants 32

46. The applicants submitted that it was impossible for them to establish, on the available evidence, whether or not the involvement of *agents provocateurs* in the offences they committed rendered the proceedings against them unfair. Evidence on this point had been withheld from the defence on grounds of public interest immunity. 33

47. They considered that the domestic proceedings were fundamentally unfair because the trial judge, who had to decide the question of fact whether the accused had been the victim of entrapment and abuse of process, also had to review the material for which the prosecution claimed public interest immunity, in the absence of any representative of the defendant and without any adversarial process. The present case could be distinguished from the above-mentioned *Jasper* judgment, because in a case such as *Jasper* where no issue of entrapment arose, the separation of function between judge and jury ensured that neither side could rely on the undisclosed evidence and therefore that equality of arms was maintained. The tribunal of fact saw nothing which the accused and his lawyers were not permitted to see, and the judge was under a duty to order disclosure if the material in question was likely to assist the defence case (see *R. v. Keane*, paragraph 36 above). In the present case, it appeared that the undisclosed material was positively damaging to the accused's allegations of entrapment, which he had the burden of proving and which the judge had to decide, but the defence remained ignorant of the nature or content of the evidence placed before the judge and was unable to challenge it. 34

48. The applicants pointed out that the Auld Report (see paragraph 41 above) constituted recognition by a respected member of the senior judiciary, following wide consultation, that the present *ex parte* system was unfair and that the practical obstacles to the introduction of a "special counsel" to ensure some adversarial testing of the issues could 35

reasonably be overcome.

B. The Court's view 36

49. The applicants claim to have been victims of entrapment. The Court recalls that, although the admissibility of evidence is primarily a matter for regulation by national law, the requirements of a fair criminal trial under Article 6 entail that the public interest in the fight against crime cannot justify the use of evidence obtained as a result of police incitement (see the above-mentioned *Teixeira de Castro* judgment, §§ 34-36). In *Teixeira de Castro* the Court found that the activities of the two police officers had gone beyond that of undercover agents, in that they had not "confined themselves to investigating the applicant's criminal activity in an essentially passive manner", but had "exercised an influence such as to incite the commission of the offence". Their actions had "gone beyond those of undercover agents because they instigated the offence and there is nothing to suggest that without their intervention it would have been committed" (ibid., § 39). 37

In arriving at this conclusion the Court laid stress on a number of features of the case before it, particularly the facts that the intervention of the two officers had not been part of a judicially supervised operation and that the national authorities had had no good reason to suspect the applicant of prior involvement in drug trafficking: he had no criminal record and there was nothing to suggest that he had a predisposition to become involved in drug dealing until he was approached by the police (ibid., §§ 37-38). 38

50. Under English law, although entrapment does not constitute a substantive defence to a criminal charge, it does place the judge under a duty either to stay the proceedings as an abuse of process or to exclude any evidence obtained by entrapment on the grounds that its admission would have such an adverse effect on the fairness of the proceedings that the court could not admit it (see *R. v. Looseley,* cited in paragraph 28 above, and the earlier case-law referred to therein). 39

51. As the applicants point out, it is impossible for this Court to determine whether or not either applicant was the victim of entrapment, contrary to Article 6, because the relevant information has not been disclosed by the prosecuting authorities. It is, therefore, essential that the Court examine the procedure whereby the plea of entrapment was determined in each case, to ensure that the rights of the defence were adequately protected (see, *mutatis mutandis*, *Jasper v. the United Kingdom* , § 53). 40

52. It is in any event a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (*Jasper v. the United Kingdom* , § 51). In addition Article 6 § 1 requires that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused (ibid.). 41

53. The entitlement to disclosure of relevant evidence is not, however, an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. Nonetheless, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1. Furthermore, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (*Jasper v. the United Kingdom* , § 52). 42

54. In cases where evidence has been withheld from the defence on public interest grounds, it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them. In any event, in many cases, including the present, where the evidence in question has never been revealed, it would not be possible for the Court to attempt to weigh the public interest in non-disclosure against that of the accused in having sight of the material. It must therefore scrutinise the decision-making procedure to ensure that, as far as possible, the procedure complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused (*Jasper v. the United Kingdom* , § 53). 43

55. In the *Jasper v. the United Kingdom* judgment the Court examined the procedure set out by the Court of Appeal in *Davis, Johnson and Rowe* (see paragraph 34 above), whereby evidence which is too sensitive to be safely revealed to the defence is examined *ex parte* by the trial judge. The Court found that the fact that it was the trial judge, with full 44

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

56. Under the English system of trial by jury, it is the jury which decides upon the guilt or innocence of the accused. The Court considered it material, in finding no violation in *Jasper v. the United Kingdom*, that the material which was withheld from the defence and which was found by the trial judge to be subject to public interest immunity formed no part of the prosecution case whatever, and was never put to the jury (ibid., § 55). 45

57. In the present case, however, it appears that the undisclosed evidence related, or may have related, to an issue of fact decided by the trial judge. Each applicant complained that he had been entrapped into committing the offence by one or more undercover police officers or informers, and asked the trial judge to consider whether prosecution evidence should be excluded for that reason. In order to conclude whether or not the accused had indeed been the victim of improper incitement by the police, it was necessary for the trial judge to examine a number of factors, including the reason for the police operation, the nature and extent of police participation in the crime and the nature of any inducement or pressure applied by the police (see paragraph 30 above). Had the defence been able to persuade the judge that the police had acted improperly, the prosecution would, in effect, have had to be discontinued. The applications in question were, therefore, of determinative importance to the applicants' trials, and the public interest immunity evidence may have related to facts connected with those applications. 46

58. Despite this, the applicants were denied access to the evidence. It was not, therefore, possible for the defence representatives to argue the case on entrapment in full before the judge. Moreover, in each case the judge, who subsequently rejected the defence submissions on entrapment, had already seen prosecution evidence which may have been relevant to the issue. For example, in Mr Edwards' case, the Government revealed before the European Court that the evidence produced to the trial judge and Court of Appeal in the *ex parte* hearings included material suggesting that Mr Edwards had been involved in drug dealing prior to the events which led to his arrest and prosecution. During the course of the criminal proceedings the applicant and his representatives were not informed of the content of the undisclosed evidence and were thus denied the opportunity to counter this allegation, which might have been directly relevant to the judges' conclusions that the applicant had not been charged with a "state created crime" (see paragraph 16 above). In Mr Lewis' case, the nature of the undisclosed material has not been revealed, but it is possible that it also was damaging to the applicant's submissions on entrapment. Under English law, where public interest immunity evidence is not likely to be of assistance to the accused, but would in fact assist the prosecution, the trial judge is likely to find the balance to weigh in favour of non-disclosure (see *R. v. Keane*, paragraph 36 above). 47

59. In these circumstances, the Court does not consider that the procedure employed to determine the issues of disclosure of evidence and entrapment complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused. It follows that there has been a violation of Article 6 § 1 in this case. 48

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION 49

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FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention; 51

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