THE OBSERVER AND THE GUARDIAN v. UNITED KINGDOM (Violation of freedom of expression)

BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

(*The President*, Judge Ryssdal; *Judges* Cremona, Vilhjálmsson, Bindschedler-Robert, Gölcüklü, Matscher, Pinheiro Farinha, Pettiti, Walsh, Sir Vincent Evans, Macdonald, Russo, Bernhardt, Spielmann, De Meyer, Valticos, Martens, Palm, Foighel, Pekkanen, Loizou, Morenilla, Gigi, Baka)

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Application No. 13585/88
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The applicants were two British newspapers. They had published details of the book *Spycatcher* and information obtained from its author, Mr. Peter Wright. The material had been made public in proceedings brought by the Attorney General for England and Wales in Australia to restrain publication of *Spycatcher* there. The book recounted Mr. Wright's memoirs of his employment by the British Government in the British Security Service. Mr. Wright had allegedly breached his duty of confidentiality in seeking to publish the book. The Attorney General began proceedings in the English courts for permanent injunctions restraining the applicants from further publication of such material. Interlocutory injunctions were imposed to like effect from 27 June 1986, confirmed in an *inter partes* hearing on 11 July 1986 to take effect until 13 October 1988. On 14 July 1987, however, *Spycatcher* was published in the United States. On 30 July 1987, the House of Lords continued the original interlocutory injunctions. The applicants complained that the interlocutory injunctions infringed Articles 10, 13 and 14 of the Convention.

Held:
(1) by 14 votes to 10, that there was no violation of Article 10 of the Convention during the period from 11 July 1986 to 30 July 1987;
(2) unanimously, that there was a violation of Article 10 during the period from 30 July 1987 to 13 October 1988;
(3) unanimously, that there has been no violation of Article 13 or 14 taken in conjunction with Article 10;
(4) unanimously, that the United Kingdom pay, within three months, to the applicants jointly the sum of £100,000, together with any value added tax that might be chargeable, for costs and expenses;
(5) unanimously, that the remainder of the claim for just satisfaction be dismissed.

1. Freedom of Speech: violation, necessity in a democratic society. (Art. 10(1) and (2)).

(a) The interference by way of interlocutory injunction in the first

period from 11 July 1986 to 30 July 1987 was sufficiently 'prescribed by law' since the guidelines to be followed by the English courts and enunciated in the case law of the House of Lords several years previously were sufficiently clear to enable the applicants to foresee their imposition to a reasonable extent. [52]–[54]

(b) The interference had aims which were legitimate under Article 10(2) of the Convention since it was intended to maintain the authority of the judiciary pending trial of the Attorney General's claim for permanent injunctions and to protect national security in the sense of the integrity of the Security Service. [56]

(c) The interference was necessary in a democratic society because of the need to preserve the Attorney General's case at the trial for permanent injunctions and to protect interests of national security in light of the contents of *Spycatcher*. The interlocutory injunction was proportionate to the aims, since its lengthy duration was necessary to allow for the preparation for trial, and its contents were tailored to take account of the facts. [62]–[64]

2. Freedom of Expression: violation, confidential information. (Art. 10(1) and (2)).

After the publication of *Spycatcher* in the United States, the material in question was no longer confidential. Thus, from 30 July 1987 the interlocutory injunction was no longer capable of protecting the Attorney General's case at final trial. The remaining aim of preserving confidence in the Security Service had already been achieved by initiating proceedings and was not sufficient to interfere with the right protected by Article 10 of the Convention. [68]–[69]

3. Freedom of Expression: discrimination, newspapers. (Arts. 14 and 10).

Foreign newspapers within jurisdiction of the English courts were subject to the same interlocutory injunctions as the applicants. Those outside the jurisdiction were not bound by the injunctions, but were in a different position from the applicants. There was therefore no discriminatory treatment of the applicants. [73]

4. Remedies: effective remedy before national authority, scope of Convention. (Art. 13).

The absence of a remedy before a national authority when national law is challenged as being contrary to the Convention is beyond the scope of the rights guaranteed by Article 13. [76]

5. Just Satisfaction: costs and expenses. (Art. 50).

The applicants were not entitled to costs of the hearings prior to publication of *Spycatcher* in the United States, since no violation of the right to freedom of expression was found. After publication, the applicants were entitled to costs necessarily incurred. Each applicant was entitled to choose its lawyers, but they were not entitled to double costs since their interests were substantially the same. The applicants' lawyers' quantum was not the basis for an award by the court. [80]–[83]

Mrs. *A. Glover*, Legal Counsellor, Foreign and Commonwealth Office (Agent), Mr. *N. Bratza*, *Q.C.* (Counsel), Mr. *P. Havers*, Barrister-at-Law (Counsel), Mrs. *S. Evans*, Home Office (Adviser), Mr. *D. Brummell*, Treasury Solicitor (Adviser) for the Government. Mr. *E. Busuttil* (Delegate) for the Commission.

Mr. *D. Browne*, *Q.C.* (Counsel), Mrs. *J. McDermott* (Solicitor), for the applicants.

The following cases were referred to in the judgment:

1. AMERICAN CYANAMID CO. *v.* ETHICON LTD. [1975] A.C. 396.
2. ATTORNEY GENERAL *v.* TIMES NEWSPAPERS LTD. [1991] 2 W.L.R. 1019.
3. SUNDAY TIMES *v.* UNITED KINGDOM 2 E.H.R.R. 245.
4. HANDYSIDE *v.* UNITED KINGDOM 1 E.H.R.R. 737.
5. OBERSCHLIK *v.* AUSTRIA Series A, No. 204.
6. LINGENS *v.* AUSTRIA (1986) 8 E.H.R.R. 103.
7. MARKT INTERN VERLAG AND BEERMANN *v.* GERMANY (1990) 12 E.H.R.R. 161.
8. WEBER *v.* SWITZERLAND (1990) 12 E.H.R.R. 508.
9. ATTORNEY GENERAL *v.* GUARDIAN NEWSPAPERS (NO. 2) [1990] A.C. 140.
10. FREDIN *v.* SWEDEN (1991) 13 E.H.R.R. 784.
11. SOERING *v.* UNITED KINGDOM (1990) 12 E.H.R.R. 439.
12. JAMES *v.* UNITED KINGDOM (1986) 8 E.H.R.R. 123.
13. GRANGER *v.* UNITED KINGDOM (1990) 12 E.H.R.R. 469.

The following further cases were referred to in the Commission's Opinion:

14. BARTHOLD *v.* GERMANY (1985) 7 E.H.R.R. 383.
15. LEANDER *v.* SWEDEN (1987) 9 E.H.R.R. 59.

The following further case was referred to in the Partly Dissenting Opinion of Judge Pettiti:

16. ELLINIKI RADIOPHONIA TILEORASSI (THE ANONINI ETAIRIA) (Case 260/89), not yet reported.

The following further case was referred to in the Partly Dissenting Opinion of Judge de Meyer *et al.*:

17. NEW YORK TIMES *v.* UNITED STATES; UNITED STATES *v.* WASHINGTON POST, 403 U.S. 713 (1971).

The following further case was referred to in the Separate Opinion of Judge de Meyer:

18. BELILOS *v.* SWITZERLAND (1988) 10 E.H.R.R. 466.

The following further cases were referred to in the Partly Dissenting Opinion of Judge Morenilla:

19. NEAR *v.* MINNESOTA, 283 U.S. 718.
20. NEBRASKA ASSOCIATION *v.* STUART, 427 U.S. 593 (1976).
21. LANDMARK COMMUNICATIONS INC. *v.* VIRGINIA, 425 U.S. 829 (1978).
22. UNITED STATES *v.* THE PROGRESSIVE, 486 F.Supp. 990 (1979).

The Facts

I. *Introduction*

A. *The applicants*

9. The applicants in this case[1] are (a) The Observer Ltd., the proprietors and publishers of the United Kingdom national Sunday newspaper *Observer*, Mr. Donald Trelford, its editor, and Mr. David Leigh and Mr. Paul Lashmar, two of its reporters; and (b) Guardian Newspapers Ltd., the proprietors and publishers of the United Kingdom national daily newspaper *The Guardian*, Mr. Peter Preston, its editor, and Mr. Richard Norton-Taylor, one of its reporters. They complain of interlocutory injunctions imposed by the English courts on the publication of details of the book *Spycatcher* and information obtained from its author, Mr. Peter Wright.

B. *Interlocutory injunctions*

10. In litigation where the plaintiff seeks a permanent injunction against the defendant, the English courts have a discretion to grant the plaintiff an 'interlocutory injunction'[2] which is designed to protect his position in the interim. In that event the plaintiff will normally be required to give an undertaking to pay damages to the defendant should the latter succeed at the trial.

The principles on which such injunctions will be granted—to which reference was made in the proceedings in the present case—were set out in AMERICAN CYANAMID CO. *v.* ETHICON LTD.[3] and may be summarised as follows.

(a) It is not for the court at the interlocutory stage to seek to determine disputed issues of fact or to decide difficult questions of law which call for detailed argument and mature consideration.

(b) Unless the material before the court at that stage fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction, the court should consider, in the light of the particular circumstances of the case, whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

(c) If damages would be an adequate remedy for the plaintiff if he were to succeed at the trial, no interlocutory injunction should normally be granted. If, on the other hand, damages would not provide an adequate remedy for the plaintiff but would adequately compensate the defendant under the plaintiff's undertaking if the defendant were to succeed at the trial, there

[1] Who are hereinafter together referred to as 'O.G.'

[2] A temporary restriction pending the determination of the dispute at the substantive trial.

[3] [1975] A.C. 396.

would be no reason to refuse an interlocutory injunction on this ground.

(d) It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience arises.

(e) Where other factors appear evenly balanced, it is a counsel of prudence to take such measures as are calculated to preserve the *status quo*.

C. *Spycatcher*

11. Mr. Peter Wright was employed by the British Government as a senior member of the British Security Service (MI5) from 1955 to 1976, when he resigned. Subsequently, without any authority from his former employers, he wrote his memoirs, entitled *Spycatcher*, and made arrangements for their publication in Australia, where he was then living. The book dealt with the operational organisation, methods and personnel of MI5 and also included an account of alleged illegal activities by the Security Service. He asserted therein, *inter alia*, that MI5 conducted unlawful activities calculated to undermine the 1974–1979 Labour Government, burgled and 'bugged' the embassies of allied and hostile countries and planned and participated in other unlawful and covert activities at home and abroad, and that Sir Roger Hollis, who led MI5 during the latter part of Mr. Wright's employment, was a Soviet agent.

Mr. Wright had previously sought, unsuccessfully, to persuade the British Government to institute an independent inquiry into these allegations. In 1987 such an inquiry was also sought by, amongst others, a number of prominent members of the 1974–1979 Labour Government, but in vain.

12. Part of the material in *Spycatcher* had already been published in a number of books about the Security Service written by Mr. Chapman Pincher. Moreover, in July 1984 Mr. Wright had given a lengthy interview to Granada Television[4] about the work of the service and the programme was shown again in December 1986. Other books and another television programme on the workings and secrets of the service were produced at about the same time, but little Government action was taken against the authors or the media.

D. *Institution of proceedings in Australia*

13. In September 1985 the Attorney General of England and Wales[5] instituted, on behalf of the United Kingdom Government, proceedings in the Equity Division of the Supreme Court of New South Wales, Australia, to restrain publication of *Spycatcher* and of

[4] An independent television company operating in the U.K.

[5] 'The Attorney General.'

any information therein derived from Mr. Wright's work for the Security Service. The claim was based not on official secrecy but on the ground that the disclosure of such information by Mr. Wright would constitute a breach of, notably, his duty of confidentiality under the terms of his employment. On 17 September he and his publishers, Heinemann Publishers Australia Pty. Ltd., gave undertakings, by which they abided, not to publish pending the hearing of the Government's claim for an injunction.

Throughout the Australian proceedings the Government objected to the book as such; it declined to indicate which passages they objected to as being detrimental to national security.

II. *The interlocutory proceedings in England and events occurring whilst they were in progress*

A. *The Observer and Guardian articles and the ensuing injunctions*

14. Whilst the Australian proceedings were still pending, there appeared, on Sunday 22 and Monday 23 June 1986 respectively, short articles on inside pages of the *Observer* and *The Guardian* reporting on the forthcoming hearing in Australia and giving details of some of the contents of the manuscript of *Spycatcher.* These two newspapers had for some time been conducting a campaign for an independent investigation into the workings of the Security Service. The details given included the following allegations of improper, criminal and unconstitutional conduct on the part of MI5 officers:

(a) MI5 'bugged' all diplomatic conferences at Lancaster House in London throughout the 1950s and 1960s, as well as the Zimbabwe independence negotiations in 1979;

(b) MI5 'bugged' diplomats from France, Germany, Greece and Indonesia, as well as Mr. Kruschev's hotel suite during his visit to Britain in the 1950s, and was guilty of routine burglary and 'bugging'[6];

(c) MI5 plotted unsuccessfully to assassinate President Nasser of Egypt at the time of the Suez crisis;

(d) MI5 plotted against Harold Wilson during his premiership from 1974 to 1976;

(e) MI5 (contrary to its guidelines) diverted its resources to investigate left-wing political groups in Britain.

The *Observer* and *Guardian* articles, which were written by Mr. Leigh and Mr. Lashmar and by Mr. Norton-Taylor respectively, were based on investigations by these journalists from confidential sources and not on generally available international press releases or similar material. However, much of the actual information in the articles had already been published elsewhere.[7] The English courts subsequently

[6] Including the entering of Soviet consulates abroad.
[7] See para. 12 above.

inferred that, on the balance of probabilities, the journalists' sources must have come from the offices of the publishers of *Spycatcher* or the solicitors acting for them and the author.[8]

15. The Attorney General instituted proceedings for breach of confidence in the Chancery Division of the High Court of Justice of England and Wales against O.G., seeking permanent injunctions restraining them from making any publication of *Spycatcher* material. He based his claim on the principle that the information in the memoirs was confidential and that a third party coming into possession of information knowing that it originated from a breach of confidence owed the same duty to the original confider as that owed by the original confidant. It was accepted that an award of damages would have been an insufficient and inappropriate remedy for the Attorney General and that only an injunction would serve his purpose.

16. The evidential basis for the Attorney General's claim was two affidavits sworn by Sir Robert Armstrong, Secretary to the British Cabinet, in the Australian proceedings on 9 and 27 September 1985. He had stated therein, *inter alia*, that the publication of any narrative based on information available to Mr. Wright as a member of the Security Service would cause unquantifiable damage, both to the service itself and to its officers and other persons identified, by reason of the disclosures involved. It would also undermine the confidence that friendly countries and other organisations and persons had in the Security Service and create a risk of other employees or former employees of that service seeking to publish similar information.

17. On 27 June 1986 *ex parte* interim injunctions were granted to the Attorney General restraining any further publication of the kind in question pending the substantive trial of the actions. On an application by O.G. and after an *inter partes* hearing on 11 July, Millett J.[9] decided that these injunctions should remain in force, but with various modifications. The defendants were given liberty to apply to vary or discharge the orders on giving 24 hours' notice.

18. The reasons for Millett J.'s decision may briefly be summarised as follows.

(a) Disclosure by Mr. Wright of information acquired as a member of the Security Service would constitute a breach of his duty of confidentiality.

(b) O.G. wished to be free to publish further information deriving directly or indirectly from Mr. Wright and disclosing alleged unlawful activity on the part of the Security Service, whether or not it had been previously published.

(c) Neither the right to freedom of speech nor the right to prevent the disclosure of information received in confidence was absolute.

[8] See Scott J.'s judgment of 21 December 1987; para. 40 below.
[9] Sitting in the Ch.D.

(d) In resolving, as in the present case, a conflict between the public interest in preventing and the public interest in allowing such disclosure, the court had to take into account all relevant considerations, including the facts that this was an interlocutory application and not the trial of the action, that the injunctions sought at this stage were only temporary and that the refusal of injunctive relief might cause irreparable harm and effectively deprive the Attorney General of his rights. In such circumstances, the conflict should be resolved in favour of restraint unless the court was satisfied that there was a serious defence of public interest that might succeed at the trial: an example would be when the proposed publication related to unlawful acts, the disclosure of which was required in the public interest. This could be regarded either as an exception to the AMERICAN CYANAMID principles[10] or their application in special circumstances where the public interest was invoked on both sides.

(e) The Attorney General's principal objection was not to the dissemination of allegations about the Security Service but to the fact that those allegations were made by one of its former employees, it being that particular fact which O.G. wished to publish. There was credible evidence[11] that the appearance of confidentiality was essential to the operation of the Security Service and that the efficient discharge of its duties would be impaired, with consequent danger to national security, if senior officers were known to be free to disclose what they had learned whilst employed by it. Although this evidence remained to be tested at the substantive trial, the refusal of an interlocutory injunction would permit indirect publication and permanently deprive the Attorney General of his rights at the trial. Bearing in mind, *inter alia*, that the alleged unlawful activities had occurred some time in the past, there was, moreover, no compelling interest requiring publication immediately rather than after the trial.

In the subsequent stages of the interlocutory proceedings, both the Court of Appeal[12] and all the members of the Appellate Committee of the House of Lords[13] considered that this initial grant of interim injunctions by Millett J. was justified.

19. On 25 July 1986 the Court of Appeal dismissed an appeal by O.G. and upheld the injunctions, with minor modifications. It referred to the AMERICAN CYANAMID principles[14] and considered that Millett J. had not misdirected himself or exercised his discretion on an

[10] See para. 10 above.
[11] In the shape of Sir Robert Armstrong's affidavits; see para. 16 above.
[12] See paras. 19 and 34 below.
[13] See paras. 35–36 below.
[14] See para. 10 below.

erroneous basis. It refused leave to appeal to the House of Lords. It also certified the case as fit for a speedy trial.

As amended by the Court of Appeal, the injunctions[15] restrained O.G., until the trial of the action or further order, from:

> '1. disclosing or publishing or causing or permitting to be disclosed or published to any person any information obtained by Peter Maurice Wright in his capacity as a member of the British Security Service and which they know, or have reasonable grounds to believe, to have come or been obtained, whether directly or indirectly, from the said Peter Maurice Wright;
>
> 2. attributing in any disclosure or publication made by them to any person any information concerning the British Security Service to the said Peter Maurice Wright whether by name or otherwise.'

The orders contained the following provisos:

> '1. this Order shall not prohibit direct quotation of attributions to Peter Maurice Wright already made by Mr. Chapman Pincher in published works, or in a television programme or programmes broadcast by Granada Television;
>
> 2. no breach of this Order shall be constituted by the disclosure or publication of any material disclosed in open court in the Supreme Court of New South Wales unless prohibited by the Judge there sitting or which, after the trial there in action no. 4382 of 1985, is not prohibited from publication;
>
> 3. no breach of this Order shall be constituted by a fair and accurate report of proceedings in (a) either House of Parliament in the United Kingdom whose publication is permitted by that House; or (b) a court of the United Kingdom sitting in public.'

20. On 6 November 1986 the Appellate Committee of the House of Lords granted leave to appeal against the Court of Appeal's decision. The appeal was subsequently withdrawn in the light of the House of Lords decision of 30 July 1987.[16]

B. *The first instance decision in Australia*

21. The trial of the Government's action in Australia[17] took place in November and December 1986. The proceedings were reported in detail in the media in the United Kingdom and elsewhere. In a judgment delivered on 13 March 1987 Powell J. rejected the Attorney General's claim against Mr. Wright and his publishers, holding that much of the information in *Spycatcher* was no longer confidential and that publication of the remainder would not be detrimental to the British Government or the Security Service. The undertakings not to publish were then discharged by order of the court.

The Attorney General lodged an appeal; after a hearing in the New South Wales Court of Appeal in the week of 27 July 1987, judgment

[15] 'The Millett injunctions.'
[16] See paras. 35–36 below.
[17] See para. 13 above.

was reserved. The defendants had given further undertakings not to publish whilst the appeal was pending.

C. *Further press reports concerning* Spycatcher*; the* Independent *case*

22. On 27 April 1987 a major summary of certain of the allegations in *Spycatcher*, allegedly based on a copy of the manuscript, appeared in the United Kingdom national daily newspaper *The Independent.* Later the same day reports of that summary were published in the *London Evening Standard* and the *London Daily News.*

On the next day the Attorney General applied to the Queen's Bench Division of the High Court for leave to move against the publishers and editors of these three newspapers for contempt of court, that is conduct intended to interfere with or prejudice the administration of justice. Leave was granted on 29 April. In this application[18] the Attorney General was not acting—as he was in the breach of confidence proceedings against O.G.—as the representative of the Government, but independently and in his capacity as 'the guardian of the public interest in the due administration of justice.'

Reports similar to those of 27 April appeared on 29 April in Australia, in the *Melbourne Age* and the *Canberra Times*, and on 3 May in the United States of America, in the *Washington Post.*

23. On 29 April 1987 O.G. applied for the discharge of the Millett injunctions[19] on the ground that there had been a significant change of circumstances since they were granted. They referred to what had transpired in the Australian proceedings and to the United Kingdom newspaper reports of 27 April.

The Vice-Chancellor, Sir Nicolas Browne-Wilkinson, began to hear these applications on 7 May but adjourned them pending the determination of a preliminary issue of law, raised in the *Independent* case,[20] on which he thought their outcome to be largely dependent, namely 'whether a publication made in the knowledge of an outstanding injunction against another party, and which if made by that other party would be in breach thereof, constitutes a criminal contempt of court upon the footing that it assaults or interferes with the process of justice in relation to the said injunction.' On 11 May, in response to the Vice-Chancellor's invitation, the Attorney General pursued the proceedings in the *Independent* case in the Chancery Division of the High Court and the Vice-Chancellor ordered the trial of the preliminary issue.

24. On 14 May 1987 Viking Penguin Inc., which had purchased from Mr. Wright's Australian publishers the United States publication rights to *Spycatcher*, announced its intention of publishing the book in the latter country.

[18] Hereinafter 'the *Independent* case.'
[19] See para. 19 above.
[20] See para. 22 above.

25. On 2 June 1987 the Vice-Chancellor decided the preliminary issue of law in the *Independent* case. He held that the reports that had appeared on 27 April 1987[21] could not, as a matter of law, amount to contempt of court because they were not in breach of the express terms of the Millett injunctions and the three newspapers concerned had not been a party to those injunctions or to a breach thereof by the persons they enjoined. The Attorney General appealed.

26. On 15 June 1987 O.G., relying on the intended publication in the United States, applied to have the hearing of their application for discharge of the Millett injunctions restored.[22] The matter was, however, adjourned pending the outcome of the Attorney General's appeal in the *Independent* case, the hearing of which began on 22 June.

D. *Serialisation of* Spycatcher *begins in the* Sunday Times

27. On 12 July 1987 the United Kingdom national Sunday newspaper the *Sunday Times*, which had purchased the British newspaper serialisation rights from Mr. Wright's Australian publishers and obtained a copy of the manuscript from Viking Penguin Inc. in the United States, printed—in its later editions in order to avoid the risk of proceedings for an injunction—the first instalment of extracts from *Spycatcher*. It explained that this was timed to coincide with publication of the book in the United States, which was due to take place on 14 July.

On 13 July the Attorney General commenced proceedings for contempt of court against Times Newspapers Ltd., the publisher of the *Sunday Times*, and Mr. Andrew Neil, its editor,[23] on the ground that the publication frustrated the purpose of the Millett injunctions.

E. *Publication of* Spycatcher *in the U.S.A.*

28. On 14 July 1987 Viking Penguin Inc. published *Spycatcher* in the U.S.A.; some copies had, in fact, been put on sale on the previous day. It was an immediate best seller. The British Government, which had been advised that proceedings to restrain publication in the United States would not succeed, took no legal action to that end either in that country or in Canada, where the book also became a best seller.

29. A substantial number of copies of the book were then brought into the U.K., notably by British citizens who had bought it whilst visiting the United States or who had purchased it by telephone or post from American bookshops. The telephone number and address of such bookshops willing to deliver the book to the U.K. were widely advertised in that country. No steps to prevent such imports were taken by the British Government, which formed the view that although a ban was within its powers, it was likely to be ineffective. It

[21] See para. 22 above.
[22] See para. 23 above.
[23] Hereinafter together referred to as 'S.T.'

did, however, take steps to prevent the book being available at U.K. booksellers or public libraries.

F. *Conclusion of the* Independent *case*

30. On 15 July 1987 the Court of Appeal announced that it would reverse the judgment of the Vice-Chancellor in the *Independent* case.[24] Its reasons, which were handed down on 17 July, were basically as follows: the purpose of the Millett injunctions was to preserve the confidentiality of the *Spycatcher* material until the substantive trial of the actions against O.G.; the conduct of *The Independent*, the *London Evening Standard* and the *London Daily News* could, as a matter of law, constitute a criminal contempt of court because publication of that material would destroy that confidentiality and, hence, the subject-matter of those actions and therefore interfere with the administration of justice. The Court of Appeal remitted the case to the High Court for it to determine whether the three newspapers had acted with the specific intent of so interfering.[25]

31. The Court of Appeal refused the defendants leave to appeal to the House of Lords and they did not seek leave to appeal from the House itself. Neither did they apply to the High Court for modification of the Millett injunctions. The result of the Court of Appeal's decision was that those injunctions were effectively binding on all the British media, including the *Sunday Times*.

G. *Conclusion of the interlocutory proceedings in the* Observer, Guardian *and* Sunday Times *cases; maintenance of the Millett injunctions*

32. S.T. made it clear that, unless restrained by law, they would publish the second instalment of the serialisation of *Spycatcher* on 19 July 1987. On 16 July the Attorney General applied for an injunction to restrain them from publishing further extracts, maintaining that this would constitute a contempt of court by reason of the combined effect of the Millett injunctions and the decision in the *Independent* case.[26]

On the same day the Vice-Chancellor granted a temporary injunction restraining publication by S.T. until 21 July 1987. It was agreed that on 20 July he would consider the application by O.G. for discharge of the Millett injunctions[27] and that, since they effectively bound S.T. as well, the latter would have a right to be heard in support of that application. It was further agreed that he would also hear the Attorney General's claim for an injunction against S.T. and that that claim would fail if the Millett injunctions were discharged.

33. Having heard argument from 20 to 22 July 1987, the Vice-

[24] See para. 25 above.
[25] Ss.2(3) and 6(c) of the Contempt of Court Act 1981.
[26] See para. 30 above.
[27] See para. 26 above.

Chancellor gave judgment on the last-mentioned date, discharging the Millett injunctions and dismissing the claim for an injunction against S.T.

The Vice-Chancellor's reasons may briefly be summarised as follows.

(a) There had, notably in view of the publication in the United States,[28] been a radical change of circumstances, and it had to be considered if it would be appropriate to grant the injunctions in the new circumstances.

(b) Having regard to the case law and notwithstanding the changed circumstances, it had to be assumed that the Attorney General still had an arguable case for obtaining an injunction against O.G. at the substantive trial; accordingly, the ordinary *American Cyanamid* principles[29] fell to be applied.

(c) Since damages would be an ineffective remedy for the Attorney General and would be no compensation to the newspapers, it had to be determined where the balance of convenience lay; the preservation of confidentiality should be favoured unless another public interest outweighed it.

(d) Factors in favour of continuing the injunctions were: the proceedings were only interlocutory; there was nothing new or urgent about Mr. Wright's allegations; the injunctions would bind all the media, so that there would be no question of discrimination; undertakings not to publish were still in force in Australia; to discharge the injunctions would mean that the courts were powerless to preserve confidentiality; to continue the injunctions would discourage others from following Mr. Wright's example.

(e) Factors in favour of discharging the injunctions were: publication in the United States had destroyed a large part of the purpose of the Attorney General's actions; publications in the press, especially those concerning allegations of unlawful conduct in the public service, should not be restrained unless this was unavoidable; the courts would be brought into disrepute if they made orders manifestly incapable of achieving their purpose.

(f) The matter was quite nicely weighted and in no sense obvious but, with hesitation, the balance fell in favour of discharging the injunctions.

The Attorney General immediately appealed against the Vice-Chancellor's decision; pending the appeal the injunctions against O.G., but not the injunction against S.T.,[30] were continued in force.

34. In a judgment of 24 July 1987 the Court of Appeal held that:

[28] See paras. 28–29 above.
[29] See para. 10 above.
[30] See para. 32 above.

(a) the Vice-Chancellor had erred in law in various respects, so that the Court of Appeal could exercise its own discretion;

(b) in the light of the American publication of *Spycatcher*, it was inappropriate to continue the Millett injunctions in their original form;

(c) it was, however, appropriate to vary these injunctions to restrain publication in the course of business of all or part of the book or other statements by or attributed to Mr. Wright on security matters, but to permit 'a summary in very general terms' of his allegations.

The members of the Court of Appeal considered that continuation of the injunctions would: serve to restore confidence in the Security Service by showing that memoirs could not be published without authority[31]; serve to protect the Attorney General's rights until the trial[32]; or fulfil the courts' duty of deterring the dissemination of material written in breach of confidence.[33]

The Court of Appeal gave leave to all parties to appeal to the House of Lords.

35. After hearing argument from 27 to 29 July 1987,[34] the Appellate Committee of the House of Lords gave judgment on 30 July, holding, by a majority of three[35] to two,[36] that the Millett injunctions should continue. In fact, they subsequently remained in force until the commencement of the substantive trial in the breach of confidence actions on 23 November 1987.[37]

The majority also decided that the scope of the injunctions should be widened by the deletion of part of the proviso that had previously allowed certain reporting of the Australian proceedings,[38] since the injunctions would be circumvented if English newspapers were to reproduce passages from *Spycatcher* read out in open court. In the events that happened, this deletion had, according to the Government, no practical incidence on the reporting of the Australian proceedings.

36. The members of the Appellate Committee gave their written reasons on 13 August 1987; they may briefly be summarised as follows.

(a) *Lord Brandon of Oakbrook*

(i) The object of the Attorney General's actions against O.G. was the protection of an important public interest, namely the maintenance as far as possible of the secrecy of the Security

[31] Sir John Donaldson, M.R.
[32] Ralph Gibson L.J.
[33] Russell L.J.
[34] When neither side supported the C.A.'s compromise solution.
[35] Lord Brandon of Oakbrook, Lord Templeman and Lord Ackner.
[36] Lord Bridge of Harwich—the immediate past Chairman of the Security Commission—and Lord Oliver of Aylmerton.
[37] See para. 39 below.
[38] See para. 19 above.

Service; as was recognised in Article 10(2) of the Convention, the right to freedom of expression was subject to certain exceptions, including the protection of national security.

(ii) The injunctions in issue were only temporary, being designed to hold the ring until the trial, and their continuation did not prejudge the decision to be made at the trial on the claim for final injunctions.

(iii) The view taken in the courts below, before the American publication, that the Attorney General had a strong arguable case for obtaining final injunctions at the trial was not really open to challenge.

(iv) Publication in the United States had weakened that case, but it remained arguable; it was not clear whether, as a matter of law, that publication had caused the newspapers' duty of non-disclosure to lapse. Although the major part of the potential damage adverted to by Sir Robert Armstrong[39] had already been done, the courts might still be able to take useful steps to reduce the risk of similar damage by other Security Service employees in the future. This risk was so serious that the courts should do all they could to minimise it.

(v) The only way to determine the Attorney General's case justly and to strike the proper balance between the public interests involved was to hold a substantive trial at which evidence would be adduced and subjected to cross-examination.

(vi) Immediate discharge of the injunctions would completely destroy the Attorney General's arguable case at the interlocutory stage, without his having had the opportunity of having it tried on appropriate evidence.

(vii) Continuing the injunctions until the trial would, if the Attorney General's claims then failed, merely delay but not prevent the newspapers' right to publish information which, moreover, related to events that had taken place many years in the past.

(viii) In the overall interests of justice, a course which could only result in temporary and in no way irrevocable damage to the cause of the newspapers was to be preferred to one which might result in permanent and irrevocable damage to the cause of the Attorney General.

(b) *Lord Templeman*[40]

(i) The appeal involved a conflict between the right of the public to be protected by the Security Service and its right to be supplied with full information by the press. It therefore involved consideration of the Convention, the question being whether the interference constituted by the injunctions was, on 30 July

[39] See para. 16 above.

[40] Who agreed with the observations of Lords Brandon and Ackner.

1987, necessary in a democratic society for one or more of the purposes listed in Article 10(2).

(ii) In terms of the Convention, the restraints were necessary in the interests of national security, for protecting the reputation or rights of others, for preventing the disclosure of information received in confidence and for maintaining the authority of the judiciary. The restraints would prevent harm to the Security Service, notably in the form of the mass circulation, both now and in the future, of accusations to which its members could not respond. To discharge the injunctions would surrender to the press the power to evade a court order designed to protect the confidentiality of information obtained by a member of the Service.

(c) *Lord Ackner*[41]

(i) It was accepted by all members of the Appellate Committee that: the Attorney General had an arguable case for a permanent injunction; damages were a worthless remedy for the Crown which, if the Millett injunctions were not continued, would lose forever the prospect of obtaining permanent injunctions at the trial; continuation of the Millett injunctions was not a 'final locking-out' of the press which, if successful at the trial, would then be able to publish material that had no present urgency; there was a real public interest, that required protection, concerned with the efficient functioning of the Security Service and it extended, as was not challenged by the newspapers, to discouraging the use of the United Kingdom market for the dissemination of unauthorised memoirs of Security Service officers.

(ii) It would thus be a denial of justice to refuse to allow the injunctions to continue until the trial, for that would sweep aside the public interest factor without any trial and would prematurely and permanently deny the Attorney General any protection from the courts.

(d) *Lord Bridge of Harwich*

(i) The case in favour of maintaining the Millett injunctions—which had been properly granted in the first place—would not be stronger at the trial than it was now; it would be absurd to continue them temporarily if no case for permanent injunctions could be made out.

(ii) Since the *Spycatcher* allegations were now freely available to the public, it was manifestly too late for the injunctions to serve the interest of national security in protecting sensitive information.

[41] Who agreed with the observations of Lord Templeman.

(iii) It could be assumed that the Attorney General could still assert a bare duty binding on the newspapers, but the question was whether the Millett injunctions could still protect an interest of national security of sufficient weight to justify the resultant encroachment on freedom of speech. The argument that their continuation would have a deterrent effect was of minimal weight.

(iv) The attempt to insulate the British public from information freely available elsewhere was a significant step down the road to censorship characteristic of a totalitarian régime and, if pursued, would lead to the Government's condemnation and humiliation by the European Court of Human Rights.

(e) *Lord Oliver of Aylmerton*

(i) Millett J.'s initial order was entirely correct.

(ii) The injunctions had originally been imposed to preserve the confidentiality of what were at the time unpublished allegations, but that confidentiality had now been irrevocably destroyed by the publication of *Spycatcher*. It was questionable whether it was right to use the injunctive remedy against the newspapers[42] for the remaining purpose which the injunctions might serve, namely punishing Mr. Wright and providing an example to others.

(iii) The newspapers had presented their arguments on the footing that the Attorney General still had an arguable case for the grant of permanent injunctions and there was force in the view that the difficult and novel point of law involved should not be determined without further argument at the trial. However, in the light of the public availability of the *Spycatcher* material, it was difficult to see how it could be successfully argued that the newspapers should be permanently restrained from publishing it and the case of the Attorney General was unlikely to improve in the meantime. No arguable case for permanent injunctions at the trial therefore remained and the Millett injunctions should accordingly be discharged.

H. *Conclusion of the Australian proceedings; further publication of* Spycatcher

37. On 24 September 1987 the New South Wales Court of Appeal delivered judgment dismissing the Attorney General's appeal[43]; the majority held that his claim was not justiciable in an Australian court since it involved either an attempt to enforce indirectly the public laws of a foreign State or a determination of the question whether

[42] Who had not been concerned with the publication.

[43] See para. 21 above.

publication would be detrimental to the public interest in the United Kingdom.

The Attorney General appealed to the High Court of Australia. In view of the publication of *Spycatcher* in the United States and elsewhere, that court declined to grant temporary injunctions restraining its publication in Australia pending the hearing; it was published in that country on 13 October. The appeal was dismissed on 2 June 1988, on the ground that, under international law, a claim—such as the Attorney General's—to enforce British governmental interests in its security service was unenforceable in the Australian courts.

Further proceedings brought by the Attorney General against newspapers for injunctions were successful in Hong Kong but not in New Zealand.

38. In the meantime publication and dissemination of *Spycatcher* and its contents continued worldwide, not only in the United States[44] and in Canada,[45] but also in Australia[46] and Ireland.[47] Nearly 100,000 copies were sent to various European countries other than the U.K. and copies were distributed from Australia in Asian countries. Radio broadcasts in English about the book were made in Denmark and Sweden and it was translated into 12 other languages, including ten European.

III. *The substantive proceedings in England*

A. *Breach of confidence*

39. On 27 October 1987 the Attorney General instituted proceedings against S.T. for breach of confidence; in addition to injunctive relief, he sought a declaration and an account of profits. The substantive trial of that action and of his actions against O.G.[48]—in which, by an amendment of 30 October, he now claimed a declaration as well as an injunction—took place before Scott J. in the High Court in November–December 1987. He heard evidence on behalf of all parties, the witnesses including Sir Robert Armstrong.[49] He also continued the interlocutory injunctions, pending delivery of his judgment.

40. Scott J. gave judgment on 21 December 1987; it contained the following observations and conclusions.

(a) The ground for the Attorney General's claim for permanent injunctions was no longer the preservation of the secrecy of certain information but the promotion of the efficiency and reputation of the Security Service.

[44] Around 715,000 copies were printed and nearly all were sold by October 1987.
[45] Around 100,000 copies were printed.
[46] 145,000 copies printed, of which half were sold within a month.
[47] 30,000 copies printed and distributed.
[48] See para. 15 above.
[49] See para. 16 above.

(b) Where a duty of confidence is sought to be enforced against a newspaper coming into possession of information known to be confidential, the scope of its duty will depend on the relative weights of the interests claimed to be protected by that duty and the interests served by disclosure.

(c) Account should be taken of Article 10 of the Convention and the judgments of the European Court establishing that a limitation of free expression in the interests of national security should not be regarded as necessary unless there was a 'pressing social need' for the limitation and it was 'proportionate to the legitimate aims pursued.'

(d) Mr. Wright owed a duty to the Crown not to disclose any information obtained by him in the course of his employment in MI5. He broke that duty by writing *Spycatcher* and submitting it for publication, and the subsequent publication and dissemination of the book amounted to a further breach, so that the Attorney General would be entitled to an injunction against Mr. Wright or any agent of his, restraining publication of *Spycatcher* in the United Kingdom.

(e) O.G. were not in breach of their duty of confidentiality, created by being recipients of Mr. Wright's unauthorised disclosures, in publishing their respective articles of 22 and 23 June 1986[50]; the articles were a fair report in general terms of the forthcoming trial in Australia and, furthermore, disclosure of two of Mr. Wright's allegations was justified on an additional ground relating to the disclosure of 'iniquity.'

(f) S.T., on the other hand, had been in breach of the duty of confidentiality in publishing the first instalment of extracts from the book on 12 July 1987,[51] since those extracts contained certain material which did not raise questions of public interest outweighing those of national security.

(g) S.T. were liable to account for the profits accruing to them as a result of the publication of that instalment.

(h) The Attorney General's claims for permanent injunctions failed because the publication and worldwide dissemination of *Spycatcher* since July 1987 had had the result that there was no longer any duty of confidence lying on newspapers or other third parties in relation to the information in the book; as regards this issue, a weighing of the national security factors relied on against the public interest in freedom of the press showed the latter to be overwhelming.

(i) The Attorney General was not entitled to a general injunction restraining future publication of information derived from Mr. Wright or other members of the Security Service.

[50] See para. 14 above.
[51] See para. 27 above.

After hearing argument, Scott J. imposed fresh temporary injunctions pending an appeal to the Court of Appeal; those injunctions contained a proviso allowing reporting of the Australian proceedings.[52]

41. On appeal by the Attorney General and a cross-appeal by S.T., the Court of Appeal[53] affirmed, on 10 February 1988, the decision of Scott. J.

However, Sir John Donaldson disagreed with his view that the articles in the *Observer* and *The Guardian* had not constituted a breach of their duty of confidence and that the claim for an injunction against these two newspapers in June 1986 was not 'proportionate to the legitimate aim pursued.' Bingham L.J., on the other hand, disagreed with Scott J.'s view that S.T. had been in breach of duty by publishing the first instalment of extracts from *Spycatcher*, that they should account for profits and that the Attorney General had been entitled, in the circumstances as they stood in July 1987, to injunctions preventing further serialisation.

After hearing argument, the Court of Appeal likewise granted fresh temporary injunctions, pending an appeal to the House of Lords; O.G. and S.T. were given liberty to apply for variation or discharge if any undue delay arose.

42. On 13 October 1988 the Appellate Committee of the House of Lords[54] also affirmed Scott J.'s judgment. Dismissing an appeal by the Attorney General and a cross-appeal by S.T., it held:

> '(i) That a duty of confidence could arise in contract or in equity and a confidant who acquired information in circumstances importing such a duty should be precluded from disclosing it to others; that a third party in possession of information known to be confidential was bound by a duty of confidence unless the duty was extinguished by the information becoming available to the general public or the duty was outweighed by a countervailing public interest requiring disclosure of the information; that in seeking to restrain the disclosure of government secrets the Crown must demonstrate that disclosure was likely to damage or had damaged the public interest before relief could be granted; that since the worldwide publication of *Spycatcher* had destroyed any secrecy as to its contents, and copies of it were readily available to any individual who wished to obtain them, continuation of the injunctions was not necessary; and that, accordingly, the injunctions should be discharged.
>
> (ii) (Lord Griffiths dissenting) that the articles of 22 and 23 June [1986] had not contained information damaging to the public interest; that the *Observer* and *The Guardian* were not in breach of their duty of confidentiality when they published [those] articles; and that, accordingly, the Crown would not have been entitled to a permanent injunction against both newspapers.
>
> (iii) That the *Sunday Times* was in breach of its duty of confidence in

[52] See paras. 19 and 35 above.

[53] Composed of Sir John Donaldson, M.R., Dillon L.J. and Bingham L.J.

[54] Lord Keith of Kinkel, Lord Brightman, Lord Griffiths, Lord Goff of Chieveley and Lord Jauncey of Tullichettle.

publishing its first serialised extract from *Spycatcher* on 12 July 1987; that it was not protected by the defence either of prior publication or disclosure of iniquity; that imminent publication of the book in the United States did not amount to a justification; and that, accordingly, the *Sunday Times* was liable to account for the profits resulting from that breach.

(iv) That since the information in *Spycatcher* was now in the public domain and no longer confidential no further damage could be done to the public interest that had not already been done; that no injunction should be granted against the *Observer* and *The Guardian* restraining them from reporting on the contents of the book; and that (Lord Griffiths dissenting) no injunction should be granted against the *Sunday Times* to restrain serialising of further extracts from the book.

(v) That members and former members of the Security Service owed a lifelong duty of confidence to the Crown, and that since the vast majority of them would not disclose confidential information to the newspapers it would not be appropriate to grant a general injunction to restrain the newspapers from future publication of any information on the allegations in *Spycatcher* derived from any member or former member of the Security Service.'

B. *Contempt of court*

43. The substantive trial of the Attorney General's actions for contempt of court against *The Independent*, the *London Evening Standard*, the *London Daily News*,[55] S.T.[56] and certain other newspapers took place before Morritt J. in the High Court in April 1989. On 8 May he held, *inter alia*, that *The Independent* and S.T. had been in contempt of court and imposed a fine of £50,000 in each case.

44. On 27 February 1990 the Court of Appeal dismissed appeals by the latter two newspapers against the finding that they had been in contempt but concluded that no fines should be imposed. A further appeal by S.T. against the contempt finding was dismissed by the Appellate Committee of the House of Lords on 11 April 1991.

PROCEEDINGS BEFORE THE COMMISSION

45. In their application (no. 13585/88) lodged with the Commission on 27 January 1988, O.G. alleged that the interlocutory injunctions in question constituted an unjustified interference with their freedom of expression, as guaranteed by Article 10 of the Convention. They further claimed that, contrary to Article 13, they had no effective remedy before a national authority for their Article 10 complaint and that they were victims of discrimination in breach of Article 14.

46. The Commission declared the application admissible on 5 October 1989. In its report of 12 July 1990 (Article 31), it expressed the opinion:

[55] See para. 22 above.
[56] See para. 27 above.

(a) by six votes to five, that there had been a violation of Article 10 in respect of temporary injunctions imposed on O.G. for the period from 11 July 1986 to 30 July 1987;
(b) unanimously, that there had been a violation of Article 10 in respect of temporary injunctions imposed on O.G. for the period from 30 July 1987 to 13 October 1988;
(c) unanimously, that there had been no violation of Article 13 or Article 14.

The Commission's report and the two separate opinions annexed to it follow.

Opinion

A. *Points at issue*

58. The following are the points at issue in the present application:
— whether the interlocutory injunctions imposed on the applicant newspapers by Millett J. on 11 July 1986 were in violation of the applicants' freedom of expression ensured by Article 10 of the Convention;
— whether the refusal to discharge these injunctions by the House of Lords on 30 July 1987 was in further violation of the applicants' rights under Article 10 of the Convention;
— whether the applicants had an effective remedy, pursuant to Article 13 of the Convention, in respect of their complaint under Article 10;
— whether the interlocutory injunctions also constituted discrimination in violation of Article 14 of the Convention read in conjunction with Article 10.

B. *As regards Article 10 of the Convention*

59. Article 10 of the Convention provides as follows:

> '1. 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.
>
> 2. 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.'

60. There are two separate periods to be considered in the present case: the first period ran from Millett J.'s judgment of 11 July 1986

until 30 July 1987, when the House of Lords refused to discharge the interlocutory injunctions against the applicants, despite the publication of *Spycatcher* in the U.S.A. on 14 July 1987. Thereafter the second period ran until the House of Lords' judgment of 13 October 1988, finally refusing the Attorney General's application for permanent injunctions against the applicants. Certain elements of the analysis of the issues in the present case are common to the two periods in question, namely whether the interlocutory injunctions imposed on the applicants constituted an interference with the applicants' freedom of expression ensured by Article 10(1) of the Convention; if so, whether that interference was prescribed by law and whether it had a legitimate aim or aims. The Commission will examine these elements together. However, apart from general considerations, different elements arise regarding the question of necessity, *i.e.* whether the purported interference corresponded to a pressing social need and was proportionate to the pursuit of a legitimate aim throughout the two periods, because the facts of the case radically altered in July 1987. The Commission will, therefore, separate this aspect of the case for the two periods.

(a) *Interference with freedom of expression*

61. It is undisputed in the present case that the interlocutory injunctions imposed on the applicants in varying forms as of 11 July 1986 constituted an interference with the applicants' freedom of expression ensured by Article 10(1) of the Convention. These injunctions prevented the applicants from, *inter alia*, publishing further details about the allegedly unlawful conduct of the British Secret Service described in the book *Spycatcher*, or further information obtained from the book's author, Peter Wright, a retired member of that Service. The Commission finds that the gagging effect of the injunctions, imposing prior restraint on further publication of matters of legitimate public interest, constituted an interference with the applicants' freedom of expression with wide repercussions. The Commission must examine whether that interference was justified under Article 10(2) of the Convention.

(b) *Prescribed by law*

62. Any interference with freedom of expression must be prescribed by law. The word 'law' in the expression 'prescribed by law' covers not only statute but also unwritten law such as the law of contempt of court or breach of confidence in English common law. Two requirements flow from this expression, that of the adequate accessibility and foreseeability of law, to enable the individual to regulate his conduct in the light of the foreseeable consequences of a given action.[57]

[57] SUNDAY TIMES *v.* UNITED KINGDOM, 2 E.H.R.R. 245, at para. 49.

63. The applicants have contended that the imposition of temporary injunctions in the present case was not 'prescribed by law' within the meaning of Article 10(2) of the Convention, the relevant domestic law being insufficiently foreseeable. The Government refuted this contention. It submitted that the relevant principles of law concerning the grant of interim injunctions pending trial of an action were clear and well-established.

64. The Commission notes that the relevant domestic law in the present case concerned not only that of interim injunctions, but also the law of contempt of court and breach of confidence, all being aspects of English common law, *i.e.* non-statutory law. At the outset the Government was concerned to prevent the publication of information directly or indirectly obtained from Peter Wright, a retired member of the British Secret Service, who, in breach of his professional duty of confidence, had divulged information about that Service.

65. A legal dispute arose between the Government, represented by the Attorney General, and the applicants over whether, *inter alia*, a third party, such as a newspaper, could be bound by that duty of confidence and thereby prevented by permanent injunction from publishing information obtained from Mr. Wright. It seems that the applicants had conceded in the interlocutory proceedings that, for the purposes of domestic law, the Attorney General had an arguable point, albeit unfounded on the merits. To protect the Attorney General's interests as a litigant and maintain the procedural *status quo* until the trial on the merits, the law of interim injunctions, as set out in the case of AMERICAN CYANAMID CO *v.* ETHICON LTD,[58] was applied in this case. Once the interim injunctions were imposed on the applicant newspapers the whole of the British media were bound by them for as long as they lasted by virtue of the law of contempt of court.

66. The Commission is of the opinion that a rule which authorises prior restraint of a publication must specify the criteria for such a restriction with sufficient precision to be compatible with the Convention requirement 'prescribed by law.' Having noted that even after the publication of the book in the U.S.A. the English judges, including the Law Lords, were not able to agree on what importance should be attached to the availability of the information contained in *Spycatcher* on the open market, the Commission queries whether the different aspects of common law applied in the present case were entirely clear. However, the Commission finds that the dominant legal principles in the present case were those concerning the grant of interim injunctions. It also finds that they were well-established in English common law, at least since 1975 in the aforementioned AMERICAN CYANAMID case. They can therefore be said to have been adequately foreseeable. The differences between the parties in the

[58] [1975] A.C. 369.

present case have turned principally on the necessity of imposing the interim injunctions, not on the absence of any legal authority for doing so. In these circumstances, the Commission concludes that the interference with the applicants' freedom of expression by interim injunctions imposed on them from 11 July 1986 until 13 October 1988 was 'prescribed by law' within the meaning of Article 10(2) of the Convention.

(c) *Legitimate aim*

67. Interference with freedom of expression may only be justified if it pursues a legitimate aim such as protecting the interests of national security, preventing the disclosure of information received in confidence or maintaining the authority of the judiciary.

68. It is not disputed by the parties that the central purpose of the interlocutory injunctions in the present case has been to protect the position of the Attorney General as a litigant pending the trial of the confidentiality claim on the merits. The Commission considers that such a purpose falls within the scope of the legitimate aim of maintaining the authority and impartiality of the judiciary, within the meaning of Article 10(2) of the Convention.

69. Indirectly the imposition of the original injunctions by Millett J. on 11 July 1986 was also intended to serve the purpose of protecting national security. Millett J. considered that one of the elements to be tested at the eventual trial was whether the efficacy of the British Secret Service would be impaired if its officers felt free to divulge confidential matters. The Commission considers that this, in principle, falls within the scope of the legitimate aim of protecting the interests of national security, within the meaning of Article 10(2) of the Convention. However, the Government has not directly relied on this aspect of justification for the purposes of the proceedings before the Commission.

(d) *Necessary in a democratic society*

70. The key issue in the present case is whether it was necessary in the circumstances to impose temporary injunctions on the applicants at any stage.

71. The adjective 'necessary' within the meaning of Article 10(2) of the Convention is not synonymous with 'indispensable' or as flexible as 'reasonable' or 'desirable,' but it implies the existence of a pressing social need.

72. The notion of necessity implies that the interference of which complaint is made corresponds to this pressing social need, that it is proportionate to the legitimate aim pursued and that the reasons given by the national authorities to justify it are relevant and sufficient.[59]

[59] BARTHOLD *v.* GERMANY (1985) 7 E.H.R.R. 383, at para. 55.

1991

The Observer and the Guardian v. *United Kingdom*

European Commission of Human Rights

Opinion

73. The initial responsibility for securing Convention rights and freedoms lies within the individual Contracting State. Accordingly Article 10(2) of the Convention leaves the Contracting State a margin of appreciation ultimate supervision of which remains with the Convention organs. The scope of the margin of appreciation will vary depending on the aim pursued under Article 10(2) of the Convention. The aim of the restriction in the present case is the maintenance of the authority of the judiciary, the protection of national security being a background element.[60]

74. The Court has acknowledged that the margin of appreciation available to States in assessing the pressing social need to protect certain aspects of national security is a wide one.[61] The Court has also held that the expression 'maintaining the authority and impartiality of the judiciary' not only refers to maintaining public confidence in the ability of the machinery of justice to determine legal rights and obligations and to settle disputes, but also encompasses the protection of the rights of litigants.[62] However, the State's margin of appreciation in this area is more restricted as the notion of the 'authority' of the judiciary has a more objective basis, reflecting a fairly substantial measure of common ground in the domestic law and practice of the Contracting States.[63]

75. Freedom of expression constitutes one of the essential foundations of a democratic society, in particular freedom of political and public debate. This is of special importance for the free press which has a legitimate interest in reporting on and drawing the public's attention to deficiencies in the operation of Government services, including possible illegal activities. It is incumbent on the press to impart information and ideas about such matters and the public has a right to receive them.[64]

76. The Commission must now examine whether, in the circumstances of the present case, there was a pressing social need to issue and maintain the interlocutory injunctions against the applicants and whether they were proportionate to the aim pursued.

77. The applicants contended that there was no pressing social need for any injunction. They submitted, *inter alia*, that their reporting in June 1986 was fair and brief on a subject of major public importance, namely, allegations of misconduct by the Security Service. Most of these allegations were already public knowledge, the Government having failed to prevent previous publication and the confidentiality apparently necessary for the effective operation of that Service having been broken. The application of private litigation principles through the AMERICAN CYANAMID case and its test of the 'balance of

[60] See paras. 67–69 above.

[61] See LEANDER *v.* SWEDEN (1987) 9 E.H.R.R. 59, at para. 59.

[62] SUNDAY TIMES *v.* UNITED KINGDOM, *loc. cit.*, paras. 55–56.

[63] *Ibid.*, para. 59.

[64] *Cf.*, *mutatis mutandis*, SUNDAY TIMES *v.* UNITED KINGDOM, *loc. cit.*, para. 65 and LINGENS *v.* AUSTRIA at (1986) 8 E.H.R.R. 103, paras. 41–42.

convenience' fell short of the Convention's necessity test, and the need to balance the public's right to be informed against the unrealistic confidentiality claim by the Attorney General.

78. The Government replied, *inter alia*, that the temporary injunctions imposed by Millett J. on 11 July 1986 were not concerned with the articles which the applicants had published but with further reports which they might wish to make. The fact that much of the information was already in the public domain ignored this new source of information provided by an insider, namely, Mr. Wright and his book *Spycatcher*. It was his authoritative rôle as a retired member of the Security Service, his breach of confidence with its repercussions on the effective operation of the Service, which concerned the Government. There was a clear need to preserve the subject matter of the case for mature determination of the issues at the trial. The applicants had even conceded that under domestic law the Attorney General had an arguable claim to a permanent injunction against them based on the law of breach of confidence. The imposition of merely temporary injunctions until trial justifiably and proportionately responded to the pressing social need of maintaining the authority of the judiciary, within the meaning of Article 10(2) of the Convention.

(aa) *Necessity: the period 11 July 1986 until 30 July 1987*

Opinion of MM. Frowein, Busuttil and Weitzel

79. In analysing the necessity issue in the present case it is essential to keep in mind the nature of the proceedings in question. We note that the Attorney General's claim was based on the rules concerning breach of confidence and it was the purpose of the temporary injunctions imposed on the applicants to protect the subject matter of the trial until it could be fully examined by the competent courts. We accept that the imposition of a temporary injunction to protect the interests of the parties until the full trial, which trial is decisive for the question whether or not material may be published, must, under normal circumstances, be considered necessary in a democratic society for maintaining the authority of the judiciary within the meaning of Article 10(2) of the Convention. To find otherwise would be to deprive the trial of its purpose. However, the need for a temporary injunction must be established with particular clarity where it is the Government which relies on a private law concept of a breach of confidence to restrict the dissemination of information which is of considerable interest to the public, as in the present case. Whilst a binding rule of confidentiality between private persons is, in principle, compatible with Article 10 of the Convention, since this Article guarantees individual rights *vis-à-vis* the State, a stricter test of necessity must be applied where the Government seeks to restrict press freedom by that same rule.

80. We note that the primary concern of the English courts in the

present case was not the protection of national security, but the protection of confidentiality. This had important consequences for the criteria which they applied: whilst the applicants had argued that their short reports published on 22 and 23 June 1986 did not contain any substantial information which had not already been published in books, newspapers or on television, this was not seen as particularly relevant by the judges concerned. Indeed, at first instance Millett J. considered that the key issue was whether the information to be published derived directly or indirectly from Mr. Wright, not whether it had already been published elsewhere.[65] The Court of Appeal in its judgment of 25 July 1986 considered the earlier publication of the material but found, nevertheless, that, as there was no evidence that the prior publication of Mr. Wright's remarks had been authorised by the Government, the essential confidentiality of the material had not been destroyed.[66] Although falling outside the period under consideration, the majority judgment of the House of Lords on 30 July 1987 also clearly demonstrates the effect of the relevant domestic law. The majority of the House of Lords found that even the publication of the book in the U.S.A. and its importation into and availability in the U.K. did not fundamentally alter the arguability of the Attorney General's claim for breach of confidence. This shows that the decisive test for the English courts was not whether reasons of national security justified the injunctions or even whether such reasons would be at issue in the trial. Only the application of the general principles relating to breach of confidence was substantially at issue throughout these proceedings. We are therefore of the opinion that the confidentiality rule applied on the 'balance of convenience' by these courts fails the necessity test laid down in Article 10(2) of the Convention.

81. We have also examined the newspaper reports printed in the *Observer* on 22 June 1986 and *The Guardian* on 23 June 1986 which gave rise to the litigation in question. We observe that these articles were short, objective and fair. They were based on information, which, although confirmed by undisclosed confidential sources, appears already to have been disclosed to the public in television interviews given by Mr. Wright and in books on the Secret Service written by Chapman Pincher and others. The Government had taken no steps to prevent this earlier disclosure of information by Mr. Wright. Moreover, in view of the previous publication of the information in question, we consider that the Government has not established that there was a pressing social need for imposing the interlocutory injunctions on the applicants. Accordingly, we are of the opinion that it has not been established that the injunctions imposed by Millett J. on 11 July 1986, and confirmed by the Court of Appeal on 25 July 1986, were necessary, within the meaning of Article 10(2) of the Convention.

[65] Transcript of judgment of 11 July 1986, p. 15B–F.
[66] Transcript of judgment of 25 July 1985, p. 15A–D.

82. In considering the necessity issue in the present case for the period 11 July 1986 until 30 July 1987, we keep in mind the nature of the proceedings in question: the Attorney General was seeking through these proceedings to protect the confidentiality of the information received by a retired member of the British Secret Service during his employment, such confidentiality being essential for the efficacy of this Service. The purpose of the temporary injunctions imposed on the applicants was the protection of the subject matter of the trial until it could be fully examined by the competent courts.

83. The imposition of a temporary injunction to protect the interests of the parties until the full trial may be considered necessary in a democratic society for maintaining the authority of the judiciary, within the meaning of Article 10(2) of the Convention. Furthermore the imposition of a temporary injunction in order to maintain the essential confidentiality of the state Secret Service pending the final determination of related issues by the courts may, in principle, be considered necessary in a democratic society in order to protect national security. However, such a restriction on freedom of expression and the right to receive and impart information must be balanced against the public interest in receiving the information in question. Moreover, the need for any such temporary injunction should be established with particular clarity and certainty where it is the Government which seeks to restrict the dissemination of information which is of considerable interest to the public, as in the present case.

84. We must examine whether the interference was necessary in a democratic society within the meaning of Article 10(2) of the Convention. This implies, *inter alia*, that a pressing social need must be demonstrated with regard to the temporary injunctions imposed on the applicants. We are of the opinion that the injunctions imposed by Millett J. on 11 July 1986, confirmed by the Court of Appeal on 25 July 1986, did not meet in a proportionate manner any pressing social need either to maintain the authority of the judiciary, or to protect national security, in the circumstances of the present case, account being taken of the following factors:

(a) The confidentiality which was supposed to have been protected had been substantially destroyed by previous publications such as the Chapman Pincher books, the television interviews with Mr. Wright and the Australian proceedings. In this respect it should be noted that the Government took no action against these previous disclosures and publications in the U.K.

(b) The injunctions could not effectively preserve the *status quo*, given the inevitable leakage of the confidential information in question from other sources, such as the Australian proceedings and the previous publications.

(c) The reports printed in the *Observer* on 22 June 1986 and *The Guardian* on 23 June 1986 which gave rise to the litigation in question were short, objective and fair. They were based on information, which, although confirmed by undisclosed, confidential sources, was derived from the material mentioned above in point (a). Moreover, the information concerned events arising years before, which by 1986 do not appear to have posed any major threat to national security.

(d) The Attorney General's claim and the imposition by the courts of the injunctions in question failed to give sufficient weight to the public's right to know about the workings of government and the duty of the press to denounce alleged misconduct by a governmental authority. In our view, considerable emphasis must be placed on the public's interest in this information.

85. In balancing the conflicting interests at issue in this case, we consider that the Government has failed to establish a pressing social need for the temporary injunctions imposed on the applicants at the outset. We are, therefore, of the opinion that the interference in the present case was not necessary in a democratic society within the meaning of Article 10(2) of the Convention.

Conclusion

86. The Commission concludes, by six votes to five, that there has been a violation of Article 10 of the Convention in respect of temporary injunctions imposed on the applicants for the period 11 July 1986 to 30 July 1987.

(bb) *Necessity: the period 30 July 1987 until 13 October 1988*

87. The Commission notes that by the end of July 1987 extensive details about the contents of *Spycatcher* had been divulged in major newspapers in Britain, Australia and the U.S.A. The *Sunday Times* published extracts of the book on 12 July 1987 and the book itself went on sale in the U.S.A. on 14 July 1987 where it became an instant best seller. As of April 1987 the applicants unsuccessfully applied for discharge of the interlocutory injunctions originally imposed in July 1986 in view of the significant change in circumstances.

88. The applicants contended that the perpetuation of these injunctions by the House of Lords on 30 July 1987 and by subsequent courts until 13 October 1988 was a wholly disproportionate measure corresponding to no pressing social need by that time. The Government persisted in its submission that the continuation of the temporary injunctions pending the final negative determination of the merits of the Attorney General's claim by the House of Lords on 13 October 1988 was necessary for the maintenance of the authority of the judiciary, within the meaning of Article 10(2) of the Convention.

89. The Commission is unable to accept the Government's

proposition. It was clear by the time the book was published in the U.S.A. that the confidentiality of the information held by Peter Wright had been destroyed. The Commission observes that the Government made no attempt to prevent the book's importation into the U.K. The Commission fails to see a pressing social need to prevent the British public reading about something which the rest of the world was free to read by then and which concerned a matter of major interest to it. Moreover, the argument concerning the merely temporary nature of the injunctions loses its cogency when account is taken of the fact that the proceedings in question took over two years and the fact that the evidence upon which the House of Lords based its decision on the merits in October 1988 was substantially available at the outset in July 1986 and fully available by July 1987.

90. In these circumstances the Commission is of the opinion that the refusal to discharge the interlocutory injunctions against the applicants as of 30 July 1987 was not necessary and met no pressing social need to maintain the authority and impartiality of the judiciary within the meaning of Article 10(2) of the Convention.

Conclusion

91. The Commission concludes, unanimously, that there has been a violation of Article 10 of the Convention in respect of temporary injunctions imposed on the applicants for the period 30 July 1987 to 13 October 1988.

C. *As regards Article 13 of the Convention*

92. Article 13 provides:

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

93. The applicants contended that the House of Lords in its judgment of 30 July 1987 failed to apply the principles laid down in Article 10(2) of the Convention. Because the Convention, or its standards, are not incorporated into U.K. domestic law, the applicants submitted that they had no effective remedy before a national authority for their claims of a breach of Article 10 of the Convention. The Government contended that just as Article 13 of the Convention does not guarantee a remedy by which legislation can be controlled as to its conformity with the Convention, so too Article 13 cannot be interpreted as guaranteeing a remedy against the decision of the highest court in the domestic legal system which is allegedly in breach of a substantive Article of the Convention.

94. The Commission is of the opinion that the interpretation of the Convention as a whole imposes certain limitations on the right to a

remedy recognised by Article 13. In the present case the applicants complain of a decision by the highest judicial authority in the English legal system. The Commission considers that in this situation Article 13 does not require yet a further remedy. Article 13 does not, therefore, apply in this case.

Conclusion

95. The Commission concludes, unanimously, that there has been no violation of Article 13 of the Convention.

D. *As regards Article 14 of the Convention*

96. Article 14 provides:

> 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

97. The applicants contended that as a result of the House of Lords' judgment of 30 July 1987 the applicants' rights and those of their readers under Article 10 of the Convention could not be enjoyed without discrimination. People in the U.S.A. and European countries could purchase and read freely distributed copies of *Spycatcher* whereas those in the U.K. most closely affected by its contents could not. Furthermore those people in the U.K. who had 'the necessary money and knowhow' could purchase *Spycatcher* from American retailers. The applicants therefore allege that there has been discrimination on the basis of national or social origin and discrimination based on property, wealth and the acquisition of privileged knowledge.

98. The Government contended that the applicants were in the same position as other newspaper publishers or other sections of the media in the U.K.; they were not subject to any different treatment under the law than others in a comparable position. Moreover the applicants were not responsible for publishing, distributing or marketing *Spycatcher*. Accordingly they could not claim to be victims of discriminatory treatment with regard to the sale or distribution of the book. Nor can the Convention organs entertain an *actio popularis* concerning the ability of members of the U.K. public to purchase the book. The Government submitted, therefore, that the applicants did not suffer any discrimination contrary to Article 14 of the Convention.

99. The Commission is of the opinion that the applicants cannot claim to be victims of a violation of Article 14 of the Convention on behalf of the U.K. public who may have had difficulties purchasing *Spycatcher* at the material time. It also agrees with the Government's contentions that the applicants were not subject to any different

treatment under the domestic law than others in a comparable position. The Government's liability under the Convention is limited to its jurisdiction. Within the U.K. the whole of the British media were bound by the House of Lords' judgment of 30 July 1987, by virtue of the law of contempt of court, to refrain from publishing details of the contents of *Spycatcher*. In these circumstances the Commission considers that the applicants did not suffer any discrimination in the enjoyment of their Article 10 rights, contrary to Article 14 of the Convention.

Conclusion

100. The Commission concludes, unanimously, that there has been no violation of Article 14 of the Convention.

E. *Recapitulation*

101. The Commission concludes, by six votes to five, that there has been a violation of Article 10 of the Convention in respect of temporary injunctions imposed on the applicants for the period 11 July 1986 to 30 July 1987.[67]

102. The Commission concludes, unanimously, that there has been a violation of Article 10 of the Convention in respect of temporary injunctions imposed on the applicants for the period 30 July 1987 to 13 October 1988.[68]

103. The Commission concludes, unanimously, that there has been no violation of Article 13 of the Convention.[69]

104. The Commission concludes, unanimously, that there has been no violation of Article 14 of the Convention.[70]

Concurring opinion of Sir Basil Hall in respect of the period 30 July 1987 until 13 October 1988

While I am in agreement with the Commission that there was a violation of Article 10 of the Convention in the maintenance of interim injunctions until 13 October 1988, when the House of Lords gave their opinions that permanent injunctions should not be ordered, I reach that conclusion on somewhat different grounds.

The only effective remedy available to the Government of the United Kingdom was an action seeking an order preventing publication of information obtained in breach of an obligation of confidentiality. As the opinion of the minority of the Commission indicates, it was proper, in order to maintain the authority of the judiciary, for the Court to impose temporary injunctions to be

[67] Para. 86.
[68] Para. 91.
[69] Para. 95.
[70] Para. 100.

effective until the trial of the action brought on behalf of the Government. It was accepted that the Government had an arguable case. But for such an interim injunction, a judgment of the Court on the merits would, if in the Government's favour, have had no practical effect. In circumstances such as these interim injunctions are necessary to maintain the authority of the judiciary.

Where such an order restricting publication pending a hearing on the merits is made, the effect is to restrict the right of freedom of expression given by Article 10 of the Convention. The national authorities then have a duty to ensure that the restriction is limited in duration, and, accordingly, that the hearing on the merits takes place expeditiously.

The proceedings in this case were instituted on 27 June 1986. The hearing at first instance on the merits took place in November and December 1987. The appeal to the Court of Appeal was decided in February 1988. The opinions of the House of Lords were delivered on 13 October 1988, a period of more than two years after the initial *ex parte* interim injunctions.

Comparison may be made with the description of the domestic proceedings in the SUNDAY TIMES case[71]: a writ claiming an injunction against publication was issued on 12 October 1972. The final decision on the merits—the judgment of the House of Lords—was delivered on 18 July 1973, nine months later. Other instances of speedy disposal of comparable cases can be found in other law reports.

In this case no effort appears to have been made to expedite a hearing on the merits. When the House of Lords delivered their opinions on the application to discharge the interim injunctions on 13 August 1987, Lord Brandon remarked:

> 'For obvious reasons that trial should have taken place as soon as possible, it has already been delayed far too long.'

In my view that was indeed so. Because of that delay, for which the United Kingdom cannot escape responsibility, the freedom of newspapers to impart information and the freedom of the public to receive information about the *Spycatcher* case was restricted for a period which cannot be justified. There was, accordingly, a violation of Article 10 of the Convention.

Partly dissenting opinion of MM. Nørgaard, Jörundsson, Schermers, Danelius and Sir Basil Hall

We found ourselves unable to agree with the finding of the majority in paragraphs 79–86 above that there has been a violation of Article 10 of the Convention in respect of temporary injunctions imposed on the applicants for the period 11 July 1986 to 30 July 1987.

Despite the fact that certain allegations in the newspaper reports

[71] SUNDAY TIMES *v.* UNITED KINGDOM, *loc. cit.*, paras. 22–34.

printed in the *Observer* on 22 June 1986 and *The Guardian* on 23 June 1986, which gave rise to the litigation in question, had apparently already been made public, the applicants have conceded that the articles were written on the basis of information which they had obtained from undisclosed confidential sources. In these circumstances, although the reports were short and fair, we consider that the Government had sufficient reason to believe that the applicants had access to further confidential information directly or indirectly obtained from Mr. Wright about the British Secret Service, the publication of which information the Government were seeking to prevent in Australia and elsewhere. This led to the Government's initiative in applying for temporary injunctions against the applicant newspapers pending the trial of the substantive claim for permanent injunctions against them. We consider that in July 1986 the Attorney General, on behalf of the Government, could be said to have had an arguable claim for permanent injunctions against the applicants. We also consider that the object of this claim, namely, preventing the publication of confidential information about the operation of the Secret Service, would have been destroyed if the applicants had been allowed to continue publication of Mr. Wright's allegations about the misconduct of the Secret Service before the trial on the merits. This created a conflict between two fundamental rights, *i.e.* the right of the press to impart information as quickly as possible on the one hand, and, on the other hand, the right of the Attorney General to have a legal dispute decided by a court rather than by a unilateral act of the opposing party.

Unlike the majority of the Commission, we are of the opinion that the grant of interlocutory injunctions by Millett J. on 11 July 1986 was justified. Although the rôle of the press in a democratic society is to keep the public informed of matters of public interest, nevertheless account must be taken of the temporary nature of the injunctions pending trial and the fact that the interests of the plaintiff, the Attorney General as litigant, could only effectively be protected by temporary injunctions on further publication rather than by damages. In these circumstances we are of the opinion that the grant of interlocutory injunctions by Millett J. on 11 July 1986 was necessary and met, with due proportion, the pressing social need of maintaining the authority and impartiality of the judiciary, which notion under Article 10(2) of the Convention encompasses the rights of litigants. We are of the view that this need continued until July 1987.

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

47. At the hearing on 25 June 1991, the Government invited the Court to make the findings set out in its memorial, namely that there had been no breach of O.G.'s rights under Articles 10, 13 or 14.

JUDGMENT

I. *Alleged violation of Article 10 of the Convention*

48. O.G. alleged that, by reason of the interlocutory injunctions to which they had been subject from 11 July 1986 to 13 October 1988, they had been victims of a violation of Article 10 of the Convention, which provides as follows:

> '1. 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.
>
> 2. 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.'

This allegation was contested by the Government. It was accepted by the Commission, by a majority as regards the period from 11 July 1986 to 30 July 1987 and unanimously as regards the period from 30 July 1987 to 13 October 1988.

49. The restrictions complained of clearly constituted, as was not disputed, an 'interference' with O.G.'s exercise of their freedom of expression, as guaranteed by paragraph (1) of Article 10. Such an interference entails a violation of Article 10 if it does not fall within one of the exceptions provided for in paragraph (2); the Court must therefore examine in turn whether the interference was 'prescribed by law,' whether it had an aim or aims that is or are legitimate under Article 10(2) and whether it was 'necessary in a democratic society' for the aforesaid aim or aims.

A. *Was the interference 'prescribed by law'?*

50. O.G. did not deny that the grant of the interlocutory injunctions was in accordance with domestic law. Although they laid no emphasis on this point at the hearing, they did maintain in their memorial that the interference complained of was not 'prescribed by law' for the purposes of Article 10. This contention was challenged by the Government and was not accepted by the Commission.

51. It is true that the Attorney General's actions for breach of confidence raised issues of law which were not clarified until judgment had been given on the merits. However, O.G.'s complaint was not directed to this aspect of the case, but solely to the legal principles upon which the injunctions were granted, which principles were, in

their submission, neither adequately accessible nor sufficiently foreseeable.[72]

52. In the Court's view, no problem arises concerning accessibility, since the relevant guidelines had been enunciated by the House of Lords several years previously, in 1975, in AMERICAN CYANAMID CO. *v.* ETHICON LTD.[73]

53. (a) As regards foreseeability, O.G. advanced three specific arguments.

(i) It was not clear whether the AMERICAN CYANAMID decision had overruled certain earlier rules relating to the grant of injunctions in particular areas of the law. The Court notes, however, that O.G. themselves recognised that the principles laid down in that decision had been expressed to be applicable to all classes of action.

(ii) There had never been a case similar to theirs in which the AMERICAN CYANAMID principles had been applied. This fact, in the Court's view, is of little consequence in the present context: since the principles were expressed to be of general application, recourse had perforce to be had to them from time to time in novel situations, so that their utilisation on this occasion involved no more than the application of existing rules to a different set of circumstances.

(iii) It was not until judgment was given on the merits of the Attorney General's actions[74] that it became clear that an injunction would be granted in a case of this kind only on proof of potential detriment to the public interest. This, however, suggests that there was a greater likelihood of a restriction being imposed under the law as it stood previously.

(b) More generally, having examined the AMERICAN CYANAMID principles in the light of its abovementioned SUNDAY TIMES judgment,[75] and especially paragraph 49 thereof, the Court entertains no doubt that they were formulated with a degree of precision that is sufficient in a matter of this kind. It considers that O.G. must have been able to foresee, to an extent that was reasonable in the circumstances, a risk that the interlocutory injunctions would be imposed.

54. The interference was accordingly 'prescribed by law.'

B. *Did the interference have aims that are legitimate under Article 10(2)?*

55. The Government submitted that the interlocutory injunctions were designed to protect the Attorney General's rights at the substantive trial and therefore had the aim, that was legitimate in

[72] See SUNDAY TIMES *v.* UNITED KINGDOM, *loc.cit.*, para. 49.
[73] See para. 10 above.
[74] See paras. 39–42 above.
[75] SUNDAY TIMES *v.* UNITED KINGDOM, cited above.

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terms of paragraph (2) of Article 10, of 'maintaining the authority of the judiciary.' Before the Court, it also asserted that the injunctions indirectly served the aim of protecting national security, since the underlying purpose of the Attorney General's actions was to prevent the effective operation of the Security Service from being undermined.

Although O.G. expressed certain reservations on the second of these points, they did not seek to deny that the interference had a legitimate aim.

56. The Court is satisfied that the injunctions had the direct or primary aim of 'maintaining the authority of the judiciary,' which phrase includes the protection of the rights of litigants.[76] Perusal of the relevant domestic judgments makes it perfectly clear that the purpose of the order made against O.G. was—to adopt the description given by Lord Oliver of Aylmerton[77]—'to enable issues between the plaintiff and the defendants to be tried without the plaintiff's rights in the meantime being prejudiced by the doing of the very act which it was the purpose of the action to prevent.'

It is also incontrovertible that a further purpose of the restrictions complained of was the protection of national security. They were imposed, as has just been seen, with a view to ensuring a fair trial of the Attorney General's claim for permanent injunctions against O.G. and the evidential basis for that claim was the two affidavits sworn by Sir Robert Armstrong, in which he deposed to the potential damage which publication of the *Spycatcher* material would cause to the Security Service.[78] Not only was that evidence relied on by Millett J. when granting the injunctions initially,[79] but considerations of national security featured prominently in all the judgments delivered by the English courts in this case.[80] The Court would only comment—and it will revert to this point in paragraph 69 below—that the precise nature of the national security considerations involved varied over the course of time.

57. The interference complained of thus had aims that were legitimate under paragraph (2) of Article 10.

C. *Was the interference 'necessary in a democratic society'?*

58. Argument before the Court was concentrated on the question whether the interference complained of could be regarded as 'necessary in a democratic society.' After summarising the relevant general principles that emerge from its case law, the Court will, like the Commission, examine this issue with regard to two distinct periods, the first running from 11 July 1986 (imposition of the Millett injunctions) to 30 July 1987 (continuation of those measures by the

[76] See SUNDAY TIMES *v.* UNITED KINGDOM, para. 56.
[77] A.G. *v.* TIMES NEWSPAPERS LTD., [1991] 2 W.L.R. 1019G.
[78] See para. 16 above.
[79] See para. 18(e) above.
[80] See paras. 18, 34, 36 and 40 above.

House of Lords), and the second from 30 July 1987 to 13 October 1988 (final decision on the merits of the Attorney General's actions for breach of confidence).

1. *General principles*

59. The Court's judgments relating to Article 10—starting with HANDYSIDE[81] concluding, most recently, with OBERSCHLICK[82] and including, amongst others, SUNDAY TIMES[83] and LINGENS[84]—enounce the following major principles.

(a) Freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph (2) of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.

(b) These principles are of particular importance as far as the press is concerned. Whilst it must not overstep the bounds set, *inter alia*, in the 'interests of national security' or for 'maintaining the authority of the judiciary,' it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital rôle of 'public watchdog.'

60. For the avoidance of doubt, and having in mind the written comments that were submitted in this case by 'Article 19,'[85] the Court would only add to the foregoing that Article 10 of the Convention does not in terms prohibit the imposition of prior restraints on publication, as such. This is evidenced not only by the words 'conditions,' 'restrictions,' 'preventing' and 'prevention' which appear in that provision, but also by the SUNDAY TIMES judgment of 26 April 1979 and its MARKT INTERN VERLAG GMBH AND KLAUS BEERMAN judgment of 20 November 1988.[86] On the other hand, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.

[81] HANDYSIDE *v.* UNITED KINGDOM, 1 E.H.R.R. 737.
[82] OBERSCHLICK *v.* AUSTRIA, Series A No. 204.
[83] SUNDAY TIMES *v.* UNITED KINGDOM.
[84] LINGENS *v.* AUSTRIA, cited above.
[85] See para. 6 above.
[86] MARKT INTERN VERLAG AND BEERMANN *v.* GERMANY (1990) 12 E.H.R.R. 161.

2. *The period from 11 July 1986 to 30 July 1987*

61. In assessing the necessity for the interference with O.G.'s freedom of expression during the period from 11 July 1986 to 30 July 1987, it is essential to have a clear picture of the factual situation that obtained when Millett J. first imposed the injunctions in question.

At that time O.G. had only published two short articles which, in their submission, constituted fair reports concerning the issues in the forthcoming hearing in Australia; contained information that was of legitimate public concern, that is to say allegations of impropriety on the part of officers of the British Security Service; and repeated material which, with little or no action on the part of the Government to prevent this, had for the most part already been made public.

Whilst substantially correct, these submissions do not tell the whole story. They omit, in the first place, O.G.'s acknowledgment, before Millett J., that they wished to be free to publish further information deriving directly or indirectly from Mr. Wright and disclosing alleged unlawful activity on the part of the Security Service, whether or not it had been previously published.[87] What they also omit is the fact that in July 1986 *Spycatcher* existed only in manuscript form. It was not then known precisely what the book would contain and, even if the previously-published material furnished some clues in this respect, it might have been expected that the author would seek to say something new. And it was not unreasonable to suppose that where a former senior employee of a security service—an 'insider,' such as Mr. Wright—proposed to publish, without authorisation, his memoirs, there was at least a risk that they would comprise material the disclosure of which might be detrimental to that service; it has to be borne in mind that in such a context damaging information may be gleaned from an accumulation of what appear at first sight to be unimportant details. What is more, it was improbable in any event that all the contents of the book would raise questions of public concern outweighing the interests of national security.

62. Millett J.'s decision to grant injunctions—which, in the subsequent stages of the interlocutory proceedings, was accepted as correct not only by the Court of Appeal but also by all the members of the Appellate Committee of the House of Lords[88]—was based on the following line of reasoning. The Attorney General was seeking a permanent ban on the publication of material the disclosure of which would, according to the credible evidence presented on his behalf, be detrimental to the Security Service; to refuse interlocutory injunctions would mean that O.G. would be free to publish that material immediately and before the substantive trial; this would effectively deprive the Attorney General, if successful on the merits, of his right to be granted a permanent injunction, thereby irrevocably destroying

[87] See para. 18(b) above.
[88] See para. 18 *in fine* above.

the substance of his actions and, with it, the claim to protect national security.

In the Court's view, these reasons were 'relevant' in terms of the aims both of protecting national security and of maintaining the authority of the judiciary. The question remains whether they were 'sufficient.'

63. In this connection, O.G. objected that the interlocutory injunctions had been granted on the basis of the AMERICAN CYANAMID principles which, in their opinion, were incompatible with the criteria of Article 10. They maintained that, in a case of this kind, those principles were unduly advantageous to the plaintiff since he had to establish only that he had an arguable case and that the balance of convenience lay in favour of injunctive relief; in their submission, a stricter test of necessity had to be applied when it was a question of restricting publication by the press on a matter of considerable public interest.

The AMERICAN CYANAMID case admittedly related to the alleged infringement of a patent and not to freedom of the press. However, it is not the Court's function to review those principles *in abstracto*, but rather to determine whether the interference resulting from their application was necessary having regard to the facts and circumstances prevailing in the specific case before it.[89]

In any event, perusal of the relevant judgments reveals that the English courts did far more than simply apply the AMERICAN CYANAMID principles inflexibly or automatically; they recognised that the present case involved a conflict between the public interest in preventing and the public interest in allowing disclosure of the material in question, which conflict they resolved by a careful weighing of the relevant considerations on either side.

In forming its own opinion, the Court has borne in mind its observations concerning the nature and contents of *Spycatcher*[90] and the interests of national security involved; it has also had regard to the potential prejudice to the Attorney General's breach of confidence actions, this being a point that has to be seen in the context of the central position occupied by Article 6 of the Convention and its guarantee of the right to a fair trial.[91] Particularly in the light of these factors, the Court takes the view that, having regard to their margin of appreciation, the English courts were entitled to consider the grant of injunctive relief to be necessary and that their reasons for so concluding were 'sufficient' for the purposes of paragraph (2) of Article 10.

64. It has nevertheless to be examined whether the actual restraints imposed were 'proportionate' to the legitimate aims pursued.

In this connection, it is to be noted that the injunctions did not erect

[89] See SUNDAY TIMES *v.* UNITED KINGDOM, para. 65.
[90] See para. 61 above.
[91] See SUNDAY TIMES *v.* UNITED KINGDOM, para. 55.

a blanket prohibition. Whilst they forbade the publication of information derived from or attributed to Mr. Wright in his capacity as a member of the Security Service, they did not prevent O.G. from pursuing their campaign for an independent inquiry into the operation of that service.[92] Moreover, they contained provisos excluding certain material from their scope, notably that which had been previously published in the works of Mr. Chapman Pincher and in the Granada Television programmes.[93] Again, it was open to O.G. at any time to seek—as they in fact did[94]—variation or discharge of the orders.

It is true that although the injunctions were intended to be no more than temporary measures, they in fact remained in force—as far as the period now under consideration is concerned—for slightly more than a year. And this is a long time where the perishable commodity of news is concerned.[95] As against this, it may be pointed out that the Court of Appeal[96] certified the case as fit for a speedy trial—which O.G. apparently did not seek—and that the news in question, relating as it did to events that had occurred several years previously, could not really be classified as urgent. Furthermore, the Attorney General's actions raised difficult issues of both fact and law: time was accordingly required for the preparation of the trial, especially since, as Lord Brandon of Oakbrook pointed out,[97] they were issues on which evidence had to be adduced and subjected to cross-examination.

65. Having regard to the foregoing, the Court concludes that, as regards the period from 11 July 1986 to 30 July 1987, the national authorities were entitled to think that the interference complained of was 'necessary in a democratic society.'

3. *The period from 30 July to 13 October 1988*

66. On 14 July 1987 *Spycatcher* was published in the U.S.A.[98] This changed the situation that had obtained since 11 July 1986. In the first place, the contents of the book ceased to be a matter of speculation and their confidentiality was destroyed. Furthermore, Mr. Wright's memoirs were obtainable from abroad by residents of the United Kingdom, the Government having made no attempt to impose a ban on importation.[99]

67. In the submission of the Government, the continuation of the interlocutory injunctions during the period from 30 July 1987 to 13 October 1988 nevertheless remained 'necessary,' in terms of Article 10, for maintaining the authority of the judiciary and thereby protecting the interests of national security. It relied on the conclusion

[92] See para. 14 above.
[93] See para. 19 above.
[94] See paras. 23 and 26 above.
[95] See para. 60 above.
[96] See para. 19 above.
[97] See para. 36(a)(iv) above.
[98] See para. 28 above.
[99] See para. 29 above.

of the House of Lords in July 1987 that, notwithstanding the United States publication: (a) the Attorney General still had an arguable case for permanent injunctions against O.G., which case could be fairly determined only if restraints on publication were imposed pending the substantive trial; and (b) there was still a national security interest in preventing the general dissemination of the contents of the book through the press and a public interest in discouraging the unauthorised publication of memoirs containing confidential material.

68. The fact that the further publication of *Spycatcher* material could have been prejudicial to the trial of the Attorney General's claims for permanent injunctions was certainly in terms of the aim of maintaining the authority of the judiciary, a 'relevant' reason for continuing the restraints in question. The Court finds, however, that in the circumstances it does not constitute a 'sufficient' reason for the purposes of Article 10.

It is true that the House of Lords had regard to the requirements of the Convention, even though it is not incorporated into domestic law.[100] It is also true that there is some difference between the casual importation of copies of *Spycatcher* into the United Kingdom and mass publication of its contents in the press. On the other hand, even if the Attorney General had succeeded in obtaining permanent injunctions at the substantive trial, they would have borne on material the confidentiality of which had been destroyed in any event—and irrespective of whether any further disclosures were made by O.G.—as a result of the publication in the United States. Seen in terms of the protection of the Attorney General's rights as a litigant, the interest in maintaining the confidentiality of that material had, for the purposes of the Convention, ceased to exist by 30 July 1987.[101]

69. As regards the interests of national security relied on, the Court observes that in this respect the Attorney General's case underwent, to adopt the words of Scott J., 'a curious metamorphosis.'[102] As emerges from Sir Robert Armstrong's evidence,[103] injunctions were sought at the outset, *inter alia*, to preserve the secret character of information that ought to be kept secret. By 30 July 1987, however, the information had lost that character and, as was observed by Lord Brandon of Oakbrook,[104] the major part of the potential damage adverted to by Sir Robert Armstrong had already been done. By then, the purpose of the injunctions had thus become confined to the promotion of the efficiency and reputation of the Security Service, notably by: preserving confidence in that Service on the part of third parties; making it clear that the unauthorised publication of memoirs by its former members would not be countenanced; and deterring others who might be tempted to follow in Mr. Wright's footsteps.

[100] See para. 36 above.

[101] See, *mutatis mutandis*, WEBER *v.* SWITZERLAND (1990) 12 E.H.R.R. 508, at para. 51.

[102] A.G. *v.* GUARDIAN NEWSPAPERS LTD. (NO. 2) [1990] 1 A.C. 140F.

[103] See para. 16 above.

[104] See para. 36(a)(iv) above.

The Court does not regard these objectives as sufficient to justify the continuation of the interference complained of. It is, in the first place, open to question whether the actions against O.G. could have served to advance the attainment of these objectives any further than had already been achieved by the steps taken against Mr. Wright himself. Again, bearing in mind the availability or an action for an account of profits,[105] the Court shares the doubts of Lord Oliver of Aylmerton[106] whether it was legitimate, for the purpose of punishing Mr. Wright and providing an example to others, to use the injunctive remedy against persons, such as O.G., who had not been concerned with the publication of *Spycatcher*. Above all, continuation of the restrictions after July 1987 prevented newspapers from exercising their right and duty to purvey information, already available, on a matter of legitimate public concern.

70. Having regard to the foregoing, the Court concludes that the interference complained of was no longer 'necessary in a democratic society' after 30 July 1987.

D. *Conclusion*

71. To sum up, there was a violation of Article 10 from 30 July 1987 to 13 October 1988, but not from 11 July 1986 to 30 July 1987.

II. *Alleged violation of Article 14 of the Convention, taken in conjunction with Article 10*

72. O.G. complained that newspapers published abroad, which could freely be imported into the United Kingdom, were not bound by the interlocutory injunctions; they thus had an advantage over the *Observer* and *The Guardian* in that country as well as in the latter's overseas markets. O.G. alleged that on this account they had been victims of a violation of Article 14 of the Convention taken in conjunction with Article 10, the former provisions reading as follows:

> 'The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

73. The factual basis for the foregoing complaint was in part contested by the Government, who maintained that the publishers and distributors of foreign newspapers within the United Kingdom would, by operation of the law of contempt of court[107] equally have been subject to the restraints in question. In any event, the Court agrees with the Government and the Commission that this complaint has to be rejected.

[105] See paras. 39–42 above.
[106] See para. 36(e)(ii) above.
[107] See para. 30 above.

Article 14 affords protection against different treatment, without an objective and reasonable justification, of persons in similar situations.[108] If and in so far as foreign newspapers were subject to the same restrictions as O.G., there was no difference of treatment. If and in so far as they were not, this was because they were not subject to the jurisdiction of the English courts and hence were not in a situation similar to that of O.G.

74. There was thus no violation of Article 14 taken in conjunction with Article 10.

III. *Alleged violation of Article 13 of the Convention*

75. O.G. complained of the fact that the English courts did not apply the proper principles in relation to Article 10 and that neither that provision nor the case law relevant thereto had been incorporated into English law. They alleged that on this account they had been victims of a violation of Article 13 of the Convention, which provides:

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

76. The Court agrees with the Government and the Commission that this allegation has to be rejected.

The thrust of O.G.'s complaint under the Convention was that the imposition of interlocutory injunctions constituted an unjustified interference with their freedom of expression and it is clear that they not only could but also did raise this issue in substance before the domestic courts. And it has to be recalled that the effectiveness of a remedy, for the purposes of Article 13, does not depend on the certainty of a favourable outcome.[109]

As regards the specific matters pleaded, the Court has held on several occasions that there is no obligation to incorporate the Convention into domestic law.[110] Again, Article 13 does not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention.[111]

77. There has accordingly been no violation of Article 13.

IV. *Application of Article 50 of the Convention*

78. Under Article 50 of the Convention,

> 'If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the . . . Convention,

[108] See, *e.g.*, FREDIN *v.* SWEDEN (1991) 13 E.H.R.R. 784, at para. 60.
[109] See SOERING *v.* UNITED KINGDOM (1990) 12 E.H.R.R. 439, at para. 122.
[110] See, *e.g.*, JAMES *v.* UNITED KINGDOM (1987) 8 E.H.R.R. 123, at para. 84.
[111] See *ibid.*, para. 85.

and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.'

O.G. made no claim for compensation for damage, but they did seek under this provision reimbursement of their legal costs and expenses in the domestic and the Strasbourg proceedings, in a total amount of £212,430·28.

The Court has examined this issue in the light of the criteria established in its case law and of the observations submitted by the Government and the applicants.

A. *The domestic proceedings*

79. The claim in respect of the domestic proceedings totalled £137,825·05. It did not extend to the 1987 hearing before the Vice-Chancellor,[112] the costs of which had already been paid by the Government to the applicants. Its breakdown is as follows:

(a) for the Court of Appeal hearing ended on 25 July 1986[113]: £55,624·11 (composed of £23,526·23 for the fees and disbursements of the applicants' solicitors and counsel, £17,364·29 for interest thereon for the period from 25 July 1986 to 25 June 1991 and £14,733·59 for the costs and interest paid by the applicants to the Attorney General);

(b) for the Court of Appeal hearing ended on 24 July 1987[114]: £31,098·20 (composed of £14,310·29 for the fees and disbursements of the applicants' solicitors and counsel, £8,421·50 for interest thereon for the period from 24 July 1987 to 25 June 1991 and £8,366·41 for the costs and interest paid by the applicants to the Attorney General);

(c) for the House of Lords hearing ended on 30 July 1987[115]: £51,102·74 (composed of £43,102·74 for the fees and disbursements of the applicants' solicitors and counsel and £8,000 for the costs paid by the applicants to the Attorney General).

80. The Court's observations on this claim are as follows.

(a) Having found no violation in respect of the period from 11 July 1986 to 30 July 1987,[116] it agrees with the Government that no award should be made in respect of costs referable to the 1986 Court of Appeal hearing. However, the same does not apply to those referable to the 1987 Court of Appeal hearing: although the latter proceedings took place within the period in question, they post-dated the publication of *Spycatcher* in the U.S.A.[117]

[112] See paras. 32–33 above.
[113] See para. 19 above.
[114] See para. 34 above.
[115] See paras. 35–36 above.
[116] See paras. 61–65 and 71 above.
[117] See paras. 28–29 above.

and, like those before the House of Lords in 1987, are to be regarded as an attempt to obtain, through the domestic legal order, prevention of the violation that the Court has found to have occurred in the period from 30 July 1987 to 13 October 1988.[118]

(b) The Court is unable to accept the Government's submission that the extra costs attributable to the fact that the *Observer* applicants and the *Guardian* applicants were represented by different firms of solicitors should be disallowed. They were entitled to instruct such lawyers as they chose. Nevertheless, bearing in mind that the interests of both sets of applicants were substantially the same, the Court shares the Government's view that the charges for the services of the total number of fee earners involved cannot all be considered to have been 'necessarily' incurred.

(c) The Court also agrees with the Government's submission that the costs charged by the solicitors concerned cannot be regarded as reasonable as to quantum for the purposes of Article 50; furthermore, it also accepts that some reduction should be made in the amount claimed for counsel's fees before the House of Lords.

(d) The Court notes that, as regards the 1987 Court of Appeal hearing, the Government has raised no objection to the applicants' claim for interest and that the sum paid by the latter to the Attorney General itself included interest.

81. Having regard to the foregoing, the Court awards to the applicants, in respect of their own costs[119] and the amounts paid by them to the Attorney General, the sum of £65,000.

B. *The Strasbourg proceedings*

82. On the applicants' claim in respect of costs and expenses referable to the Strasbourg proceedings,[120] the Court's observations are as follows.

(a) A reduction should be made to reflect the fact that no violation was found to have occurred in the period from 11 July 1986 to 30 July 1987. On the other hand, it would not be appropriate to make a significant reduction in respect of the unsuccessful complaints of breach of Articles 13 and 14,[121] since the bulk of the work done by the applicants' advisers related to Article 10.[122]

[118] See paras. 66–71 above.
[119] Including interest on those incurred in the C.A.
[120] Totalling £74,605·23.
[121] See paras. 72–77 above.
[122] See, *mutatis mutandis*, GRANGER *v.* UNITED KINGDOM (1990) 12 E.H.R.R. 469, at para. 55.

(b) The remarks in paragraph 80(c) above concerning the solicitors' charges apply equally to the Strasbourg proceedings.

The Court also considers that, in the circumstances, certain of the amounts claimed by way of counsel's fees exceed what can be regarded as reasonable as between the parties.

83. Having regard to the foregoing, the Court awards the sum of £35,000.

C. *Conclusion*

84. The total amount to be paid to the applicants is accordingly £100,000. This figure is to be increased by any value added tax that may be chargeable.

For these reasons, THE COURT

1. *Holds*, by 14 votes to 10, that there was no violation of Article 10 of the Convention during the period from 11 July 1986 to 30 July 1987;
2. *Holds*, unanimously, that there was a violation of Article 10 during the period from 30 July 1987 to 13 October 1988;
3. *Holds*, unanimously, that there has been no violation of Article 13 or of Article 14 taken in conjunction with Article 10;
4. *Holds*, unanimously, that the United Kingdom is to pay, within three months, to the applicants jointly the sum of £100,000, together with any value added tax that may be chargeable, for costs and expenses;
5. *Dismisses*, unanimously, the remainder of the claim for just satisfaction.

Partly Dissenting Opinion of Judge Pettiti, joined by Judge Pinheiro Farinha

(Provisional translation)

I voted for a violation of Article 10 in respect of the first period too, unlike the majority. In my view there was a violation as much for the first period concerning the *Observer* and *The Guardian* as for the second which also concerned the *Sunday Times*. Indeed I consider it to be contradictory to adopt a different position on these two periods while reaffirming the fundamental value in a democracy of the freedom of expression.

The injunction originated in the proposal to publish in Australia in 1985 Mr. Wright's memoirs which included material already revealed by the books of Mr. Pincher and by the Granada television programmes in the U.K. 'Secret agents' often publish their memoirs after their retirement and this does not in general give cause for concern to the states in question. The pretext for the proceedings instituted in Australia was not a betrayal of state secrets but a breach of

confidentiality. The articles in the *Observer* and *The Guardian* of June 1986 concerned similar facts. The courts concluded that the source of the material was *Spycatcher*'s publishers. The proceedings instituted by the Attorney General were founded on the breach of confidentiality. The interlocutory injunction issued by Millett J. in July 1986, based on a failure to comply with the duty of discretion, already in my view constituted an infringement of the freedom of expression. That freedom cannot be made subject to the criterion of confidentiality, otherwise there would no longer be any literature.

In any event the extension of the injunction beyond a few days or weeks[123] constituted an additional infringement of the freedom of expression, because where the press is concerned a delay in relation to items of current affairs deprives a journalist's article of a large part of its interest. The publication in America and in Europe of more significant memoirs by the heads of secret services has never given rise to a similar prohibition.[124]

One gets the impression that the extreme severity of Millett J.'s injunction and of the course adopted by the Attorney General was less a question of the duty of confidentiality than the fear of disclosure of certain irregularities carried out by the security service in the pursuit of political rather than intelligence aims.

In this respect there was a violation of the right to receive information, which is the second component of Article 10. To deprive the public of information on the functioning of State organs is to violate a fundamental democratic right.

However, the majority of the Court concerned itself with the first aspect rather than the second.

If the state believes that a publication puts at risk state secrets or national security, there are other procedural means at its disposal. If the state contests a failure to comply with the duty of discretion on the part of a retired civil servant, appropriate procedures are available. In the present case the state did not prosecute Mr. Wright.

However, the United Kingdom should, by virtue of the positive obligation imposed by the European Convention, have secured the public's right to be informed. At the hearing the Government did not enlarge upon this issue.

An interim injunction, not subsequently lifted after a short period, is in effect a disguised means of instituting censure or restraint on the freedom of the press.[125] The violation is in my view all the more patent in that it is confirmed by the decision finding a violation as regards the second period.

The majority's reasoning is indeed based on interference with the

[123] Until October 1988.

[124] See in France the books of Mr. de Maranches and Mr. Marion.

[125] Other disguised means used in other countries include prosecution for alleged tax offences.

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freedom of expression; but to explain the contrary decision concerning the first period the Court confines itself to stating as follows:

> 'What they also omit is the fact that in July 1986 *Spycatcher* existed only in manuscript form. It was not then known precisely what the book would contain and, even if the previously-published material furnished some clues in this respect, it might have been expected that the author would seek to say something new. And it was not unreasonable to suppose that where a former senior employee of a security service—an "insider," such as Mr. Wright—proposed to publish, without authorisation, his memoirs, there was at least a risk that they would comprise material the disclosure of which might be detrimental to that service; it has to be borne in mind that in such a context damaging information may be gleaned from an accumulation of what appear at first sight to be unimportant details. What is more, it was improbable in any event that all the contents of the book would raise questions of public concern outweighing the interests of national security.'[126]

The contradiction in the way the two periods were viewed is in my opinion the following: on the one hand, a decision imposing a restriction based on mere suppositions or assumptions by the Attorney General and the competent court is regarded as justified; on the other, the publication of the book in the United States, then its partial circulation, are said to have rendered the continuation of the injunction unjustified.

But freedom of expression in one country cannot be made subject to whether or not the material in question has been published in another country. In the era of satellite television it is impossible territorially to partition thought and its expression or to restrict the right to information of the inhabitants of a country whose newspapers are subject to a prohibition.

The publication abroad was not truly material to the pretext invoked initially, namely confidentiality, because that had already been breached by Mr. Pincher's books and the Granada programmes before Millet J.'s order and because it was in any case very relative. It is possible, with hindsight, to measure the weakness of the Attorney General's argument, although he persisted with the proceedings in 1987 and in 1988. This requirement of confidentiality, which according to him was of major importance, was as it turned out regarded as insignificant by the courts as soon as the information had become known abroad and the book *Spycatcher* reached the U.K. clandestinely in the luggage of a few citizens and tourists.

It is true that in the decision on the merits Scott J., in keeping with the great liberal and judicial tradition of the U.K., found that the *Observer* and *The Guardian* had not infringed the duty of discretion, but he did so belatedly, not until 21 December 1987.

On 13 October 1988 the House of Lords rightly decided that it was not necessary to restrain the *Observer* and *The Guardian* from disseminating the contents of the book.

[126] See para. 61 of the judgment.

These contradictory decisions of eminent judges show the lack of clarity of the position adopted by the Attorney General. The first decision of the United Kingdom courts remains a surprising one. If the majority of the Court had reasoned on the basis of the 'right to receive information' aspect, it would undoubtedly have found a violation for both periods.

It may be recalled that in the ELLINIKI RADIOPHONIA TILÉORASSI—ANONINI ETAIRIA CASE,[127] Advocate General Lenz at the European Court of Justice, made the following observations in his opinion[128]:

> '49. The Rules of the Convention must be regarded as an integral part of the Community legal system. Television Directive no. 15 indicates in this connection that the first paragraph of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, ratified by all the Member States, applied to the broadcasting and distribution of television services, is likewise a specific manifestation in Community law of a more general principle, namely the freedom of expression. This right must therefore be observed by the Community organs.
>
> 50. However, it is also clear that the Court of Justice is not required to rule in the first instance on alleged or real violations by the Member States of the human rights secured under that Convention (that is the rôle of the organs so designated by the European Convention of Human Rights); . . .'

The judgment of the European Court of Justice, delivered on 18 June 1991, contains the following passage[129]:

> '[41] As regards Article 10 of the European Convention on Human Rights . . . , it should be noted in the first place that, as the Court has consistently held, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In so doing, the Court draws inspiration from constitutional traditions common to the Member States and from indications provided by the international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories.[130] In this connection the European Convention on Human Rights is of particular significance.[131] It follows that, as the Court affirmed in the judgment of 13 July 1989, WACHAUF,[132] measures incompatible with the respect for the human rights therein recognised and secured are not permissible in the Community.'

The eminent judge Lord Bridge appositely observed in the House of Lords in his dissenting opinion:

> 'Freedom of speech is always the first casualty under a totalitarian régime. Such a régime cannot afford to allow the free circulation of information and ideas among its citizens. Censorship is the indispensable tool to regulate what the public may and what they may not know. The present

[127] Case 260/89.

[128] Unofficial translation.

[129] Unofficial translation.

[130] See, *inter alia*, NOLD *v.* E.C. COMMISSION (Case 4/73) [1974] E.C.R. 491, [1974] 2 C.M.L.R. 338, at para. 13.

[131] See, *inter alia*, JOHNSTON *v.* CHIEF CONSTABLE OF THE ROYAL ULSTER CONSTABULARY (Case 222/84) [1986] E.C.R. 1651, [1986] 3 C.M.L.R. 240, at para. 18.

[132] WACHAUF *v.* GERMANY (Case 5/88) [1989] E.C.R. 2609, at para. 19.

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attempt to insulate the public in this country from information which is freely available elsewhere is a significant step down that very dangerous road. The maintenance of the ban, as more and more copies of the book *Spycatcher* enter this country and circulate here, will seem more and more ridiculous. If the Government are determined to fight to maintain the ban to the end, they will face inevitable condemnation and humiliation by the European Court of Human Rights in Strasbourg. Long before that they will have been condemned at the bar of public opinion in the free world.'[133]

The same line of thought is reflected in the words of Mr. Redwood, a U.K. Secretary of State, when he gave vent to his anxiety concerning the 'current flood of restrictive directives from the EEC which threatens the freedom of expression.'[134]

The protection afforded by Article 10 is therefore essential; this has always been the approach of the European Court in its judgments in SUNDAY TIMES I, BARTHOLD and LINGENS.

The defence of democracy cannot be achieved without the freedom of the press. The countries of Eastern Europe which have thrown off the shackles of totalitarian rule have well understood this. The European Court through all its earlier judgments has shown its attachment to the protection of freedom of expression and the priority which this is acknowledged to have.

To remain consistent with its case law it should, in my view, have found a violation for both periods.

The Council of Europe, together with the organs of the European Convention has a crucial task: this is to introduce true freedom of expression in all its forms and at the same time guarantee the public's right to receive information. This acquired democratic right must be preserved if we wish to protect freedom of thought!

Partly Dissenting Opinion of Judge Walsh

1. I agree with the majority of the Court that in respect of the period 30 July 1987 to 13 October 1988 there was a violation of Article 10 of the Convention by reason of the injunctions imposed on the applicants in respect of that period.

2. Unlike the majority of the Court I am of opinion that there was also a breach of Article 10 in respect of the period 11 July 1986 to 30 July 1987.

3. Freedom of the press is not totally unrestricted. The press in its pursuit of news is not free to counsel or to procure the commission of acts which are illegal, and may be restrained in appropriate cases from publishing material so gained, or may be liable in damages or may suffer both restraint and damages. In so far as breach of confidentiality amounts to an illegality either on the criminal side or on the civil side

[133] [1987] 1 W.L.R. 1286F.
[134] *Le Monde*, 3 November 1991.

the newspapers will be so liable in respect of matters the revelation of which they have counselled or procured.

4. Their liability is not necessarily the same when their news gathering has benefited from windfall revelations which may have resulted from some breach of confidence for which they have no responsibility. It is a legitimate activity of the press to follow up such news and to publish the results of their inquiries provided that in so doing they do not come into conflict with, say, national security. However that cannot be invoked to gain a restriction simply by an expression of opinion on the part of the authorities as was the case here. The issues of breach of confidence and national security were joined by the Government in the present case to the extent that the lines between them were blurred in the initial application for an injunction. The truth or falsity of the 'revelations' was not put in issue. It appears to me that for the purposes of Article 10 of the Convention the publication of 'revelations' cannot be restrained without at least an allegation of their truth by the moving party. If, as was done in the Australian hearing, the Government simply 'admits the truth' for the purposes of the case the application to restrain becomes moot. Sufficient of the allegations by Mr. Wright had already become public to enable their truth or otherwise to be ascertained. The identification of Mr. Wright as the source did not affect that issue.

Even if the truth of the principal allegations is to be assumed, namely that the Security Service agents had indulged in illegal activities, that had already publicly been aired in a manner which left no doubt that Mr. Wright, by his writings, conversations and television interview, was at least one source of the allegations. The applicant newspapers campaigned for an investigation of the allegations and their subsequent conduct was in furtherance of that campaign. They were not engaged directly or indirectly in debriefing Mr. Wright on other knowledge he had gained as a secret service agent. There was no indication that the newspapers were intent on publishing any material other than what was directly related to information already published and which it had not been sought to restrain. The 'revelation' that Mr. Wright was personally involved in the commission of the alleged illegal activities could scarcely be regarded as a restrainable piece of information in the light of all that was already known.

5. In view of the fact that the claim of confidentiality made in support of the initial application for a restraining order never made clear that a true breach of confidentiality was imminent, namely that true facts were threatened with disclosure, the Attorney General's position, which it was sought to protect, was never really made known at that stage. In my opinion the circumstances were insufficient to bring the case within the area of restrictions permitted by Article 10(2) of the Convention.

It is clear that the matters the applicants had wished to deal with were of great interest to the public and perhaps even of concern. The

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public interest invoked by the Government appears to be equated with Government policy. That policy may very well justify, in the Government's view, making every effort to stem leakages from the Security Service or indeed in the interests of that service to take no action at all to deal with the allegations or indeed to pursue Mr. Wright in any way available. These are policy matters and are not grounds for invoking the restrictions permitted by Article 10(2). Equally it may be understandable that, as was evident, the main objective of the proceedings was to act as a deterrent to those who in the future might be tempted to reveal secrets gained from their work as agents or members of the Security Service. That, however, is not a consideration which can justify the application of the restrictions on the press permitted by Article 10(2). The relief sought against the applicants, as distinct from Mr. Wright, has not been shown to have been, in all the circumstances, necessary in the democratic society which is the United Kingdom.

Partly Dissenting Opinion of Judge de Meyer (concerning prior restraint), joined by Judges Pettiti, Russo, Foighel and Bigi

I cannot endorse the Court's reasoning concerning prior restraint upon publications. Nor can I agree with its finding that, in the present case, the applicants' right to freedom of expression was not violated before the end of July 1987.

In my view, it was violated not only after that date and until the case was concluded in October 1988, but from the very beginning of the proceedings in June 1986, when the Attorney General set about seeking injunctions against them.

My reasons for so finding are simple.

I firmly believe that 'the press must be left free to publish news, what the source, without censorship, injunctions, or prior restraint'[135]: in a free and democratic society there can be no room, in times of peace, for restrictions of that kind, and particularly not if these are resorted to, as they were in the present case, for 'governmental suppression of embarrassing information'[136] or ideas.

Of course, those who publish any material which a pressing social need required should remain unpublished may subsequently be held liable in court, as may those acting in breach of a duty of confidentiality. They may be prosecuted if and in so far as this is prescribed by penal law, and they may in any case be sued for compensation if injury has been caused. They may also be subject to other sanctions provided for by law, including, as the case may be,

[135] Black J., joined by Douglas J., in the case, very similar to the present one, of the Pentagon Papers, NEW YORK TIMES *v.* U.S., and U.S. *v.* WASHINGTON POST, 403 U.S. 713 at 717 (1971). Although they were there used in the context of the Constitution of the U.S.A., these words perfectly express the general principle to be applied in this field.

[136] Douglas J., joined by Black J., in the same case, at pp. 723–724.

confiscation and destruction of the material in question and forfeiture of the profit obtained.

Under no circumstances, however, can prior restraint, even in the form of judicial injunctions, either temporary or permanent, be accepted, except in what the Convention describes as a 'time of war or other public emergency threatening the life of the nation' and, even then, only 'to the extent strictly required by the exigencies of the situation.'[137]

Separate Opinion of Judge de Meyer (concerning domestic remedies), joined by Judge Pettiti

I cannot subscribe to the third sub-paragraph of paragraph 76 of this judgment.

The reasons given in the second sub-paragraph suffice to conclude that there was, in the present case, no violation of the right of the applicants to an 'effective remedy before a national authority.'

The question whether a certain treaty is, or is not, 'incorporated into domestic law' may be of some interest as regards other kinds of treaties. It has no relevance when fundamental rights are concerned: these are of such a nature that it cannot be necessary to have them formally 'incorporated into domestic law.'

As I have already said on another occasion, the object and purpose of the European Convention on Human Rights was not to create but to recognise rights which must be respected and protected even in the absence of any instrument of positive law.[138] It has to be accepted that, everywhere in Europe, these rights 'bind the legislature, the executive and the judiciary, as directly applicable law'[139] and as 'supreme law of the land, . . . anything in the constitution or laws of any State to the contrary notwithstanding.'[140]

Separate Opinion of Judge Valticos
(provisional translation)

While in full agreement with the foregoing judgment, I wish to comment on a passage which appears at paragraph 76 of the text. It is recalled therein, at the third sub-paragraph, that 'the Court has held on several occasions that there is no obligation to incorporate the Convention into domestic law.' This statement is correct, but remains somewhat over-succinct.

It cannot of course be disputed that under international law the strict obligation incumbent on states which ratify a convention concerning their legislation and their practice is to give effect to the convention at

[137] Art. 15 of the Convention.

[138] See my opinion concerning BELILOS *v.* SWITZERLAND (1988) 10 E.H.R.R. 466. See also Art. 1 of the Convention, particularly in the French text.

[139] See Art. 1, s.3 of the Constitution of the Federal Republic of Germany.

[140] See Art. VI, s.2, of the U.S. Constitution.

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national level, but this does not necessarily mean that the actual terms of the convention must as such be transposed into the domestic legal system. What is essential is that the Convention is, in one way or another, complied with. All this is beyond question and indeed elementary.

There is however in this connection a tendency towards over-simplification which leads to confusion. The starting point is that the formal effects which the ratification of a convention entails at domestic level naturally depend on the national constitutional system or practice and that, in this respect, under that system (or practice) in several countries (moreover an increasing number of them) that ratification entails the incorporation of the ratified text into domestic law, while in others the two orders (international and municipal) remain distinct, even though sometimes the ratifying statute expressly enacts this incorporation. It is also worth noting that such incorporation is moreover effective, at least initially, only if the Convention provisions are—according to the generally accepted expression—self-executing, in other words capable of execution without implementation by more specific (national) rules. All this is well-known and calls to mind old academic quarrels, happily mostly forgotten, and I trust that I shall be forgiven for recalling these self-evident truths.

I consider nevertheless that it is necessary to return, at least indirectly, to this question here because I wish to draw the following conclusion: yes, the Court is right when it affirms once again that states are not bound to incorporate the actual terms of the Convention into their national legal system. This statement should however be supplemented by adding: 'but they are of course under a duty to give it effect.' Some will say that this is only to state the obvious. Indeed it is, but the affirmation should be further qualified by: 'and the obligation to give it effect is often best fulfilled where the terms of the Convention are transposed into the domestic legal system.' This has nothing to do with national constitutional systems or with the old 'monist' *v.* 'dualist' quarrels. What is suggested is that the states whose constitutional system does not automatically effect such incorporation should carry it out by an express measure, whether legislative or otherwise, following the ratification, accompanying it, if necessary, by provisions intended either to implement the provisions of a general nature or to adapt the national system to the new standards. Who would dispute that the national courts, whose attention would thus be drawn to the very terms of the Convention, which will have become national law, would find in the provisions, even the general ones, of the Convention, elements and criteria rendering their full application easier, and this may be the case even where the Government concerned considers that the existing legislation or case law already gives effect to the Convention standards?

Although such a measure is not obligatory, it is nevertheless highly

desirable with a view to ensuring not only better knowledge of the Convention but certainly also its more complete implementation. This is the general conclusion which I have arrived at after more than 30 years of practice in the sphere of application of international conventions concerning human rights. It is, in the instant case, the necessary addition to the principle briefly set out by the Court.

Partly Dissenting Opinion of Judge Martens

A. *Introduction*

1. Like the majority of the Court, I consider that the interim injunctions, as maintained by Millett J. in his judgment of 11 July 1986, constituted an interference with O.G.'s exercise of their freedom of expression, within the meaning of paragraph (1) of Article 10. Unlike the majority, however, I find myself unable to accept that this interference was justified under paragraph (2) of that Article even during the period from 11 July 1986 to 30 July 1987.

More specifically, I am not satisfied that the requirement of necessity was met.

B. *Particular features of the present case*

2. The interim injunctions sought by the Attorney General against O.G. formed part of the legal campaign on which the British Government embarked when it learned that Mr. Wright intended to publish his memoirs. This campaign started with the Attorney General's claim in the Australian courts for an injunction to restrain publication of the book. It continued when, after publishing short articles giving details of some of the contents of the book, O.G. refused to give undertakings that were acceptable to the Attorney General: he then sought permanent injunctions against any publication by O.G. of *Spycatcher* material and, within the ambit of these proceedings, interim injunctions to the same effect. Such interim injunctions were granted *ex parte* on 27 June 1986 and then continued, with some modifications, by Millett J. in his aforementioned judgment.

3. In legal terms, this campaign was based on the proposition that the disclosure by Mr. Wright of information derived by him from his work for the Security Service would constitute a breach of a duty of confidentiality, as would disclosure by O.G., since they had obtained the information knowing that it originated from that breach. However, the Government's principal concern was—as Millett J. put it—'not with what Mr. Wright says, but with the fact that it is a former senior officer of the Security Service who says it.' Accordingly, its campaign was mainly designed to secure implementation of the idea that members of the Security Service—to quote the same judge—'simply cannot be allowed to write their memoirs.' The appearance of

confidentiality being essential to the effective operation of the Security Service, the damage caused by the news that one of its former senior members was contemplating publishing his memoirs could—to borrow again from Millett J.'s judgment—'be undone only if he was *swiftly and effectively stopped*, and seen to be stopped' (emphasis added). This applied to all indirect publication as well.

4. O.G., however, wished to be free to publish information which might come into their possession, even if it derived directly or indirectly from Mr. Wright, in so far as it disclosed misconduct or unlawful activities on the part of members of the Security Service. Like Mr. Wright in the Australian proceedings, they claimed that it was in the public interest that evidence of such misconduct should be published, part of such evidence being that the allegations thereof were made by a former senior officer of the service on the basis of information acquired by him whilst employed by it.

5.1 It follows from paragraph 4 that the impugned interim injunctions do constitute what is commonly called a 'prior restraint.'

5.2 When giving judgment on the appeal from Millett J.'s decision, the Master of the Rolls started by saying, somewhat deprecatingly: '"Prior Restraint" are two of the most emotive words in the media vocabulary.' There is, however, no ground for deprecating the emotion these words tend to generate, because they designate, especially with regard to the media, what undoubtedly is, after censorship, the most serious form of interference with a freedom which, as this Court has rightly emphasised time and again, constitutes one of the essential foundations of a democratic society.[141] In the present case the prior restraint concerned, moreover, possible comment by two 'responsible newspapers'[142] 'in the context of public debate on a political question of general interest.'[143] Its consequences were all the more dramatic since, under the doctrine of contempt of court as understood[144] by the Court of Appeal in the *Independent* case, it gagged not only O.G. but *all media* within the jurisdiction of the English courts.

C. *The Court's task when reviewing necessity*

6. In its HANDYSIDE judgment of 7 December 1976[145] the Court had already made it clear that when reviewing the 'necessity' of an interference it had to decide, on the basis of the different data available, 'whether the reasons given by the national authorities to justify the actual measures of "interference" they take are relevant and sufficient under Article 10(2).'[146] Recently, in paragraph 60 of its

[141] See, as the most recent example, OBERSCHLICK *v.* AUSTRIA, at para. 57 *et seq.*

[142] I quote again from the Master of the Rolls.

[143] Borrowed from para. 60 of the OBERSCHLICK judgment.

[144] Apparently for the first time.

[145] HANDYSIDE *v.* UNITED KINGDOM, cited above, at para. 50.

[146] *Idem:* SUNDAY TIMES *v.* UNITED KINGDOM, at para. 62 and BARTHOLD *v.* SWITZERLAND, at para. 55.

aforementioned OBERSCHLICK judgment, the Court specified that this test implies that it has to satisfy itself that the national authorities 'did apply standards which were in conformity with these principles'—*i.e.* the principles to be derived from Article 10—'and, moreover, that in doing so they based themselves on an acceptable assessment of the relevant facts.'

D. *Application of this test*

7. Accordingly, in order to determine whether the prior restraint can be held justified it is necessary to examine very carefully: (a) whether, in deciding to impose this exceptional measure, the national authorities did apply standards which were in conformity with the principles to be derived from Article 10; and (b) whether, in doing so, they based themselves on an acceptable assessment of the relevant facts.

In my opinion, such examination cannot but lead to the conclusion that both limbs of this question must be answered in the negative. I will explain why.

E. *The standards used*

8. I start with the first limb: what standards were applied[147] and are they in conformity with the principles to be derived from Article 10?[148] I note that, in addressing these two questions, it is sufficient to analyse the judgment of Millett J., because in the subsequent stages of the interlocutory proceedings not only was his decision held to be justified, but also no fundamental criticism was levelled as to the legal principles on which he had based it.

9.1 Millett J. started from the assumption that there was at best a conflict of two legitimate public interests: on the one hand, the (incontestable) interest the public has in the maintenance of confidentiality within any organisation as a condition for its efficiency and, on the other, the (possible) interest of the public in being informed of unlawful acts or other misconduct. He held that the applications to discharge the *ex parte* injunctions could be granted only if O.G. had satisfied him that the latter interest existed and outweighed the former.

9.2 Leaving aside (as immaterial for the present purposes) the complication that interim injunctions had already been granted *ex parte* so that it was O.G. who had to apply for their discharge, the conclusion must be that the standard used by the national judge for deciding whether or not to impose a prior restraint was: an interim injunction sought for the purpose of preserving confidentiality should be granted *unless the defendant* satisfies the court that (a) disclosure is

[147] Paras. 9 and 10.
[148] Para. 11.

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in the public interest and (b) this interest outweighs the interest in preserving confidentiality.

10.1 Millett J. left open the question whether the standard he used was an exception to or an application of the AMERICAN CYANAMID principles,[149] but held that he was satisfied that pecuniary compensation to either party would be wholly inappropriate. He continued by saying that, 'in resolving the conflict' of interests, one of the particular facts he had to take into account was that 'a refusal of injunctive relief may cause irreparable harm and effectively deprive the plaintiff of his right.'

10.2 In my opinion, one can only infer from these and similar passages that the judge did apply the AMERICAN CYANAMID principles, at least to the extent of tacitly assuming that the material before him did not disclose that the Attorney General did not have any real prospect of succeeding in his claim for a permanent injunction.

11.1 Are these standards in conformity with the principles to be derived from Article 10? I do not think so.

11.2 I take first Millet J.'s starting-point, namely that there was at best a conflict between two legitimate public interests, one in the maintenance of confidentiality, the other in receiving information about misconduct or impropriety. Evidently, for him these two interests had, in principle, the same weight. This is, however, incompatible with Article 10. Under that provision the interest in freely receiving information clearly in principle outweighs the interest in 'preventing the disclosure of information received in confidence': the latter interest is not in itself sufficient to justify an interference with the right to freedom of expression, but does so only if and in so far as the interference is 'necessary in a democratic society.' Similarly, under Article 10 it is not for the press, if threatened by a prior restraint, to ward off the interference by satisfying the court that (a) there *is* a public interest in imparting and receiving the information with regard to which the injunction is sought, and (b) this interest outweighs the interest in preserving the confidentiality of that information. That is to turn things topsy-turvy: under Article 10, freedom of the press is the rule and this implies that what has to be justified is the interference; therefore it is for the party seeking the restraint—in this case the Attorney General—to satisfy the court that the requirements of paragraph (2) are met, *i.e.* that the restraint can be said to be 'necessary in a democratic society' (in the rather strict meaning these words have according to this Court's settled case law) for the preservation of confidentiality.

11.3 Thus, the standard used unduly tipped the balance in advance in favour of the Attorney General, the party who was seeking to restrict freedom of expression. This is all the more serious because, when applying that standard, Millett J.—following the AMERICAN

[149] See for these principles, para. 10 of the Court's judgment.

CYANAMID principles as he did[150] again favoured the Attorney General in a way which is incompatible with the principles to be derived from Article 10.

11.4 When applying the above standard, Millett J. was, as he pointed out, taking into account 'that this is an interlocutory application and not the trial.' Yet, without more ado, he also took into account that refusal of injunctive relief might 'deprive the plaintiff of his right.' In particular, he did so without going explicitly into the question whether the plaintiff in fact had any right and without inquiring what the Attorney General's chances were of obtaining permanent injunctions at the trial. As I have already said in paragraph 10.2 above, it must be inferred that the judge confined himself to ascertaining that, on the material before him, it could *not* be said that on the face of it the Attorney General's claim did not have any real chance of success.

11.5 When assessing whether this approach is in conformity with the principles to be derived from Article 10, it is important to realise that the interim injunction sought by the Attorney General in the interlocutory proceedings was merely a derivative from the permanent injunction sought by him in the main proceedings. I say 'merely a derivative' because the interim injunction did not serve an independent purpose, but was intended solely to prevent (further) indirect publication until the court had had the opportunity to take a final decision as to whether indirect publication would be allowed or not.

11.6 It is also to be noted that under Article 10 both the interim and the permanent injunction could be granted only if they could be said to be 'necessary in a democratic society.' Just as the interim injunction is merely a derivative from the permanent one, so the necessity requirement for granting the former is but a derivative from that for granting the latter. Accordingly, the application for the interlocutory prior restraint could be granted only if the court were satisfied at that stage that the Attorney General's claim in the main proceedings would probably meet the requirement of necessity. It could hold the interlocutory injunction to be 'necessary,' within the meaning of Article 10(2), only if it were satisfied that the claim for a permanent injunction would probably be accepted. If that was open to serious doubts or even merely uncertain, the interference could hardly be qualified as necessary: this, as the Court has repeatedly and rightly stressed, is a rather strict requirement especially where the freedom of expression of the press in matters of public interest is at stake.

11.7 It follows that: (a) to comply with the principles to be derived from Article 10, Millett J. should have imposed the interim prior restraint only if the Attorney General had satisfied him that the claim for a permanent injunction would probably succeed; and (b) by

[150] See para. 10.2 above.

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confining himself to examining whether it was evident that that claim did not have any real chance of success, the judge in fact applied a standard which was at variance with those principles.

F. *The assessment of the facts*

12.1 I now turn to the second limb of the question outlined in paragraph 7 above: was Millett J.'s decision based on an acceptable assessment of the relevant facts? And I note that the expression 'the relevant facts' implies (*inter alia*) reviewing whether facts that should have been taken into account under Article 10 were indeed duly considered. In this respect, I recall that the injunctions sought by the Attorney General against O.G. formed part of the legal campaign on which the British Government embarked when it learned that Mr. Wright intended to publish his memoirs. Within the ambit of this campaign the relationship between the English and the Australian proceedings was similar to that which existed between the interlocutory and the main proceedings in England, as outlined in paragraphs 11.5 and 11.6 above: just as the Attorney General started the interim proceedings in order to preserve his position in his claim for a permanent injunction restraining all indirect publication of *Spycatcher* material, so he made that claim in order to preserve his position in the Australian case, where he asked for an injunction restraining publication of the book itself.

It follows that the probable outcome of the English proceedings (the relevance of which has been discussed in paragraphs 11.4–11.7 above) would depend to a large extent on that of the Australian proceedings: would the Attorney General's endeavours to stop the imminent publication of the memoirs be likely to succeed? If their success would have been open to serious doubts, the same would have applied to the prospects of his claim for a permanent injunction against O.G. If, at the moment when the English courts had to decide whether or not to grant that claim, his action concerning direct publication had already failed or was likely to do so shortly, those courts would hardly be in a position to hold that a permanent injunction against indirect publication should nevertheless be regarded as necessary.

12.2 These considerations show that Millett J. should have asked himself whether it was likely that the Government would attain what he—after a judicious analysis of the allegations made and the evidence submitted by the Attorney General—rightly considered as its goal, namely to stop swiftly and effectively Mr. Wright's attempts to public memoirs which should not even have been written.[151] 'The learned judge failed, however, to do so and therefore cannot be said to have based his decision on an acceptable assessment of the relevant facts.[152]

12.3 There is a second and, to my mind, still more important ground

[151] See para. 3 above.
[152] See para. 6 above.

for so holding, namely that, if the question whether the Government would succeed in effectively keeping *Spycatcher* from the public had been considered, it should have been answered in the negative.

As the Government had been advised, proceedings to restrain publication of the book in the United States of America would fail.[153] It was likely (and the events in 1987 clearly confirmed this) that Mr. Wright had been similarly advised. It does not appear that Millet J. considered the repercussions of these facts and yet, within the context of the relationship between the English and the Australian proceedings, they are of decisive importance. The impossibility of preventing publication in the United States highlights that in this 'age of information' information and ideas just cannot be stopped at frontiers any longer. Article 10(1) has explicitly drawn the legal consequences of this situation. Accordingly, under Article 10 the impossibility of restraining publication in the United States perforce implied that restraint in Australia could not be held to be 'necessary,' within the meaning of paragraph (2). It is immaterial whether the Australian courts would have drawn this conclusion when confronted with that impossibility. For it is the conclusion which a court in a member State should have drawn and that is what should have been deemed decisive in the context of the dispute between O.G. and the U.K.'

These considerations suggest that one of the respects in which I differ from the majority of the Court comes down to this: whereas for them the fact that the book *had been* published in the United States in the meantime is the sole decisive reason for holding that prior restraint on indirect publication in England was thenceforth no longer justified, for me the fact that the book *could* be legally published in the United States made it, even at the time when the Attorney General introduced his breach of confidence actions, so unlikely that Mr. Wright could effectively be stopped that the interim injunction should never have been granted. But Millett J. did not take this factor into account, just as he did not consider what chances the Attorney General had of winning the Australian case.

G. *Conclusion*

13. To sum up: in my opinion, Millet J.'s decision was based on standards that were not in conformity with the principles to be derived from Article 10 and also on a factual assessment which, in the light of this provision, is incomplete to a decisive degree. I therefore find myself unable to accept that, even during the period from 11 July 1986 to 30 July 1987, the interference was 'necessary' under paragraph (2) of that Article.

[153] See para. 28 of the judgment.

Partly Dissenting Opinion of Judge Pekkanen

I regret that I am unable to agree with the majority of the court that there was no violation of Article 10 of the Convention on acount of the temporary injunctions binding on the applicants in the period from 11 July 1986 to 30 July 1987.

I agree with the majority that Article 10 does not prohibit the imposition on the press of prior restraints, as such, on the publication of certain news or information. However, taking into account the vital importance in a democratic society of freedom of expression and freedom of the press, the State's margin of appreciation in these cases is very narrow indeed. The use of prior restraints must be based, in my opinion, on exceptionally relevant and weighty reasons which clearly outweigh the public's legitimate interest in receiving news and information without hindrance. This leads me to the general conclusion that prior restraints can be imposed on the press only in very rare and exceptional circumstances and usually only for very short periods of time.

The aim of the temporary injunctions in this instance was to preserve the *status quo* during judicial proceedings. As such, this is a legitimate aim. But there was a pressing social need for these measures in a democratic society and were they proportionate to the aims pursued?

First of all, I would stress that in today's world news and information travel very quickly and easily from country to country and that it is practically impossible to stop this. As the present case shows, temporary injunctions imposed on the *Observer* and *Guardian* applicants—which were binding on all the British media through the operation of the doctrine of the contempt of court—could not prevent the flow of information in question from abroad. Prior restraint was, therefore, not an effective means of achieving the aim of preserving the *status quo*. Furthermore, before the temporary injunctions were granted, the confidentiality of the material concerned had to a large extent already been destroyed by previous publications and television interviews. Accordingly, there was no need for the restrictions on this occasion.

These considerations alone show, in my opinion, that in the instant case there was no pressing social need for so drastic a measure as prohibiting the press from disseminating information.

Partly Dissenting Opinion of Judge Morenilla

1. I agree with the majority of the Court that the interlocutory injunctions imposed on the *Observer* and *Guardian* applicants by Millett J. on 11 July 1986[154] forbidding the publication of information obtained by Mr. Peter Wright in his capacity as a member of the British

[154] 'The Millett injunctions.'

Security Service—which injunctions extended to all the British media, including the *Sunday Times*, by virtue of the law of contempt of court and remained in force until 13 October 1988—constituted an interference with O.G.'s freedom of expression and their right to hold opinions and to receive and impart information and ideas, guaranteed by Article 10(1) of the Convention.

I also agree, but not without some hesitation, that this interference was 'prescribed by law,' as this expression is understood in accordance with the common law system, it was based on judicial precedents and they were adequately accessible and the result of their application sufficiently foreseeable. Again, I share the majority's view that the injunctions were designed to protect the position of the Attorney General as a litigant pending the trial of his breach of confidence actions against O.G. and also served the purpose of protecting national security by preventing further dissemination of confidential information on the operation of the Security Service. Both of these aims are legitimate under paragraph (2) of Article 10.

I must, however, regard my disagreement on the key issue, namely the necessity of such restrictions in a democratic society. At no time, in my opinion, were these temporary injunctions justified by a 'pressing social need' or proportionate to any legitimate aims pursued. I must, therefore, dissent from the majority's conclusion regarding the period from 11 July 1986 to 30 July 1987.

2. In my view, this central issue should not have been separated into two periods, as was done by the Commission, 'for the sake of clarity,' and the majority of the Court. All the decisions, from that of Millett J. to that of the House of Lords in 1987, were part of the same interlocutory proceedings and O.G. were subject to essentially the same restrictions throughout the period from July 1986 to October 1988. Separating it into two has led to the somewhat inconsistent outcome of finding those restrictions to be partly in accordance with and partly in violation of the Convention.

On 29 April 1987 O.G. applied for the discharge of the Millett injunctions, notably because of reports that had appeared in three other English newspapers.[156] On 12 July 1987, a date intended to coincide with that of the publication of *Spycatcher* in the U.S.A., the *Sunday Times* published a first extract from the book.[157] Nevertheless, the House of Lords decided to maintain the injunctions and, as a result of the law of contempt of court, they bound all the British media, including the *Sunday Times*.

The publication of *Spycatcher* in the United States and the worldwide diffusion of Mr. Wright's disclosures on the activities of MI5 are not 'relevant,' in my opinion, either to O.G.'s claim under Article 10 or to the breach of confidentiality that the Government

[155] See SUNDAY TIMES *v.* UNITED KINGDOM, at paras. 47–49.
[156] See paras. 22–23 of the judgment.
[157] See paras. 27–28 of the judgment.

imputed to them: they merely confirmed that to attempt to prevent the dissemination in English-speaking countries of information of general interest by imposing a judicial restraint on the British media was neither realistic nor effective.

3. The major principles emerging from the Court's case law on Article 10—with which principles I fully agree—are conveniently summarised in paragraph 59 of the present judgment and I do not need to elaborate on that summary here.

The Government recalled the Court's observation, in its MARKT INTERN VERLAG GMBH AND KLAUS BEERMANN judgment of 20 November 1989,[158] that it should not substitute its own evaluation for that of the national courts where the latter, on reasonable grounds, have considered restrictions to be necessary. It also submitted that the margin of appreciation to be afforded to the national authorities, in assessing whether the protection of national security demands the imposition of temporary restraints on publications, is a wide one.

The Court's observations in the MARKT INTER case, which related to the publication in a specialised sector of the press of information of a commercial nature, do not in any way establish an exception to its supervisory jurisdiction, which is described in paragraph 59(d) of the present judgment.

In the Convention system, the Court has been empowered to draw the line between the competence of the national courts and its own competence, while at the same time maintaining their respective responsibilities to secure the guaranteed rights and freedoms, according to Articles 1 and 19. It is true that the State's margin of appreciation is wider when it is a question of protecting national security than when it is a question of maintaining the authority of the judiciary by safeguarding the rights of the litigants.[159] However, the margin of appreciation concept must always be applied, taking into account the circumstances of each case, on the basis of a coherent interpretation of Article 10 in accordance with the European case law and certainly not in a manner that could destroy the substance of freedom of expression.

4. The overriding importance of freedom of expression, the vital rôle of the press in a democratic society and the right of the public to receive information on matters of general concern, all of which factors have been repeatedly emphasised in the case law of this Court, required in the present case the application of a very strict test of necessity. When seeking to justify the restrictions imposed on O.G. on the grounds of the interests of national security and of preserving the Attorney General's rights until the trial the Government has, in my opinion, failed to 'establish convincingly'[160] that such a test was satisfied.

[158] MARKT INTERN VERLAG AND BEERMANN *v.* GERMANY, at para. 37.

[159] See SUNDAY TIMES *v.* UNITED KINGDOM, at para. 59 and LEANDER *v.* SWEDEN (1987) 9 E.H.R.R. 433, at para. 59.

[160] See para. 59(a) of the present judgment.

A. *The interests of national security issue*

5. Like the members of the majority of the Commission Mr. Frowein, Mr. Busuttil and Mr. Weitzel, I am of the opinion that the primary concern of the English courts in the present case was not the protection of national security but the protection of confidentiality. The danger for national security was alleged indirectly, as resulting from the loss of confidentiality and the impairment of the efficiency and reliability of the Security Service. Thus, Millett J. said in his judgment[161]: 'It is obvious that a Security Service must be seen to be leak-proof. The appearance of confidentiality is essential for its proper functioning. Its members simply cannot be allowed to write their memoirs.'

The interlocutory injunctions had the consequences that (1) a restraint was imposed without a full hearing of the plaintiff's arguments; and (2) the ban extended to all the media by operation of the common law doctrine of criminal contempt of court. And, in fact, contempt of court proceedings were instituted against *The Independent*, the *London Evening Standard*, the *London Daily News* and the *Sunday Times*.[162]

The national judges were well aware of the gravity of the measure. Millett J. said in his judgment[163] that 'prior restraint of publication is a serious interference with the freedom of the Press and the important constitutional right to freedom of speech.' In the Court of Appeal on 25 July 1986, Sir John Donaldson began his judgment[164] by stating that '"Prior Restraint" are two of the most emotive words in the media vocabulary. Accordingly *The Guardian* and the *Observer* reacted swiftly and forcefully to news that Mr. Justice MacPherson had granted an *ex parte* injunction on 27 June 1986 . . .'

6. In fact, distrust for these provisional restraints on the press is long-established in the common law tradition. Blackstone wrote in 1765 in his *Commentaries on the Law of England* a sentence which it has become obligatory to quote: 'The liberty of the Press is indeed essential to the nature of a free State: but this consists in laying no previous restraints upon publications and not in freedom from censure for criminal matter when published.'

The United States case law cited by 'Article 19,' the International Centre against Censorship,[165] has consistently held that the principal purpose of the First Amendment's guarantee is to prevent prior restraints. With regard to the national security aim the U.S. Supreme Court declared in NEAR *v.* MINNESOTA[166] that: 'The fact that for approximately 150 years there has been almost an entire absence of

[161] Transcript, p. 11E–F.
[162] See paras. 22 and 27 of the judgment.
[163] Transcript, p. 6B–C.
[164] Transcript, p. 3A.
[165] See para. 6 of the present judgment.
[166] 283 U.S. 718.

attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right.'

The other leading decisions of that Court, such as those in NEW YORK TIMES CO. LIMITED *v.* U.S.,[167] LANDMARK COMMUNICATIONS INC. *v.* VIRGINIA,[168] NEBRASKA ASSOCIATION *v.* STUART,[169] and U.S. *v.* THE PROGRESSIVE,[170] have consistently required that very strict conditions ('all but totally absolute') must be satisfied before prior restraints can be imposed on the publication of information on matters related to national security. In the words of the NEBRASKA judgment, 'the thread running through all these cases is that prior restraints on speech or publication are the most serious and least tolerable infringement on the First Amendment rights. . . . A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraints "freeze" it, at least for a time.' Brennan J., concurring with the judgment, stated 'although variously expressed it was evident that even the exception was to be construed very, very narrowly: when disclosure "will surely result in direct, immediate and irreparable damage to our nation or its people".'

7. While sharing the view of the majority expressed in paragraph 60 of the present judgment, I believe that restrictions on freedom of expression such as those imposed on O.G. allegedly to protect national security are very far from fulfilling these standards. The Government has not shown the 'direct, immediate and irreparable damage' to the security of the United Kingdom that was or would have been occasioned by the articles published by O.G. or from the disclosures which it was feared at the time that Mr. Wright might make. Millett J. said in his judgment[171]: 'It is clear from those passages [in Sir Robert Armstrong's affidavits] that the true nature of the Attorney General's objection is not to the fresh dissemination of allegations about past activities of the Security Service of the kind outlined in the recent articles published by the defendants. They are ancient history and have been the subject of widespread previous publicity.'

The 'appearance of confidentiality' may be 'essential to the effective operation of the Security Service'—as it is to other public services—but, for the purposes of Article 10(2) of the Convention, it does not, in my opinion, of itself justify the imposition, on the grounds of protecting national security, of a prior restraint that impairs freedom of the press and the right of the public to be properly informed. Dissemination of the information in question could be restricted 'only

[167] 403 U.S. 713 (1971) (Pentagon Papers case).
[168] 425 U.S. 829 (1978) (the Landmark case).
[169] 427 U.S. 593 (1976).
[170] 486 F. Supp. 990 (1979) (the Hydrogen Bomb case).
[171] Transcript, p. 10F.

if it appeared absolutely certain' that its diffusion would have the adverse consequence legitimately feared by the State.[172]

The two Law Lords who dissented from the decision of the House of Lords of 30 July 1987 expressed their views on this point. Lord Bridge of Harwich said that 'freedom of speech is always the first casualty under a totalitarian régime. Such a régime cannot afford to allow the free circulation of information and ideas among its citizens. Censorship is the indispensable tool to regulate what the public may and what they may not know. The present attempt to insulate the public in this country from information which is freely available elsewhere is a significant step down that very dangerous road.[173] Lord Oliver of Aylmerton stated that 'to attempt, even temporarily, to create a sort of judicial cordon sanitaire against the infection from abroad of public comment and discussion is not only, as I believe, certain to be ineffective but involves taking the first steps upon a very perilous path.'[174]

8. When considering whether the injunctions imposed on O.G. by the national authorities were necessary for and proportionate to the aim of protecting national security, I see the following circumstances as militating against the necessity of so serious a restriction.

(a) The Government had neither indicated precisely what information in the articles published by O.G. imperilled British security operations nor demonstrated the imminent or substantial danger for national security it created.

(b) The articles, which appeared on the inside pages of the newspapers, were short and fair reports on the issues in the Australian proceedings. The allegations about the activities of MI5 had, according to Scott J.,[175] been divulged before in 12 books and three television programmes, and especially in two books written by Mr. Chapman Pincher in 1981 and 1984 and in a television interview with Mr. Wright himself that had been publicly announced in advance. And, as the Vice-Chancellor, Sir Nicolas Browne-Wilkinson, stated,[176] 'in the present case, it is not suggested, nor could it be, that *The Guardian* and the *Observer* have in any sense been involved in any activity with Mr. Wright leading to the publication of his book . . . . They have not aided and abetted Mr. Wright in his breach of duty.' He concluded that if 'a third party who is not a participator in the confidant's breach of duty receives information which at the time of receipt is in the public domain—that is to say, he gets it

[172] See, *mutatis mutandis*, SUNDAY TIMES *v.* UNITED KINGDOM, para. 66.
[173] A.G. *v.* GUARDIAN NEWSPAPERS LTD. [1987] 1 W.L.R. at 1286F.
[174] *Ibid.* at 1321D.
[175] A.G. *v.* GUARDIAN NEWSPAPERS LTD. (NO. 2) [1990] 1 A.C. at 128–138.
[176] A.G. *v.* GUARDIAN NEWSPAPERS LTD., [1987] 1 W.L.R. at 1264C.

from the public domain—in my judgment he would not, as at present advised, come under any duty of confidence.'[177]

(c) The Government had neither taken any steps to prosecute Mr. Wright or the authors or editors of the earlier publications under the Official Secrets Act 1911 nor brought civil actions for breach of confidence seeking a declaration, damages or an account of profits.

(d) The claim for permanent injunctions against the newspapers was based on rather hypothetical grounds, for example: (1) their information was obtained directly or indirectly from Mr. Wright; (2) they wished to publish further disclosures about the activities of the Security Service; (3) this would endanger the efficient operation of the Service and its 'appearance of confidentiality'; and (4) this would also encourage other members or former members of the Service to publish confidential information.

(e) The evidence adduced by the Attorney General at the interlocutory stage was the two affidavits sworn by Sir Robert Armstrong in the Australian proceedings, which emphasised that the preservation of the appearance of confidentiality was essential to the effective operation of the Security Service. It deserves to be stressed that, in fact, as the Commission pointed out in its report,[178] 'the evidence upon which the House of Lords based its decision on the merits in October 1988 was substantially available at the outset in July 1986 and fully available by July 1987.'

B. *The maintenance of the authority of the judiciary issue*

9. As stated before, one aim of the temporary injunctions was the preservation of the rights of the Attorney General pending the substantive trial. The Government contended that the imposition of an interlocutory injunction to restrain publication of material which is the subject-matter of an action might, if publication in advance of the trial would destroy the substance of the action, in principle be considered necessary in a democratic society for maintaining the authority of the judiciary, in terms of the Court's abovementioned SUNDAY TIMES judgment.[179] While accepting *in abstracto* such a proposition, I consider, nevertheless, that in the circumstances of the present case the Government has failed to show that the grant of an injunction on this ground responded to any 'pressing social need' or that the measure was proportionate to the aim pursued.

10. Interlocutory injunctions provisionally restrain the parties to a civil suit from taking any action that could endanger the final decision

[177] *Ibid.*, at 1265E.
[178] Para. 89.
[179] SUNDAY TIMES *v.* UNITED KINGDOM, at para. 66.

of the Court. They are thus designed to preserve the *status quo* until the trial in order to ensure, in a case where an award of damages would not compensate for the injury caused by the defendant, that the judgment will be effective.

The general principles governing the grant of interlocutory injunctions were enunciated by the House of Lords in AMERICAN CYANAMID CO. *v.* ETHICON LTD.,[180] a case relating to the alleged infringement of a patent. On that occasion the House modified the former criteria by directing that, instead of examining whether the evidence disclosed a *prima facie* case of infringement, the Court should only check whether the plaintiff's claim for a permanent injunction had any real prospect of success, that is whether he had an arguable case. If the claim was not 'frivolous or vexatious,' the question whether an injunction should be granted was to be determined in the light of the 'balance of convenience' between the conflicting interests of the litigants.

It was on the basis of these AMERICAN CYANAMID rules that the Millett injunctions were granted and subsequently upheld in the interlocutory proceedings.

11. The application of these stricter criteria clearly favours a plaintiff who seeks a temporary injunction because, without having a full trial on the main issue of whether or not the alleged confidential information may be published, he can succeed merely by showing that his case is 'arguable.'

Indeed, in the present case the rigid application of the AMERICAN CYANAMID principles led to the 'inevitable' imposition of a prior restraint on the media, which directly impaired O.G.'s freedom of expression and the right of the public to be informed quickly about matters of legitimate general concern, such as allegedly unlawful activities on the part of the Security Service.

Consequently, the legal stategy of the Attorney General turned out to be in conflict with the 'necessity' test under Article 10(2) of the Convention and the national courts, when balancing the conflicting interests at issue, did not give sufficient weight to the fundamental importance in a democratic society of freedom of expression.

The particular circumstances of the case, to which I have already referred in section A above, and the following factors, which were all clearly apparent when the claims for interlocutory injunctions were determined, meant that the restrictions on the media sought by the Government were not justified under Article 10(2) for the aim of maintaining the authority of the judiciary.

(a) For the first time the Attorney General was instituting private law proceedings relating to a breach by a former employee of the Security Service of his duty of confidence and, relying on a commercial law precedent, was seeking an interlocutory

[180] See para. 10 of the present judgment.

injunction to preserve his claim for a permanent injunction as the sole means of protecting that duty of confidence. Lord Oliver of Aylmerton said, 'I have not been able to find nor have your Lordships been referred to any previously reported decision which could be said to be even remotely parallel to the instant case.'[181]

(b) In June 1986 Mr. Wright's disclosures were already in the public domain and the information was no longer confidential because, as stated above, it had been published in several books and divulged by him in a television interview, with no reaction on the part of the Government. Millett J. was very explicit on this point when saying in his judgment, 'the allegations themselves may be compiled from a number of published sources by anyone who takes the trouble to go to them' and 'the objection is not to the allegations themselves, but to Mr. Wright's input. It is true that Mr. Wright has provided information on previous occasions, once in a television interview and, if footnotes to certain published works are to be believed, by collaborating with their author.'[182]

(c) As a consequence, the aim of preserving the *status quo* could not be attained because of the leakage of the confidential information and the absence of any previous reaction by the Government.

(d) The application of the AMERICAN CYANAMID principles to a case of breach of confidence involving matters of legitimate public concern had the consequence of imposing on the media—without a full hearing on the issue of whether or not the information might be published—a prior restraint implying, because of the threat of contempt of court proceedings, a partial self-censorship.

In fact, the rationale of the Millett injunctions was to maintain the 'appearance of confidentiality' of the Security Service by forbidding—through the imposition on the media, albeit temporarily, of an immediate restraint—the publication of anticipated further disclosures or 'leakages' in the Service.

The English courts arrived at this decision after applying the 'balance of convenience' test and this resulted in a serious limitation on freedom of expression. Millett J. said on this point[183] that 'it makes no difference that the claim to suppress publication is made by the Government and not by a private litigant; the principles remain the same.' However, while that test may be correct under English law, it is not acceptable when it comes to deciding whether a limitation of freedom of expression of the kind involved in this case is justified under

[181] A.G. *v.* GUARDIAN NEWSPAPERS LTD., [1987] 1 W.L.R. at 1315G.
[182] Transcript, pp. 5c and 13B.
[183] Transcript, p. 8D.

Article 10(2) of the Convention. I agree with the majority of the Commission that, when it is the Government which seeks to restrict the dissemination of information that is of considerable public interest, the need for a temporary injunction 'should be established with particular clarity and certainty' because of the predominant place occupied by freedom of expression and the international obligation incumbent on the public authorities not to interfere with it.

(e) The fact that, as noted in the interlocutory decisions, O.G. were in no way involved in Mr. Wright's proposed publication was overshadowed by their admission that they wished to publish credible information, of legitimate public concern, relating to the unlawful operation of the Security Service or the misconduct of its members. Millett J.'s opinion that 'disclosures to the proper authorities may be sufficient in some cases' also seems inconsistent with the right to receive and impart information and ideas enshrined in Article 10. The public has a right to be promptly informed on such matters, irrespective of whether a report is made to the proper authorities with a view to prosecution and punishment. Since a limitation on freedom of the press was involved, greater weight should have been given to the 'iniquity defence'[184] relied on by O.G.

The dangers of so rigid an application of this precedent were pointed out by Lord Oliver of Aylmerton when he said: 'The guidelines laid down by this House in AMERICAN CYANAMID CO. *v.* ETHICON LTD. . . . have come to be treated as carved on tablets of stone, so that a plaintiff seeking interlocutory relief has never to do more than show that he has a fairly arguable case. Thus the effect in a contest between a would-be publisher and one seeking to restrain the publication of allegedly confidential information is that the latter, by presenting an arguable case, can effectively through the invocation of the law of contempt, restrain until the trial of the action, which may be two or more years ahead, publication not only by the defendant but by anyone else within the jurisdiction and thus stifle what may, in the end, turn out to be perfectly legitimate comment until it no longer has any importance or commands any public interest.'[185]

(f) The discretionary grant of an interlocutory injunction should not prejudice the final determination of the action, but the court, under the AMERICAN CYANAMID principles, has to consider if the plaintiff has shown an 'arguable case' or if he has a 'good cause.' The *fumus boni iuris* of the main action is thus an important element in the exercise of the discretion.

The circumstances of the present case did not show, or at least

[184] The right to report misconduct.
[185] A.G. *v.* TIMES NEWSPAPERS LTD., [1991] 2 W.L.R. at 1022B.

did not show with sufficient clarity, that the Attorney General had an arguable case for a permanent injunction. All the interlocutory decisions nevertheless reached the opposite conclusion and consequently the temporary injunctions were granted to preserve his rights pending trial.

Today, however, with the benefit of hindsight and after the judgments on the merits delivered at three levels, it is easy to affirm that such a 'good cause' did not exist. The terms used by the judges leave no doubt on this issue. In his very thorough judgment of 21 December 1987 Scott J. said: 'It is equally unacceptable that the Government's assertion of what national security requires should suffice to decide the limitations that must be imposed on freedom of speech or of the press'; 'In my view the articles represented the legitimate and fair reporting of a matter that the newspapers were entitled to place before the public, namely the court action in Australia'; and he concluded categorically: '*The Guardian* and the *Observer* were not in breach of confidence in publishing the articles about the Australian *Spycatcher* case in their respective editions of 23 June 1986 and 22 June 1986.'[186]

Likewise, when the House of Lords gave judgment on 13 October 1988, Lord Keith of Kinkel said[187]: 'I consider that on balance the prospects are that the Crown would not have been held entitled to a permanent injunction. Scott J. and the majority of the Court of Appeal took that view, and I would not be disposed to differ from them.' Lord Brightman affirmed[188]: 'I agree with the majority of your Lordships that, despite the reprehensible leakage of information which was the source of these articles about the then forthcoming Australian proceedings, the articles were not in fact damaging to the public interest and are not therefore a proper foundation for any case by the Crown against these newspapers.' And Lord Goff of Chieveley expressed himself in similar terms[189]: 'the articles were very short: they give little detail of the allegations: a number of the allegations had been made before: and in so far as the articles went beyond what had previously been published, I do not consider that the judge erred in holding that, in the circumstance, the claim to an injunction was not proportionate to the legitimate aim pursued.'

(g) The 'temporary' and 'provisional' nature of the interlocutory measures cannot justify under the Convention the restriction imposed on O.G. As they asserted, 'in many media cases, an interlocutory injunction is effectively a final injunction, because

[186] A.G. *v.* GUARDIAN NEWSPAPERS LTD. (NO. 2) [1990] 1 A.C. at 144B, 167H and 172H.
[187] *Ibid.*, at 264A.
[188] *Ibid.*, at 266E.
[189] *Ibid.*, at 290C.

news is perishable; a delay of weeks, months or more is equivalent to no publication.' To 'postpone'—the word used in the domestic judgments—information for more than two years could result in finding that the content had volatilised because of the transient character of the news.

(h) Finally, it was also obvious that the injunctions did not correspond to a 'pressing social need' because, as the facts of this case have demonstrated, they were useless and unreal. It was plainly unreal to seek, by a judicial order, to restrain dissemination of news of general interest, or to seek, by an injunction against the media, to discourage members of State authorities who have access to secret, classified or simply confidential information of general interest from publishing it. And this unreality is even more evident when the news is written or broadcast in English: information is diffused universally in this language, notably by American or foreign publications or broadcasts that are sold or received in the United Kingdom. In today's circumstances such an injunction is an illusory measure since many of these media are outside the jurisdiction of the English courts.

Like the Vice-Chancellor in his judgment of 22 July 1987,[190] I think that 'there is a limit to what can be achieved by orders of the court. If the courts were to make orders manifestly incapable of achieving their avowed purpose, such as to prevent the dissemination of information which is already disseminated, the law would to my mind indeed be an ass . . . The truth of the matter is that in the contemporary world of electronics and jumbo jets news anywhere is news everywhere. But whilst the news is international, the jurisdiction of this court is strictly territorial.'[191]

This pragmatic reasoning is, in my opinion, sufficient to demonstrate that what is clearly impracticable cannot be considered 'necessary.' Likewise, the very limited effect of the ban on the British media shows that the restraints imposed on O.G. were manifestly disproportionate.

12. Consequently, taking all these factors separately and as a whole, I must depart from the majority's conclusion[192] that the national authorities were entitled to think that the interference complained of was necessary in a democratic society. Furthermore, I believe that the reasons expressed in paragraphs 68 and 69 of the judgment for finding a violation in the period after 30 July 1987 were also valid as regards the earlier period, when such of the information published in *Spycatcher* as was relevant was already known to the public.[193]

[190] See para. 33 of the present judgment.
[191] A.G. *v.* GUARDIAN NEWSPAPERS LTD., [1987] 1 W.L.R. at 1269F and H.
[192] See para. 65 of the judgment.
[193] See para. 12 of the judgment.

I therefore conclude that there was a violation of Article 10 of the Convention in the period from 11 July 1986 to 30 July 1987, as well as in that from 30 July 1987 to 13 October 1988.