THIRD SECTION

CASE OF P.G. AND J.H. v. THE UNITED KINGDOM

(Application no. 44787/98)

JUDGMENT

STRASBOURG

25 September 2001

FINAL

25/12/2001

In the case of P.G. and J.H. v. the United Kingdom,

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

Mr J.-P. COSTA, *President*,
Mr W. FUHRMANN,
Mr P. KŪRIS,
Mrs F. TULKENS,
Mr K. JUNGWIERT,
Sir Nicolas BRATZA,
Mr K. TRAJA, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 24 October 2000 and 4 September 2001,

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

PROCEDURE

1. The case originated in an application (no. 44787/98) against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two United Kingdom nationals, P.G. and J.H. ("the applicants"), on 7 May 1997.

2. The applicants, who had been granted legal aid, were represented before the Court by Bindmans Solicitors, London. The United Kingdom Government ("the Government") were represented by their Agent, Mr C. Whomersley, of the Foreign and Commonwealth Office. The President of the Chamber acceded to the applicants' request not to have their names disclosed (Rule 47 § 3 of the Rules of Court).

3. The applicants complained that covert listening devices had been used to record their conversations at a flat and while they were detained in a police station, that information had been obtained by the police concerning the use of a telephone, that part of a police report had not been disclosed to the defence at their trial and that the judge had heard evidence from the police officer concerned in the absence of the defence and that the taped evidence had been used in evidence at their trial. They relied on Articles 6, 8 and 13 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11). The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 24 October 2000 the Chamber declared the application admissible [*Note by the Registry*. The Court's decision is obtainable from the Registry].

6. The applicants and the Government each filed observations on the merits (Rule 59 § 1).

7. The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. On 28 February 1995 Detective Inspector Mann (D.I. Mann), received information that an armed robbery of a Securicor Ltd cash-collection van was going to be committed on or around 2 March 1995 by the first applicant and B. at one of several possible locations. The police knew where B. lived and began visual surveillance of those same premises the same day. D.I. Mann learnt that B. was suspected of being a drug dealer and that surveillance operations mounted against B. in the past had proved unsuccessful because they had been compromised. It was therefore concluded that B. was "surveillance-conscious". B. was suspected of being responsible for the shooting of a police officer with a shotgun in the course of a robbery. This was something that all the officers, and particularly the Chief Constable, were aware of when the police operation was being planned.

9. No robbery took place on 2 March 1995. By 3 March 1995, however, the police had received further information that the robbery was to take place "somewhere" on 9 March 1995. Further information as to the location or target of the proposed robbery could not be obtained on 3 March 1995. In order to obtain further details about the proposed robbery, D.I. Mann prepared a report for the Chief Constable in support of an application for authorisation to install a covert listening device in B.'s flat. Some of the contents of this report were the subject of a successful application for non-disclosure by the Crown on the ground that serious damage would be caused to the public interest were they to be made public.

10. The use of covert listening devices was governed by the "Guidelines on the Use of Equipment in Police Surveillance Operations" issued by the Home Office in 1984 ("the Guidelines"). On 3 March 1995 the Chief Constable decided that the use of such a device was justified under the Guidelines but would not authorise its use until he was satisfied that its installation was feasible. Reconnaissance during the night of 3/4 March established that it was feasible.

11. On 4 March 1995 the Chief Constable gave oral authorisation to proceed with its use. However, he did not provide written confirmation as required by the Guidelines because he was on annual leave, so he gave the authority by telephone from home. The Chief Constable stated that the use of the device was to be reviewed on a daily basis. He said that he had asked the Deputy Chief Constable to look after the written formalities and to ensure, *inter alia*, that there was written confirmation of the message that the installation of the device was feasible. He did not receive this confirmation until 8 March. On 8 March 1995 the Deputy Chief Constable gave "retrospective" written authorisation for use of the listening device.

12. On 4 March a covert listening device was therefore installed in a sofa in B.'s flat before the Deputy Chief Constable had confirmed the authorisation in writing. Conversations between B. and others in B.'s living room were monitored and recorded until 15 March 1995.

13. On 14 March 1995 the police made a request to BT (British Telecommunications PLC) for itemised billing in relation to the telephone number of B. at his flat for the period from 1 January 1995 to the date of the request. The data-protection form was countersigned by a police superintendent in line with BT's requirements, stating that the information was necessary to assist in the identification of members of a team of suspected armed robbers. While the request was originally made in an effort to identify the unknown third person in the conspiracy (now known to have been the second applicant), the data was also used later in court to corroborate the times and dates recorded by the officers in respect of the covert listening device in the flat.

14. On 15 March 1995 B. and others who were with him in his home discovered the listening device and abandoned the premises. The robbery did not take place. The police had been continuing their visual surveillance of the premises, taking photographs and video footage whilst the audio surveillance was in progress. The applicants were identified by various officers going in and out of the flat and observed on some occasions to be carrying various hold-alls. The police had also been keeping watch on a cache in a rural location and observed the first applicant collecting an item from this location on the evening of 15 March 1995. An officer had earlier inspected the hidden item, which he stated he could tell through the plastic bag was a revolver. It appeared that the vehicle which the first applicant used for transport that evening was a stolen vehicle in which he was subsequently arrested.

15. On 16 March 1995 the applicants were arrested in the stolen Vauxhall car. In the boot of the vehicle were found two hold-alls containing, *inter alia*, two black balaclavas, five black plastic cable ties, two pairs of leather gloves and two army kitbags. Following legal advice, the applicants declined to comment during interview and refused to provide speech samples to the police. The police obtained a search warrant for the flat and searched it. Fingerprints of the applicants were found, as well as items such as a pair of overalls and a third balaclava. Three vehicles were recovered and examined. The items retained included balaclavas, hold-alls, overalls and a broken petrol cap.

16. As they wished to obtain speech samples to compare with the tapes, the police applied for authorisation to install covert listening devices in the cells being used by the applicants and to attach covert listening devices to the police officers who were to be present when the applicants

were charged and when their antecedents were examined. Written authorisation was given by the Chief Constable in accordance with the Home Office Guidelines. Samples of the applicants' speech were recorded without their knowledge or permission. In the case of the second applicant, the conversations that were recorded included, on one occasion, the second applicant taking advice from his solicitor. The Government state that, when the police officer realised what the conversation was about, it was not listened to. That recording was not adduced in evidence at trial.

17. The voice samples of the applicants were sent to an expert who compared them with the voices on the taped recordings of conversations held in B.'s home between 4 and 15 March. The expert concluded that it was "likely" that the first applicant's voice featured on the taped recordings and that it was "very likely" that the second applicant's voice featured on them.

18. B. and the applicants were charged with conspiracy to rob Securicor Ltd of monies. B. pleaded guilty in view of the House of Lords decision in *R. v. Khan* ([1996] 3 All England Law Reports 289). The House of Lords held in that case that relevant evidence was admissible notwithstanding that it had been obtained by unlawful means (for example, trespass). The applicants, however, challenged the admissibility of the evidence derived from the use of the covert listening devices at B.'s home on two grounds.

(a) The Chief Constable should not have authorised the use of a covert listening device at B.'s premises because other forms of investigation had not been tried and failed as required by paragraph 4 (b) of the Guidelines, with the result that it would be unfair to admit evidence which ought never to have been obtained.

(b) The covert listening device had been installed and used before written confirmation of the Chief Constable's authorisation had been received and there was no specific permission for the recordings obtained from the device to be used in evidence.

Before the jury was sworn in at the trial, Judge Brodrick heard evidence by means of a *voir dire* (submissions on a point of law in the absence of the jury) on matters relating to the admissibility of the challenged evidence. The prosecution conceded that the relevant evidence had been obtained by unlawful means, namely trespass. During this procedure the prosecution claimed that the public interest was likely to be damaged if certain disclosures were made and certain evidence given, in other words claiming public interest immunity. The prosecution argued that the test of admissibility was relevance. The defence argued that the judge had the discretion to exclude the evidence under section 78 of the Police and Criminal Evidence Act 1984 (PACE), and that he should do so because the Chief Constable had failed to abide by the Guidelines.

19. Judge Brodrick decided that some documents, including D.I. Mann's report, which led to the Chief Constable's decision to authorise the use and installation of a covert listening device in B.'s flat, were to be withheld from the applicants and their lawyers. The judge kept under review the non-disclosure during the proceedings and at one point some disclosure was made, although not D.I. Mann's report in its entirety. D.I. Mann also declined to answer questions put to him in cross-examination by defence counsel on the ground that it might reveal sensitive material. Judge Brodrick asked defence counsel whether they wanted him to put the unanswered questions to D.I. Mann under oath, in chambers, and they agreed. The judge proceeded to put the questions to D.I. Mann in private in the absence of the applicants and their lawyers. He heard evidence from D.I. Mann concerning the ability of the police to "control" B. in order to install the device in the flat, which the defence asserted indicated that normal methods of surveillance would have been possible. He also heard D.I. Mann concerning the arrangements made and put into effect for this period. The answers to those questions were not divulged, the judge indicating in open court that the benefit to the defence from the answers given was slight, if any at all, while the damage to the

public interest if the answers were made public would be great. Accordingly, he held that D.I. Mann was entitled on public immunity grounds to refuse to answer those questions.

20. Judge Brodrick rejected the applicants' challenge to the admissibility of the evidence derived from the covert listening devices in B's flat. In reaching his decision, Judge Brodrick stated:

> "61. It follows that I must apply the test set out in section 78 on the basis that this was a properly authorised decision to install the device and that the police were justified in continuing to use it up to the moment when it was discovered. At most there were one or possibly two breaches of procedure, but neither, in my judgment, could be described as either significant or substantial. It is conceded by the Crown that the installation of the device amounted to a civil trespass. In addition it was a serious invasion of privacy in circumstances in which those concerned would have expected their conversations to be private.
>
> 62. I was invited to take into account, and I do, that the installation of the device may well amount to an invasion of the general right to privacy under Article 8 [of the Convention]. It is not for me to determine whether there has, in fact, been a breach of Article 8, but in weighing this point I must bear in mind that it is at least arguable that the interference in the present case could be justified on one or more of the grounds set out in Article 8 § 2. In those circumstances I cannot see any reason for concluding that the possible breach of Article 8 was either substantial or significant.
>
> 63. I was also invited to consider whether the admission of this evidence and the difficulties faced by the Defence in seeking to test the validity of the Chief Constable's decision breached Article 6 of the Convention ... I am satisfied beyond reasonable doubt that to the extent that there has been a breach of Article 6 it has not in fact deprived these Defendants of the right to a fair trial."

21. The applicants also challenged the admissibility of evidence derived from the use of covert listening devices attached to the officers charging them and dealing with their antecedents. Judge Brodrick stated:

> "75. ... it does not seem to me to be right to attach great weight to the unfair way in which the control tapes were obtained. The fact that they provide relevant evidence, in the sense that they are a reliable sample of speech, which can be clearly attributed to each of these Defendants, weighs more heavily in my judgment. On balance therefore I am satisfied that the admission of the control tapes would not have such an adverse effect on the fairness of the proceedings that I ought to exclude them."

22. The police submitted statements from those officers who had conducted the audio and visual surveillance of the flat, and the searches of the flat and the recovered vehicles. There was also evidence from officers who had been keeping watch on a cache. One officer stated that the item hidden under a tree was in fact a revolver. The first applicant was seen collecting this item on the evening of 15 March 1995.

23. On 9 August 1996 the applicants were convicted of conspiracy to commit armed robbery and were sentenced to fifteen years' imprisonment. They applied to the Court of Appeal for leave to appeal on grounds relating to the judge's rulings to admit taped evidence. They did not challenge the judge's decisions with respect to non-disclosure of certain evidence on public interest immunity grounds. Their applications were refused on 12 November 1996, a single judge finding that the judge's exercise of his discretion to admit evidence did not give rise to an arguable ground of appeal. Notification of the refusal was sent to them on 10 and 20 December 1996 respectively. It does not appear that the applicants made any complaints to the Police Complaints Authority in respect of the covert listening devices.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Home Office Guidelines

24. At the relevant time, guidelines on the use of equipment in police surveillance operations (The Home Office Guidelines of 1984) provided that only chief constables or assistant chief constables were entitled to give authority for the use of such devices. The Guidelines were available in the library of the House of Commons and were disclosed by the Home Office on application. They provided, *inter alia*:

> "4. In each case, the authorising officer should satisfy himself that the following criteria are met:
>
> (a) the investigation concerns serious crime;
>
> (b) normal methods of investigation must have been tried and failed, or must from the nature of things, be unlikely to succeed if tried;
>
> (c) there must be good reason to think that use of the equipment would be likely to lead to an arrest and a conviction, or where appropriate, to the prevention of acts of terrorism;
>
> (d) use of equipment must be operationally feasible.
>
> 5. In judging how far the seriousness of the crime under investigation justifies the use of a particular surveillance technique, authorising officers should satisfy themselves that the degree of intrusion into the privacy of those affected is commensurate with the seriousness of the offence."

25. The Guidelines also stated that there might be circumstances in which material so obtained could appropriately be used in evidence at subsequent court proceedings.

B. The Police Complaints Authority

26. The Police Complaints Authority was created by section 89 of the Police and Criminal Evidence Act 1984. It is an independent body empowered to receive complaints as to the conduct of police officers. It has powers to refer charges of criminal offences to the Director of Public Prosecutions and itself to bring disciplinary charges.

C. The Police and Criminal Evidence Act 1984 (PACE)

27. Section 78(1) of this Act provides as follows:

> "In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

D. The Police Act 1997

28. The 1997 Act provides for a statutory basis for the authorisation of police surveillance operations involving interference with property or wireless telegraphy. The relevant sections relating to the authorisation of surveillance operations, including the procedures to be adopted in the authorisation process, entered into force on 22 February 1999.

29. Since 25 September 2000, these controls have been augmented by Part II of the Regulation of Investigatory Powers Act 2000 (RIPA). In particular, covert surveillance in a police cell is now governed by sections 26(3) and 48(1) of RIPA. RIPA also establishes a statutory Investigatory Powers Tribunal to deal with complaints about intrusive surveillance and the use of informants by the police.

E. Disclosure of evidence to the defence

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

31. The case of *R. v. Ward* ([1993] 1 Weekly Law Reports 619) dealt with the question of what duties the prosecution has to disclose evidence to the defence. It laid down the proper procedure to be followed when the prosecution claims that certain material is the subject of public interest immunity. The Court of Appeal held that it was the court, and not the prosecution, who would undertake the balancing exercise between the interests of public interest immunity and fairness to the party claiming disclosure:

> "In our judgment the exclusion of the evidence without an opportunity of testing its relevance and importance amounted to a material irregularity. When public interest immunity is claimed for a document, it is for the court to rule whether the claim should be upheld or not. To do that involves a balancing exercise. The exercise can only be performed by the judge himself examining or viewing the evidence, so as to have the facts of what it contains in mind. Only then can he be in a position to balance the competing interests of public interest immunity and fairness to the party claiming disclosure."

This judgment also clarified that, where an accused appeals to the Court of Appeal on the grounds that material has been wrongly withheld, the Court of Appeal will itself view the material *ex parte*.

F. Disclosure of personal data

32. Section 45 of the Telecommunications Act 1945 prohibits the disclosure by a person engaged in a telecommunications system of any information concerning the use made of the telecommunications services provided for any other person by means of that system.

33. However, pursuant to section 28(3) of the Data Protection Act 1984:

> "Personal data are exempt from non-disclosure provisions in any case in which –
>
> (a) the disclosure is for any of the purposes mentioned in subsection 1 above; and
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> (b) the application of those provisions in relation to the disclosure would be likely to prejudice any of the matters mentioned in that subsection."

Subsection 1 refers to data held for the purpose of:

> "(a) the prevention or detection of crime;
>
> (b) the apprehension or prosecution of offenders; or
>
> (c) the assessment or collection of any tax or duty."

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 8 OF THE CONVENTION

34. The applicants complained that covert listening devices were used by the police to monitor and record their conversations at a flat, that information was obtained by the police concerning the use of a telephone at the flat and that listening devices were used while they were at the police

station to obtain voice samples. They relied on Article 8 of the Convention, the relevant parts of which provide as follows:

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

A. The use of a covert listening device at B.'s flat

1. The parties' submissions

35. The applicants submitted that the use of a covert listening device at B.'s flat to monitor and record conversations was an interference with their rights under Article 8 § 1 of the Convention which was not justified under the second paragraph of that provision. At the time of the events in their case there existed no statutory system to regulate the use of covert listening devices, although the Police Act 1997 now provides such a statutory framework. The Home Office Guidelines which provided the relevant instructions to the police were neither legally binding nor directly publicly accessible. The interference with their right to respect for their private life was therefore not "in accordance with the law" and there had been a violation of Article 8 in that respect.

36. The Government acknowledged that the use of this device interfered with the applicants' right to respect for their private life. They submitted that it was justifiable under the second paragraph of Article 8 as being necessary in a democratic society in the interests of public safety, for the prevention of crime and/or for the protection of the rights of others. They referred, *inter alia*, to the serious nature of the crime under investigation, the fact that B. was regarded as being surveillance-conscious, rendering conventional forms of surveillance insufficient, and that the conversations proved that an armed robbery was being planned. They recalled, however, that in *Khan v. the United Kingdom* (no. 35394/97, §§ 26-28, ECHR 2000-V), the Court found that the Home Office Guidelines governing such devices did not satisfy the requirement of "in accordance with the law" and recognised that the Court was liable to reach the same conclusion in the present case.

2. The Court's assessment

37. The Court notes that it is not disputed that the surveillance carried out by the police at B.'s flat amounted to an interference with the right of the applicants to respect for their private life. As regards conformity with the requirements of the second paragraph of Article 8 – that any such interference be "in accordance with the law" and "necessary in a democratic society" for one or more of the specified aims – it is conceded by the Government that the interference was not "in accordance with the law" as at the time of the events there existed no statutory system to regulate the use of covert listening devices. Such measures were governed by the Home Office Guidelines, which were neither legally binding nor directly publicly accessible.

38. As there was no domestic law regulating the use of covert listening devices at the relevant time (see *Khan*, cited above, §§ 26-28), the interference in this case was not "in accordance with the law" as required by Article 8 § 2 of the Convention, and there has therefore been a violation of Article 8 in this regard. In the light of this conclusion, the Court is not required to determine whether the interference was, at the same time, "necessary in a democratic society" for one of the aims enumerated in paragraph 2 of Article 8.

B. Concerning information obtained about the use of B.'s telephone

1. The parties' submissions

39. The applicants submitted that the telephone metering of the telephone in B.'s flat constituted an interference with their rights under Article 8 of the Convention, referring to *Malone v. the United Kingdom* (judgment of 2 August 1984, Series A no. 82, pp. 30-31, § 64). They conceded that the information was disclosed in accordance with the applicable domestic law (namely section 45 of the Telecommunications Act 1984 and section 28(3) of the Data Protection Act 1984). However, neither, of these legislative provisions, nor any common-law rule, provided the safeguards envisaged in the Court's case-law (see *Khan*, cited above, §§ 26-28; *Halford v. the United Kingdom*, judgment of 25 June 1997, *Reports of Judgments and Decisions* 1997-III, p. 1017, §§ 49-51; and *Huvig v. France*, judgment of 24 April 1990, Series A no. 176-B, pp. 55-57, §§ 32-35), in particular as regards the use to which the material could be put, the conditions under which it would be stored, provision for its destruction, etc. They argued that section 45 of the 1984 Act merely exempted telephone operatives from prosecution if they disclosed information in connection with a criminal offence. Equally, the Data Protection Act rendered personal data liable to disclosure for the purpose of preventing or detecting crime. Neither Act stipulated any of the restraints on abuse which, for instance, are to be found in the Police Act 1997 in relation to covert recordings. Accordingly, the interference with the applicants' rights under Article 8 was effected otherwise than "in accordance with the law".

40. The Government acknowledged that those who used the telephone had an expectation of privacy in respect of the numbers which they dialled and that obtaining detailed billing information concerning that telephone constituted an interference with the applicants' rights under Article 8. The obtaining of the information was, however, necessary in a democratic society in the interests of public safety, for the prevention of crime and/or the protection of the rights of others, as the investigation concerned a very serious crime, the applicants had guns for use in the intended robbery and, as B. was surveillance-conscious, conventional surveillance would not suffice. The only use of the information was to corroborate the times recorded by police officers in respect of the covert listening device in the flat.

41. In the Government's view, the interference was also "in accordance with the law" as there was a statutory prohibition in the Telecommunications Act 1984 against disclosure of such information, save where a specific exception was satisfied. Similarly under the Data Protection Act 1984 which governed the storage, processing and disclosure of "personal data", there was a strict regime which, however, permitted disclosure for the purposes of the apprehension or prosecution of offenders. Accordingly, the disclosure to, and use by, the police of the itemised telephone bill was made in accordance with domestic law. Material not covered by the Data Protection Act would have been stored or destroyed according to the policy of the police force in question. In this case, under the Dorset Police Policy and Procedure Guideline System, the billing records concerning serious crime would have been retained in paper form for six years or longer at the discretion of a detective inspector.

2. The Court's assessment

42. It is not in dispute that the obtaining by the police of information relating to the numbers called on the telephone in B.'s flat interfered with the private lives or correspondence (in the sense of telephone communications) of the applicants who made use of the telephone in the flat or were telephoned from the flat. The Court notes, however, that metering, which does not *per se* offend

against Article 8 if, for example, done by the telephone company for billing purposes, is by its very nature to be distinguished from the interception of communications which may be undesirable and illegitimate in a democratic society unless justified (see *Malone*, cited above, pp. 37-38, §§ 83-84).

43. The Court has examined whether the interference in the present case was justified under Article 8 § 2, notably whether it was "in accordance with the law" and "necessary in a democratic society" for one or more of the purposes enumerated in that paragraph.

(a) "In accordance with the law"

44. The expression "in accordance with the law" requires, firstly, that the impugned measure should have some basis in domestic law; secondly, it refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and that it is compatible with the rule of law (see, amongst other authorities, *Kopp v. Switzerland*, judgment of 25 March 1998, *Reports* 1998-II, p. 540, § 55).

45. Both parties agreed that the obtaining of the billing information was based on statutory authority, in particular, section 45 of the Telecommunications Act 1984 and section 28(3) of the Data Protection Act 1984. The first requirement therefore poses no difficulty. The applicants argued that the second requirement was not fulfilled in their case, as there were insufficient safeguards in place concerning the use, storage and destruction of the records.

46. The Court observes that the quality of law criterion in this context refers essentially to considerations of foreseeability and lack of arbitrariness (see *Kopp*, cited above, p. 541, § 64). What is required by way of safeguard will depend, to some extent at least, on the nature and extent of the interference in question. In this case, the information obtained concerned the telephone numbers called from B.'s flat between two specific dates. It did not include any information about the contents of those calls, or who made or received them. The data obtained, and the use that could be made of them, were therefore strictly limited.

47. While it does not appear that there are any specific statutory provisions (as opposed to internal policy guidelines) governing storage and destruction of such information, the Court is not persuaded that the lack of such detailed formal regulation raises any risk of arbitrariness or misuse. Nor is it apparent that there was any lack of foreseeability. Disclosure to the police was permitted under the relevant statutory framework where necessary for the purposes of the detection and prevention of crime, and the material was used at the applicants' trial on criminal charges to corroborate other evidence relevant to the timing of telephone calls. It is not apparent that the applicants did not have an adequate indication as to the circumstances in, and conditions on, which the public authorities were empowered to resort to such a measure.

48. The Court concludes that the measure in question was "in accordance with the law".

(b) "Necessary in a democratic society"

49. The Court notes that the applicants have not sought to argue that the measure was not in fact justified, as submitted by the Government, as necessary for the protection of public safety, the prevention of crime and the protection of the rights of others.

50. The information was obtained and used in the context of an investigation into, and trial of, a suspected conspiracy to commit armed robberies. No issues of proportionality have been identified. The measure was accordingly justified under Article 8 § 2 as "necessary in a democratic society" for the purposes identified above.

51. The Court concludes that there has been no violation of Article 8 of the Convention in respect of the applicants' complaints about the metering of the telephone in this case.

C. Concerning the use of listening devices in the police station

1. The parties' submissions

52. The applicants complained that their voices were recorded secretly when they were being charged at the police station and while they were being held in their cells. They submitted that what was said, which ranged from the giving of personal details to a conversation about football instigated by a police officer, was irrelevant. They considered that it was the circumstances in which the words were spoken which was significant and that there was a breach of privacy if the speaker believed that he was only speaking to the person addressed and had no reason to believe that the conversation was being broadcast or recorded. The key issue in their view was whether the speaker knew or had any reason to suspect that the conversation was being recorded. In the present case, the police knew that the applicants had refused to provide voice samples voluntarily and sought to trick to them into speaking in an underhand procedure which was wholly unregulated, arbitrary and attended by bad faith. It was also irrelevant that the recording was used for forensic purposes rather than to obtain information about the speaker, as it was the covert recording itself, not the use made of it, which amounted to the breach of privacy.

53. The applicants further submitted that the use of the covert listening devices was not "in accordance with the law" as there was no domestic law regulating the use of such devices and that there were no safeguards provided within the law to protect against abuse of such surveillance methods. They rejected any assertion that the police could rely on any general power to obtain and store evidence.

54. The Government submitted that the use of the listening devices in the cells and when the applicants were being charged did not disclose any interference, as these recordings were not made to obtain any private or substantive information. The aural quality of the applicants' voices was not part of private life but was rather a public, external feature. In particular, the recordings made while they were being charged – a formal process of criminal justice, in the presence of at least one police officer – did not concern their private life. The applicants could have had no expectation of privacy in that context. In any event, to the extent that the Court might find that the recordings did engage Article 8, any interference was so negligible as not to amount to a violation of their rights under that provision. By analogy, if the obtaining of samples of breath, blood or urine would not raise problems under Article 6, the obtaining of voice samples would equally not offend Articles 6 or 8 (see *Saunders v. the United Kingdom*, judgment of 17 December 1996, *Reports* 1996-VI, pp. 2064-65, § 69).

55. Assuming that there was an interference with any right under Article 8, the Government contended that it was justified under the second paragraph as necessary in a democratic society to protect public safety, prevent crime and/or protect the rights of others. They relied, *inter alia*, on the fact that the investigation concerned a very serious crime, that the applicants were known to have guns, that the voice samples were needed to establish fairly whether the voices recorded in the flat belonged to the applicants, and that the judge ruled at the trial that the voice samples represented relevant, reliable and probative evidence of the identity of those planning the robbery. The measure was proportionate as it did not involve any act of trespass, the use of the samples was limited to identification and the applicants had the opportunity at trial to challenge their admissibility. Any interference was also conducted "in accordance with the law" as the making of

the recordings after arrest was an exercise by the police of their normal common-law powers to obtain and store evidence and had not been found by the trial judge to contravene any requirements regarding cautioning or interview codes.

2. The Court's assessment

(a) The existence of an interference with private life

56. Private life is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8 (see, for example, *B. v. France*, judgment of 25 March 1992, Series A no. 232-C, pp. 53-54, § 63; *Burghartz v. Switzerland*, judgment of 22 February 1994, Series A no. 280-B, p. 28, § 24; *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, pp. 18-19, § 41; and *Laskey, Jaggard and Brown v. the United Kingdom*, judgment of 19 February 1997, *Reports* 1997-1, p. 131, § 36). Article 8 also protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world (see, for example, *Burghartz*, cited above, opinion of the Commission, p. 37, § 47, and *Friedl v. Austria*, judgment of 31 January 1995, Series A no. 305-B, opinion of the Commission, p. 20, § 45). It may include activities of a professional or business nature (see *Niemietz v. Germany*, judgment of 16 December 1992, Series A no. 251-B, pp. 33-34, § 29, and *Halford*, cited above, p. 1016, § 44). There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life".

57. There are a number of elements relevant to a consideration of whether a person's private life is concerned by measures effected outside a person's home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor. A person who walks down the street will, inevitably, be visible to any member of the public who is also present. Monitoring by technological means of the same public scene (for example, a security guard viewing through closed-circuit television) is of a similar character. Private-life considerations may arise, however, once any systematic or permanent record comes into existence of such material from the public domain. It is for this reason that files gathered by security services on a particular individual fall within the scope of Article 8, even where the information has not been gathered by any intrusive or covert method (see *Rotaru v. Romania* [GC], no. 28341/95, §§ 43-44, ECHR 2000-V). The Court has referred in this context to the Council of Europe's Convention of 28 January 1981 for the protection of individuals with regard to automatic processing of personal data, which came into force on 1 October 1985 and whose purpose is "to secure in the territory of each Party for every individual ... respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him" (Article 1), such data being defined as "any information relating to an identified or identifiable individual" (Article 2) (see *Amann v. Switzerland* [GC], no. 27798/95, §§ 65-67, ECHR 2000-II, where the storing of information about the applicant on a card in a file was found to be an interference with private life, even though it contained no sensitive information and had probably never been consulted).

58. In the case of photographs, the Commission previously had regard, for the purpose of delimiting the scope of protection afforded by Article 8 against arbitrary interference by public authorities, to whether the taking of the photographs amounted to an intrusion into the individual's

privacy, whether the photographs related to private matters or public incidents and whether the material obtained was envisaged for a limited use or was likely to be made available to the general public (see *Friedl*, cited above, opinion of the Commission, p. 21, §§ 49-52). Where photographs were taken of an applicant at a public demonstration in a public place and retained by the police in a file, the Commission found no interference with private life, giving weight to the fact that the photograph was taken and retained as a record of the demonstration and no action had been taken to identify the persons photographed on that occasion by means of data processing (ibid., §§ 51-52).

59. The Court's case-law has, on numerous occasions, found that the covert taping of telephone conversations falls within the scope of Article 8 in both aspects of the right guaranteed, namely, respect for private life and correspondence. While it is generally the case that the recordings were made for the purpose of using the content of the conversations in some way, the Court is not persuaded that recordings taken for use as voice samples can be regarded as falling outside the scope of the protection afforded by Article 8. A permanent record has nonetheless been made of the person's voice and it is subject to a process of analysis directly relevant to identifying that person in the context of other personal data. Though it is true that when being charged the applicants answered formal questions in a place where police officers were listening to them, the recording and analysis of their voices on this occasion must still be regarded as concerning the processing of personal data about the applicants.

60. The Court concludes therefore that the recording of the applicants' voices when being charged and when in their police cell discloses an interference with their right to respect for private life within the meaning of Article 8 § 1 of the Convention.

(b) Compliance with the requirements of the second paragraph of Article 8

61. The Court has examined, firstly, whether the interference was "in accordance with the law." As noted above, this criterion comprises two main requirements: that there be some basis in domestic law for the measure and that the quality of the law is such as to provide safeguards against arbitrariness (see paragraph 44).

62. It recalls that the Government relied as the legal basis for the measure on the general powers of the police to store and gather evidence. While it may be permissible to rely on the implied powers of police officers to note evidence and collect and store exhibits for steps taken in the course of an investigation, it is trite law that specific statutory or other express legal authority is required for more invasive measures, whether searching private property or taking personal body samples. The Court has found that the lack of any express basis in law for the interception of telephone calls on public and private telephone systems and for using covert surveillance devices on private premises does not conform with the requirement of lawfulness (see *Malone*, *Halford* and *Khan*, all cited above). It considers that no material difference arises where the recording device is operated, without the knowledge or consent of the individual concerned, on police premises. The underlying principle that domestic law should provide protection against arbitrariness and abuse in the use of covert surveillance techniques applies equally in that situation.

63. The Court notes that the Regulation of Investigatory Powers Act 2000 contains provisions concerning covert surveillance on police premises. However, at the relevant time, there existed no statutory system to regulate the use of covert listening devices by the police on their own premises.

The interference was not therefore "in accordance with the law" as required by the second paragraph of Article 8 and there has been a violation of this provision. In these circumstances, an examination of the necessity of the interference is no longer required.

II. ALLEGED VIOLATIONS OF ARTICLE 6 § 1 OF THE CONVENTION

64. The applicants complained that part of the evidence relating to the authorisation of a listening device was not disclosed to the defence during the trial, that part of the police officer's oral evidence was heard by the judge alone and that the evidence obtained from the listening device at the flat and voice samples from the devices in the police station were used in evidence at their trial. They relied on Article 6 § 1 of the Convention, the relevant part of which provides:

> "In the determination of his civil rights and obligations or 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."

A. Non-disclosure of evidence during the trial

1. The parties' submissions

65. The applicants complained that the non-disclosure of evidence in this case deprived them of a fair trial. It went beyond the mere withholding of documents from the defence since it also concerned the judge taking and recording evidence in the absence of the defence. This was not fair or capable of providing an adequate substitute for cross-examination. The witness in question was a key officer in the investigation and, since the defence did not hear the evidence, they could not put forward any meaningful arguments. While they did not dispute the accuracy of the description of the *voir dire*, it could not be suggested that defence counsel had "consented" to the manner in which the witness D.I. Mann was heard in private – he had a choice between the judge putting the questions and possibly deciding to reveal the answers, on the one hand, and the questions not being put at all, on the other. In any event, such a clandestine procedure cried out for review at the appeal stage, but since the defence did not know the content of the testimony there was no prospect of appeal on grounds of an error of law. Though they had not appealed on this point as the trial judge's approach to the matter had complied with domestic law, there should, in their view, have been an automatic review by the Court of Appeal of the undisclosed material, otherwise errors of law or excesses of jurisdiction would go unchallenged.

66. The Government, relying on *Jasper* and *Fitt* (*Jasper v. the United Kingdom* [GC], no. 27052/95, §§ 51-58, 16 February 2000, unreported, and *Fitt v. the United Kingdom* [GC], no. 29777/96, §§ 44-50, ECHR 2000-II), submit that in this case the prosecution did not decide what evidence should or should not be disclosed to the defence but properly submitted the documentary material to the trial judge. The procedure adopted concerning the non-disclosure of part of D.I. Mann's report complied with the requirements of Article 6 § 1, as the trial judge reviewed the material and was in the best position to balance the interests of the accused and the sensitivity of the material. The material was not disclosed to the jury and was extremely limited. It played no part in the conviction, being relevant only to ancillary questions of compliance with the Home Office Guidelines and having no bearing on guilt or innocence. They also pointed out that defence counsel agreed to the judge's proposal that he question D.I. Mann with defence counsels' questions in private and therefore that this part of the procedure took place with the consent of the defence. The need for non-disclosure was kept constantly under review by the judge, and the effectiveness

of this safeguard was shown by his revisiting non-disclosure as the trial progressed and ordering disclosure of certain evidence.

2. The Court's assessment

67. 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 paragraph 30 above), that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused (see *Edwards v. the United Kingdom*, judgment of 16 December 1992, Series A no. 247-B, p. 35, § 36).

68. 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 criminal investigation, which must be weighed against the rights of the accused (see, for example, *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports* 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, as a general principle, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1 (see *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 *Doorson*, cited above, p. 471, § 72, and *Van Mechelen and Others*, cited above, p. 712, § 54).

69. In cases where evidence has been withheld from the defence on public interest grounds, however, 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 *Edwards*, 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 (see *Rowe and Davis v. the United Kingdom* [GC], no. 28901/95, § 62, ECHR 2000-II).

70. In this case, the prosecution did not disclose to the defence part of a report issued by D.I. Mann relating to the surveillance measures and instead submitted it to the judge. When D.I. Mann gave evidence and refused to answer certain questions put in cross-examination by defence counsel which related to the background to the surveillance, the judge put those questions to the witness in chambers and took the decision, weighing the harm to public interests against the slight benefit to the defence, that part of the report and the oral answers should not be disclosed.

71. The Court is satisfied, as in *Jasper* and *Fitt* (both cited above, §§ 55-58 and §§ 48-50 respectively) that the defence were kept informed and were permitted to make submissions and participate in the above decision-making process as far as was possible without revealing to them the material which the prosecution sought to keep secret on public interest grounds. The questions which defence counsel had wished to put to the witness D.I. Mann were asked by the judge in

chambers. The Court also notes that the material which was not disclosed in the present case formed no part of the prosecution case whatever, and was never put to the jury. The fact that the need for disclosure was at all times under assessment by the trial judge provided a further, important safeguard in that it was his duty to monitor throughout the trial the fairness or otherwise of the evidence being withheld. It has not been suggested that the judge was not independent and impartial within the meaning of Article 6 § 1. He was fully versed in all the evidence and issues in the case and in a position to monitor the relevance to the defence of the withheld information both before and during the trial.

72. The Court finds that no point of distinction arises, as argued by the applicants, due to the fact that in this case the non-disclosure included oral evidence as well as documentary evidence. While this application does differ from *Jasper* and *Fitt* as in the latter there was an additional level of safeguard when the Court of Appeal reviewed the undisclosed material and the decision of the trial judge on non-disclosure, the Court notes that the present applicants did not include any ground of appeal on this issue in the proceedings before the Court of Appeal and that they concede that the judge exercised his balancing role correctly in domestic-law terms. If, however, they had wished the Court of Appeal to review this matter, it would have been open to them to raise it, as was done in *Jasper* and *Fitt*. The Court is not persuaded that there is any basis for holding that there should be an automatic appeal review of such matters, where the defendants themselves do not make complaint.

73. In *Jasper* and *Fitt* (§§ 56 and 49 respectively), the Court was satisfied that, according to the jurisprudence of the English Court of Appeal, the assessment which the trial judge was required to make fulfilled the conditions which, according to the Court's case-law, are essential for ensuring a fair trial in instances of non-disclosure of prosecution material (see paragraphs 67-68 above). The domestic trial court in the present case thus applied standards which were in conformity with the relevant principles of a fair hearing embodied in Article 6 § 1 of the Convention.

In conclusion, therefore, the Court finds that, as far as possible, the decision-making procedure complied with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused. It follows that there has been no violation of Article 6 § 1 in this regard.

B. Use at trial of taped evidence obtained by covert surveillance devices

1. The parties' submissions

74. The applicants submitted that the fairness of their trial was undermined by the use of the taped materials. Their case could be distinguished from *Khan*, cited above. They pointed out that in *Khan* the Court referred to the fact that the evidence had been obtained in accordance with the Guidelines, whereas in their case there had been a clear breach of those Guidelines. It had not been shown that the police had made any significant efforts to obtain the evidence by other means (a precondition of permission to use such methods) and the Chief Constable had not given prior written confirmation of his authorisation, such only being effected retrospectively. While the applicant in *Khan* had obtained a review of his case on appeal, the applicants had been refused leave to appeal against the judge's ruling. The Court in *Khan* had also given weight to the fact that the evidence obtained in breach of Article 8 had been strong and cogent. In their case, the evidence in relation to at least the first applicant was not particularly strong in that the forensic expert was only able to conclude that it was "likely" that his voice featured in the tape recordings. Finally, the applicants referred to the underhand manner in which police officers had obtained samples of their

voices for comparison, in a procedure which was unregulated, arbitrary and attended by bad faith. It also violated their right not to incriminate themselves, as they had already expressly refused to give samples and these were in the event taken against their will.

75. The Government submitted that the use of the taped materials did not infringe the overall fairness of the applicants' trial, referring to the Court's judgment in *Khan*, cited above. The applicants had the opportunity, which they made use of, to challenge the admissibility of the recordings under section 78 of PACE. Their admissibility was judged by the most suitable tribunal, namely, the trial judge, by reference to the test of fairness. They were also able to appeal against the judge's ruling to the Court of Appeal. The recordings had been obtained in accordance with the applicable code of practice. Furthermore, there was almost no dispute about the authenticity of the written transcript of the tapes, and the expert evidence on voice identification was corroborated by the visual observations of the surveillance team and by their video and photographic evidence. The applicants did not call any expert evidence to challenge the tapes. Accordingly, there was no reasonable doubt that it was their voices on the tapes, or about the reliability of the tapes as evidence. The content of the taped conversations was highly incriminating and those conversations had been entirely voluntary. The tapes were not in any event the only evidence against the applicants. The prosecution called forty-five witnesses, and incriminating evidence was found in B.'s flat and in the car which the applicants were driving.

2. The Court's assessment

76. The Court reiterates that its duty, according to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law (see *Schenk v. Switzerland*, judgment of 12 July 1988, Series A no. 140, p. 29, §§ 45-46, and, for a more recent example in a different context, *Teixeira de Castro v. Portugal*, judgment of 9 June 1998, *Reports* 1998-IV, p. 1462, § 34). It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the alleged "unlawfulness" in question and, where violation of another Convention right is concerned, the nature of the violation found.

77. In *Schenk*, cited above, in concluding that the use of the unlawfully obtained recording in evidence did not deprive the applicant of a fair trial, the Court noted, first, that the rights of the defence had not been disregarded: the applicant had been given the opportunity, which he took, of challenging the authenticity of the recording and opposing its use, as well as the opportunity of examining Mr Pauty and summoning the police inspector responsible for instigating the recording. The Court further "attache[d] weight to the fact that the recording of the telephone conversation was not the only evidence on which the conviction was based" (ibid., pp. 29-30, § 48). More recently, the Court has applied these principles in *Khan* (cited above, §§ 34-40) and found that the use at trial of recordings of the applicant's conversations was not contrary to the requirements of Article 6 § 1 notwithstanding that they were obtained in circumstances where the Court had found,

under Article 8 of the Convention, that the surveillance measures had not been "in accordance with the law".

78. This case presents strong similarities with *Khan*. As in *Khan*, the fixing of the listening device and the recording of the applicants' conversation were not unlawful in the sense of being contrary to domestic criminal law. Under English law there is in general nothing unlawful about a breach of privacy. There is no indication that the admissions made by the applicants during conversations in B.'s flat were made involuntarily, there being no entrapment and the applicants being under no inducement to make such admissions. Though the applicants asserted that in this case, unlike *Khan*, the police had not operated in conformity with the Home Office Guidelines, the Court notes that it is not argued that this rendered the police actions unlawful. While the Chief Constable gave written confirmation of authorisation retrospectively, there is no suggestion that he had not in fact been informed and given his oral permission. It is not established that any substantive precondition for the police exercising their surveillance powers was not in fact complied with. The "unlawfulness" in the present case therefore relates exclusively to the fact that there was no statutory authority for the interference with the applicants' right to respect for private life and that, accordingly, such interference was not "in accordance with the law", as that phrase has been interpreted in Article 8 § 2 of the Convention.

79. The use of the taped evidence at the trial differs from *Khan* more significantly in that this material was not the only evidence against the applicants. Furthermore, as in *Schenk*and *Khan*, the present applicants had ample opportunity to challenge both the authenticity and the use of the recordings. They did not challenge their authenticity, but challenged their use at the *voir dire* at which the trial judge assessed the effect of admitting the evidence on the fairness of the trial by reference to section 78 of PACE. Though the applicants were unsuccessful in their arguments and did not obtain leave to appeal, it is clear that, had the domestic courts been of the view that the admission of the evidence would have given rise to substantive unfairness, they would have had a discretion to exclude it. The applicants have argued that the evidence identifying in particular the first applicant's voice on the tape was weak as it was only shown that it was "likely" to have been his voice. However, the Government have pointed out that there was other evidence corroborating the involvement of the applicants in the events. The Court considers that there was no unfairness in leaving it to the jury, on the basis of a thorough summing-up by the judge, to decide where the weight of the evidence lay.

80. In so far as the applicants complained of the underhand way in which the voice samples for comparison were obtained and that this infringed their privilege against self-incrimination, the Court considers that the voice samples, which did not include any incriminating statements, may be regarded as akin to blood, hair or other physical or objective specimens used in forensic analysis and to which privilege against self-incrimination does not apply (see *Saunders*, cited above, pp. 2064-65, § 69).

81. In these circumstances, the Court finds that the use at the applicants' trial of the secretly taped material did not conflict with the requirements of fairness guaranteed by Article 6 § 1 of the Convention.

III. ALLEGED VIOLATIONS OF ARTICLE 13 OF THE CONVENTION

82. The applicants complained that they had no effective remedy in respect of the violations of their rights, relying on Article 13 of the Convention, which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

83. The applicants submitted that there was no material distinction between their case and the judgment in *Khan*, and relied on the Court's observations in that case with regard to the effectiveness of PACE and the Police Complaints Authority and the lack of any sufficient protection against the abuse of authority.

84. The Government accepted that in the light of the judgment in *Khan*, the Court would be likely to find that no effective remedy was available to the applicants in respect of any breach of their rights under Article 8 of the Convention, since the Court had already ruled that the operation of section 78 of PACE and the availability of the procedures before the Police Complaints Authority did not provide an adequate remedy in similar circumstances.

85. The Court has found above that there has been a violation of the applicants' rights to respect for their private life in that the use of covert recording devices at B.'s flat and in the police station were not "in accordance with the law". Article 13 guarantees the availability of a remedy at the national level to enforce the substance of Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. Thus, its effect is to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, without, however, requiring incorporation of the Convention (see *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 135, ECHR 1999-VI).

86. In the present case, the domestic courts were not capable of providing a remedy because, although they could consider questions of fairness in admitting the evidence in the criminal proceedings, it was not open to them to deal with the substance of the Convention complaint that the interference with the applicants' right to respect for their private lives was not "in accordance with the law"; still less was it open to them to grant appropriate relief in connection with the complaint.

87. As regards the various other avenues open to the applicants in respect of their Article 8 complaint, grievances only have to be referred to the Police Complaints Authority in circumstances where they contain allegations that the relevant conduct resulted in death or serious injury or where the complaint is of a type specified by the Secretary of State. In other circumstances the Chief Constable of the area will decide whether or not he is the appropriate authority to decide the case. If he concludes that he is the correct authority, then the standard procedure is to appoint a member of his own force to carry out the investigation. Although the Police Complaints Authority can require a complaint to be submitted to it for consideration under section 87 of PACE, the extent to which the Police Complaints Authority oversees the decision-making process undertaken by the Chief Constable in determining if he is the appropriate authority is unclear. The Court has also previously noted the important role played by the Secretary of State in appointing, remunerating and, in certain circumstances, dismissing members of the Police Complaints Authority. In particular, under section 105(4) of PACE the Police Complaints Authority is to have regard to any guidance given to it by the Secretary of State with respect to the withdrawal or preferring of disciplinary charges and criminal proceedings (see *Khan*, cited above, §§ 45-46).

88. Accordingly, the Court finds that the system of investigation of complaints does not meet the requisite standards of independence needed to constitute sufficient protection against the abuse of authority and thus provide an effective remedy within the meaning of Article 13. There has therefore been a violation of Article 13 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

89. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

90. The applicants made no claim for pecuniary damage. However, they wished the Court to consider making an award for non-pecuniary damage in respect of injury to their feelings brought about by an abiding sense of injustice due to the methods employed by the police in securing their convictions. They noted that an award of 1,000 pounds sterling (GBP) had been made in the similar case of *Govell v. the United Kingdom* (no. 27237/95, Commission's report of 14 January 1998, unreported).

91. The Government considered that the finding of a violation constituted in itself sufficient just satisfaction for any damage which the applicants might have suffered.

92. The Court recalls that the applicants' right to respect for private life was violated in several aspects and that they had no effective remedy under domestic law. It considers that the applicants must thereby have suffered some feelings of frustration and invasion of privacy which is not sufficiently compensated by a finding of violation. It therefore awards each applicant GBP 1,000.

B. Costs and expenses

93. The applicants claimed a total of GBP 16,510.51 for costs and expenses, inclusive of value-added tax. This included counsel's fees of GBP 7,700.

94. The Government submitted that sums claimed for counsel gave no indication of the numbers of hours worked or the fee rate claimed and that the sum seemed excessive for a junior member of the Bar. The claim made for the work of two solicitors also did not seem reasonable in the circumstances of this case. They considered a sum of GBP 9,000 to be reasonable.

95. Making an assessment on an equitable basis and having regard to similar cases, the Court makes an award of GBP 12,000.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 8 of the Convention in respect of the use of a covert listening device at B.'s flat;

2. *Holds* unanimously that there has been no violation of Article 8 of the Convention in respect of the obtaining of information about the use of the telephone at B.'s flat;

3. *Holds* unanimously that there has been a violation of Article 8 of the Convention in respect of the use of covert listening devices at the police station;

4. *Holds* unanimously that there has been no violation of Article 6 § 1 of the Convention in respect of the non-disclosure of part of a report to the applicants at trial or the hearing of evidence from Detective Inspector Mann in the absence of the applicants or their lawyers;

5. *Holds* by six votes to one that there has been no violation of Article 6 § 1 of the Convention in respect of the use at trial of the materials obtained by the covert listening devices;

6. *Holds* unanimously that there has been a violation of Article 13 of the Convention in respect of the use of covert listening devices;

7. *Holds* unanimously
(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention;
(i) GBP 1,000 (one thousand pounds sterling) each in respect of non-pecuniary damage;
(ii) GBP 12,000 (twelve thousand pounds sterling) in respect of costs and expenses;
(b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;

8. *Dismisses* unanimously the remainder of the applicants' claims for just satisfaction.

Done in English, and notified in writing on 25 September 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ J.-P. COSTA
Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Mrs Tulkens is annexed to this judgment.

J.-P.C.
S.D.

PARTLY DISSENTING OPINION OF JUDGE TULKENS

(Translation)

The Court has – unanimously – acknowledged that the use of a listening device, both at B.'s flat and at the police station, infringed Article 8 of the Convention because such an interference with their right to respect for their private life was not in accordance with the law.

However, the majority considered that the use of that evidence at the applicants' trial did not conflict with the requirement of a fair hearing guaranteed by Article 6. I cannot share that view for a number of reasons.

1. I do not think that a trial can be described as "fair" where evidence obtained in breach of a fundamental right guaranteed by the Convention has been admitted during that trial. As the Court has already had occasion to stress, the Convention must be interpreted as a coherent whole (see *Klass and Others v. Germany*, judgment of 6 September 1978, Series A no. 28, pp. 30-31, §§ 68-69).

In that respect I share the partly dissenting opinion of Judge Loucaides annexed to *Khan v. the United Kingdom* (no. 35394/97, ECHR 2000-V): "It is my opinion that the term 'fairness', when examined in the context of the European Convention on Human Rights, implies observance of the rule of law and for that matter it presupposes respect of the human rights set out in the Convention. I do not think one can speak of a 'fair' trial if it is conducted in breach of the law."

In the instant case the violation which the Court found of Article 8 of the Convention was constituted, indeed exclusively constituted, by the unlawfulness of the impugned evidence (see paragraphs 63 and 78 *in fine* of the judgment). The fairness referred to in Article 6 of the Convention also includes a requirement of lawfulness (see *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 102, ECHR 2000-VII). Fairness presupposes compliance with the law and thus also, *a fortiori*, respect for the rights guaranteed by the Convention, which it is the Court's very task to scrutinise.

2. With regard to the nature and scope of the Court's scrutiny, the Court rightly reiterates that "its duty, according to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention" (see paragraph 76 of the judgment). Accordingly, and I firmly share this observation, "it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention". Similarly, although it is not "the role of the Court to determine, as a *matter of principle*, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible", the position is different, however, where, as in this case, the evidence has been
obtained in breach of a right guaranteed by the Convention because it is the Court's very duty, where the taking of evidence is concerned, to ensure that the commitments entered into under the Convention are honoured by the Contracting States.

3. The majority refer in their reasoning to *Schenk v. Switzerland*, (judgment of 12 July 1988, Series A no. 140), and consider that *Khan* (cited above) applied those principles, from which they deduce that, owing to similarities between the facts of that judgment and those of the present case, they have an obligation to follow precedent (see paragraphs 77 and 78 of the judgment).

I do not believe that to be the case, not least because in *Schenk* the evidence had been held to be unlawful under domestic law and not under the Convention. Furthermore, certain considerations in *Khan* (cited above, §§ 37 and 38), suggest that it could even be seen as a "re-reading" of the *Schenk* judgment and therefore interpreted as a departure from the precedent established in *Schenk*.

The present judgment could have removed the doubts arising from the Court's case-law on the subject and reiterated clearly that what is forbidden under one provision (Article 8) cannot be permitted under another provision (Article 6).

4. In concluding that there has not been a violation of Article 6, the Court renders Article 8 completely ineffective. The rights enshrined in the Convention cannot remain purely theoretical

or virtual because "the Convention must be interpreted and applied in such a way as to guarantee rights that are practical and effective" (see *Comingersoll S.A. v. Portugal*[GC], no. 35382/97, § 35, ECHR 2000-IV; *Beer and Regan v. Germany* [GC], no. 28934/95, § 57, 18 February 1999, unreported; and *García Manibardo v. Spain*, no. 38695/97, § 43, ECHR 2000-II).

5. Lastly, the majority's point of view appears to me to harbour a real danger, which has already been pointed out by Judge Loucaides: "If violating Article 8 can be accepted as 'fair' then I cannot see how the police can be effectively deterred from repeating their impermissible conduct" (see the dissenting opinion in *Khan*, cited above). The Court has itself stressed "the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action ... including the guarantees contained in Articles 5 and 8 of the Convention" (see *Osman v. the United Kingdom*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, pp. 3159-60, § 116). Will there come a point at which the majority's reasoning will be applied where the evidence has been obtained in breach of other provisions of the Convention, such as Article 3, for example? Where and how should the line be drawn? According to which hierarchy in the guaranteed rights? Ultimately, the very notion of fairness in a trial might have a tendency to decline or become subject to shifting goalposts.

P.G. AND J.H. v. THE UNITED KINGDOM JUDGMENT

P.G. AND J.H. v. THE UNITED KINGDOM JUDGMENT

P.G. AND J.H. v. THE UNITED KINGDOM JUDGMENT –
PARTLY DISSENTING OPINION OF JUDGE TULKENS

P.G. AND J.H. v. THE UNITED KINGDOM JUDGMENT –
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