A House of Lords

Regina *v* Shayler

[2002] UKHL 11

2002 Feb 4, 5, 6; March 21

B Lord Bingham of Cornhill, Lord Hope of Craighead, Lord Hutton, Lord Hobhouse of Woodborough and Lord Scott of Foscote

Crime — Official secrets — Disclosure without lawful authority — Former member of security service prosecuted for disclosing documents and information to newspaper — Whether able to argue defence that disclosure necessary in public or national interest — Whether ban on disclosure of information incompatible with right to freedom of expression — Official Secrets Act 1989 (c 6), ss 1(1), 4(1) — Human Rights Act 1998 (c 42), Sch 1, Pt I, art 10

C

Crown Court — Practice — Preparatory hearing — Judge ruling that defences of duress, necessity of circumstances and public interest not available to defendant — Whether entitled to make ruling at preparatory hearing — Criminal Procedure and Investigations Act 1996 (c 25), s 29

D The defendant was a member of the security service from November 1991 to October 1996. At the outset of his service he signed a declaration pursuant to the Official Secrets Act 1989, acknowledging the confidential nature of documents and other information relating to security or intelligence that might come into his possession as a result of his position, and an acknowledgement that he was under a contractual obligation not to disclose, without authority, any information that came into his possession by virtue of his employment. On leaving the service he signed a further declaration acknowledging that the provisions of the Act continued to apply E to any information, documents or other articles relating to security or intelligence which might have come into his possession as a result of his previous employment. In 1997 the defendant disclosed a number of documents relating to security or intelligence matters to a national newspaper. Shortly thereafter he left the country. In August 2000 he returned to the United Kingdom and was charged with disclosing documents or information without lawful authority, contrary to sections 1 and 4 of the 1989 Act[1]. In the course of a preparatory hearing under section 29 of the F Criminal Procedure and Investigations Act 1996[2], the trial judge ruled that the defence of duress or necessity of circumstances was not open to the defendant, having by implication been excluded by the 1989 Act, nor could he argue, at common law or as a result of the coming into force of the Human Rights Act 1998[3], that his disclosures were necessary in the public interest to avert damage to life or limb or serious damage to property. The Court of Appeal dismissed the defendant's appeal and ruled that the defence of duress or necessity of circumstances was available to a G person who committed an otherwise criminal act to avoid an imminent danger to life or serious injury to himself or to individuals for whom he reasonably regarded himself as being responsible, but that the defence was not available to the defendant since there was no sufficient nexus between his disclosures and possible injury to members of the public, that having regard to national security the restrictions placed

[1] Official Secrets Act 1989, ss 1, 4: see post, para 13.

H [2] Criminal Procedure and Investigations Act 1996, s 29: "Where it appears to the judge of a Crown Court that an indictment reveals a case of such complexity, or a case whose trial is likely to be of such length, that substantial benefits are likely to accrue from a hearing—(a) before a jury are sworn . . . he may order that such a hearing . . . shall be held."

S 31: "(1) At the preparatory hearing the judge may . . . (3) . . . make a ruling as to—(a) any question as to the admissibility of evidence; (b) any other question of law relating to the case."

[3] Human Rights Act 1998, Sch 1, Pt I, art 10(1): see post, para 22.

Art 10(2): see post, para 23.

on past and present members of the security service was not a contravention of their right to freedom of expression, and that the judge had been entitled to make the ruling he did.

On the defendant's appeal—

Held, dismissing the appeal, (1) that since the defendant's case was complex and likely to lead to a long trial the criteria in section 29 of the 1996 Act were satisfied and the judge was entitled to conduct a preparatory hearing in order to expedite the proceedings before the jury and assist in the management of the trial; but that the judge's power at a preparatory hearing was limited by section 31(3)(b) to questions of law "relating to the case", and that limitation was to be strictly observed; that the facts of the defendant's case did not raise any questions relating to the defences of necessity or duress of circumstances, and that therefore neither the judge nor the Court of Appeal should have made any ruling on those defences; and that, accordingly, it was unnecessary to consider or express any view on them (post, paras 16, 17, 39, 87, 117, 119, 120).

(2) That (per Lord Bingham of Cornhill, Lord Hutton, Lord Hobhouse of Woodborough and Lord Scott of Foscote) sections 1(1)(a) and 4(1) and (3)(a) of the 1989 Act, when given their plain and natural meaning and read in the context of the Act as a whole, made it clear that Parliament did not intend that a defendant prosecuted under those sections should be acquitted if he showed that it was, or that he believed that it was, in the public or national interest to make the disclosure in question, or if the jury concluded that it might have been, or that the defendant might have believed it to be, in the public or national interest to make the disclosure; that the sections did not require the prosecution to prove that the disclosure was damaging or was not in the public interest; and that, accordingly, the defendant was not entitled to argue as a defence that the unauthorised disclosures he had made were made in the public interest or that he thought that they were (post, paras 18–20, 87, 119, 120).

(3) That the ban imposed by the 1989 Act on the disclosure of information by members and former members of the security service was not absolute but was confined to disclosure without lawful authority; that there were procedures available under the Act to enable them to make official complaints about malpractices in the service or to seek official authorisation before disclosing information or documents; that if authorisation was refused it was open to a member or former member to apply for judicial review of that refusal, and, since such an application would involve an alleged violation of a human right, the court would be entitled to conduct a more rigorous and intrusive review than was normally permissible under its judicial review jurisdiction; that the safeguards built into the Act, if properly applied, were sufficient to ensure that unlawfulness and irregularity could be reported to those who could take effective action, that the power to withold authorisation was not abused and that proper disclosures were not stifled; that, therefore, in view of the special position of members of the security and intelligence services, and the highly confidential nature of information which came into their possession, the interference with their right to freedom of expression prescribed by the 1989 Act was not greater than was required to achieve the legitimate object of acting in the interests of national security; and that, accordingly, sections 1 and 4 of the 1989 Act came within the qualification in article 10(2) as a justified interference with the right to freedom of expression guaranteed by article 10 of the 1998 Act, and were not incompatible with article 10 (post, paras 24–26, 31–33, 34, 36, 62, 63, 67–75, 79, 82, 83, 86, 95–98, 100, 106, 111, 117–120).

R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532, HL(E) considered.

Decision of the Court of Appeal (Criminal Division) [2001] EWCA Crim 1977; [2001] 1 WLR 2206 reversed in part.

The following cases are referred to in the opinions of their Lordships:

A v The Scottish Ministers 2001 SLT 1331, PC
Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA
Attorney General v Blake [2001] 1 AC 268; [2000] 3 WLR 625; [2000] 4 All ER 385, HL(E)
Attorney General v Guardian Newspapers Ltd [1987] 1 WLR 1248; [1987] 3 All ER 316, CA and HL(E)
Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109; [1988] 3 WLR 776; [1988] 3 All ER 545, HL(E)
Barthold v Germany (1985) 7 EHRR 383
Brind v United Kingdom (1994) 18 EHRR CD 76
Bryan v United Kingdom (1995) 21 EHRR 342
Chahal v United Kingdom (1996) 23 EHRR 413
Chassagnou v France (1999) 29 EHRR 615
Connolly v Commission of the European Communities (Case C-274/99) [2001] ECR I-1611, ECJ
de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69; [1998] 3 WLR 675, PC
Engel v The Netherlands (No 1) (1976) 1 EHRR 647
Esbester v United Kingdom (1993) 18 EHRR CD 72
Fitt v United Kingdom (2000) 30 EHRR 480
Hadjianastassiou v Greece (1992) 16 EHRR 219
Handyside v United Kingdom (1976) 1 EHRR 737
Jasper v United Kingdom (2000) 30 EHRR 441
Kingsley v United Kingdom The Times, 9 January 2001
Klass v Federal Republic of Germany (1978) 2 EHRR 214
Leander v Sweden (1987) 9 EHRR 433
Lingens v Austria (1986) 8 EHRR 407
McCartan Turkington Breen v Times Newspapers Ltd [2001] 2 AC 277; [2000] 3 WLR 1670; [2000] 4 All ER 913, HL(NI)
Murray v United Kingdom (1994) 19 EHRR 193
New York Times Co v United States (1971) 403 US 713
Nyambirai v National Social Security Authority [1996] 1 LRC 64
Porter v Magill [2001] UKHL 67; [2002] 2 AC 357; [2002] 2 WLR 37; [2002] 1 All ER 465, HL(E)
R v A (No 2) [2001] UKHL 25; [2002] 1 AC 45; [2001] 2 WLR 1546; [2001] 3 All ER 1, HL(E)
R v Carass [2001] EWCA Crim 2845; [2002] 1 WLR 1714, CA.
R v Lambert [2001] UKHL 37; [2002] 2 AC 545; [2001] 3 WLR 206; [2001] 3 All ER 577, HL(E)
R v Ministry of Defence, Ex p Smith [1996] QB 517; [1996] 2 WLR 305; [1996] 1 All ER 257, CA
R v Secretary of State for the Home Department, Ex p Simms [2000] 2 AC 115; [1999] 3 WLR 328; [1999] 3 All ER 400, HL(E)
R (Daly) v Secretary of State for the Home Department [2001] UKHL 26; [2001] 2 AC 532; [2001] 2 WLR 1622; [2001] 3 All ER 433, HL(E)
R (Director of Public Prosecutions) v Acton Youth Court [2001] EWHC Admin 402; [2001] 1 WLR 1828, DC
R (Pretty) v Director of Public Prosecutions (Secretary of State for the Home Department intervening) [2001] UKHL 61; [2002] 1 AC 800; [2001] 3 WLR 1598; [2002] 1 All ER 1, HL(E)
Rowe and Davis v United Kingdom (2000) 30 EHRR 1
Secretary of State for the Home Department v Rehman [2003] 1 AC 153; [2000] 3 WLR 1240; [2000] 3 All ER 778, CA and HL(E)
Smith and Grady v United Kingdom (1999) 29 EHRR 493

Sunday Times, The v United Kingdom (1979) 2 EHRR 245
Tinnelly & Sons Ltd v United Kingdom (1998) 27 EHRR 249
Vereniging Weekblad Bluf! v The Netherlands (1995) 20 EHRR 189
Vogt v Germany (1995) 21 EHRR 205
Winterwerp v The Netherlands (1979) 2 EHRR 387

The following additional cases were cited in argument:

A (Children) (Conjoined Twins: Surgical Separation), In re [2001] Fam 147; [2001] 2 WLR 480; [2000] 4 All ER 961, CA
Bowman v United Kingdom (1998) 26 EHRR 1
Director of Public Prosecutions v Stonehouse [1978] AC 55; [1977] 3 WLR 143; [1977] 2 All ER 909, HL(E)
Fressoz and Roire v France (1999) 31 EHRR 28
Goodwin v United Kingdom (1996) 22 EHRR 123
Gunawardena, Harbutt and Banks, In re [1990] 1 WLR 703; [1990] 2 All ER 447, CA
Lion Laboratories Ltd v Evans [1985] QB 526; [1984] 3 WLR 539; [1984] 2 All ER 417, CA
Lord Advocate v The Scotsman Publications Ltd [1990] 1 AC 812; [1989] 3 WLR 358; [1989] 2 All ER 852, HL(Sc)
R v Preston [1994] 2 AC 130; [1993] 3 WLR 891; [1993] 4 All ER 638, HL(E)
R v Secretary of State for the Home Department, Ex p McQuillan [1995] 4 All ER 400
R v Toronto Sun Publishing Ltd (1979) 98 DLR 3d 524

INTERLOCUTORY APPEAL from the Court of Appeal

This was an appeal by leave of the House of Lords (Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Scott of Foscote) granted on 1 November 2001, by the defendant, David Michael Shayler, from a decision of the Court of Appeal (Lord Woolf CJ, Wright and Leveson JJ) on 28 September 2001, dismissing the defendant's appeal from a decision of Moses J on 16 May 2001 in the course of a preparatory hearing under section 29 of the Criminal Procedure and Investigations Act 1996 that the defendant, who was charged with, inter alia, disclosing documents relating to security or intelligence without lawful authority contrary to section 1(1) of the Official Secrets Act 1989, was not able to raise the defence that his disclosure was necessary in the public interest to avert a threat to life or limb or serious damage to property. The Cout of Appeal certified the following questions of law:

> "1. Whether the offence of disclosing information relating to security or intelligence without lawful authority contrary to section 1(1) of the Official Secrets Act 1989 was committed if, or was subject to the defence that, the disclosure was necessary in the public interest to avert damage to life or limb or serious damage to property, or to expose serious and pervasive illegality or iniquity in the obtaining of warrants and surveillance of suspected persons, either at common law or as a result of the coming into force of the Human Rights Act 1998.
>
> "2. Whether the offence of disclosing information obtained under warrants issued under the Interception of Communications Act 1985 contrary to section 4(1) of the Official Secrets Act 1989 was committed if, or was subject to a defence that, the disclosure was necessary in the public interest to avert damage to life or limb or serious damage to property or to expose serious and pervasive illegality or iniquity in the

A obtaining of warrants and surveillance of suspected persons, either at common law or as a result of the coming into force of the Human Rights Act 1998.

"3. Whether an 'extended' defence based on the doctrine of necessity was available under the Official Secrets Act 1989, and if so, what its limits were."

B "The Times", "The Sunday Times", "The Observer", "The Guardian", "The Mirror", "The Sunday People", "The Mail on Sunday", "The Independent", "The Independent on Sunday", Channel 4 Television, Channel 5 Television and the Newspaper Society appeared as interveners.

The facts are stated in the opinion of Lord Bingham of Cornhill.

C *Geoffrey Robertson QC* (who did not appear below) and *Keir Starmer* for the defendant. The over-arching issue in the appeal is whether section 1 of the Official Secrets Act 1989 which imposes a blanket ban on disclosure by present and former members of the security and intelligence services is compatible with article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which establishes a presumptive right to impart information and ideas without interference by public D authorities.

The disclosure with which the defendant is charged includes his opinions and matters of general public importance. The courts below overlooked the fact that the disclosure was to or through a national newspaper, as opposed to disclosure to an enemy of the state or for commercial reasons, and therefore required special treatment due to the watchdog role of the press. E [Reference was made to *Attorney General v Blake* [2001] 1 AC 268 and *Goodwin v United Kingdom* (1996) 22 EHRR 123.]

Although the judge had power to order a preparatory hearing pursuant to section 29 of the Criminal Proceedings and Investigations Act 1996, he had to exercise that power for the purposes defined in section 29(2) of the 1996 Act: see *In re Gunawardena, Harbutt and Banks* [1990] 1 WLR 703. A management power introduced to help judges handle excessively long F cases should not be used to attenuate an essentially forensic occasion the crucial parts of which must take place while the defendant is in the jury's charge. The judge was not entitled to rule out a defence before evidence was called. The defendant was entitled to give his evidence and the jury to assess its nuances: see *Director of Public Prosecutions v Stonehouse* [1978] AC 55.

The only question that properly arises for determination under G section 31(3) of the 1996 Act is whether there are no circumstances in which disclosure in the public interest to the press is lawful, even if there are no realistic alternatives to avert a threat to life or limb or serious damage to property. *Attorney General v Guardian Newspapers Ltd* [1987] 1 WLR 148 and *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 establish that neither the common law of confidence nor the European Convention for the Protection of Human Rights and Fundamental Freedoms H permits in every circumstance the enforcement of an absolute lifelong duty of confidence on members of the security and intelligence services. But that is what was intended to be achieved by section 1(1) of the 1989 Act.

By passing the Human Rights Act 1998 Parliament intended that offences which were not by customary canons of construction compliant with the

Convention should either be re-interpreted by the courts or declared incompatible. Section 1(1) of the 1989 Act infringes article 10 of the Convention because it incriminates all unauthorised disclosures about security and intelligence made to the media, irrespective of whether they serve the public interest or are already in the public domain, for no reason other than that they are made by persons with a particular status, namely, employees and former employees of the security and intelligence services. Equally authoritative disclosures of the same information made by a Crown servant would not be punished unless it was damaging.

Article 10 gave the defendant a presumptive right to impart information "without interference by public authority" and section 1(1) of the 1989 Act infringes that right by imposing a blanket ban on members and former members of the security and intelligence services. The exchange of information in the public interest attracts the highest level of protection, and restrictions under article 10(2) are justified only if there is a competing and overriding public interest. The mere fact that the information that an individual seeks to impart is confidential does not rule out article 10 protection: see *Fressoz and Roire v France* (1999) 31 EHRR 28.

The ban on public interest disclosures by reference to national security, irrespective of whether there is a pressing need to prohibit disclosure, is disproportionate. The only legitimate justification advanced for the criminalisation of the disclosure and the restriction of the defendant's article 10 rights is the risk of damage to the public interest. Such damage does not have to be proved, and benefit to the public cannot be advanced as a defence. Therefore no causal link has to be established between the imposition of the restriction and the only legitimate basis advanced for the restriction. That interpretation is maintained even where the employee is seeking to expose criminality, illegality or conduct that endangers the public.

A system of safeguards or alternative remedies may operate to correct abuses within a closed system but does not provide for any information concerning abuses to be made public. Consequently it does nothing to justify or even ameliorate the interference with the article 10(1) right. There is no mechanism for the publication of information about abuses which will be rectified, if at all, within a closed institution. The public interest in this area is not confined to rectification. There is a distinct value in communicating information about immoral or unlawful acts by agents of government irrespective of whether such conduct is investigated and discontinued. The public has a fundamental right to know what the government has been doing in its name. Judicial review of a refusal to authorise disclosure is not an adequate alternative remedy since the courts are unwilling to intervene when national security is given as a reason for denying individual rights. [Reference was made to *R v Secretary of State for the Home Department, Ex p McQuillan* [1995] 4 All ER 400; *Tinnelly & Sons v United Kingdom* (1998) 27 EHRR 249; *Chahal v United Kingdom* (1996) 23 EHRR 413 and *Bowman v United Kingdom* (1998) 26 EHRR 1.]

The imposition of a blanket ban on disclosure is not justified by the desire to avoid a trial process that might result in an acquittal. The exercise of free speech must not be punished without a fair trial by a jury, representative of the public, and "fairness" in this context means opportunity for a defendant to put the prosecution to proof and, if called upon, to testify in his defence.

A Whether his own defence is good in law cannot be decided until his evidence has been heard.

Necessity or duress of circumstances may be raised as a defence to strict liability offences if the defendant believes that the forbidden act was necessary to avoid a demonstrably greater harm which was likely to have befallen him or those he had a duty to protect. [Reference was made to *In re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147.]

B It is possible to read sections 1(1) and 4(1) of the Official Secrets Act 1989 so that they do not make criminal the exercise of the common law right to disclose iniquity as a last resort. [Reference was made to *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115.] If sections 1(1) and 4(1) do as a matter of ordinary construction make criminal that common law right, then they should, if at all possible, be read compatible C with the Convention, or else declared incompatible.

Michael Tugendhat QC and *Sapna Jethani* for the newspapers. The proper and effective investigation of the conduct of public affairs is a duty of the press. Those in the security and intelligence services are as accountable to the public as any other servants of the state: see *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, 290–291. Disclosure to D the public is good in itself, provided it does not defeat the purposes for which the security and intelligence services exist. The Government does not consider that every disclosure is harmful: see *Lord Advocate v The Scotsman Publications Ltd* [1990] 1 AC 812.

There will be cases where disclosure of wrongdoing is required. The assumption in the cases for the Crown and the Home Secretary and in the White Paper (Cmnd 5104) is that nothing will go wrong or that nothing will E go wrong that will not be put right by the systems already in place. That assumption is unrealistic and incorrect and undermines the high value placed on the right to freedom of expression. Even where appropriate action has been taken, the matter should be made public.

It is hard to see how an Official Secrets Act which contains no public domain defence can fulfil the requirement of Art 10 that it be necessary in a F democratic society: *Attorney General v Blake* [1997] Ch 84, 93. [Reference was made to *R v Toronto Sun Publishing Ltd* (1979) 98 DLR 3d 524.]

The availability of judicial review where authorisation for disclosure has been refused cannot be relied on for saying that a conviction under the Official Secrets Act 1989 is compatible with article 10 of the Convention. It is clear that in passing the 1989 Act Parliament did not contemplate that judicial review other than on the limited grounds set out in *Associated* G *Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223 would be available to challenge a refusal of authorisation for publication of information disclosed by a member of the services. Section 1 was believed to leave no wider an avenue to challenge a refusal so that a conviction could result from a disclosure which could not be restrained by injunction.

Nigel Sweeney QC, Jason Coppel and *Jonathan Laidlaw* for the Crown. H The sole legitimate purpose of a preparatory hearing is to determine the ambit of offences which the prosecution have to prove: what evidence they need to adduce to prove their case The purpose of section 29 of the 1996 Act was to remove the old problems which arose from juries having to be sent home for long periods during the trial.

The preparatory hearing procedure was appropriate because of the complexity of the offence and the defences available. A ruling which the judge was entitled to make was that a particular defence was or was not open to the defendant. The judge was not concerned with the strength of the defence or its chances of success before a jury. No question of usurping the jury's function therefore arose.

On their ordinary construction sections 1(1) and 4(1) of the 1989 Act do not provide for, and indeed exclude, expressly or by necessary implication, any defence of disclosure of iniquity or of necessity or duress of circumstance. If a member or former member of the security or intelligence service is concerned about serious wrongdoing within the service he is entitled to take several steps without committing a criminal offence.

No common law defence to criminal proceedings under the 1989 Act can be derived from judgment of the House of Lords in *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109. The Human Rights Convention does not recognise a right to disclose iniquity.

The common law and article 10 of the Convention are in concurrence. Although the right to freedom of expression is an extremely important right and the press has an important part to play in that right, it is not an absolute right. The interests of national security require a lifelong duty on members of the security and intelligence services not to disclose without proper authority confidential information which came into their possession by virtue of their employment.

The interference with the right to freedom of expression contemplated by sections 1(1) and 4(1) of the 1989 Act pursues a legitimate aim within article 10(2) of the Convention, namely, the protection of "national security". Whether the interference is "necessary in a democratic society" is a question of proportionality which must be considered on the facts of each case.

The issue is whether it is compatible with article 10 to prosecute/convict the defendant who has made wide-ranging disclosures of highly sensitive information directly to the public via the press, without having made use of the legitimate avenues, including resort to the High Court, for addressing his concerns.

All disclosures relating to security and intelligence made by members or former members of the security and intelligence services are harmful to the public interest because such disclosures have a special credibility and have a higher degree of sensitivity. There are grave disadvantages in a system where the demands of the public interest are determined after disclosure by the press and not before. In *Lord Advocate v Scotsman Publications Ltd* [1990] 1 AC 812 the House of Lords held that the civil law would restrain any disclosure by a former member of the services regardless of its content, but that disclosure by third parties such as the press had to be assessed in the light of the damage which would ensue.

It is undesirable for a single individual to be the arbiter of what disclosure is in the public interest when a financial gain to that individual is envisaged in the disclosure. There is also the problem of having to make more disclosures of a damaging nature in the trial proceedings. Parliament was concerned about unscrupulous individuals who might play out their defence in front of the jury knowing that the Crown would be unable to put in evidence. In relation to members of the security and intelligence services

A Parliament has laid down that there should be no public interest defence. [Reference was made to *Attorney General v Blake* [2001] 1 AC 268; *R v Preston* [1994] 2 AC 130 and *Lion Laboratories Ltd v Evans* [1985] QB 526.] On their ordinary construction sections 1(1) and 4(1) do not provide for defences of disclosure of iniquity or necessity or duress of circumstances.

B *Jonathan Crow* for the Secretary of State for the Home Department. The only real issue of principle is whether sections 1(1) and 4(1) represent a proportionate response to the risk of disclosure by members or former members of the security and intelligence services. The question therefore is whether there is a reasonable relationship of proportionality between the restrictions imposed by those sections and the legitimate objectives they seek
C to protect. Because of the wide diversity of social, economic and religious conditions in the states which are signatories to the Human Rights Convention, the Strasbourg authorities allow each state a "margin of appreciation" in this regard. [Reference was made to *Vogt v Germany* (1995) 21 EHRR 205 and *Hadjianastassiou v Greece* (1992) 16 EHRR 219.]

D That margin of appreciation, which is allowed to each state, is reflected in the margin of discretion allowed by the domestic court to the executive and legislative decision-makers in the United Kingdom. When it comes to questions of national security the courts have no expertise and both domestic and Strasbourg jurisprudence recognise that the decisions of legislature and the executive are entitled to appropriate respect: see *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153;
E *Leander v Sweden* (1987) 9 EHRR 433 and *Esbester v United Kingdom* (1993) 18 EHRR CD 72. The subject matter of the legislation, namely, the protection of national security, is one in which Parliament and the executive are best placed to make an informed decision and the courts are not.

The Convention requires a balance to be struck not just between the particular rights of an individual seeking to rely on article 10 and the general
F interests of the community but also between competing Convention rights of individuals. The exercise of one person's freedom of expression is liable to involve an infringement of another's right to private life. This is an area in which Parliament's margin of discretion should be respected: see *Chassagnou v France* (1999) 29 EHRR 615.

The defendant never sought official authorisation to make the disclosures
G so he cannot complain about what might have happened if he had sought it and been refused. His complaints about the potential limitations of judicial review are misplaced. The court could have mitigated any serious procedural problems by appointing an amicus curiae, and judicial review would have been likely to involve the question whether sufficiently credible allegations of wrongdoing had been made. A person in the defendant's position has many lawful opportunities for making disclosures in order to
H prevent abuses within the system.

The statutory system did not extinguish the defendant's right to freedom of expression but merely circumscribed the manner in which that right could lawfully be exercised. The particular restrictions imposed by sections 1(1) and 4(1) are proportionate to the objective they pursue. In order to

fulfil their functions effectively the activities of members of the security and intelligence services must remain secret.

Where a person has given undertakings which restrict his right to disclose material obtained in the course of his employment, that is a material factor in determining whether the sanctions for breaking those undertakings are compatible with article 10.

Sections 1(1) and 4(1) impose a proportionate restriction on disclosure and are therefore compatible with article 10 of the Convention.

Robertson QC replied.

Their Lordships took time for consideration.

21 March. **LORD BINGHAM OF CORNHILL**

1 My Lords, Mr David Shayler, the appellant, is a former member of the security service. He has been indicted on three counts charging him with unlawful disclosure of documents and information contrary to sections 1 and 4 of the Official Secrets Act 1989. Moses J, exercising a power conferred by section 29(1) of the Criminal Procedure and Investigations Act 1996, ordered that a preparatory hearing be held before him. At that hearing the judge ruled under section 31(3)(b) of that Act that no public interest defence was open to the appellant under those sections, which he held to be compatible with article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969). The appellant appealed to the Court of Appeal (Criminal Division) against those rulings, and also questioned whether it had been appropriate for the judge to make rulings under the 1996 Act. The Court of Appeal held that the judge had been entitled to make rulings under the 1996 Act, and upheld his rulings both on the absence of a public interest defence and on the compatibility with article 10 of the European Convention of sections 1 and 4 of the Official Secrets Act 1989: [2001] 1 WLR 2206. The appellant now challenges these rulings of the judge and the Court of Appeal before the House. At the hearing of this appeal the House had the benefit of submissions on behalf of media interests and the Home Secretary.

The facts

2 The appellant faces trial on indictment and his right to a fair trial must of course be protected. No evidence has yet been called and no facts proved. In summarising the facts giving rise to the appeal it is appropriate to rely very heavily on the statement of facts agreed between the parties.

3 The appellant was a member of the security service ("the service") from November 1991 to October 1996. At the outset of his service he signed an Official Secrets Act 1989 ("OSA 1989") declaration acknowledging the confidential nature of documents and other information relating to security or intelligence, defence or international relations that might come into his possession as a result of his position; he also signed an acknowledgement that he was under a contractual obligation not to disclose, without authority, any information that came into his possession by virtue of his employment. On leaving the service he signed a further OSA declaration acknowledging that the provisions of the Act continued to apply to him notwithstanding the termination of his appointment, and that the same

A requirements of confidentiality continued to apply to any information, documents or other articles relating to security or intelligence, defence or international relations which might have come into his possession as a result of his previous employment. He made a written declaration that he had surrendered any and all information in material form (whether classified or not) made or acquired by him owing to his official position, save such as he had the written authority of the service to retain.

B **4** Before August 1997, the appellant disclosed a number of documents to journalists from the "Mail on Sunday". Some 29 different documents were later returned by the newspaper to the Treasury Solicitor in March 1998. Most of them appeared to relate to security and intelligence matters and were classified at levels ranging from "Classified" up to and including "Top Secret". The prosecution allege that certain of the documents included C material obtained by or relating to the interception of communications in obedience to warrants issued under section 2 of the Interception of Communications Act 1985.

5 On 24 August 1997, the "Mail on Sunday" published an article written by the appellant himself (according to the by-line) and a number of other articles by journalists purporting to be based on information disclosed by the appellant. The prosecution allege that the appellant was paid a D substantial sum of money by the newspaper for these activities. The prosecution also allege that the information contained in and referred to in the articles relates to matters of security and intelligence to which the appellant could only have had access by reason of his employment with the service.

6 Just before the articles were published, the appellant left the country E and a subsequent attempt to extradite him from France failed. He returned on 21 August 2000 and was arrested on his arrival at Dover. He was cautioned and made no reply. He was not interviewed at any stage, but was taken to London and charged at Charing Cross Police Station that same afternoon. In reply to the charge he said:

> "I have been living in Paris for three years and I have decided F voluntarily to return to Britain to face charges under the Official Secrets Act. I have done this to clear my name and to allow a jury of 12 of my fellow citizens to judge me. I have also returned to challenge the cover-ups and complacency that have followed my disclosures. I admit that as an officer of the security service, I was a Crown servant from November 1991 to October 1996. However, I do not admit making any disclosures which were contrary to the criminal law. Any disclosures made by me G were in the public and national interests. In my defence I will rely on my right of freedom of expression as guaranteed by the common law, the Human Rights Act and article 10 of the European Convention on Human Rights."

7 The first count in the indictment against the appellant alleges that, on or before 24 August 1997, being a person who had been a member of the H security and intelligence services, he disclosed documents relating to security or intelligence without lawful authority contrary to section 1(1) of the OSA 1989. The second count alleges that, on or before 24 August 1997, being a person who had been a Crown servant, he without lawful authority disclosed information obtained by reason of warrants issued under the

Interception of Communications Act 1985, contrary to section 4(1) of the OSA 1989. The third count alleges that on 24 August 1997, being a person who had been a member of the security and intelligence services, he without lawful authority disclosed information relating to security or intelligence, contrary to section 1(1) of the OSA 1989. The appellant has pleaded not guilty to these charges.

8 At the preparatory hearing before the judge the first issue was whether, in law, the appellant would be entitled to be acquitted of the charges against him if (as he asserted on his arrest) his disclosures had (or, one should add, might have) been made in the public and national interest. In his judgment Moses J referred to the assertion made by the appellant on his arrest and quoted the written submission made on the appellant's behalf:

> "Any disclosures made by him were intended to draw attention to the illegal, unlawful and inefficient workings of the security and intelligence services, which, on occasion risked, and continued to risk, life and limb."

The judge, at paragraph 4, recorded the appellant as seeking

> "to contend that his disclosures were necessary to expose serious illegality by the security and intelligence services, and, in particular such disclosure was necessary to avert threat to life or limb or serious damage to property."

The judge's conclusion expressed at the end of his judgment, was unequivocal:

> "Section 1(1) and section 4 of the Official Secrets Act 1989 do not permit a defendant to raise a defence that his disclosure was necessary in the public interest to avert damage to life or limb or serious damage to property."

The judge developed at some length his reasons for holding that the sections as so construed were not incompatible with article 10 and at paragraph 82 of his judgment, under the heading "Extending the common law", said:

> "Were I to have concluded that the absence of any public interest offence is incompatible with the Convention, Mr Fitzgerald QC's argument that the common law principle of necessity should be developed in the light of article 10 seems to me to afford a more fruitful basis for the courts to permit such a defence."

He then went on to consider the common law defences of necessity and duress of circumstances. He was prepared to accept that a conventional defence of duress was in theory open to a former member of the service, but could not accept that a defence of necessity or duress of circumstances was open. The Court of Appeal took a different legal view on this latter issue, to which much of its judgment was directed, but it was of the opinion that there was no material before the court to suggest that a defence of necessity or duress of circumstances was open to the appellant on the facts.

The Official Secrets Act 1989

9 Section 2 of the Official Secrets Act 1911, enacted in great haste, was the subject of sustained criticism over many years. Its excessive scope had proved an obstacle to its effective enforcement. For this reason, and in

A fulfilment of a pledge to get rid of unnecessary secrecy, a departmental committee under the distinguished chairmanship of Lord Franks was established in 1971 to consider and recommend an effective and enforceable alternative. The committee reported in 1972 (Cmnd 5104). The committee recognised in paragraph 1

> "the concern of democratic governments to see that information is
B widely diffused, for this enables citizens to play a part in controlling their common affairs. There is an inevitable tension between the democratic requirement of openness, and the continuing need to keep some matters secret."

The committee went on to observe, at pp 47–48, paras 122–123:

> "It is generally accepted that secrecy is an important element in the
C effectiveness of defence measures and equipment, and that a breach of secrecy could seriously damage the nation . . . Defence is traditionally thought of in terms of troops, weapons and equipment, and plans. Intelligence is also an important aspect of defence, and comprises both our own intelligence operations and measures taken against the intelligence operations of others. All defence matters must be treated in
D terms not just of this country, but of the United Kingdom and her allies taken together. The Government are under an obligation to protect the defence information of our allies in the same way as our own. For the purposes of our broad categories, we regard defence as including home defence and internal security."

After observing (p 49, para 127) that in the field of international relations
E secrecy is mutual, since one country cannot breach secrecy unilaterally without damaging its relations with others, the committee said, at p 50, para 130:

> "Exchanges between governments not amounting to negotiations are often on a confidential basis. One nation may entrust to a second nation or to its friends or allies information which it is on no account prepared to
F allow to go further. A breach of this trust could have a seriously adverse effect on relations between the countries concerned, which might extend well beyond the particular matter which leaked."

10 A White Paper based on the Franks recommendations was published in July 1978 and a bill was introduced in Parliament in the following year. The bill was however criticised for its reliance on conclusive ministerial
G certificates and the excessive width of the prohibition it imposed. In the face of strong criticism it was withdrawn. Unsuccessful attempts to reform the law were made by private members, and in 1987 the government of the day again sought to devise an acceptable reform. A further White Paper (Cm 408) was published in June 1988.

11 This White Paper was the immediate precursor of the OSA 1989 and
H its recommendations bear directly on the interpretation of the Act. The following paragraphs are particularly relevant:

> "25. The most obvious areas in which the public interest needs to be protected are those where the protection of the nation from attack from outside or from within is involved. Clearly new legislation must protect

information relating to defence (including civil preparedness) and information relating to security and intelligence." A

"30. There is a particular sensitivity about the interception of telephone calls, mail and other forms of communication. It is an exceptional but vital instrument which is used, for the protection of society, when other means are not available. Successive Governments have recognised that properly controlled interception for limited purposes, such as national security or the prevention and detection of crime, is not only justified but essential in the public interest. The effectiveness of interception would be much reduced if details of the practice were readily available. But it is not only the means by which interception is practised which need to be protected. The information gathered by its use, even where it is not covered by one of the other categories already mentioned, ought not to be publicly available. Interception inevitably involves interference, without their knowledge, with the privacy of those whose communications are intercepted. Such interference is acceptable in the public interest only if those responsible for interception maintain the privacy of the information obtained." B C

"38. . . . [The Government] proposes instead that legislation should make a distinction between disclosures by members and former members of the security and intelligence services and disclosures by other persons; and that, in the latter case, the prosecution should have to show that the disclosure was likely to damage the operation of the security or intelligence services. D

"39. Because of the exceptional sensitivity of this area of information, however, there is a particular difficulty in bringing prosecutions in some cases which would be exacerbated by the need to show that the proposed test of harm had been met. In order to prove the truth of the information at present, and in order to satisfy the test of harm if the Government's proposal is adopted, evidence may need to be adduced which involves a disclosure which is as harmful as or more harmful than the disclosure which is the subject of the prosecution. Because of this danger it is not always possible to bring a prosecution at all. The Government considers that it is not in the public interest that those who wish to disclose information which damages the operation of the security or intelligence services (for example by revealing details of their operations or identifying personnel) should be able to do so with impunity, simply by reason of the sensitivity of the subject matter." E F

"41. While the Government believes that this proposed test of harm is in general adequate to safeguard the interests both of the defendant and of the security and intelligence services, it considers that different arguments apply to the unauthorised disclosure of information by members or former members of those services. It takes the view that all such disclosures are harmful to the public interest and ought to be criminal. They are harmful because they carry a credibility which the disclosure of the same information by any other person does not, and because they reduce public confidence in the services' ability and willingness to carry out their essentially secret duties effectively and loyally. They ought to be criminal because those who become members of the services know that membership carries with it a special and inescapable duty of secrecy about their work. Unauthorised disclosures betray that duty and the trust G H

placed in the members concerned, both by the State and by people who give information to the services.

"42. The Government accordingly proposes that it should not be necessary for the prosecution to adduce evidence of the likely damage to the operation of the security or intelligence services when information relating to security or intelligence has been disclosed by a member or former member of one of those services.

"43. The difficulties described in paragraph 39, arising from the fact that a trial may lead to the disclosure of information more sensitive than has already been disclosed, need particularly to be overcome where the defendant is a member or former member of the security or intelligence services. It is clearly not in the public interest that a person who is entrusted with the protection of the security of the country, and who betrays that trust, should be able to escape prosecution because of the very sensitivity of the information with which he has been entrusted. Furthermore, as a general policy, Governments do not comment on assertions about security or intelligence: true statements will generally go unconfirmed, and false statements will normally go undenied. As a result, and because of the particular credibility attaching to statements about security or intelligence by members of the services concerned, the circulation of misinformation by a member of the services may, in a different way, be as harmful as his disclosure of genuine information.

"44. The Government proposes to meet these problems by making it an offence for a member or former member of the security or intelligence services to make any disclosure which is either of information relating to security or intelligence or which purports to be of such information or which is intended to be taken as such."

"53. Finally, paragraph 30 sets out the reasons why the disclosure of information relating to the process of interception or obtained by that means is harmful. It seems to the Government that no information relating to this process can be disclosed without the possibility of damaging this essential weapon against terrorism and crime and vital safeguard of national security. Similarly no information obtained by means of interception can be disclosed without assisting terrorism or crime, damaging national security or seriously breaching the privacy of private citizens. The Government does not therefore consider that a specific test of harm can be formulated or, indeed, is necessary or appropriate for this category of information."

Under the heading "A Public Interest Defence", the White Paper continued:

"58. Suggestions have been made that the law should provide a general defence that disclosure was in the public interest. The object would be to enable the courts to consider the benefit of the unauthorised disclosure of particular information, and the motives of the person disclosing it, as well as the harm which it was likely to cause. It is suggested, in particular, that such a defence is necessary in order to enable suggestions of misconduct or malpractice to be properly investigated or brought to public attention.

"59. The Government recognises that some people who make unauthorised disclosures do so for what they themselves see as altruistic reasons and without desire for personal gain. But that is equally true of some people who commit other criminal offences. The general principle

which the law follows is that the criminality of what people do ought not to depend on their ultimate motives—though these may be a factor to be taken into account in sentencing—but on the nature and degree of the harm which their acts may cause.

"60. In the Government's view, there are good grounds for not departing from the general model in this context; and two features of the present proposals particularly reinforce this conclusion. First, a central objective of reform is to achieve maximum clarity in the law and in its application. A general public interest defence would make it impossible to achieve such clarity. Secondly, the proposals in this White Paper are designed to concentrate the protection of the criminal law on information which demonstrably requires its protection in the public interest. It cannot be acceptable that a person can lawfully disclose information which he knows may, for example, lead to loss of life simply because he conceives that he has a general reason of a public character for doing so.

"61. So far as the criminal law relating to the protection of official information is concerned, therefore, the Government is of the mind that there should be no general public interest defence and that any argument as to the effect of disclosure on the public interest should take place within the context of the proposed damage tests where applicable."

What became the OSA 1989 was debated in both Houses during its passage through Parliament. An amendment designed to introduce a public interest defence was rejected. The Act as passed gives general effect to the proposals in the White Paper.

12 As enacted the OSA 1989 makes important distinctions leading to differences of treatment.

(1) The Act distinguishes between different classes of discloser. Thus, in section 1, members and former members of the intelligence and security services and persons notified that they are subject to the subsection are covered by subsection (1), whereas past and present Crown servants and government contractors are covered by subsection (3).

(2) The Act distinguishes between different kinds of information. Section 1 deals with security and intelligence information. Successive sections deal with information relating to defence, international relations and crime.

(3) The Act provides specific defences on which reliance may be placed in different circumstances: thus, in addition to the defence expressly provided in section 1(5) quoted below, further defences are provided in sections 2(3), 3(4), 4(4) and (5), 5(3) and (4), 6(3), 7(4) and 8(2).

(4) The requirement to prove damage differs according to the nature of the disclosure and the information disclosed. Thus the provisions in section 1(3) and (4) are to be contrasted with the lack of any express requirement of damage in section 1(1), and are in line with similar provisions in sections 2(1) and (2), 3(1), (2) and (3), 4(2), 5(3) and 6(2).

13 Section 1 under which counts 1 and 3 of the indictment against the appellant have been laid, provides (so far as relevant) as follows:

"(1) A person who is or has been—(a) a member of the security and intelligence services; or (b) a person notified that he is subject to the provisions of this subsection, is guilty of an offence if without lawful authority he discloses any information, document or other article relating

to security or intelligence which is or has been in his possession by virtue of his position as a member of any of those services or in the course of his work while the notification is or was in force.

"(2) The reference in subsection (1) above to disclosing information relating to security or intelligence includes a reference to making any statement which purports to be a disclosure of such information or is intended to be taken by those to whom it is addressed as being such a disclosure.

"(3) A person who is or has been a Crown servant or government contractor is guilty of an offence if without lawful authority he makes a damaging disclosure of any information, document or other article relating to security or intelligence which is or has been in his possession by virtue of his position as such but otherwise than as mentioned in subsection (1) above.

"(4) For the purposes of subsection (3) above a disclosure is damaging if—(a) it causes damage to the work of, or of any part of, the security and intelligence services; or (b) it is of information or a document or other article which is such that its unauthorised disclosure would be likely to cause such damage or which falls within a class or description of information, documents or articles the unauthorised disclosure of which would be likely to have that effect.

"(5) It is a defence for a person charged with an offence under this section to prove that at the time of the alleged offence he did not know, and had no reasonable cause to believe, that the information, document or article in question related to security or intelligence or, in the case of an offence under subsection (3), that the disclosure would be damaging within the meaning of that subsection."

"(9) In this section 'security or intelligence' means the work of, or in support of, the security and intelligence services or any part of them, and references to information relating to security or intelligence include references to information held or transmitted by those services or by persons in support of, or of any part of, them."

Section 4, under which count two of the indictment is laid, provides (so far as material, and as amended) as follows:

"(1) A person who is or has been a Crown servant or government contractor is guilty of an offence if without lawful authority he discloses any information, document or other article to which this section applies and which is or has been in his possession by virtue of his position as such . . .

"(3) This section also applies to—(a) any information obtained by reason of the interception of any communication in obedience to a warrant issued under section 2 of the Interception of Communications Act 1985, any information relating to the obtaining of information by reason of any such interception and any document or other article which is or has been used or held for use in, or has been obtained by reason of, any such interception; and (b) any information obtained by reason of action authorised by a warrant issued under section 3 of the Security Service Act 1989 or under section 5 of the Intelligence Services Act 1994 or by an authorisation given under section 7 of that Act, any information relating to the obtaining of information by reason of any such action and

any document or other article which is or has been used or held for use in, or has been obtained by reason of, any such action."

"(5) It is a defence for a person charged with an offence under this section in respect of any other disclosure to prove that at the time of the alleged offence he did not know, and had no reasonable cause to believe, that the information, document or article in question was information or a document or article to which this section applies."

Section 7 governs the authorisation of disclosures. It deals first with disclosures by Crown servants and persons subject to notification under section 1(1), then with government contractors, and then in subsection (3) provides:

"For the purposes of this Act a disclosure made by any other person is made with lawful authority if, and only if, it is made—(a) to a Crown servant for the purposes of his functions as such; or (b) in accordance with an official authorisation."

"Official authorisation" is defined to mean an authorisation duly given by a Crown servant or by or on behalf of a prescribed body or a body of a prescribed class. These expressions are defined in section 12. A "Crown servant" includes any minister, civil servant, member of the armed forces or constable, and any holder of an office or body or member of a body prescribed by the secretary of state. In section 13 "disclose" and "disclosure" are defined to include parting with possession of a document.

The Security Service Act 1989

14 The Security Service Act 1989 was enacted, very shortly before the OSA 1989, to put the service on a statutory basis. Its functions are defined in section 1 (as amended):

"(2) The function of the service shall be the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.

"(3) It shall also be the function of the service to safeguard the economic well-being of the United Kingdom against threats posed by the actions or intentions of persons outside the British Islands.

"(4) It shall also be the function of the service to act in support of the activities of police forces, the National Criminal Intelligence Service, the National Crime Squad and other law enforcement agencies in the prevention and detection of serious crime."

Under section 2 (as amended), the Director General is to be responsible for the efficiency of the service and it is to be his duty to ensure:

"(a) that there are arrangements for securing that no information is obtained by the Service except so far as necessary for the proper discharge of its functions or disclosed by it except so far as necessary for that purpose or for the purpose of the prevention or detection of serious crime or for the purpose of any criminal proceedings; and (b) that the service does not take any action to further the interests of any political party; and (c) that there are arrangements, agreed with the Director General of the

A National Criminal Intelligence Service, for co-ordinating the activities of the service in pursuance of section 1(4) of this Act with the activities of police forces, the National Criminal Intelligence Service, the National Crime Squad and other law enforcement agencies."

The preparatory hearing

15 Section 29(1) of the Criminal Procedure and Investigations Act 1996 B confers powers on a judge of the Crown Court to order a preparatory hearing where it appears to him that an indictment reveals a case of such complexity, or a case whose trial is likely to be of such length, that substantial benefits are likely to accrue from a hearing before the jury are sworn for any of the purposes listed in subsection (2). These purposes are those of "(a) identifying issues which are likely to be material to the verdict C of the jury; (b) assisting their comprehension of any such issues; (c) expediting the proceedings before the jury; (d) assisting the judge's management of the trial". The order may be made on the application of the prosecutor or the defendant or of the judge's own motion, and at the hearing the judge may under section 31(3) make a ruling as to (a) any question as to the admissibility of evidence or (b) any other question of law relating to the case. An appeal lies to the Court of Appeal, with leave, against any ruling D given: section 35(1).

16 As section 29 makes clear, resort to this procedure is only permissible where the case appears complex or likely to lead to a lengthy trial. But in such cases the procedure can be highly beneficial. The process of disclosure can be conducted, and the marshalling of evidence prepared, with direct reference to the live issues in the case. Jurors and witnesses, E summoned to court for the trial, can be spared hours or days of frustrating inaction while issues of law are argued out in their absence. The risk of sudden adjournments to deal with unforeseen contingencies can be reduced. And, perhaps most important of all, the risk that the trial will be conducted on what an appellate court later rules to be a mistaken legal basis, leading to the necessarily undesirable consequence of a retrial, can be minimised if not eliminated. If there is an issue on the proper interpretation of a section or the F correct direction to be given to a jury, it may be better to resolve the question sooner rather than later: *R v Carass* [2002] 1 WLR 1714, 1720, para 22.

17 The judge's decision to order a preparatory hearing in this case, not challenged at the time, was entirely sound. Substantial benefits were indeed likely to accrue. It was faintly suggested in argument before the House that the case did not meet the statutory criteria of complexity and likely length. G But the legal argument occupied four days before the judge, three days in the Court of Appeal and three days before the House. There are eight substantial bundles of authorities before the House. The test of complexity is comfortably satisfied, and the likely length of the trial in large measure depended on how the main legal issue was resolved. It is however important to stress that the judge's power under section 31(3)(b) is limited to ruling on questions of law "relating to the case". This limitation must be strictly H observed. Here, the issues of law before the judge were whether the sections under which the appellant was charged, on a proper construction, afford him a public interest defence; whether, if not, those sections are compatible with article 10 of the European Convention; and whether, if they are not, they can or should be read conformably with the Convention or a

declaration of incompatibility made. The appellant's case before the judge did not raise any question of necessity or duress of circumstances, and it is a little unfortunate that the judge ventured into this vexed and uncertain territory not "relating to the case". It is a little unfortunate, for the same reason, that the Court of Appeal followed him into it. I should not for my part be taken to accept all that the Court of Appeal said on these difficult topics, but in my opinion it is unnecessary to explore them in this case. The appellant's case, put very broadly, is understood to be that he was appalled at the unlawfulness, irregularity, incompetence, misbehaviour and waste of resources in the service, which he thought was failing to perform its public duty; he believed that unless these failings were exposed and remedied dire consequences would follow; and he therefore believed it in the public and national interest to make the disclosure he did. This omnibus contention may or may not afford him a defence under the OSA 1989, depending on whether a public interest defence is available; but it is not within measurable distance of affording him a defence of necessity or duress of circumstances.

Construction of section 1(2) and 4(1) of the OSA 1989

18 Section 1(1)(a) of the OSA 1989 imposes criminal liability on a member or former member of the security and intelligence services if, without lawful authority (as defined in section 7), he discloses any information or document relating to security or intelligence which is or has been in his possession by virtue of his position as a member of any of those services. The only defence expressly provided is, under subsection (5), that at the time of the disclosure he did not know and had no reasonable cause to believe that the information or documents in question related to security or intelligence. As already demonstrated, a member or former member of the security and intelligence services is treated differently under the Act from other persons, and information and documents relating to security and intelligence are treated differently from information and documents relating to other matters. Importantly, the section does not require the prosecution to prove that any disclosure made by a member or former member of the security and intelligence services was damaging to the interests of that service or the public service generally.

19 Section 4(1), read in conjunction with section 4(3)(a), imposes criminal liability on a serving or former Crown servant if, without lawful authority (as defined in section 7), he discloses any information obtained by reason of the interception of any communication in obedience to a warrant issued under section 2 of the Interception of Communications Act 1985 which has been in his possession by virtue of his position as a serving or former Crown servant. The only defence expressly provided is, under subsection (5), that at the time of the disclosure he did not know and had no reasonable cause to believe that any information or document disclosed was information or a document to which the section applied. In a prosecution under the subsections referred to the prosecution do not have to prove damage or the likelihood of damage (as required under section 4(2)) and a limited defence based on lack of knowledge that damage would be caused (as provided under section 4(4)) does not apply.

20 It is in my opinion plain, giving sections 1(1)(a) and 4(1) and (3)(a) their natural and ordinary meaning and reading them in the context of the OSA 1989 as a whole, that a defendant prosecuted under these sections is

A not entitled to be acquitted if he shows that it was or that he believed that it was in the public or national interest to make the disclosure in question or if the jury conclude that it may have been or that the defendant may have believed it to be in the public or national interest to make the disclosure in question. The sections impose no obligation on the prosecution to prove that the disclosure was not in the public interest and give the defendant no
B opportunity to show that the disclosure was in the public interest or that he thought it was. The sections leave no room for doubt, and if they did the 1988 White Paper quoted above, which is a legitimate aid to construction, makes the intention of Parliament clear beyond argument.

The right to free expression

C **21** The fundamental right of free expression has been recognised at common law for very many years: see, among many other statements to similar effect, *Attorney General v Guardian Newspapers Ltd* [1987] 1 WLR 1248, 1269B, 1320G; *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 178E, 218D, 220C, 226A, 283E; *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 126E; *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, 290–291. The
D reasons why the right to free expression is regarded as fundamental are familiar, but merit brief restatement in the present context. Modern democratic government means government of the people by the people for the people. But there can be no government by the people if they are ignorant of the issues to be resolved, the arguments for and against different solutions and the facts underlying those arguments. The business of
E government is not an activity about which only those professionally engaged are entitled to receive information and express opinions. It is, or should be, a participatory process. But there can be no assurance that government is carried out for the people unless the facts are made known, the issues publicly ventilated. Sometimes, inevitably, those involved in the conduct of government, as in any other walk of life, are guilty of error, incompetence,
F misbehaviour, dereliction of duty, even dishonesty and malpractice. Those concerned may very strongly wish that the facts relating to such matters are not made public. Publicity may reflect discredit on them or their predecessors. It may embarrass the authorities. It may impede the process of administration. Experience however shows, in this country and elsewhere, that publicity is a powerful disinfectant. Where abuses are exposed, they can be remedied. Even where abuses have already been remedied, the public
G may be entitled to know that they occurred. The role of the press in exposing abuses and miscarriages of justice has been a potent and honourable one. But the press cannot expose that of which it is denied knowledge.

22 Despite the high value placed by the common law on freedom of expression, it was not until incorporation of the European Convention into
H our domestic law by the Human Rights Act 1998 that this fundamental right was underpinned by statute. Article 10(1) of the Convention, so far as relevant, provides:

> "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information

and ideas without interference by public authority and regardless of frontiers." A

Section 12 of the 1998 Act reflects the central importance which attaches to the right to freedom of expression. The European Court of Human Rights for its part has not wavered in asserting the fundamental nature of this right. In paragraph 52 of its judgment in *Vogt v Germany* (1995) 21 EHRR 205 the court said: B

"The court reiterates the basic principles laid down in its judgments concerning article 10:

"(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Subject to article 10(2), it is applicable not only to 'information' or 'ideas' that are favourably C received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'."

It is unnecessary to multiply citations to the same effect. Thus for purposes of the present proceedings the starting point must be that the appellant is D entitled if he wishes to disclose information and documents in his possession unless the law imposes a valid restraint upon his doing so.

Article 10(2)

23 Despite the high importance attached to it, the right to free expression was never regarded in domestic law as absolute. Publication E could render a party liable to civil or criminal penalties or restraints on a number of grounds which included, for instance, libel, breach of confidence, incitement to racial hatred, blasphemy, publication of pornography and, as noted above, disclosure of official secrets. The European Convention similarly recognises that the right is not absolute: article 10(2) qualifies the broad language of article 10(1) by providing, so far as relevant to this case: F

"The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime . . . for the protection of the . . . rights of others, for preventing the disclosure of information received in confidence . . ." G

It is plain from the language of article 10(2), and the European Court has repeatedly held, that any national restriction on freedom of expression can be consistent with article 10(2) only if it is prescribed by law, is directed to one or more of the objectives specified in the article and is shown by the state concerned to be necessary in a democratic society. "Necessary" has been H strongly interpreted: it is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable": *Handyside v United Kingdom* (1976) 1 EHRR 737, 754, para 48. One must consider whether the interference complained of corresponded to a pressing social need, whether it was proportionate to

A the legitimate aim pursued and whether the reasons given by the national authority to justify it are relevant and sufficient under article 10(2): *The Sunday Times v United Kingdom* (1979) 2 EHRR 245, 277–278, para 62.

24 In the present case there can be no doubt but that the sections under which the appellant has been prosecuted, construed as I have construed them, restricted his prima facie right to free expression. There can equally be no doubt but that the restriction was directed to objectives specified in B article 10(2) as quoted above. It was suggested in argument that the restriction was not prescribed by law because the procedure for obtaining authorisation was not precisely specified in the OSA 1989, but I cannot accept this. The restriction on disclosure is prescribed with complete clarity. A member or former member of any of the security or intelligence services wishing to obtain authority to disclose could be in no doubt but that he C should seek authorisation from his superior or former superior in the relevant service or the head of that service, either of whom might no doubt refer the request to higher authority. It was common ground below, in my view, rightly, that the relevant restriction was prescribed by law. It is on the question of necessity, pressing social need and proportionality that the real issue between the parties arises.

25 There is much domestic authority pointing to the need for a security D or intelligence service to be secure. The commodity in which such a service deals is secret and confidential information. If the service is not secure those working against the interests of the state, whether terrorists, other criminals or foreign agents, will be alerted, and able to take evasive action; its own agents may be unmasked; members of the service will feel unable to rely on each other; those upon whom the service relies as sources of information will E feel unable to rely on their identity remaining secret; and foreign countries will decline to entrust their own secrets to an insecure recipient: see, for example, *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 118C, 213–214, 259A, 265F; *Attorney General v Blake* [2001] 1 AC 268, 287D–F. In the *Guardian Newspapers Ltd (No 2)* case, at p 269E–G, Lord Griffiths expressed the accepted rule very pithily:

F > "The Security and Intelligence Services are necessary for our national security. They are, and must remain, secret services if they are to operate efficiently. The only practical way to achieve this objective is a brightline rule that forbids any member or ex-member of the service to publish any material relating to his service experience unless he has had the material cleared by his employers. There is, in my view, no room for an exception to this rule dealing with trivia that should not be regarded as confidential. G What may appear to the writer to be trivial may in fact be the one missing piece in the jigsaw sought by some hostile intelligence agency."

As already shown, this judicial approach is reflected in the rule laid down, after prolonged consideration and debate, by the legislature.

26 The need to preserve the secrecy of information relating to intelligence and military operations in order to counter terrorism, criminal H activity, hostile activity and subversion has been recognised by the European Commission and the Court in relation to complaints made under article 10 and other articles under the Convention: see *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, paras 100–103; *Klass v Federal Republic of Germany* (1978) 2 EHRR 214, para 48; *Leander v Sweden*

(1987) 9 EHRR 433, para 59; *Hadjianastassiou v Greece* (1992) 16 EHRR 219, paras 45–47; *Esbester v United Kingdom* (1993) 18 EHRR CD 72, 74; *Brind v United Kingdom* (1994) 18 EHRR CD 76, 83–84; *Murray v United Kingdom* (1994) 19 EHRR 193, para 58; *Vereniging Weekblad Bluf! v The Netherlands* (1995) 20 EHRR 189, paras 35, 40. The thrust of these decisions and judgments has not been to discount or disparage the need for strict and enforceable rules but to insist on adequate safeguards to ensure that the restriction does not exceed what is necessary to achieve the end in question. The acid test is whether, in all the circumstances, the interference with the individual's Convention right prescribed by national law is greater than is required to meet the legitimate object which the state seeks to achieve. The OSA 1989, as it applies to the appellant, must be considered in that context.

27 The OSA 1989 imposes a ban on disclosure of information or documents relating to security or intelligence by a former member of the service. But it is not an absolute ban. It is a ban on disclosure without lawful authority. It is in effect a ban subject to two conditions. First of all, the former member may, under section 7(3)(a), make disclosure to a Crown servant for the purposes of his functions as such.

(1) The former member may make disclosure to the staff counsellor, whose appointment was announced in the House of Commons in November 1987 (Hansard (HC Debates) 2 November 1987, written answers col 512), before enactment of the OSA 1989 and in obvious response to the grievances ventilated by Mr Peter Wright in *Spycatcher*. The staff counsellor, a high ranking former civil servant, is available to be consulted: "by any member of the security and intelligence services who has anxieties relating to the work of his or her service which it has not been possible to allay through the ordinary processes of management—staff relations." In February 1989 the role of the staff counsellor was further explained: see the judgment of the Court of Appeal [2001] 1 WLR 2206, para 39.

(2) If the former member has concerns about the lawfulness of what the service has done or is doing, he may disclose his concerns to (among others) the Attorney General, the Director of Public Prosecutions or the Commissioner of Metropolitan Police. These officers are subject to a clear duty, in the public interest, to uphold the law, investigate alleged infractions and prosecute where offences appear to have been committed, irrespective of any party affiliation or service loyalty.

(3) If a former member has concerns about misbehaviour, irregularity, maladministration, waste of resources or incompetence in the service he may disclose these to the Home Secretary, the Foreign Secretary, the Secretary of State for Northern Ireland or Scotland, the Prime Minister, the Secretary to the Cabinet or the Joint Intelligence Committee. He may also make disclosure to the secretariat, provided (as the House was told) by the Home Office, of the parliamentary Intelligence and Security Committee. He may further make disclosure, by virtue of article 3 of and Schedule 2 to the Official Secrets Act 1989 (Prescription) Order 1990 (SI 1990/200) to the staff of the Comptroller and Auditor General, the National Audit Office and the Parliamentary Commissioner for Administration.

28 Since one count of the indictment against the appellant is laid under section 4(1) and (3) of the OSA 1989, considerable attention was directed by the judge and the Court of Appeal to the role of the commissioners

A appointed under section 8(1) of the Interception of Communications Act 1985, section 4(1) of the Security Service Act 1989 and section 8(1) of the Intelligence Services Act 1994. The appellant submits, correctly, that none of these commissioners is a minister or a civil servant, that their functions defined by the three statutes do not include general oversight of the three security services, and that the secretariat serving the commissioners is, or was, of modest size. But under each of the three Acts, the commissioner was B given power to require documents and information to be supplied to him by any Crown servant or member of the relevant services for the purposes of his functions (section 8(3) of the 1985 Act, section 4(4) of the 1989 Act, section 8(4) of the 1994 Act), and if it were intimated to the commissioner, in terms so general as to involve no disclosure, that serious abuse of the power to intercept communications or enter premises to obtain information C was taking or had taken place, it seems unlikely that the commissioner would not exercise his power to obtain information or at least refer the warning to the Home Secretary or (as the case might be) the Foreign Secretary.

29 One would hope that, if disclosure were made to one or other of the persons listed above, effective action would be taken to ensure that abuses were remedied and offenders punished. But the possibility must exist that D such action would not be taken when it should be taken or that, despite the taking of effective action to remedy past abuses and punish past delinquencies, there would remain facts which should in the public interest be revealed to a wider audience. This is where, under the OSA 1989 the second condition comes into play: the former member may seek official authorisation to make disclosure to a wider audience.

E **30** As already indicated, it is open to a former member of the service to seek authorisation from his former superior or the head of the service, who may no doubt seek authority from the secretary to the cabinet or a minister. Whoever is called upon to consider the grant of authorisation must consider with care the particular information or document which the former member seeks to disclose and weigh the merits of that request bearing in mind (and if necessary taking advice on) the object or objects which the statutory ban on F disclosure seeks to achieve and the harm (if any) which would be done by the disclosure in question. If the information or document in question were liable to disclose the identity of agents or compromise the security of informers, one would not expect authorisation to be given. If, on the other hand, the document or information revealed matters which, however, scandalous or embarrassing, would not damage any security or intelligence G interest or impede the effective discharge by the service of its very important public functions, another decision might be appropriate. Consideration of a request for authorisation should never be a routine or mechanical process: it should be undertaken bearing in mind the importance attached to the right of free expression and the need for any restriction to be necessary, responsive to a pressing social need and proportionate.

31 One would, again, hope that requests for authorisation to disclose H would be granted where no adequate justification existed for denying it and that authorisation would be refused only where such justification existed. But the possibility would of course exist that authority might be refused where no adequate justification existed for refusal, or at any rate where the former member firmly believed that no adequate justification existed. In this

situation the former member is entitled to seek judicial review of the decision to refuse, a course which the OSA 1989 does not seek to inhibit. In considering an application for judicial review of a decision to refuse authorisation to disclose, the court must apply (albeit from a judicial standpoint, and on the evidence before it) the same tests as are described in the last paragraph. It also will bear in mind the importance attached to the Convention right of free expression. It also will bear in mind the need for any restriction to be necessary to achieve one or more of the ends specified in article 10(2), to be responsive to a pressing social need and to be no more restrictive than is necessary to achieve that end.

32 For the appellant it was argued that judicial review offered a person in his position no effective protection, since courts were reluctant to intervene in matters concerning national security and the threshold of showing a decision to be irrational was so high as to give the applicant little chance of crossing it. Reliance was placed on *Chahal v United Kingdom* (1996) 23 EHRR 413 and *Tinnelly & Sons Ltd v United Kingdom* (1998) 27 EHRR 249, in each of which the European Court was critical of the effectiveness of the judicial review carried out.

33 There are in my opinion two answers to this submission. First the court's willingness to intervene will very much depend on the nature of the material which it is sought to disclose. If the issue concerns the disclosure of documents bearing a high security classification and there is apparently credible unchallenged evidence that disclosure is liable to lead to the identification of agents or the compromise of informers, the court may very well be unwilling to intervene. If, at the other end of the spectrum, it appears that while disclosure of the material may cause embarrassment or arouse criticism, it will not damage any security or intelligence interest, the court's reaction is likely to be very different. Usually, a proposed disclosure will fall between these two extremes and the court must exercise its judgment, informed by article 10 considerations. The second answer is that in any application for judicial review alleging an alleged violation of a Convention right the court will now conduct a much more rigorous and intrusive review than was once thought to be permissible. The change was described by Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 546–548 where, after referring to the standards of review reflected in *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223 and *R v Ministry of Defence, Ex p Smith* [1996] QB 517, he said:

> "26. . . . There is a material difference between the *Wednesbury* and *Smith* grounds of review and the approach of proportionality applicable in respect of review where Convention rights are at stake.
>
> "27. The contours of the principle of proportionality are familiar. In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 the Privy Council adopted a three-stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself: 'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.'

"Clearly, these criteria are more precise and more sophisticated than the traditional grounds of review. What is the difference for the disposal of concrete cases? Academic public lawyers have in remarkably similar terms elucidated the difference between the traditional grounds of review and the proportionality approach: see Professor Jeffrey Jowell QC, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] PL 671; Professor Paul Craig, *Administrative Law*, 4th ed (1999), pp 561–563; Professor David Feldman, 'Proportionality and the Human Rights Act 1998', essay in *The Principle of Proportionality in the Laws of Europe* edited by Evelyn Ellis (1999), pp 117, 127 et seq. The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach. Making due allowance for important structural differences between various convention rights, which I do not propose to discuss, a few generalisations are perhaps permissible. I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights. It will be recalled that in *Smith* the Court of Appeal reluctantly felt compelled to reject a limitation on homosexuals in the army. The challenge based on article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the right to respect for private and family life) foundered on the threshold required even by the anxious scrutiny test. The European Court of Human Rights came to the opposite conclusion: *Smith and Grady v United Kingdom* (1999) 29 EHRR 493. The court concluded, at p 543, para 138: 'the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the court's analysis of complaints under article 8 of the Convention.' In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.

"28. The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving Convention rights must be analysed in the correct way."

This approach contrasts sharply with that adopted in the authorities on which the appellant based his submission. In *Chahal*, on applications for both habeas corpus and judicial review, there was no effective judicial inquiry into the legality of the applicant's detention, and this was of even greater importance where the applicant faced the risk of torture or inhuman or degrading treatment: 23 EHRR 413, paras 132, 150–151. In *Tinnelly* the issue of conclusive certificates had effectively prevented any judicial determination of the merits of the applicants' complaints: 27 EHRR 249, para 77.

34 The appellant contended that even if, theoretically, judicial review offered a means of challenging an allegedly wrongful refusal of authorisation to disclose, it was in practice an unavailable means since private lawyers were not among those to whom disclosure could lawfully be made under section 7(3)(a), and a former member of the service could not be expected to initiate proceedings for judicial review without the benefit of legal advice and assistance. I would for my part accept that the fair hearing guaranteed by article 6(1) of the Convention to everyone in the determination of their civil rights and obligations must ordinarily carry with it the right to seek legal advice and assistance from a lawyer outside the government service. But this is a matter to be resolved by seeking official authorisation under section 7(3)(b). The service would at that stage, depending on the nature of the material sought to be disclosed, be fully entitled to limit its authorisation to material in a redacted or anonymised or schematic form, to be specified by the service; but I cannot envisage circumstances in which it would be proper for the service to refuse its authorisation for any disclosure at all to a qualified lawyer from whom the former member wished to seek advice. If, at the hearing of an application for judicial review, it were necessary for the court to examine material said to be too sensitive to be disclosed to the former member's legal advisers, special arrangements could be made for the appointment of counsel to represent the applicant's interests as envisaged by the Court of Appeal in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, 186–187, paras 31–32.

35 There is one further safeguard which deserves mention. By section 9(1) of the OSA 1989 the consent of the Attorney General is required before any prosecution is instituted for an offence under (among other sections) sections 1(1) and 4(1) and (3). The appellant submitted that this is not an effective safeguard since there are no criteria to govern the giving of consent. Successive Directors of Public Prosecutions, acting under the general superintendence of the Attorney General, have, however, published codes for the guidance of Crown prosecutors, and the practice of the Attorney General is to follow this guidance, although he may of course take a broader view of the public interest. The tests laid down comprise a merits or evidential test, requiring a realistic prospect of securing a conviction, and a public interest test. The Attorney General will not give his consent to prosecution unless he judges prosecution to be in the public interest. He is unlikely to consent if the disclosure alleged is trivial or the information disclosed stale and notorious or the facts are such as would not be thought by reasonable jurors or judges to merit the imposition of criminal sanctions. The consent of the Attorney General is required as a safeguard against ill-judged or ill-founded or improperly motivated or unnecessary prosecutions.

A 36 The special position of those employed in the security and intelligence services, and the special nature of the work they carry out, impose duties and responsibilities on them within the meaning of article 10(2): *Engel v The Netherlands (No 1)* 1 EHRR 647, para 100; *Hadjianastassiou v Greece* 16 EHRR 219, para 46. These justify what Lord Griffiths called a brightline rule against disclosure of information of documents relating to security or intelligence obtained in the course of their B duties by members or former members of those services. (While Lord Griffiths was willing to accept the theoretical possibility of a public interest defence, he made no allowance for judicial review: *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 269G). If, within this limited category of case, a defendant is prosecuted for making an unauthorised disclosure it is necessary to relieve the prosecutor of the need C to prove damage (beyond the damage inherent in disclosure by a former member of these services) and to deny the defendant a defence based on the public interest; otherwise the detailed facts concerning the disclosure and the arguments for and against making it would be canvassed before the court and the cure would be even worse than the disease. But it is plain that a sweeping, blanket ban, permitting of no exceptions, would be inconsistent with the general right guaranteed by article 10(1) and would not survive the D rigorous and particular scrutiny required to give effect to article 10(2). The crux of this case is whether the safeguards built into the OSA 1989 are sufficient to ensure that unlawfulness and irregularity can be reported to those with the power and duty to take effective action, that the power to withhold authorisation to publish is not abused and that proper disclosures are not stifled. In my opinion the procedures discussed above, properly E applied, provide sufficient and effective safeguards. It is, however, necessary that a member or former member of a relevant service should avail himself of the procedures available to him under the Act. A former member of a relevant service, prosecuted for making an unauthorised disclosure, cannot defend himself by contending that if he had made disclosure under section 7(3)(a) no notice or action would have been taken or that if he had sought authorisation under section 7(3)(b) it would have been refused. If a F person who has given a binding undertaking of confidentiality seeks to be relieved, even in part, from that undertaking he must seek authorisation and, if so advised, challenge any refusal of authorisation. If that refusal is upheld by the courts, it must, however reluctantly, be accepted. I am satisfied that sections 1(1) and 4(1) and (3) of the OSA 1989 are compatible with article 10 of the Convention; no question of reading those sections conformably with G the Convention or making a declaration of incompatibility therefore arises. On these crucial issues I am in agreement with both the judge and the Court of Appeal. They are issues on which the House can form its own opinion. But they are also issues on which Parliament has expressed a clear democratic judgment.

37 The House received and heard interesting submissions on behalf of the Newspaper Society, nine newspapers and two television channels. But H this appeal calls for decision of no issue directly affecting the media and I think it would be undesirable to attempt to give guidance in the context of this appeal.

38 I would dismiss the appeal. I do not think it necessary to address the specific questions certified by the Court of Appeal. When the matter returns

to the judge he will direct the jury on the law, sum up the evidence as it then stands, identify the issues which the jury have to decide and invite the jury to return their verdict in the ordinary way.

LORD HOPE OF CRAIGHEAD

39 My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Bingham of Cornhill. I gratefully adopt his narrative of the facts and of the legislative background. I respectfully agree with all that he has said about the decision of the trial judge to make a preparatory ruling and the defences of duress and necessity of circumstances. I shall concentrate on the points which lie at the heart of this case.

40 It has been obvious ever since the publication of the Government's proposals for reform in its White Paper, *Reform of Section 2 of the Official Secrets Act 1911*, June 1988 (Cm 408) that it was not going to be easy to reconcile its rejection of any proposal for a general defence that a disclosure of information was in the public interest with article 10 (2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which allows restrictions to be imposed upon the right to freedom of expression if, but only if, the restriction is prescribed by law and is necessary in a democratic society in the interests of national security.

41 The fact that the White Paper did not mention article 10 Convention rights leaves one with the uneasy feeling that, although the right of individual petition under article 25 had been available to persons in this country since 1966, the problems which it raises were overlooked. Many attempts were made in both Houses of Parliament to introduce a public interest defence in one form or another when the Bill was being discussed there, but they were all unsuccessful. The Official Secrets Act 1989, when it finally emerged from the parliamentary process, contained no such defence. The effect of section 1(1) of the Act, construed according to the ordinary principles of statutory interpretation, is that any unauthorised disclosure of information, documents or articles relating to security or intelligence by anyone who is or has been a member of the security and intelligence services is an offence, irrespective of whether or not its disclosure is or is likely to be harmful to the interests of national security.

42 The coming into force of the Human Rights Act 1998 has revived interest in the apparent lack of harmony between section 1(1) of the 1989 Act and article 10(2) of the Convention. There appears to be general agreement among those writers who have commented on the issue that it is likely to be difficult to reconcile them. For example, *Clayton & Tomlinson, The Law of Human Rights* (2000), p 1105, paras 15.261 and 15.262 state:

> "The Official Secrets Act 1989 is also difficult to reconcile with article 10. In particular, where restrictions on freedom of expression are permissible without the need to prove damage, it is arguable that such restrictions are unnecessary. Under section 1 the defendant could be liable for disclosing information which is already in the public domain.
>
> "The 1989 Act does not include a 'public interest defence'. This contrasts with proceedings for breach of confidence in which such a defence is available. As Feldman points out, this means that: 'under all provisions of the 1989 Act criminal liability may be imposed in

A circumstances when no injunction could have been obtained to restrain publication.' (*David Feldman, Civil Liberties and Human Rights in England and Wales* (1993), p 669.)

"The result of these considerations is that: 'It seems likely . . . that . . . the restraints on freedom of expression resulting from the [Official Secrets Act 1989] go . . . further than is necessary in a democratic society.' (*Richard Stone, Textbook on Civil Liberties,* 2nd ed (1997), p 184.)"

B

43 The White Paper noted that it had been difficult to find agreement on the precise nature of the reform: paragraph 13. It acknowledged that there was a case for a public interest defence, but it rejected it: paragraph 61. It did so for two main reasons. The first was that a central objective of the reform was to achieve maximum clarity in the law and its application. The C view was taken that a general public interest would make it impossible to achieve such clarity. The second was that its proposals were designed to concentrate the protection of the criminal law on information which demonstrably required its protection in the public interest. It was recognised that what justifies the application of the criminal law is the degree of harm to the public interest which may result: paragraph 14. But the proposed test of harm was not regarded as appropriate in the case of unauthorised disclosure D of information by members or former members of the security and intelligence services: paragraph 41. The view was taken that all such disclosures are harmful to the public interest and ought to be criminal. This was because they reduce public confidence in the services' ability to carry out their duties effectively and loyally, and because they betray the members' duty of secrecy about their work and the trust placed in them by people who E give information to these services. Under its proposals it would be for the courts to decide whether the disclosure of particular information was criminal, and it was to be left to the jury to safeguard the public interest: paragraph 79.

44 These are powerful arguments. But they do not meet the points on which the measure has been criticised, and there is no discussion in the White Paper of the system under which the disclosure of information which F it was in the public interest to know about by former members of the security and intelligence services might be officially authorised. Professor Stone points out that those who support a public interest defence do not argue that it should permit disclosures that are harmful, and he finds it hard to accept that there could be no circumstances in which a public interest in disclosure would outweigh the possible damage that might be caused by it: *Textbook* G *on Civil Liberties and Human Rights*, 3rd ed (2000), para 5.6.6.3. He concludes that the lack of any public interest defence must make the 1989 Act vulnerable.

45 Against this background I would approach the question which lies at the heart of this case from a position of considerable doubt as to whether the problems which it raises have really been faced up to by the legislature. I would place the onus firmly on those who seek to rely on article 10(2) to H show that sections 1(1) and 4(1) are compatible with the Convention right.

46 Two points in particular must be made at the outset. The first is that the construction that must be put on Mr Shayler's explanation for making the unauthorised disclosures with which he has been charged must be the most favourable to him, as he has not yet had an opportunity of giving

evidence. The context is that of a preparatory hearing under section 29 of the Criminal Procedure and Investigations Act 1996, one of the purposes of which is to identify the issues that are likely to be material at the trial. At this stage he is entitled under article 6(2) of the Convention, as well as under the common law, to the presumption of innocence. The second point is indicated by the jurisprudence of the Strasbourg Court. The provisions of section 1(1) and 4(1) of the 1989 Act under which Mr Shayler has been charged must be subjected to very close scrutiny in order to determine whether or not they are compatible.

The explanation

47 When he was charged at Charing Cross police station after his arrest on 21 August 2000 Mr Shayler replied that he did not admit to making any disclosures which were contrary to the criminal law, that any disclosures made by him were made in the public and national interests and that in his defence he would rely on his right of freedom of expression as guaranteed by the common law, the Human Rights Act 1998 and article 10 of the Convention. He had not previously been interviewed, and he has made no other statement to the police.

48 It is agreed in the statement of facts and issues that the bulk of the documents which he disclosed to the "Mail on Sunday" newspaper appeared to relate to security and defence matters and that they were classified at levels ranging from "Classified" to "Top Secret". It is also agreed that certain of these documents included material obtained by or relating to the interception of communications in obedience to warrants issued by the Secretary of State under section 2 of the Interception of Communications Act 1985. But Mr Shayler does not admit that the disclosure of any of these documents was or would be likely to be damaging. It must be assumed in his favour at this stage, for the purposes of the public interest argument, that none of them was of that character. It is alleged that he was paid a substantial sum of money for his activities. But this fact also is not admitted, and I would regard it too as something that has yet to be proved.

49 The public interest which Mr Shayler seeks to assert is the right of the public to be provided with information which will enable it to assess whether the powers given to the security and intelligence services are being abused and whether the services are being run properly. He seeks to draw attention to past incidents of misconduct. His point is that, unless the services are reformed, they will continue to be operated in a manner which creates a danger to the public in respect of life, limb and property. At the heart of the matter is the right of the public to make informed decisions about behaviour on the part of those who are responsible for these services. It is the right of the public to call the Government to account wherever there is dishonesty, malpractice or inefficiency.

50 The disclosures were made by Mr Shayler to the press. I narrate that simply as a fact, not as a ground for criticism. As Black J said in *New York Times Co v United States* (1971) 403 US 713, 739, only a free and unrestrained press can effectively expose deception in government. Its role is to act as the eyes and ears of the people. Facts should not be withheld from it simply on the ground that they are inconvenient or embarrassing. It is not suggested that Mr Shayler attempted to obtain official authorisation before making the disclosures. His position is that there were no effective steps that

A he could have taken through official channels to address his concerns, or that would have resulted in his being authorised to make the disclosures to the press. As the Court of Appeal said, there must be some doubt as to whether authorisation would have been given by the authorities if he had asked for it: [2001] 1 WLR 2206, 2216D, para 23. I think that it is equally doubtful whether all the ends which he was seeking to achieve could have been B achieved by addressing his concerns to those to whom he could address them without being officially authorised.

51 I would approach this case therefore on the basis that Mr Shayler may have good grounds for arguing that it was in the public interest that the matters which were of concern to him should be disclosed, and that the fact that he decided to disclose his concerns to the press is not in itself a ground for criticism.

C

The Human Rights Act 1998

52 The context for the discussion about the compatibility of sections 1(1) and 4(1) of the 1989 Act with article 10 of the Convention can be stated quite simply. So far as it is possible to do so, these provisions must be read and given effect in a way that is compatible with Convention rights: D Human Rights Act 1998, section 3(1). The word "must" indicates, as Lord Steyn said in *R v A (No 2)* [2002] 1 AC 45, that the court must strive to read the statute in a way that is compatible. But the same word is also qualified by the phrase "so far as it is possible to do so". The obligation, powerful as it is, is not to be performed without regard to its limitations: *R v Lambert* [2002] 2 AC 545, 585, para 79. The techniques of judicial interpretation on the one hand and of legislation on the other are different, and this fact must E be respected. If compatibility cannot be achieved without overruling decisions which have already been taken on the very point at issue by the legislator, or if to do so would make the statute unintelligible or unworkable, it will be necessary to leave it to Parliament to amend the statute. The only option left to the court will be to make a declaration of incompatibility under section 4(2) of the Act.

F **53** Mr Robertson for Mr Shayler did not suggest that a public interest defence as such could be read into sections 1(1) and 4(1) of the 1989 Act. He did suggest that the word "lawful" should be inserted into sections 1(9) and 4(3)(a) in a way which might achieve this result. But Moses J said that it was not possible to interpret the 1989 Act in this way: see paras 78–81 of his judgment. Mr Crow for the Secretary of State joined with the respondent in G submitting that, if the Act is incompatible with Mr Shayler's Convention rights, it cannot be interpreted compatibly with those rights by virtue of section 3 of the 1998 Act. I agree that, if the legislation is incompatible with Mr Shayler's Convention rights, the position whether it should be amended so as to remove the incompatibility must be left to Parliament. This means that the issue of incompatibility can be addressed directly in this case, without the distraction of trying to resolve the issue by means of the H technique of judicial interpretation.

The Strasbourg jurisprudence

54 Article 10(1) of the Convention states that the right to freedom of expression includes the right to impart information and ideas without

interference by public authorities. Article 10(2) states, by way of qualification, that the exercise of this right, "since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary . . . in the interests of national security . . ."

55 The wording of article 10(2) as applied to this case indicates that any such restriction, if it is to be compatible with the Convention right, must satisfy two basic requirements. First, the restriction must be "prescribed by law". So it must satisfy the principle of legality. The second is that it must be such as is "necessary" in the interests of national security. This raises the question of proportionality. The jurisprudence of the European Court of Human Rights explains how these principles are to be understood and applied in the context of the facts of this case. As any restriction with the right to freedom of expression must be subjected to very close scrutiny, it is important to identify the requirements of that jurisprudence before undertaking that exercise.

56 The principle of legality requires the court to address itself to three distinct questions. The first is whether there is a legal basis in domestic law for the restriction. The second is whether the law or rule in question is sufficiently accessible to the individual who is affected by the restriction, and sufficiently precise to enable him to understand its scope and foresee the consequences of his actions so that he can regulate his conduct without breaking the law. The third is whether, assuming that these two requirements are satisfied, it is nevertheless open to the criticism on the Convention ground that it was applied in a way that is arbitrary because, for example, it has been resorted to in bad faith or in a way that is not proportionate. I derive these principles, which have been mentioned many times in subsequent cases, from *The Sunday Times v United Kingdom* 2 EHRR 245, para 49 and also from *Winterwerp v The Netherlands* (1979) 2 EHRR 387, 402–403, para 39 and *Engel v The Netherlands (No 1)* 1 EHRR 647, 669, paras 58–59, which were concerned with the principle of legality in the context of article 5(1); see also *A v The Scottish Ministers* 2001 SLT 1331, 1336–1337.

57 The phrase "necessary . . . in the interests of national security" has to be read in the light of article 18, which provides that the restrictions permitted under the Convention must not be applied for any purpose other than those for which they have been prescribed. The word "necessary" in article 10(2) introduces the principle of proportionality, although the word as such does not appear anywhere in the Convention: see *Handyside v United Kingdom* 1 EHRR 737, 753–755, paras 48–49. In paragraph 49 of its judgment the court said:

> "The court's supervisory functions oblige it to pay the utmost attention to the principles characterising a 'democratic society'. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man . . . This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued."

58 Applied to the circumstances of this case, this means that a restriction on the disclosure of information cannot be said to be "necessary"

in the interests of national security unless (a) "relevant and sufficient reasons" are given by the national authority to justify the restriction, (b) the restriction on disclosure corresponds to a "pressing social need" and (c) it is "proportionate to the legitimate aim pursued": *The Sunday Times v United Kingdom* 2 EHRR 245, 277–278, para 62.

59 The principle involves a question of balance between competing interests. But it is important to appreciate that there is a process of analysis that must be carried through. The starting point is that an authority which seeks to justify a restriction on a fundamental right on the ground of a pressing social need has a burden to discharge. There is a burden on the state to show that the legislative means adopted were no greater than necessary: *R v Lambert* [2002] 2 AC 545, 571H per Lord Steyn. As Sir Sydney Kentridge QC observed in his Tanner Lecture at Oxford, "Human Rights: A Sense of Proportion", 26 February 2001: " 'Necessary' does not mean indispensable, but it does connote the existence of a pressing social need . . . It is only on the showing of such need that the question of proportionality or 'balancing' should arise."

60 The European Court has not identified a consistent or uniform set of principles when considering the doctrine of proportionality: see Richard Clayton, "Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle" [2001] EHRLR 504, 510. But there is a general international understanding as to the matters which should be considered where a question is raised as to whether an interference with a fundamental right is proportionate.

61 These matters were identified in the Privy Council case of *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 by Lord Clyde. He adopted the three stage test which is to be found in the analysis of Gubbay CJ in *Nyambirai v National Social Security Authority* [1996] 1 LRC 64, where he drew on jurisprudence from South Africa and Canada: see also *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 547A–B, per Lord Steyn; *R (Pretty) v Director of Public Prosecutions (Secretary of State for the Home Department intervening)* [2002] 1 AC 800, 844A–C. The first is whether the objective which is sought to be achieved—the pressing social need—is sufficiently important to justify limiting the fundamental right. The second is whether the means chosen to limit that right are rational, fair and not arbitrary. The third is whether the means used impair the right as minimally as is reasonably possible. As these propositions indicate, it is not enough to assert that the decision that was taken was a reasonable one. A close and penetrating examination of the factual justification for the restriction is needed if the fundamental rights enshrined in the Convention are to remain practical and effective for everyone who wishes to exercise them.

Further analysis: legality

62 It is plain that the first requirement of the principle of legality is satisfied in this case, because the restrictions on the fundamental right are set out in sections 1 and 4 of the 1989 Act. We are dealing here with a statutory scheme for the protection of information relating to the security and intelligence services. In order to see whether the second and third requirements relating to accessibility, precision and lack of arbitrariness are satisfied it is necessary to look more closely at that scheme.

63 Although there is no general public interest defence, the restriction on disclosure is certainly not a blanket restriction. The offences which are created by section 1(1) and section 4(1) of the 1989 Act both relate only to the disclosure of information, documents or other articles to which those sections apply "without lawful authority". The meaning of the phrase "lawful authority" is explained by section 7, which defines the circumstances in which the disclosure of any information to which the Act applies may be made with lawful authority. The relevant provision in the case of someone in Mr Shayler's position, who is no longer a Crown servant as he is no longer a member of the security or intelligence services, is section 7(3). It provides:

> "For the purposes of this Act a disclosure made by any other person is made with lawful authority if, and only if, it is made—(a) to a Crown servant for the purposes of his functions as such; or (b) in accordance with an official authorisation."

64 The expression "Crown servant" is defined in section 12(1). It includes a minister of the Crown, any person employed in the civil service of the Crown, any constable and any person who is a member or employee of a prescribed body or a body of a prescribed class or is the holder of a prescribed office. The word "prescribed" means prescribed by an order made for the purposes of that subsection: see section 12(3). Opportunities also exist for disclosure through their civil service staff to the Security Service Commissioner appointed under section 4 of the Security Service Act 1989, the Commissioner for the Secret Intelligence Service under section 8 of the Intelligence Services Act 1994, the Commissioner appointed under section 7 of the Interception of Communications Act 1985 and the Intelligence and Security Committee. I do not think that a person who has read the relevant provisions of these statutes and the orders made under them can be said to have been left in any doubt as to wide range of persons to whom an authorised disclosure may be made for the purposes of their respective functions without having first obtained an official authorisation. Section 2(2)(b) of the Security Service Act 1989 imposes a duty on the Director General of the Security Service to secure that disclosures are made for the discharge of the service's functions. In *Esbester v United Kingdom* 18 EHRR CD 72, 74 the Commission rejected an argument that the fact that the guidelines relating to the Director General's supervision of information obtained by the security service were unpublished meant that they were not sufficiently accessible to the individual.

65 In this connection it should be noted that Mr Shayler signed a declaration on leaving the service in which he acknowledged that his attention had been drawn to the Official Secrets Acts and the consequences that might follow any breach, and that he understood he was liable to be prosecuted if he disclosed either orally or in writing any information or material which had come into his possession as a result of his employment as a Crown servant on terms requiring it to be held in confidence unless he had previously obtained the official sanction in writing of the service by which he was appointed. He also acknowledged that to obtain such sanction "two copies of the manuscript of any article, book, play, film, speech or broadcast, intended for publication, which contains such information or material shall be submitted to the Director General". In fact, the class of person from

A whom official authorisation may be obtained in terms of section 7(5) of the Official Secrets Act 1989 is very wide.

66 Whether making use of the opportunities of disclosure to Crown servants would have been a practical and effective means of addressing the points which Mr Shayler wished to raise is another matter. The alternative, which requires the seeking of an official authorisation duly given by a Crown servant, is not further explained in the Act. It too requires more careful
B examination. I shall have to return to these points once I have set the scene for their examination more precisely.

Further analysis: proportionality

67 The objective which is sought to be achieved by the Act is to safeguard national security by preventing the disclosure to unauthorised
C persons of information relating to the work of the security and intelligence services. Long before the horrific events of 11 September 2001 in New York and Washington it was recognised by the European Court of Human Rights that democratic societies are threatened by highly sophisticated forms of espionage and by terrorism. The court held that they have to be able to take measures which will enable them to counter such threats effectively: *Klass v*
D *Federal Republic of Germany* 2 EHRR 214, para 48. But it stressed in the same case that it must be satisfied that there exist adequate and effective guarantees that such measures will not be abused: paragraph 50. An assessment of their adequacy and effectiveness depends on all the circumstances of the case, such as the scope and duration of the possible measures, the grounds required for ordering such measures, the authorities competent to permit, carry out and supervise such measures, and the kind of
E remedy provided by the national law.

68 So it is not enough for the authorities to show in general terms that a restriction on disclosure is needed in the interests of national security. There is, of course, an obvious risk that unauthorised disclosures will impair the efficiency of the work done by the security and intelligence services. Lives may be put at risk, sources of information compromised, operations
F undermined and vital contacts with friendly foreign intelligence agencies terminated. These points need not be elaborated. It is clear that the state is entitled to impose restrictions on the disclosure of information by members or former members of those services who have had access to information relating to national security, having regard to their specific duties and responsibilities and the obligation of discretion by which they are bound: *Leander v Sweden* 9 EHRR 433, para 59; *Hadjianastassiou v Greece*
G 16 EHRR 219, paras 45–47. The margin of appreciation which is available to the contracting states in assessing the pressing social need and choosing the means of achieving the legitimate aim is a wide one: *Leander v Sweden*, para 59; *Esbester v United Kingdom* 18 EHRR CD 72, 74. The special nature of terrorist crime, the threat which it presents to a democratic society and the exigencies of dealing with it must also be brought into account:
H *Murray v United Kingdom* 19 EHRR 193, para 47.

69 The problem is that, if they are to be compatible with the Convention right, the nature of the restrictions must be sensitive to the facts of each case if they are to satisfy the second and third requirements of proportionality. The restrictions must be rational, fair and not arbitrary, and they must impair the fundamental right no more than is necessary.

70 As I see it, the scheme of the Act is vulnerable to criticism on the ground that it lacks the necessary degree of sensitivity. There must, as I have said, be some doubt as to whether a whistle-blower who believes that he has good grounds for asserting that abuses are being perpetrated by the security or intelligence services will be able to persuade those to whom he can make disclosures to take his allegations seriously, to persevere with them and to effect the changes which, if there is substance in them, are necessary. The integrity and energy of Crown servants, as defined in section 12(1) of the Official Secrets Act 1989, of the commissioners and members of the Intelligence and Security Committee is not in question. But one must be realistic, as the Court of Appeal recognised. Institutions tend to protect their own and to resist criticism from wherever it may come. Where this occurs it may require the injection of a breath of fresh air from outside before institutional defects are recognised and rectified. On the other hand, the sensitivity and effectiveness of this system has not been tested, as Mr Shayler chose not to make use of any of these opportunities.

71 The official authorisation system provides the final opportunity. It too has not been tested by Mr Shayler. But it must be effective, if the restrictions are not to be regarded as arbitrary and as having impaired the fundamental right to an extent that is more than necessary. Here too there must be some doubt as to its adequacy. I do not regard the fact that the Act does not define the process of official authorisation beyond referring in section 7(5) to the persons by or on behalf of whom it is to be given as a serious defect. The European Court of Justice has held that article 17 of the Staff Regulations, which requires an official of the Commission of the European Communities to obtain prior permission for the publication of material dealing with the work of the Commission, is compatible with the right of freedom of expression in article 10: *Connolly v Commission of the European Communities* (Case C-274/99) [2001] ECR I-1611. Members and former members of the security and intelligence services are unlikely to be in doubt as to whom they should turn for this purpose, and common sense suggests that no further formalities require to be laid down: see paragraphs 64–65 above. The defect lies in the fact that the Act does not identify the criteria that officials should bear in mind when taking decisions as to whether or not a disclosure should be authorised.

72 But the scheme of the Act does not stand alone. Any decision to decline an official authorisation will be subject to judicial review. The European Court of Human Rights has recognised, in the context of a complaint of lack of impartiality in breach of the article 6(1) Convention right, the value which is to be attached to a process of review by a judicial body that has full jurisdiction and provides the guarantees of that article: *Bryan v United Kingdom* (1995) 21 EHRR 342, 360–361, paras 44 and 46; *Kingsley v United Kingdom* The Times, 9 January 2001; *Porter v Magill* [2002] 2 AC 357, 490A–F. I would apply that reasoning to the present case. An effective system of judicial review can provide the guarantees that appear to be lacking in the statute. Two question then arise. First, there is a procedural point. The list of Crown servants in section 12(1), to whom disclosures may be made under section 7(3)(a) without an official authorisation, does not include those to whom the applicant may wish to turn for legal assistance. The second is a point of substance. Is the process of

judicial review capable of providing the intensity of review that is needed to satisfy the requirements of the Convention right?

73 The procedural point can, I think, be met by the authorisation system itself with judicial review with regard to it as the ultimate safeguard. Each case will have to be taken on its own facts, but the basic principle is that everyone is entitled to a lawyer of his own choosing in the determination of his civil rights and obligations or of any criminal charge against him. This is a matter of express provision in article 6(3)(c) in the case of a person who has been charged with a criminal offence. At the stage when authorisation is being sought the matter to be determined still lies within the scope of the person's civil rights and obligations. But he is nevertheless entitled to a fair hearing under article 6(1). I think that it follows that he has an implied right to legal assistance of his own choosing, especially if his dispute is with the state. Access to legal advice is one of the fundamental rights enjoyed by every citizen under the common law.

74 It was suggested to your Lordships that, if the matter was particularly sensitive, authorisation could be given on condition that the person who is to provide legal assistance agrees to be notified under section 1(6) of the Act that he is subject to the provisions of section 1(1). That solution carries with it the risk of criminal sanctions in the event of any breach of the statutory restriction, and it would be open to objection on Convention grounds if freedom of choice was at risk of being inhibited. But the same objection is unlikely to be present if all that is sought is the giving of undertakings sufficient to ensure that any information is properly safeguarded.

75 As for the point of substance, it has now been recognised that, although there is an overlap between them, a greater intensity of review is available under the proportionality approach to issues relating to alleged breaches of Convention rights than is the case where the review is conducted on the traditional *Wednesbury* grounds: see *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, per Lord Bingham of Cornhill, at p 546A, and Lord Steyn, at p 547E. As Lord Steyn explained in that case, at p 547E–G, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. It may also require attention to be directed to the relative weight which is to be accorded to different interests and considerations. It is, above all, important that cases involving Convention rights are analysed in the right way.

76 As Lord Steyn acknowledged in his judgment in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 546, much useful guidance on the difference between the traditional grounds of judicial review and the proportionality approach can be found in the work of academic public lawyers on this subject. Professor David Feldman points out in his essay, "Proportionality and the Human Rights Act 1998", in *The Principle of Proportionality in the Laws of Europe* edited by Evelyn Ellis (1999), pp 123–124 that it is necessary first clearly to understand the place which the doctrine of proportionality occupies in the structure of analysis under the Human Rights Act 1998: see also *David Feldman, Civil Liberties and Human Rights in England and Wales*, 2nd ed (2002), pp 55–57. As Professor Feldman explains, the principle is relevant only at a very late stage in the analysis of a case, when the court has decided that that a Convention

right has been interfered with and that the justification offered by the State has a basis in domestic law and was or may have been for a legitimate purpose. At the end of the process of reasoning, where there is doubt about the justifiability of an established infringement of a Convention right, the principle allows the court to balance the reasons for and against regarding the infringement as justifiable. At p 134 of his essay he made these points which have a particular bearing on the present case:

> "In some cases, then, no balancing of rights against security will be permitted. Even where non-absolute rights are in issue, the careful balancing required by a doctrine of proportionality should become a major check on the acceptability of claims to the shield of national security, both in relation to the existence of threats to national security and their significance in relation to the interference with rights in the particular case. There will be some cases in which the national security considerations are so sensitive and important that the courts will still decline to intervene, but the doctrine of proportionality should be able to operate (giving appropriate but not unquestioning weight to national security) whenever the court is not satisfied that it ought to treat the particular type of national security consideration as being of such overriding sensitivity and importance as to make the decision in respect of it essentially non-justiciable."

77 Professor Jeffrey Jowell QC has also emphasised the importance of the carefully constructed set of criteria which the process of analysis involves. In "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] PL 671, 679 he explains that a test for proportionality is more sophisticated than that undertaken in English administrative law. As he puts it, the administrative law test is not rooted in any particular criteria but is, by and large, a test as to whether relevant considerations have been properly weighed or balanced. As for proportionality, it is a test of constitutionality. It is both too simple and wrong to equate it with a merits test, but it involves more than a heightened scrutiny of the decision in question:

> "It starts by asking whether the breach is justifiable in terms of the aims it seeks. Some Convention rights can only be violated for a specific purpose (such as national security) and therefore other aims would not be legitimate, whatever their rationale. It then proceeds to consider whether in reality those aims are capable of being achieved. Spurious or impractical aims will not suffice. It then goes on to consider whether less restrictive means could have been employed. The breach must be the minimum necessary. Finally it asks whether the breach is necessary (not merely desirable or reasonable) in the interest of democracy. Only a 'pressing social need' can justify the breach of a fundamental right."

78 In *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, 543, para 138 the European Court said that the threshold of review had been placed so high in that case by the High Court and the Court of Appeal that it effectively excluded any consideration by the domestic courts of the question whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order

A claims pursued by the Ministry of Defence policy which placed a limitation on homosexuals in the army. It is now clear that, if the approach which was explained and approved in *Daly* [2001] 2 AC 532 is adopted, the more precise method of analysis which is provided by the test of proportionality will be a much more effective safeguard.

79 So I would hold that, where a refusal of official authorisation under section 7(3)(b) to disclose information is in issue, the court should address
B the following questions. (1) What, with respect to that information, was the justification for the interference with the Convention right? (2) If the justification was that this was in the interests of national security, was there a pressing social need for that information not to be disclosed? And (3) if there was such a need, was the interference with the Convention right which was involved in withholding authorisation for the disclosure of that
C information no more than was necessary. This structured approach to judicial control of the question whether official authorisation should or should not be given will enable the court to give proper weight to the public interest considerations in favour of disclosure, while taking into account at the same time the informed view of the primary decision maker. By adopting this approach the court will be giving effect to its duty under section 6(1) of the Human Rights Act 1998 to act in a way that is compatible
D with the Convention rights: see paragraph 58 above.

Where the balance lies

80 The question is whether the scheme of the Act, safeguarded by a system of judicial review which applies the test of proportionality, falls within the wide margin of discretion which is to be accorded to the
E legislature in matters relating to national security especially where the Convention rights of others such as the right to life may be put in jeopardy: *Leander v Sweden* 9 EHRR 433, para 59; *Chassagnou v France* (1999) 29 EHRR 615, paras 112–113. I do not think that it can be answered without taking into account the alternatives.

81 It has not been suggested that the disclosure of information relating
F to the work of the security and intelligence services should be unrestricted. The European Court has held that a democratic state is entitled to impose a duty of discretion on civil servants, on account of their status provided that a fair balance is struck between their fundamental right to freedom of expression and the legitimate interests of the state: *Vogt v Germany* 21 EHRR 205, para 53. On the one hand there is the system of control laid down by section 7(3) the Act, which permits disclosure to Crown servants as
G defined in section 12(1) for the purposes of their functions as such but not otherwise unless the disclosure is officially authorised. As part of this system undertakings to abide by it are given by members of the security and intelligence services on taking up their employment, so that they are left in no doubt about the restrictions. On the other there is a system of individual decision as to what it is in the public interest to disclose. This is subject to
H control of wider publication by the court on the grounds discussed in *Attorney General v Guardian Newspapers (No 2)* [1990] 1 AC 109. It would be subject also to the imposition of the criminal sanction, if there was a general defence to an unauthorised disclosure on public interest grounds and the prosecution could prove that there was no public interest to be served by the disclosure.

82 It was suggested in the course of the argument that a contrast should be drawn between judicial review of a decision to withhold authorisation and the factors to be taken into account where an injunction is sought to prevent the publication of disclosed material. Reference was made to Lord Griffiths's speech in *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 273A–B where he said that, while the court cannot brush aside claims that publication will imperil national security, it must examine and weigh against the countervailing public interest of freedom of speech and the right of people in a democracy to be informed by a free press. The suggestion was that judicial review on traditional *Wednesbury* grounds would fall short of the degree of scrutiny which the court can bring to bear in injunction cases. But once the full scope and intensity of judicial review of individual decisions to withhold official authorisation on proportionality grounds is recognised, there is parity on this point between the two systems. The essential difference between the two systems is between the taking of decisions on public interest grounds before disclosure on the one hand and taking those decisions after disclosure on the other.

83 It is plain that these two alternatives are not exactly two sides of the same coin. One system of control depends ultimately on judicial review of decisions taken beforehand by administrators. Control under the other system would depend ultimately on decisions taken after the event by judges and juries in the criminal process. There is a choice to be made, and it seems to me that the choice of a system which favours official authorisation before disclosure subject to judicial review on grounds of proportionality is within the margin of discretion which ought to be accorded to the legislature.

84 In favour of that choice there are a number of important factors. However well intentioned he or she may be, a member or former member of the security or intelligence services may not be equipped with sufficient information to understand the potential impact of any disclosure. It may cause far more damage than the person making the disclosure was ever in a position to anticipate. The criminal process risks compounding the potential for damage to the operations of these services, if the prosecution have to prove beyond reasonable doubt the damaging nature of the disclosures.

85 As Mr Crow for the Secretary of State pointed out, there is for this reason a serious risk that disclosures of security and intelligence material would go unprosecuted if the strict controls of section 1(1) and 4(1) of the 1989 Act were not in place. This is not a new point, as it was mentioned in the White Paper: see paragraph 39. And it has to be borne in mind that a successful prosecution will do nothing to remedy the damage that a disclosure of security or intelligence information may have caused. Damage already done may well be irreparable, and the gathering together and disclosure of evidence to prove the nature and extent of the damage may compound its effects to the further detriment of national security. I think therefore that there is in the end a strong case for insisting upon a system which provides for the matter to be addressed by requiring that official authorisation be obtained by former members of the security and intelligence services, if necessary after judicial review of any refusal on grounds of proportionality, before any disclosures are made by them other than to Crown servants of information, documents or other articles to which sections 1(1) and 4(1) of the Act apply.

Conclusion

86 For these reasons, and for those given by my noble and learned friend, Lord Bingham of Cornhill, with which I agree, I would hold that the provisions of the 1989 Act under which Mr Shayler has been charged are not incompatible with his article 10 Convention right. I would dismiss the appeal.

LORD HUTTON

87 My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Bingham of Cornhill. For the reasons which he gives I agree that the judge, Moses J, was fully entitled to hold a preparatory hearing pursuant to section 29 of the Criminal Procedure and Investigations Act 1996 and that the judge acted within his powers in the course of that hearing. I further agree that on ordinary principles of construction sections 1 and 4 of the Official Secrets Act 1989 do not permit a defendant to raise a defence that the information which he disclosed without lawful authority was disclosed by him in the public interest when those sections are considered without regard to article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

88 Therefore I turn to consider the principal issue which arose before your Lordships, which is whether this construction infringes the provisions of article 10. Article 10(1) provides:

> "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."

89 The appellant submitted that the prohibitions imposed by sections 1 and 4 and his prosecution under those sections infringe his right to impart information about the security service of which he was formerly a member without interference by public authority. He further submitted that the infringement is the more serious because the information which he disclosed was given by him to the press, and the freedom of the press to receive information of public interest and to publish it is one of the great bulwarks of democracy.

90 I commence the consideration of these submissions and the submissions of the Crown by observing, as did Bingham LJ in *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 213 (the Spycatcher Case), that they represent a clash between two competing aspects of the public interest. On the one hand there is the assertion by the appellant of the public interest in freedom of speech and the exercise of that freedom by those who give information to the press so that the press may publish it and comment on it for the public benefit. On the other hand there is the reliance by the Crown on the public interest in the maintenance of the secrecy of the work of the security service so that it can operate effectively to protect national security. Both interests are valid and important and it is for the courts to resolve the clash of interests and to decide how the balance is to be struck.

91 In carrying out this function in the present case the courts must look for guidance to the terms of article 10 and also to the decisions of the European Court of Human Rights in applying that article to the cases which have come before it.

92 Article 10 itself recognises in express terms that there will be clashes between the right to impart information without interference by public authority and the interests of national security and that in some circumstances the interests of national security must prevail and article 10(2) provides:

> "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The wording of article 10(2) directs attention to a number of matters and requirements and I propose to consider them in turn.

Duties and responsibilities

93 Article 10(2) recognises that the exercise of the freedoms set out in article 10(1) carries with it duties and responsibilities which may give rise to restrictions. It is clear that in its decisions determining whether restrictions on the freedom of expression are justified under article 10(2) the European Court recognises that the particular position which a person holds and the work which he carries out may impose special duties and responsibilities upon him. In *Engel v Netherlands (No 1)* 1 EHRR 647 the European Court found there had been no violation of article 10. In that case two soldiers had been committed to a disciplinary unit for having taken part in the publication and distribution of a writing tending to undermine discipline. The court stated in its decision, at p 625, para 100:

> "The court doubtless has jurisdiction to supervise, under the Convention, the manner in which the domestic law of the Netherlands has been applied in the present case, but it must not in this respect disregard either the particular characteristics of military life (paragraph 54 in fine above), the specific 'duties' and 'responsibilities' incumbent on members of the armed forces, or the margin of appreciation that article 10(2) like article 8(2), leaves to the contracting states."

The court stated, at p 685, paras 102–103:

> "Mr Dona and Mr Schul allege a dual breach of articles 10 and 14 taken together. They stress that a civilian in the Netherlands in a comparable situation does not risk the slightest penalty. In addition, they claim to have been punished more severely than a number of Netherlands servicemen, not belonging to the VVDM, who had also been prosecuted for writing or distribution material likely to undermine military discipline.

A "On the first question, the court emphasises that the distinction at issue is explicable by the differences between the conditions of military and of civil life and, more specifically, by the 'duties' and 'responsibilities' peculiar to members of the armed forces in the field of freedom of expression."

94 In *Hadjianastassiou v Greece* 16 EHRR 219 the applicant, a serving
B officer, was in charge of a project for the design and production of a guided missile and he submitted a report to the air force on the missile on which he had been working. The following year he communicated to a private company another technical study on guided missiles which he had prepared himself. He was convicted and sentenced for having disclosed military information relating to the design and produce of guided missiles to a private
C company. The domestic court concluded that although the disclosed study differed from the one used by the air force, nonetheless some transfer of technical knowledge had inevitably occurred. The European Court found that there had been no violation of article 10. The court stated in its decision, at p 240, paras 46–47:

"It is also necessary to take into account the special conditions attaching to military life and the specific 'duties' and 'responsibilities'
D incumbent on the members of the armed forces. The applicant, as the officer at the KETA in charge of an experimental missile programme, as bound by an obligation of discretion in relation to anything concerning the performance of his duties.

"In the light of these considerations, the Greek military courts cannot be said to have overstepped the limits of the margin of appreciation which
E is to be left to the domestic authorities in matters of national security. Nor does the evidence disclose the lack of a reasonable relationship of proportionality between the means employed and the legitimate aim pursued."

95 In the present case also there were special conditions attached to life in the security service and there were special duties and responsibilities
F incumbent on the appellant whereby, unlike the great majority of other citizens, he was prohibited by statute from disclosing information about his work or about the actions of others engaged in the same work. Moreover these duties and responsibilities were specifically acknowledged and accepted by the appellant. The agreed statement of facts in the present case states:

G "The appellant was a member of the security service ('the service') from November 1991 to October 1996. At the outset of his service he signed an Official Secrets Act 1989 ('OSA') declaration acknowledging the confidential nature of documents and other information relating to security or intelligence, defence or international relations that might come into his possession as a result of his position; he also signed an acknowledgement that he was under a contractual obligation not to
H disclose, without authority, any information that came into his possession by virtue of his employment. On leaving the service he signed a further OSA declaration acknowledging that the provisions of the Act continued to apply to him notwithstanding the termination of his appointment, and that the same requirements of confidentiality continued to apply to

any information, documents or other articles relating to security or intelligence, defence or international relations which might have come into his possession as a result of his previous employment."

Therefore in considering whether the restrictions contained in sections 1 and 4 of the 1989 Act were permissible under article 10(2) it is relevant to take into account that the appellant was subject to particular duties and responsibilities arising from his membership of the security service.

Such restrictions or penalties as are prescribed by law

96 In my opinion the restrictions and penalties to which the appellant was subject are prescribed by law. The terms of sections 1 and 4 of the 1989 Act are clear. Each section prohibits the disclosure of information "without lawful authority" and section 7(3) of the Act provides:

"For the purposes of this Act a disclosure made by any other person [which includes a former member of the security service] is made with lawful authority if, and only if, it is made—(a) to a Crown servant for the purposes of his functions as such; or (b) in accordance with an official authorisation."

Section 12(1) defines who is a "Crown servant":

"(1) In this Act 'Crown servant' means—(a) a Minister of the Crown; (b) a person appointed under section 8 of the Northern Ireland Constitution Act 1973 (the Northern Ireland Executive etc); (c) any person employed in the civil service of the Crown, including Her Majesty's Diplomatic Service, Her Majesty's Overseas Civil Service, the civil service of Northern Ireland and the Northern Ireland Court Service; (d) any member of the naval, military or air forces of the Crown, including any person employed by an association established for the purposes of [Part XI of the Reserve Forces Act 1996]; (e) any constable and any other person employed or appointed in or for the purposes of any police force (including a police force within the meaning of the Police Act (Northern Ireland) 1970); (f) any person who is a member or employee of a prescribed body or a body of a prescribed class and either is prescribed for the purposes of this paragraph or belongs to a prescribed class of members or employees of any such body; (g) any person who is the holder of a prescribed office or who is an employee of such a holder and either is prescribed for the purposes of this paragraph or belongs to a prescribed class of such employees."

Section 13(1) defines the meaning of "prescribed": "'prescribed' means prescribed by an order made by the Secretary of State." And section 7(5) defines the meaning of "official authorisation":

"In this section 'official authorisation' and 'official restriction' mean, subject to subsection (6) below, an authorisation or restriction duly given or imposed by a Crown servant or government contractor or by or on behalf of a prescribed body or a body of a prescribed class."

It is also relevant to note that the declaration which the appellant signed on leaving the security service stated that in order to obtain the official sanction of the service to publish any material two copies of the manuscript of the

work containing such information should be submitted to the Director General.

Necessary in a democratic society in the interests of national security

97 The judgments of the European Court have established that these words contain two requirements. First, the restrictions on the imparting of information must pursue a legitimate aim and, secondly, the requirements must be necessary in a democratic society. In addition the reasons given by the national authority to justify the restrictions must be relevant and sufficient under article 10(2): see *The Sunday Times v United Kingdom* 2 EHRR 245, para 62, *Barthold v Germany* (1985) 7 EHRR 383, para 55 and *Lingens v Austria* (1986) 8 EHRR 407, para 39.

A legitimate aim

98 The function of the security service is to protect national security against threats from espionage, terrorism and sabotage and from actions intended to overthrow or undermine parliamentary democracy (see section 1 of the Security Service Act 1989). In order to carry out this function effectively I consider it to be clear that the security service must operate under and be protected by a cloak of secrecy. This view is in conformity with the judgment of the European Court in *Vereniging Weekblad Bluf! v The Netherlands* 20 EHRR 189 which related to the restriction on a publication of a report prepared by the BVD, the internal security service of the Netherlands. The court stated in its decision, at pp 201–202, paras 35–36:

> "The court recognises that the proper functioning of a democratic society based on the rule of law may call for institutions like the BVD which, in order to be effective, must operate in secret and be afforded the necessary protection. In this way a state may protect itself against the activities of individuals and groups attempting to undermine the basic values of a democratic society.
>
> "In view of the particular circumstances of the case and the actual terms of the decisions of the relevant courts, the interferences were unquestionably designed to protect national security, a legitimate aim under article 10(2)."

Therefore I consider that the restrictions imposed by sections 1 and 4 of the 1989 Act were imposed for a legitimate aim.

Necessary in a democratic society

99 As regards the second requirement, the judgments of the European Court have also established that a restriction which is necessary in a democratic society must be one which is required by a pressing social need and is proportionate to the legitimate aim pursued. On these issues the appellant advanced two principal arguments. One argument was that whilst there are many matters relating to the work of the security service which require to be kept secret in the interests of national security, there are other matters where there is no pressing need for secrecy and where the prohibition of disclosure and the sanction of criminal punishment are a disproportionate response. An example of such a matter would be where a political figure in the United Kingdom had been under surveillance for a

period a considerable number of years ago. It was submitted that the disclosure of such information could not constitute any impairment of national security or hinder in any way the efficient working of the security service.

100 I am unable to accept this submission. It has been recognised in decisions in this jurisdiction that the disclosure of any part of the work or activities of the security service by a member or past member would have a detrimental effect upon the service and its members because it would impair the confidence of the members in each other and would also impair the confidence of those, whether informers or the intelligence services of other states, who would entrust secret information to the security service of the United Kingdom on the understanding and expectation that such information would never be revealed to the outside world. As Lord Nicholls of Birkenhead stated in *Attorney General v Blake* [2001] 1 AC 268, 287:

> "It is of paramount importance that members of the service should have complete confidence in all their dealings with each other, and that those recruited as informers should have the like confidence. Undermining the willingness of prospective informers to co-operate with the services, or undermining the morale and trust between members of the services when engaged on secret and dangerous operations, would jeopardise the effectiveness of the service. An absolute rule against disclosure, visible to all, makes good sense."

101 Moreover the appellant's submission is advanced on the basis that it would be for the individual member or past member of the security service who wished to make public a particular piece of information to decide himself whether its disclosure would or would not be damaging to the work of the service. But such a decision could not safely be left to that individual because he may not have a full appreciation of how that piece of information fits into a wider picture and of what effect the disclosure might have on other aspects of the work of the service of which he is unaware or of which he lacks a full appreciation. Moreover there is the risk that on some occasions the individual making the decision may be motivated in varying degrees by desire for money or by spite or by some similar emotion.

102 The second submission advanced by the appellant was that the restrictions contained in sections 1 and 4 of the 1989 Act were too wide and were therefore disproportionate because they prevented a member or past member of the security service from revealing to the public through the press or other sections of the media information that the security service had engaged in illegal activities or that its work was conducted in an incompetent and disorganised way. The appellant submitted that the disclosure of such matters was required in the public interest, because unless such matters were disclosed the public would be unable to demand that steps should be taken to stop such conduct and to ensure that the work of the service was lawfully and competently carried out.

103 In answer to this submission the Crown made the reply that under section 7(3)(a) there are a considerable number of senior and responsible Crown servants to whom the appellant could have gone with his concerns and with a request that the conduct of which he complained should be investigated and that, if established, appropriate steps should be taken to punish it or to stop it. If he were concerned about unlawful activity he could

have given information to the Attorney General, the Director of Public Prosecutions or the Commissioner of the Metropolitan Police. If he were concerned about incompetence or maladministration he could have brought his concerns to any one of the wide range of Crown servants, including Government ministers and senior civil servants who are listed in section 12(1) of the 1989 Act.

104 The appellant's response to this reply by the Crown was that if members of the security service have deliberately carried out illegal actions (it may be with the approval of their superior officers) which they consider to be necessary to further the work of the service it is probable that complaints to law enforcement officers or to senior civil servants or to a Government minister would not be acted upon or would be met by the eventual response that the activities complained of had been investigated and that no wrongdoing had been discovered. He also submitted that senior civil servants or ministers might be reluctant to investigate complaints of incompetence or maladministration.

105 In my opinion these arguments should be rejected. In *Klass v Federal Republic of Germany* 2 EHRR 214, where the applicants claimed that surveillance of letters and telephone conversations constituted a violation of article 8, the state claimed that the surveillance was necessary in a democratic state in the interests of national security and for the prevention of disorder and crime, and that the administrative procedures in place were designed to ensure that surveillance was not ordered improperly. The applicants advanced the argument, similar to the argument advanced by the present appellant, that the safeguards were inadequate because they did not provide protection against dishonesty or negligence on the part of the supervising officials. The European Court rejected this submission stating, at pp 236–237, para 59:

> "Both in general and in relation to the question of subsequent notification, the applicants have constantly invoked the danger of abuse as a ground for their contention that the legislation they challenge does not fulfil the requirements of article 8(2) of the Convention. While the possibility of improper action by a dishonest, negligent or over-zealous official can never be completely ruled out whatever the system, the considerations that matter for the purposes of the court's present review are the likelihood of such action and the safeguards provided to protect against it.
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> "The court has examined above (at paragraphs 51–58) the contested legislation in the light, inter alia, of these considerations. The court notes in particular that the G 10 contains various provisions designed to reduce the effect of surveillance measures to an unavoidable minimum and to ensure that the surveillance is carried out in strict accordance with the law. In the absence of any evidence or indication that the actual practice followed is otherwise, the court must assume that, in the democratic society of the Federal Republic of Germany, the relevant authorities are properly applying the legislation in issue."

106 In the present case there is no suggestion in the agreed statement of facts that the appellant sought to place his concerns before the Director General of the Security Service or before the Home Secretary or any other Crown servant. Therefore there is no evidence that the persons to whom the

appellant could have made complaints would not have considered and, if necessary, investigated them in an honest and proper way and taken steps to remedy any wrongs revealed. Accordingly there is no basis for concluding that the safeguard provided by the ability to make such complaints are inadequate to protect the public interest. In my opinion the reasoning of Moses J, at paragraph 54 of his judgment, was correct and fully in accordance with the judgment of the European Court in *Klass* 2 EHRR 214:

> "I accept that, in general, a restriction on disclosure cannot be justified as being proportionate without regard to the public interest in the particular disclosure. However, that proposition must be considered in the context of the statutory scheme in the instant case. There is no blanket ban on disclosure by a former member of the Security services. Where a former member of a security service seeks to expose illegality or avert a risk of injury to persons or property, he is entitled to approach any Crown servant identified in section 12(1) of the OSA 1989 for the purposes of that Crown servant's functions (see section 7(3)). It is not therefore correct to say that a restriction is imposed irrespective of the public interest in disclosure. If there is a public interest in disclosure, it is, at the very least, not unreasonable to expect at least one of the very large number identified to recognise the public interest, if it is well founded, and to act upon it."

107 Moreover, if complaints to Crown servants were to prove fruitless and the appellant considered that the public interest required that he should disclose the information in his possession about alleged wrongdoing or incompetence to the press or other sections of the media the Crown argued that he would have another course open to him. This would be to apply, pursuant to section 7(3)(b), for official authorisation to disclose the information to the public. If his complaints to official quarters had been fruitless and if official authorisation were not granted, the appellant could apply to the High Court for a judicial review of the refusal to give official authorisation.

108 The appellant submitted that such an application would be fruitless. He argued that in order to present his case in an effective way to the High Court it would be necessary for him to make disclosure to his own lawyers and to the judge of the information which he wished to bring to the attention of the public, but the refusal of official authorisation (which was the subject matter of his complaint) would prevent such disclosure.

109 In considering this argument it is necessary to take account of the judgment of the European Court in *Tinnelly & Sons Ltd v United Kingdom* 27 EHRR 249. The principal point decided in that case was that a certificate issued pursuant to statute by the Secretary of State that an act was done for the purpose of safeguarding national security cannot exclude access to a court to determine a dispute as to a citizen's rights: the right guaranteed by article 6(1) "cannot be displaced by the ipse dixit of the executive" (see para 77). But the court also recognised that the right of access to a court may be subject to limitations in the interests of national security provided that the very essence of the right is not impaired and that there is a reasonable relationship of proportionality between the means employed and the aims sought to be achieved (see para 72). The court also noted that in other contexts it had been found possible to modify judicial procedures in such a

A way as to safeguard national security concerns about the nature and sources of intelligence information and yet accord the individual a substantial degree of procedural justice (see para 78).

110 In *Jasper v United Kingdom* (2000) 30 EHRR 441 the European Court again recognised that national security may require certain information not to be disclosed and stated that the fact that the issue of whether there should be disclosure was monitored by a judge was an important safeguard which could lead to the conclusion that there had not been a violation of article 6(1). The court stated, at pp 471–472, paras 52 and 56:

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

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111 In the light of these principles stated by the European Court I consider that if the appellant were refused official authorisation to disclose information to the public and applied for judicial review of that decision, a judge of the High Court would be able to conduct an inquiry into the refusal in such a way that the hearing would ensure justice to the appellant and uphold his rights under article 6(1) whilst also guarding against the disclosure of information which would be harmful to national security. The intensity of the review, involving as it would do Convention rights, would be greater than a review conducted under the *Wednesbury* principle: see per Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] AC 532, 547D–G.

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112 In a recent judgment of the Divisional Court, *R (Director of Public Prosecutions) v Acton Youth Court* [2001] 1 WLR 1828, after referring to *Jasper v United Kingdom* 30 EHRR 441, *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1, and *Fitt v United Kingdom* (2000) 30 EHRR 480, Lord Woolf CJ said, at p 1838, para 34, that "the European Court of Human Rights is prepared to accept the obvious need in limited circumstances for the courts to protect in the public interest immunity from production of documents . . ."

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113 It would not be appropriate or practicable in this speech to specify the steps which a judge, before whom an application for judicial review was brought, should take to achieve the objective of giving substantial protection to the Convention rights of a past member of the security service in a way

which would not result in the disclosure of information which would be harmful to national security. But just as it is possible to devise a procedure to be followed in the Crown Court for upholding a claim to public interest immunity whilst not impairing the essential rights of the accused under article 6(1), so I consider that the High Court could devise a procedure to achieve a similar objective in applications for judicial review of a refusal of official authorisation. A possible course might be for the judge to appoint a special counsel to represent the interests of the person seeking disclosure. This procedure was referred to by Lord Woolf MR, in his judgment in the Court of Appeal in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, 1250–1251, para 31, where an issue of national security arose:

> "As it was possible that part of the hearing would have to be in closed session, Mr Nicholas Blake appeared at the request of the court. The Act of 1997 makes no provision for a special advocate on an appeal. However, it seemed to us that, if it was necessary for the court in order to dispose justly of the appeal to hear submissions in the absence of Mr Rehman and his counsel, under the inherent jurisdiction of the court, counsel instructed by the Treasury Solicitor, with the agreement of the Attorney General, would be able to perform a similar role to a special advocate without the advantage of statutory backing for this being done. A court will only hear submissions on a substantive appeal in the absence of a party in the most extreme circumstances. However, considerations of national security can create situations where this is necessary. If this happens, the court should use its inherent power to reduce the risk of prejudice to the absent party so far as possible . . ."

114 Another possible course might be for the past member of the security service, as a preparatory step before instituting an application for judicial review, to seek official authorisation to disclose the information only to a specified solicitor and counsel, and in the course of his submissions on behalf of the Crown Mr Sweeney stated that he was instructed to say that if such an application for authorisation were made it would be looked at sympathetically. If authorisation for such restricted disclosure were refused the past member could seek judicial review of that refusal.

115 There would, of course, be no substance in the argument by the Crown that the appellant would have a remedy in judicial review to challenge an improper refusal of authorisation to make disclosure to the public, if the right to apply for judicial review was merely a formal right where the application would be bound to fail because the applicant could place no information before the court to support it. But, notwithstanding the difficulties which could arise in relation to placing the necessary information before the High Court, I consider that those difficulties would not be insurmountable and that the High Court would be able to assist the appellant to overcome those difficulties and to ensure that justice was done to him.

116 It is to be observed that the appellant took no steps to apply for official authorisation to publish the information which he wished to disclose to the public and for the reasons which I have given I consider that he cannot argue that, if there had been a refusal of authorisation, an application for

judicial review would have been fruitless and would not have provided an effective remedy.

117 Therefore I consider that sections 1 and 4 of the 1989 Act are not incompatible with article 10. I am in agreement with Lord Bingham that the defence of necessity or duress of circumstances did not arise for consideration in this case and, like him, I would not wish to be taken to agree with all that the Court of Appeal said on this issue. I am also in agreement with him that no issue directly affecting the media arises in this case and therefore it would be undesirable to express an opinion on the interesting submissions advanced on their behalf to the House.

118 I would dismiss this appeal.

LORD HOBHOUSE OF WOODBOROUGH

119 My Lords, for the reason given by my noble and learned friend, Lord Bingham of Cornhill, I too would dismiss this appeal.

LORD SCOTT OF FOSCOTE

120 My Lords, I have had the advantage of reading in draft the opinions of my noble and learned friends, Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Hutton. Save that on the matters referred to in paragraphs 99 and 100 of Lord Hutton's opinion I would wish to reserve my opinion as to how the balance between the requirements of national security on the one hand and freedom of expression and freedom of the press on the other hand should be struck, I am in full agreement with them and for the reasons they give I, too, would dismiss this appeal.

Appeal dismissed.

Solicitors: Liberty and Birnberg Peirce & Partners; Crown Prosecution Service, Ludgate Hill; Solicitor, Times Newspapers Ltd.

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