COURT (GRAND CHAMBER)

CASE OF GOODWIN v. THE UNITED KINGDOM

(Application no. 17488/90)

JUDGMENT

STRASBOURG

27 March 1996

In the case of Goodwin v. the United Kingdom [1],

The European Court of Human Rights, sitting, in pursuance of Rule 51 of Rules of Court A [2], as a Grand Chamber composed of the following judges:

MrR. RYSSDAL, *President*,
MrR. BERNHARDT,
MrTHÓR VILHJÁLMSSON,
MrF. MATSCHER,
MrB. WALSH,
MrC. RUSSO,
MrA. SPIELMANN,
MrJ. DE MEYER,
MrN. VALTICOS,
MrsE. PALM,
MrF. BIGI,
SirJOHN FREELAND,
MrA.B. BAKA,
MrD. GOTCHEV,
MrB. REPIK,
MrP. JAMBREK,
MrP. KURIS,
MrU. LOHMUS,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 30 September 1995 and 22 February 1996,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 20 May 1994, within the three-month period laid down by Article 32 para. 1 (art. 32-1) and Article 47 (art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in application (no. 17488/90) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under Article 25 (art. 25) by Mr William Goodwin, a British citizen, on 27 September 1990.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 (art. 10) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyers who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 28 May 1994, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr B. Walsh, Mr C. Russo, Mr J. De Meyer, Mrs E. Palm, Mr A.B. Baka and Mr B. Repik (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the United Kingdom Government ("the Government"), the applicant's lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the orders made in consequence, the Registrar received the Government's memorial on 3 February 1995 and the applicant's memorial on 1 March. On 19 April 1995 the Secretary to the Commission indicated that the Delegate did not wish to reply in writing.

On various dates between 12 April and 7 September 1995 the Registrar received from the Government and the applicant observations on his Article 50 (art. 50) claim.

5. On 24 February 1995 the President, having consulted the Chamber, granted leave to Article 19 and Interights, two London based non-governmental human rights organisations, to submit observations on national law in the area in question in the present case, as applicable in certain countries (Rule 37 para. 2). Their comments were filed on 10 March 1995.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 24 April 1995. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr I. CHRISTIE, Foreign and Commonwealth Office,*Agent*,
Mr M. BAKER, QC,*Counsel*,
Mr M. COLLON, Lord Chancellor's Department,*Adviser*;
(b) for the Commission
Mrs G.H. THUNE,*Delegate*;
(c) for the applicant
Mr G. ROBERTSON QC,*Counsel*,
Mr G. BINDMAN, Solicitor,
Mr R.D. SACK, Attorney,
Ms A.K. HILKER, Attorney,
Ms L. MOORE, Attorney,
Mr J. MORTIMER QC,*Advisers*.

The Court heard addresses by Mrs Thune, Mr Robertson and Mr Baker and also replies to a question put by one of its members individually.

7. Following deliberations on 27 April 1995 the Chamber decided to relinquish jurisdiction forthwith in favour of a Grand Chamber (Rule 51 para. 1).

8. The Grand Chamber to be constituted included ex officio Mr Ryssdal, President of the Court, Mr R. Bernhardt, Vice-President of the Court, and the other members of the Chamber which had relinquished jurisdiction (Rule 51 para. 2 (a) and (b)). On 5 May 1995, in the presence of the Registrar, the President drew by lot the names of the nine additional judges called on to complete the Grand Chamber, namely Mr F. Matscher, Mr A. Spielmann, Mr N. Valticos, Mr R. Pekkanen, Mr F. Bigi, Mr D. Gotchev, Mr P. Jambrek, Mr P. Kuris and Mr U. Lohmus (Rule 51 para. 2 (c)). Mr Pekkanen subsequently withdrew, being unable to take part in the further consideration of the case (Rule 24 para. 1 in conjunction with Rule 51 para. 6).

9. Having taken note of the opinions of the Agent of the Government, the Delegate of the Commission and the applicant, the Grand Chamber decided on 4 September 1995 that it was not necessary to hold a further hearing following the relinquishment of jurisdiction by the Chamber (Rules 26 and 38, taken together with Rule 51 para. 6).

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

10. Mr William Goodwin, a British national, is a journalist and lives in London.

11. On 3 August 1989 the applicant joined the staff of The Engineer, published by Morgan-Grampian (Publishers) Ltd ("the publishers"), as a trainee journalist. He was employed by Morgan Grampian PLC ("the employer").

On 2 November 1989 the applicant was telephoned by a person who, according to the applicant, had previously supplied him with information on the activities of various companies. The source gave him information about Tetra Ltd ("Tetra"), to the effect that the company was in the process of raising a £5 million loan and had financial problems as a result of an expected loss of £2.1 million for 1989 on a turnover of £20.3 million. The information was unsolicited and was not

given in exchange for any payment. It was provided on an unattributable basis. The applicant maintained that he had no reason to believe that the information derived from a stolen or confidential document. On 6 and 7 November 1989, intending to write an article about Tetra, he telephoned the company to check the facts and seek its comments on the information.

The information derived from a draft of Tetra's confidential corporate plan. On 1 November 1989 there had been eight numbered copies of the most recent draft. Five had been in the possession of senior employees of Tetra, one with its accountants, one with a bank and one with an outside consultant. Each had been in a ring binder and was marked "Strictly Confidential". The accountants' file had last been seen at about 3 p.m. on 1 November in a room they had been using at Tetra's premises. The room had been left unattended between 3 p.m. and 4 p.m. and during that period the file had disappeared.

A. Injunction and orders for disclosure of sources and documents

12. On 7 November 1989 Mr Justice Hoffmann of the High Court of Justice (Chancery Division) granted an application by Tetra of the same date for an ex parte interim injunction restraining the publishers of The Engineer from publishing any information derived from the corporate plan. The company informed all the national newspapers and relevant journals of the injunction on 16 November.

13. In an affidavit to the High Court dated 8 November 1989, Tetra stated that if the plan were to be made public it could result in a complete loss of confidence in the company on the part of its actual and potential creditors, its customers and in particular its suppliers, with a risk of loss of orders and of a refusal to supply the company with goods and services. This would inevitably lead to problems with Tetra's refinancing negotiations. If the company went into liquidation, there would be approximately four hundred redundancies.

14. On 14 November 1989 Mr Justice Hoffmann, on an application by Tetra, ordered the publishers, under section 10 of the Contempt of Court Act 1981 ("the 1981 Act"; see paragraph 20 below), to disclose by 3 p.m. on 15 November the applicant's notes from the above telephone conversation identifying his source. On the latter date, the publishers having failed to comply with the order, Mr Justice Hoffmann granted Tetra leave to join the applicant's employer and the applicant himself to the proceedings and gave the defendants until 3 p.m. on the following day to produce the notes.

On 17 November 1989 the High Court made a further order to the effect that the applicant represented all persons who had received the plan or information derived from it without authority and that such persons should deliver up any copies of the plan in their possession. The motion was then adjourned for the applicant to bring this order to the attention of his source. However, the applicant declined to do so.

15. On 22 November 1989 Mr Justice Hoffmann ordered the applicant to disclose by 3 p.m. on 23 November his notes on the grounds that it was necessary "in the interests of justice", within the meaning of section 10 of the 1981 Act (see paragraph 20 below), for the source's identity to be disclosed in order to enable Tetra to bring proceedings against the source to recover the document, obtain an injunction preventing further publication or seek damages for the expenses to which it had been put. The judge concluded:

> "There is strong prima facie evidence that it has suffered a serious wrong by the theft of its confidential file. There is similar evidence that it would suffer serious commercial damage from the publication of the information in the file during the near future. It is true that the source may not be the person who stole the file. He may have had the information second hand, although this is less likely. In either case, however, he was trying to secure damaging publication of information which he must have known to be sensitive and confidential. According to the respondent, having given him the information he telephoned again a few days later to ask how the article was getting on. The plaintiff wishes to bring proceedings against the source for recovery of the document, an injunction against further publication and damages for the expense to which it has been put. But it cannot obtain any of those remedies because it does not know whom to sue. In the circumstance of this case, in which a remedy against the source is urgently needed, I think that disclosure is necessary in the interests of justice.

... There is no doubt on the evidence that the respondent was an innocent recipient of the information but the Norwich Pharmacal case shows that this does not matter. The question is whether he had become mixed up in the wrongdoing ...

The respondent has sworn an affidavit expressing the view that the public interest requires publication of the plaintiff's confidential commercial information. Counsel for the respondent says that the plaintiff's previous published results showed it as a prosperous expanding company and therefore the public was entitled to know that it was now experiencing difficulties. I reject this submission. There is nothing to suggest that the information in the draft business plan falsifies anything which has been previously made public or that the plaintiff was under any obligation, whether in law or commercial morality, to make that information available to its customers, suppliers and competitors. On the contrary, it seems to me that business could not function properly if such information could not be kept confidential."

16. On the same date the Court of Appeal rejected an application by the applicant for a stay of execution of the High Court's order, but substituted an order requiring the applicant either to disclose his notes to Tetra or to deliver them to the Court of Appeal in a sealed envelope with accompanying affidavit. The applicant did not comply with this order.

B. Appeals to the Court of Appeal and to the House of Lords

17. On 23 November 1989 the applicant lodged an appeal with the Court of Appeal from Mr Justice Hoffmann's order of 22 November 1989. He argued that disclosure of his notes was not "necessary in the interests of justice" within the meaning of section 10 of the 1981 Act; the public interest in publication outweighed the interest in preserving confidentiality; and, since he had not facilitated any breach of confidence, the disclosure order against him was invalid.

The Court of Appeal dismissed the appeal on 12 December 1989. Lord Donaldson held:

"The existence of someone with access to highly confidential information belonging to the plaintiffs who was prepared to break his obligations of confidentiality in this way was a permanent threat to the plaintiffs which could only be eliminated by discovering his identity. The injunctions would no doubt be effective to prevent publication in the press, but they certainly would not effectively prevent publication to the plaintiffs' customers or competitors.

...

... I am loath in a judgment given in open court to give a detailed explanation of why this is a case in which, if the full facts were known and the courts had to say that they could give the plaintiffs no assistance, there would, I think, be a significant lessening in public confidence in the administration of justice generally. Suffice it to say that the plaintiffs are a, and perhaps the, leader in their very important field, which I deliberately do not identify, with national and international customers and competitors. They are faced with a situation which is in part the result of their own success. They have reached a point at which they have to refinance and expand or go under with the loss not only of money, but of a significant number of jobs. This is not the situation in which the court should be or be seen to be impotent in the absence of compelling reasons. The plaintiffs are continuing with their refinancing discussions menaced by the source (or the source's source) ticking away beneath them like a time bomb. Prima facie they are entitled to assistance in identifying, locating and defusing it.

That I should have concluded that the disclosure of Mr Goodwin's source is necessary in the interests of justice is not determinative of this appeal. It does, however, mean that I have to undertake a balancing exercise. On the one hand there is the general public interest in maintaining the confidentiality of journalistic sources, which is the reason why section 10 was enacted. On the other is, in my judgment, a particular case in which disclosure is necessary in the general interests of the administration of justice. If these two factors stood alone, the case for ordering disclosure would be made out, because the parliamentary intention must be that, other things being equal, the necessity for disclosure on any of the four grounds should prevail. Were it otherwise, there would be no point in having these doorways.

But other things would not be equal if, on the particular facts of the case, there was some additional reason for maintaining the confidentiality of a journalistic source. It might, for example, have been the case that the information disclosed what, on the authorities, is quaintly called `iniquity'. Or the plaintiffs might have been a public company whose shareholders were unjustifiably being kept in ignorance of information vital to their making a sensible decision on whether or not to sell their shares. Such a feature would erode the public interest in maintaining the confidentiality of the leaked information and correspondingly enhance the public interest in maintaining the confidentiality of journalistic sources. Equally, on particular facts such as that the identification of the source was necessary in order to support or refute a defence of alibi in a major criminal trial, the necessity for disclosure `in the interests of justice' might be enhanced and overreach the threshold of the statutory doorway requiring some vastly increased need for the protection of the source if it was to be counterbalanced. Once the[plaintiffs] can get through a doorway, the balancing exercise comes into play.

On the facts of this case, nothing is to be added to either side of the equation. The test of the needs of justice is met, but not in superabundance. The general public interest in maintaining the confidentiality of journalistic sources exists, but the facts of this particular case add absolutely nothing to it. No `iniquity' has been shown. No shareholders have been kept in the dark. Indeed the public has no legitimate interest in the business of the plaintiffs who, although corporate in form, are in truth to be categorised as private individuals. This is in reality apiece of wholly unjustified intrusion into privacy.

Accordingly, I am left in no doubt that, notwithstanding the general need to protect journalistic sources, this is a casein which the balance comes down in favour of disclosure. I would dismiss the companies' appeals. I can see no reason injustice for doing otherwise with regard to Mr Goodwin'sappeals."

Lord Justice McCowan stated that the applicant must have been "amazingly naïve" if it had not occurred to him that the source had been at the very least guilty of breach of confidence.

The Court of Appeal granted the applicant leave to appeal to the House of Lords.

18. The House of Lords upheld the Court of Appeal's decision on 4 April 1990, applying the principle expounded by Lord Reid in Norwich Pharmacal Co. v. Customs and Excise Commissioners [1974] Appeal Cases 133, a previous leading case:

"if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers."

Lord Bridge, in the first of the five separate speeches given in the applicant's case, underlined that in applying section 10 it was necessary to carry out a balancing exercise between the need to protect sources and, inter alia, the "interests of justice". He referred to a number of other cases in relation to how the balancing exercise should be conducted (in particular Secretary of State for Defence v. Guardian Newspapers Ltd [1985] Appeal Cases 339) and continued:

"... the question whether disclosure is necessary in the interests of justice gives rise to a more difficult problem of weighing one public interest against another. A question arising under this part of section 10 has not previously come before your Lordships' House for decision. In discussing the section generally Lord Diplock said in Secretary of State for Defence v. Guardian Newspapers Ltd [1985] Appeal Cases 339,350:

`The exceptions include no reference to "the public interest" generally and I would add that in my view the expression "justice", the interests of which are entitled to protection, is not used in a general sense as the antonym of "injustice" but in the technical sense of the administration of justice in the course of legal proceedings in a court of law, or, by reason of the extended definition of "court" in section 19 of the Act of 1981 before a tribunal or body exercising the judicial power of the state.'

I agree entirely with the first half of this dictum. To construe `justice' as the antonym of `injustice' in section 10 would be far too wide. But to confine it to the `technical sense of the

administration of justice in the course of legal proceedings in a court of law' seems to me, with all respect due to any dictum of the late Lord Diplock, to be too narrow. It is, in my opinion, `in the interests of justice', in the sense in which this phrase is used in section 10, that persons should be enabled to exercise important legal rights and to protect themselves from serious legal wrongs whether or not resort to legal proceedings in a court of law will be necessary to attain these objectives. Thus, to take a very obvious example, if an employer of a large staff is suffering grave damage from the activities of an unidentified disloyal servant, it is undoubtedly in the interests of justice that he should be able to identify him in order to terminate his contract of employment, notwithstanding that no legal proceedings may be necessary to achieve that end.

Construing the phrase `in the interests of justice' in this sense immediately emphasises the importance of the balancing exercise. It will not be sufficient, per se, for a party seeking disclosure of a source protected by section 10 to show merely that he will be unable without disclosure to exercise the legal right or avert the threatened legal wrong on which he bases his claim in order to establish the necessity of disclosure. The judge's task will always be to weigh in the scales the importance of enabling the ends of justice to be attained in the circumstances of the particular case on the one hand against the importance of protecting the source on the other hand. In this balancing exercise it is only if the judge is satisfied that disclosure in the interests of justice is of such preponderating importance as to override the statutory privilege against disclosure that the threshold of necessity will be reached.

Whether the necessity of disclosure in this sense is established is certainly a question of fact rather than an issue calling for the exercise of the judge's discretion, but, like many other questions of fact, such as the question of whether somebody has acted reasonably in given circumstances, it will call for the exercise of a discriminating and sometimes difficult value judgment. In estimating the weight to be attached to the importance of disclosure in pursuance of the policy which underlies section 10 on the other hand, many factors will be relevant on both sides of the scale.

It would be foolish to attempt to give a comprehensive guidance as to how the balancing exercise should be carried out. But it may not be out of place to indicate the kind of factors which will require consideration. In estimating the importance to be given to the case in favour of disclosure there will be a wide spectrum within which the particular case must be located. If the party seeking disclosure shows ,for example, that his very livelihood depends upon it, this will put the case near one end of the spectrum. If he shows no more than that what he seeks to protect is a minor interest in property, this will put the case at or near the other end. On the other side the importance of protecting a source from disclosure in pursuance of the policy underlying the statute will also vary within a spectrum. One important factor will be the nature of the information obtained from the source. The greater the legitimate interest in the information which the source has given to the publisher or intended publisher, the greater will be the importance of protecting the source. But another and perhaps more significant factor which will very much affect the importance of protecting the source will be the manner in which the information was itself obtained by the source. If it appears to the court that the information was obtained legitimately this will enhance the importance of protecting the source. Conversely, if it appears that the information was obtained illegally, this will diminish the importance of protecting the source unless, of course, this factor is counterbalanced by a clear public interest in publication of the information, as in the classic case where the source has acted for the purpose of exposing iniquity. I draw attention to these considerations by way of illustration only and I emphasise once again that they are in no way intended to be read as a code ...

In the circumstances of the instant case, I have no doubt that [the High Court] and the Court of Appeal were right in finding that the necessity for disclosure of Mr Goodwin's notes in the interests of justice was established. The importance to the plaintiffs of obtaining disclosure lies in the threat of severe damage to their business, and consequentially to the livelihood of their employees, which would arise from disclosure of the information contained in their corporate plan while their refinancing negotiations are still continuing. This threat ... can only be defused

ifthey can identify the source either as himself the thief ofthe stolen copy of the plan or as a means to lead to the identification of the thief and thus put themselves in a position to institute proceedings for the recovery of the missing document. The importance of protecting the source on the other hand is much diminished by the source's complicity, at the very least, in a gross breach of confidentiality which is not counterbalanced by any legitimate interest which publication of the information was calculated to serve. Disclosure in the interests of justice is, on this view of the balance, clearly of preponderating importance so as to override the policy underlying the statutory protection of sources and the test of necessity for disclosure is satisfied..."

Lord Templeman added that the applicant should have "recognised that [the information] was both confidential and damaging".

C. Fine for contempt of court

19. In the meantime, on 23 November 1989, the applicant had been served with a motion seeking his committal for contempt of court, an offence which was punishable by an unlimited fine or up to two years' imprisonment (section 14 of the 1981 Act). On 24 November, at a hearing in the High Court, counsel for the applicant had conceded that he had been in contempt but the motion was adjourned pending the appeal.

Following the House of Lord's dismissal of the appeal, the High Court, on 10 April 1990, fined the applicant £5,000 for contempt of court.

II. RELEVANT DOMESTIC LAW

20. Section 10 of the Contempt of Court Act 1981 provides:

"No court may require a person to disclose, nor is a person guilty of contempt of court for refusing to disclose the source of information contained in the publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime."

21. Section 14[3] reads:

"In any case where a court has power to commit a person to prison for contempt of court and (apart from this provision)no limitation applies to the period of committal, the committal shall (without prejudice to the power of the court to order his earlier discharge) be for a fixed term, and that term shall not on any occasion exceed two years in the case of committal by a superior court, or one month in the case of committal by an inferior court."

22. In Secretary of State for Defence v. Guardian Newspapers Lord Diplock considered the expression "interests of justice" in section 10 of the 1981 Act:

"The exceptions include no reference to the 'public interest' generally and I would add that in my view the expression 'justice', the interests of which are entitled to protection, is not used in a general sense as the antonym of 'injustice' but in a technical sense of the administration of justice in the course of legal proceedings in a court of law ... [The expression `interests of justice'] ... refers to the administration of justice in particular legal proceedings already in existence or, in the type of `bill of discovery' case ... exemplified by the Norwich Pharmacal Co. v. Customs and Excise Commissioners ... a particular civil action which it is proposed to bring against a wrongdoer whose identity has not yet been ascertained. I find it difficult to envisage a civil action in which section 10 of the [1981] Act would be relevant other than one of defamation or for detention of goods where the goods, as in the instant case and in British Steel Corporation v. Granada Television ...consist of or include documents that have been supplied to the media in breach of confidence."

PROCEEDINGS BEFORE THE COMMISSION

23. In his application (no. 17488/90) of 27 September 1990 to the Commission, the applicant complained that the imposition of a disclosure order requiring him to reveal the identity of a source violated his right to freedom of expression under Article 10 (art. 10) of the Convention.

24. The Commission declared the application admissible on 7 September 1993. In its report of 1 March 1994 (Article 31) (art. 31), the Commission expressed the opinion that there had been a violation of Article 10 (art. 10) (by eleven votes to six). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment.

FINAL SUBMISSIONS MADE TO THE COURT

25. At the hearing on 24 April 1995 the Government, as they had done in their memorial, invited the Court to hold that there had been no violation of Article 10 (art. 10) of the Convention.

26. On the same occasion the applicant reiterated his request to the Court, stated in his memorial, to find that there had been a breach of Article 10 (art. 10) and to award him just satisfaction under Article 50 (art. 50) of the Convention.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 (art. 10) OF THE CONVENTION

27. The applicant alleged that the disclosure order requiring him to reveal the identity of his source and the fine imposed upon him for having refused to do so constituted a violation of Article 10 (art. 10) of the Convention, which reads:

> "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 (art. 10) 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."

28. It was undisputed that the measures constituted an interference with the applicant's right to freedom of expression as guaranteed by paragraph 1 of Article 10 (art. 10-1) and the Court sees no reason to hold otherwise. It must therefore examine whether the interference was justified under paragraph 2 of Article 10 (art. 10-2).

A. Was the interference "prescribed by law"?

29. The Court observes that, and this was not disputed, the impugned disclosure order and the fine had a basis in national law, namely sections 10 and 14 of the 1981 Act (see paragraphs 20 and 21 above). On the other hand, the applicant maintained that as far as the disclosure order was concerned the relevant national law failed to satisfy the foreseeability requirement which flows from the expression "prescribed by law".

30. The Government contested this allegation whereas the Commission did not find it necessary to reach a conclusion on this point.

31. The Court reiterates that, according to its case-law, the relevant national law must be formulated with sufficient precision to enable the persons concerned - if need be with appropriate legal advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. A law that confers a discretion is not in itself inconsistent with this requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference (see, for instance, the Tolstoy Miloslavsky v. the United Kingdom judgment of 13 July 1995, Series A no. 316-B, pp. 71-72, para. 37).

32. The applicant argued that the interests-of-justice exception to the protection of sources under section 10 of the 1981 Act was not sufficiently precise to enable journalists to foresee the circumstances in which such an order could be made against them in order to protect a private company. By applying this provision to the present case, Lord Bridge had completely revised the interpretation given by Lord Diplock in Secretary of State for Defence v. Guardian Newspapers. The balancing exercise introduced by Lord Bridge amounted to subjective judicial assessment of factors based on retrospective evidence presented by the party seeking to discover the identity of the source (see paragraph 18 above). At the time the source provided the information, the journalist could not possibly know whether the party's livelihood depended upon such discovery and could not assess with any degree of certainty the public interest in the information. A journalist would usually be in a position to judge whether the information was acquired by legitimate means or not, but would not be able to predict how the courts would view the matter. The law, as it stood, was no more than a mandate to the judiciary to order journalists to disclose sources if they were "moved" by the complaint of an aggrieved party.

33. The Court recognises that in the area under consideration it may be difficult to frame laws with absolute precision and that a certain degree of flexibility may even be desirable to enable the national courts to develop the law in the light of their assessment of what measures are necessary in the interests of justice.

Contrary to what is suggested by the applicant, the relevant law did not confer an unlimited discretion on the English courts in determining whether an order for disclosure should be made in the interests of justice. Important limitations followed in the first place from the terms of section 10 of the 1981 Act, according to which an order for disclosure could be made if it was "established to the satisfaction of the court that disclosure [was] necessary in the interests of justice" (see paragraph 20 above).

In addition, at the material time, that is when the applicant received the information from his source, there existed not only an interpretation by Lord Diplock of the interests-of-justice provision in section 10 in the case of Secretary of State for Defence v. Guardian Newspapers but also a ruling by Lord Reid in Norwich Pharmacal Co. v. Customs and Excise Commissioners (1973), to the effect that a person who through no fault of his own gets mixed up in wrongdoing may come under a duty to disclose the identity of the wrongdoer (see paragraphs 15, 18 and 22 above).

In the Court's view the interpretation of the relevant law made by the House of Lords in the applicant's case did not go beyond what could be reasonably foreseen in the circumstances (see, mutatis mutandis, the recent S.W. v. the United Kingdom judgment of 22 November 1995, Series A no. 335-B, p. 42, para. 36). Nor does it find any other indication that the law in question did not afford the applicant adequate protection against arbitrary interference.

34. Accordingly, the Court concludes that the impugned measures were "prescribed by law".

B. Did the interference pursue a legitimate aim?

35. It was not disputed before the Convention institutions that the aim of the impugned measures was to protect Tetra's rights and that the interference thus pursued a legitimate aim. The Government maintained that the measures were also taken for the prevention of crime.

36. The Court, being satisfied that the interference pursued the first of these aims, does not find it necessary to determine whether it also pursued the second.

C. Was the interference "necessary in a democratic society"?

37. The applicant and the Commission were of the opinion that Article 10 (art. 10) of the Convention required that any compulsion imposed on a journalist to reveal his source had to be limited to exceptional circumstances where vital public or individual interests were at stake. This test was not satisfied in the present case.

The applicant and the Commission invoked the fact that Tetra had already obtained an injunction restraining publication (see paragraph 12 above), and that no breach of that injunction had occurred. Since the information in question was of a type commonly found in the business press, they did not consider that the risk of damage that further publication could cause was substantiated by Tetra, which had suffered none of the harm adverted to. The applicant added that the information was newsworthy even though it did not reveal matters of vital public interest, such as crime or malfeasance. The information about Tetra's mismanagement, losses and loan-seeking activities was factual, topical and of direct interest to customers and investors in the market for computer software. In any event, the degree of public interest in the information could not be a test of whether there was a pressing social need to order the source's disclosure. A source may provide information of little value one day and of great value the next; what mattered was that the relationship between the journalist and the source was generating the kind of information which had legitimate news potential. This was not to deny Tetra's entitlement to keep its operations secret, if it could, but to contest that there was a pressing social need for punishing the applicant for refusing to disclose the source of the information which Tetra had been unable to keep secret.

38. The Government contended that the disclosure order was necessary in a democratic society for the protection of "the rights" of Tetra. The function of the domestic courts was both to ascertain facts and, in the light of the facts established, to determine the legal consequences which should flow from them. In the Government's view, the supervisory jurisdiction of the Convention institutions extended only to the latter. These limitations on the Convention review were of importance in the present case, where the national courts had proceeded on the basis that the applicant had received the information from his source in ignorance as to its confidential nature, although, in fact, this was something he ought to have recognised. Moreover, the source was probably the thief of the confidential business plan and had improper motives for divulging the information. In addition, the plaintiffs would suffer serious commercial damage from further publication of the information. These findings by the domestic courts were based upon the evidence which was placed before them.

It was further submitted that there was no significant public interest in the publication of the confidential information received by the applicant. Although there is a general public interest in the free flow of information to journalists, both sources and journalists must recognise that a journalist's express promise of confidentiality or his implicit undertaking of non-attributability may have to yield to a greater public interest. The journalist's privilege should not extend to the protection of a source who has conducted himself mala fide or, at least, irresponsibly, in order to enable him to pass on, with impunity, information which has no public importance. The source in the present case had not exercised the responsibility which was called for by Article 10 (art. 10) of the Convention. The information in issue did not possess a public-interest content which justified interference with the rights of a private company such as Tetra.

Although it was true that effective injunctions had been obtained, so long as the thief and the source remained untraced, the plaintiffs were at risk of further dissemination of the information and, consequently, of damage to their business and to the livelihood of their employees. There were no other means by which Tetra's business confidence could have been protected.

In these circumstances, according to the Government, the order requiring the applicant to divulge his source and the further order fining him for his refusal to do so did not amount to a breach of the applicant's rights under Article 10 (art. 10) of the Convention.

39. The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance (see, as a recent authority, the Jersild v. Denmark judgment of 23 September 1994, Series A no. 298, p. 23, para. 31).

Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is

affirmed in several international instruments on journalistic freedoms (see, amongst others, the Resolution on Journalistic Freedoms and Human Rights, adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, 7-8 December 1994) and Resolution on the Confidentiality of Journalists' Sources by the European Parliament, 18 January 1994, Official Journal of the European Communities No. C 44/34). Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 (art. 10) of the Convention unless it is justified by an overriding requirement in the public interest.

These considerations are to be taken into account in applying to the facts of the present case the test of necessity in a democratic society under paragraph 2 of Article 10 (art. 10-2).

40. As a matter of general principle, the "necessity" for any restriction on freedom of expression must be convincingly established (see the Sunday Times v. the United Kingdom (no. 2) judgment of 26 November 1991, Series A no. 217, pp. 28-29, para. 50, for a statement of the major principles governing the "necessity" test). Admittedly, it is in the first place for the national authorities to assess whether there is a "pressing social need" for the restriction and, in making their assessment, they enjoy a certain margin of appreciation. In the present context, however, the national margin of appreciation is circumscribed by the interest of democratic society in ensuring and maintaining a free press. Similarly, that interest will weigh heavily in the balance in determining, as must be done under paragraph 2 of Article 10 (art. 10-2), whether the restriction was proportionate to the legitimate aim pursued. In sum, limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court.

The Court's task, in exercising its supervisory function, is not to take the place of the national authorities but rather to review under Article 10 (art. 10) the decisions they have taken pursuant to their power of appreciation. In so doing, the Court must look at the "interference" complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".

41. In the instant case, as appears from Lord Bridge's speech in the House of Lords, Tetra was granted an order for source disclosure primarily on the grounds of the threat of severe damage to their business, and consequently to the livelihood of their employees, which would arise from disclosure of the information in their corporate plan while their refinancing negotiations were still continuing (see paragraph 18 above). This threat, "ticking away beneath them like a time bomb", as Lord Donaldson put it in the Court of Appeal (see paragraph 17 above), could only be defused, Lord Bridge considered, if they could identify the source either as himself the thief of the stolen copy of the plan or as a means to lead to identification of the thief and thus put the company in a position to institute proceedings for the recovery of the missing document. The importance of protecting the source, Lord Bridge concluded, was much diminished by the source's complicity, at the very least, in a gross breach of confidentiality which was not counterbalanced by any legitimate interest in publication of the information (see paragraph 18 above).

42. In the Court's view, the justifications for the impugned disclosure order in the present case have to be seen in the broader context of the ex parte interim injunction which had earlier been granted to the company, restraining not only the applicant himself but also the publishers of The Engineer from publishing any information derived from the plan. That injunction had been notified to all the national newspapers and relevant journals (see paragraph 12 above). The purpose of the disclosure order was to a very large extent the same as that already being achieved by the injunction, namely to prevent dissemination of the confidential information contained in the plan. There was no doubt, according to Lord Donaldson in the Court of Appeal, that the injunction was effective in stopping dissemination of the confidential information by the press (see paragraph 17 above). Tetra's creditors, customers, suppliers and competitors would not therefore come to learn of the information through the press. A vital component of the threat of damage to the company had thus already largely been neutralised by the injunction. This being so, in the Court's opinion, in so far as the disclosure order merely served to reinforce the injunction, the additional restriction

on freedom of expression which it entailed was not supported by sufficient reasons for the purposes of paragraph 2 of Article 10 (art. 10-2) of the Convention.

43. What remains to be ascertained by the Court is whether the further purposes served by the disclosure order provided sufficient justification.

44. In this respect it is true, as Lord Donaldson put it, that the injunction "would not effectively prevent publication to [Tetra's] customers or competitors" directly by the applicant journalist's source (or that source's source) (see paragraph 17 above). Unless aware of the identity of the source, Tetra would not be in a position to stop such further dissemination of the contents of the plan, notably by bringing proceedings against him or her for recovery of the missing document, for an injunction against further disclosure by him or her and for compensation for damage.

It also had a legitimate reason as a commercial enterprise in unmasking a disloyal employee or collaborator, who might have continuing access to its premises, in order to terminate his or her association with the company.

45. These are undoubtedly relevant reasons. However, as also recognised by the national courts, it will not be sufficient, per se, for a party seeking disclosure of a source to show merely that he or she will be unable without disclosure to exercise the legal right or avert the threatened legal wrong on which he or she bases his or her claim in order to establish the necessity of disclosure (see paragraph 18 above). In that connection, the Court would recall that the considerations to be taken into account by the Convention institutions for their review under paragraph 2 of Article 10 (art. 10-2) tip the balance of competing interests in favour of the interest of democratic society in securing a free press (see paragraphs 39 and 40 above). On the facts of the present case, the Court cannot find that Tetra's interests in eliminating, by proceedings against the source, the residual threat of damage through dissemination of the confidential information otherwise than by the press, in obtaining compensation and in unmasking a disloyal employee or collaborator were, even if considered cumulatively, sufficient to outweigh the vital public interest in the protection of the applicant journalist's source. The Court does not therefore consider that the further purposes served by the disclosure order, when measured against the standards imposed by the Convention, amount to an overriding requirement in the public interest.

46. In sum, there was not, in the Court's view, a reasonable relationship of proportionality between the legitimate aim pursued by the disclosure order and the means deployed to achieve that aim. The restriction which the disclosure order entailed on the applicant journalist's exercise of his freedom of expression cannot therefore be regarded as having been necessary in a democratic society, within the meaning of paragraph 2 of Article 10 (art. 10-2), for the protection of Tetra's rights under English law, notwithstanding the margin of appreciation available to the national authorities.

Accordingly, the Court concludes that both the order requiring the applicant to reveal his source and the fine imposed upon him for having refused to do so gave rise to a violation of his right to freedom of expression under Article 10 (art. 10).

II. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

47. Mr William Goodwin sought just satisfaction under Article 50 (art. 50) of the Convention, which reads:

> "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, 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."

A. Non-pecuniary damage

48. The applicant claimed 15,000 pounds sterling for non-pecuniary damage, on account of mental anguish, shock, dismay and anxiety which he felt as a result of the proceedings against him. For five months he was in constant peril of being sent to prison, for up to two years, as a punishment for obeying his conscience and for living up to his ethical obligations as a journalist.

He still has to live with a criminal record since his crime of contempt of court would not be expunged by a finding of breach by the Court. He had been the subject of harassment by court process servers and his employers so as to comply with a court order against themselves, all of which was added to the pressure exerted on him by the threat of dismissal if he did not disclose the identity of his source.

49. The Government objected to the applicant's claim on the ground that the alleged adverse consequences stemmed from the fact that he was defying and disobeying the law. Even if he considered it a bad law, he should have obeyed the order to provide the information to the court in a sealed envelope, or, at the very least, he should have recognised his duty to obey the disclosure order when he lost his case in the House of Lords. Had he done so, the Government would have found it difficult to resist a claim for compensation for any adverse consequences.

50. The Court is not persuaded by the Government's arguments. What matters under Article 50 (art. 50) is whether the facts found to constitute a violation have resulted in non-pecuniary damage. In the present case, the Court finds it established that there was a causal link between the anxiety and distress suffered by the applicant and the breach found of the Convention. However, in the circumstances of the case, the Court considers that this finding constitutes adequate just satisfaction in respect of the damage claimed under this head.

B. Costs and expenses

51. The applicant further sought reimbursement of costs and expenses totalling £49,500, in respect of the following items specified in his memorial to the Court of 1 March 1995:

(a) £19,500 for counsel's fees for drafting the application to the Commission and written observations to the latter and the Court and for preparing and presenting the case before both the Commission and the Court;

(b) £30,000 for work by the applicant's solicitors in connection with the proceedings before the Commission and the Court.

To the above amounts should be added any applicable value added tax (VAT).

52. The Government, by letter of 11 April 1995, invited the applicant to provide a detailed breakdown of the costs.

53. In a letter of 25 July 1995 the applicant stated that the solicitors' work before the Commission and Court amounted to a total of 136 hours at, on average, £250 per hour for a senior partner and £150 per hour for an assistant solicitor.

54. On 30 August 1995, the Government submitted their comments on the breakdown provided by the applicant. Without prejudice to the Court's decision regarding the belatedness of the applicant's claim, they stated that they considered that the £19,500 sought in respect of counsel was unreasonably high and that £16,000 would be reasonable.

As to solicitors' fees, the Government regarded the rates and the number of hours claimed as excessive. In their view 110 hours at an average rate of £160 per hour for a senior partner and £100 per hour for an assistant solicitor would be reasonable.

According to the Government's calculations, it would be reasonable to indemnify the applicant £37,595.50 (VAT included) for costs.

55. By letter of 1 September 1995, the applicant stressed that the number of hours and the hourly rates claimed were reasonable. He conceded that if the Court found in his favour, it could properly in its discretion award the amounts indicated by the Government. He stated that he would be prepared to settle for a total figure midway between the total figures contended for by the two parties.

56. The Court considers the sum conceded by the Government to be adequate in the circumstances of the present case. The Court therefore awards the applicant £37,595,50 (VAT included) for legal costs and expenses, less the 9,300 French francs already paid in legal aid by the Council of Europe in respect of legal fees.

C. Default interest

57. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 8% per annum.

FOR THESE REASONS, THE COURT

1. Holds by eleven votes to seven that there has been a violation of Article 10 (art. 10) of the Convention;

2. Holds unanimously that the finding of a violation constitutes adequate just satisfaction for the non-pecuniary damage suffered by the applicant;

3. Holds unanimously: (a) that the respondent State is to pay to the applicant, within three months, in respect of costs and expenses£37,595.50 (thirty seven thousand, five hundred and ninetyfive pounds sterling and fifty pence) less 9,300 (ninethousand, three hundred) French francs to be converted into pounds sterling at the rate applicable on the date of delivery of the present judgment; (b) that simple interest at an annual rate of 8% shall be payable from the expiry of the above-mentioned three months until settlement;

4. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 27 March 1996.

Rolv RYSSDAL
President

Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mr De Meyer;

(b) joint dissenting opinion of Mr Ryssdal, Mr Bernhardt,Mr Thór Vilhjálmsson, Mr Matscher, Mr Walsh, Sir JohnFreeland and Mr Baka;

(c) separate dissenting opinion of Mr Walsh.

R. R.
H. P.

CONCURRING OPINION OF JUDGE DE MEYER

I fully agree with the Court's conclusion that the order requiring the applicant to reveal his source and the fine imposed upon him for having refused to do so violated his right to freedom of expression. I would however observe that so did also, in my view, the earlier injunction against publication of the information[4], since it was an utterly unacceptable form of prior restraint[5].

Even if there had not been such an injunction the disclosure order and the ensuing fine would not have been legitimate. The protection of a journalist's source is of such a vital importance for the exercise of his right to freedom of expression that it must, as a matter of course, never be allowed to be infringed upon, save perhaps in very exceptional circumstances, which certainly did not exist in the present case.

JOINT DISSENTING OPINION OF JUDGES RYSSDAL, BERNHARDT, THÓR VILHJÁLMSSON, MATSCHER, WALSH, SIR JOHN FREELAND AND BAKA

1. We are unable to agree that, as the majority conclude in paragraph 46 of the judgment, "both the order requiring the applicant to reveal his source and the fine imposed upon him for having refused to do so gave rise to a violation of his right to freedom of expression under Article 10 (art. 10)".

2. We of course fully accept that, as is recalled in paragraph 39 of the judgment, freedom of expression constitutes one of the essential foundations of a democratic society and the safeguards to be afforded to the press are of particular importance. We likewise agree that, as the paragraph goes on to say, "Protection of journalistic sources is one of the basic conditions for press freedom ... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected". It follows that an order for source disclosure cannot be compatible with Article 10 (art. 10) of the Convention unless it is justified under paragraph 2 of that Article (art. 10-2).

3. Where we part company with the majority is in the assessment of whether, in the circumstances of the present case, such a justification existed - whether, in particular, the test of necessity in a democratic society should be regarded as having been satisfied.

4. As regards the test in domestic law, section 10 of the Contempt of Court Act 1981 clearly gives statutory force to a presumption against disclosure of sources. It provides (see paragraph 20 of the judgment) that no court may require disclosure "unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime".

5. As explained by Lord Bridge in the House of Lords in the applicant's case, this statutory restriction operates unless the party seeking disclosure can satisfy the court that "disclosure is necessary" in the interests of one of the four matters of public concern that are listed in the section. In asking himself the question whether disclosure of the source of some particular information is necessary to serve one of the interests in question, the judge has to engage in a balancing exercise: he must start "with the assumptions, first, that the protection of sources is itself a matter of high public importance, secondly, that nothing less than necessity will suffice to override it, thirdly, that the necessity can only arise out of concern for another matter of high public importance, being one of the four interests listed in the section". Dealing with the way in which the judge should determine necessity where, as here, the relevant interests are those of justice, Lord Bridge said that it would never be enough for a party seeking disclosure of a source protected by the section to show merely that he will be unable without disclosure to exercise a legal right or avert a threatened legal wrong. "The judge's task will always be to weigh in the scales the importance of enabling the ends of justice to be attained in the circumstances of the particular case on the one hand against the importance of protecting the source on the other hand. In this balancing exercise it is only if the judge is satisfied that disclosure in the interests of justice is of such preponderating importance as to override the statutory privilege against disclosure that the threshold of necessity will be reached."

6. Given that, as the judgment accepts, the protection of Tetra's rights by way of the "interests-of-justice" exception amounts to the pursuit of a legitimate aim under paragraph 2 of Article 10 (art. 10-2), the domestic-law test of necessity strikingly resembles that required by the Convention. The domestic courts at three levels, on the basis of all the evidence which was before them, concluded that disclosure was necessary in the interests of justice. Factors which Lord Bridge stressed, in support of his conclusion that the judge at first instance and the Court of Appeal were right in finding that the necessity for disclosure in the interests of justice was established, were the following. First, the importance to Tetra of obtaining disclosure lay in the threat of severe damage to their business, and consequentially to the livelihood of their employees, which would arise from disclosure of the information contained in their corporate plan while their refinancing operations were still continuing. This threat could only be defused if they could identify the source as himself the thief of the stolen copy of the plan or as a means to lead to identification of the thief and thus put themselves in a position to institute proceedings for the recovery of the missing document. Secondly, the importance of protecting the source was much diminished by the source's complicity,

at the very least, in a gross breach of confidentiality which was not counterbalanced by any legitimate interest which publication of the information was calculated to serve. In this view of the balance, disclosure in the interests of justice was clearly of preponderating importance so as to override the policy underlying the statutory protection of sources and the test of necessity for disclosure was satisfied.

7. The judgment, on the other hand, concludes that there was not a reasonable relationship of proportionality between the legitimate aim pursued by the disclosure order and the means deployed to achieve that aim (paragraph 46). In reaching this conclusion, the judgment first says (rightly), in paragraph 42, that the justifications for the disclosure order have to be seen in the broader context of the injunction which Tetra had already obtained. That injunction was effective in stopping dissemination of the confidential information by the press, so that a "vital component of the threat of damage to the company had ... already largely been neutralised ...". "This being so", the paragraph continues "... in so far as the disclosure order merely served to reinforce the injunction, the additional restriction on freedom of expression which it entailed was not supported by sufficient reasons for the purposes of paragraph 2 of Article 10 (art. 10-2) ..".

8. To suggest, however, that the disclosure order may have "merely served to reinforce the injunction" is to misstate the case. As the decisions of the domestic courts explain, the purpose of the disclosure order was to extend the protection of Tetra's rights by closing gaps left by the injunction. The injunction bit upon the press, but it would not effectively prevent publication to Tetra's customers or competitors directly by the applicant's source (or that source's source). Without knowing the identity of the source, Tetra would not be in a position to stop further dissemination of the contents of the plan by bringing proceedings against him for recovery of the missing document, for an injunction prohibiting further disclosure by him and for damages. Nor would they be able to remove any threat of further harm to their interests from a possible disloyal employee or collaborator who might enjoy continued access to their premises.

9. These further purposes served by the disclosure order are considered in paragraphs 44 and 45 of the judgment. The latter paragraph, after recalling that the considerations to be taken into account by the Convention institutions for their review under paragraph 2 of Article 10 (art. 10-2) "tip the balance of competing interests in favour of the interest of democratic society in securing a free press", asserts that Tetra's interests in securing the additional measures of protection sought through the disclosure order were insufficient to outweigh the vital public interest in the protection of the applicant's source.

10. No detailed assessment of these interests of Tetra's is, however, undertaken, and in the absence of it there is no satisfactory basis for the balancing exercise which the Court is required to undertake. The domestic courts were, in any event, better placed to evaluate, on the basis of the evidence before them, the strength of those interests, and in our view the conclusion which they reached as to where, in the light of their evaluation, the corresponding balance should be struck was within the margin of appreciation allowed to the national authorities.

11. We therefore conclude that neither the disclosure order nor the fine imposed upon the applicant for his failure to comply with it gave rise to a violation of his right to freedom of expression under Article 10 (art. 10).

SEPARATE DISSENTING OPINION OF JUDGE WALSH

1. In his opening address to the Court counsel for the applicant stated that his client was "claiming no special privilege by virtue of his profession because journalists are not above the law". Yet it appears to me that the Court in its decision has decided in effect that under the Convention a journalist is by virtue of his profession to be afforded a privilege not available to other persons. Should not the ordinary citizen writing a letter to the papers for publication be afforded an equal privilege even though he is not by profession a journalist? To distinguish between the journalist and the ordinary citizen must bring into question the provisions of Article 14 (art. 14) of the Convention.

2. In the present case the applicant did not suffer any denial of expressing himself. Rather has he refused to speak. In consequence a litigant seeking the protection of the law for his interests which were wrongfully injured is left without the remedy the courts had decided he was entitled to. Such a result is certainly a matter of public interest and the applicant has succeeded in frustrating his national courts in their efforts to act in the interests of justice. It is for the national courts to decide whether or not the document in question was stolen. Yet the applicant claims that because he does not believe it was stolen he can justify his refusal to comply with the court order made in his case. His attitude and his words give the impression that he would comply if he believed the document in question had been stolen. He is thus setting up his personal belief as to truth of a fact which is exclusively within the domain of the national courts to decide as a justification for not obeying the order of the courts simply because he does not agree with the judicial findings of fact.

3. It does not appear to me that anything in the Convention permits a litigant to set up his own belief as to the facts against the finding of fact made by the competent courts and thereby seek to justify a refusal to be bound by such judicial finding of fact. To permit him to do so simply because he is a journalist by profession is to submit the judicial process to the subjective assessment of one of the litigants and to surrender to that litigant the sole decision as to the moral justification for refusing to obey the court order in consequence of which the other litigant is to be denied justice and to suffer damage. Thus there is a breach of a primary rule of natural justice - no man is to be the judge of his own cause.

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[1] . The case is numbered 16/1994/463/544. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of corresponding originating applications to the Commission.

[2] Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently

[3] For practical reasons this annex will appear only with the printed version of the judgment (Reports 1996-II), but a copy of the Commission's report is obtainable from the Registry.

[4] Paragraphs 12 and 42 of the judgement.

[5] See my partly dissenting opinion on that matter in the case of Observer and Guardian v. the United Kingdom, judgment of 26 November 1991, Series A no. 216, p.46

Fatto:
Il sig. Goodwin, giornalista britannico effettuava uno stage presso il giornale "The Engineer".

In data 2 novembre 1989, il giornalista riceveva da un informatore, a cui non era stato corrisposto alcun compenso, ma dietro la promessa dell'anonimato, notizie relative alle difficoltà finanziarie della società Tetra Ltd.

Pochi giorni dopo il sig. Goodwin, intenzionato a scrivere un articolo sulla società si metteva in contatto con la Tetra, per verificare i fatti ed avere commenti sulle informazioni, così apprendeva che le notizie, che gli erano state fornite, provenivano da un progetto segreto, di piano di sviluppo della stessa Tetra, illegalmente sottratto. In seguito a ciò, la società, adita la High Court of Justice (Chancery Division), otteneva, senza contraddittorio, un'ingiunzione provvisoria che vietava all'editore di "The Engineer" di pubblicare qualsiasi informazione tratta dal piano di sviluppo. Inoltre, in virtù dell'art. 10 della legge del 1981 sul contempt of court, " nell'interesse della giustizia" la High Court of Justice con un'ordinanza intimava all'editore di produrre davanti all'autorità giudiziaria, le annotazioni da cui si sarebbe potuto risalire all'identità del suo informatore. Tale divulgazione avrebbe, infatti, permesso alla Tetra di incardinare un processo contro lo stesso informatore, di rientrare in possesso del documento, di ottenere un'ingiunzione che proibisse qualsiasi ulteriore pubblicazione e di chiedere un risarcimento di danni per le spese di cui era stata costretta a farsi carico. Invero, l'articolo succitato, riconosceva il potere in capo al Tribunale di ordinare ad una persona la divulgazione della fonte di informazione se ciò si dimostrava necessario per l'interesse della giustizia o della sicurezza nazionale o per la difesa dell'ordine o per la prevenzione dei reati, pena l'accusa di contempt of court in caso di rifiuto. Contro l'ordinanza, il giornalista presentò opposizione prima dinanzi alla Corte D'Appello e poi alla Camera dei Lord. Le autorità adite respinsero la richiesta del ricorrente poiché, nel caso di specie, i principi alla base della protezione legale delle fonti soccombeva di fronte all'interesse della giustizia, poiché la riservatezza dell'informatore costituiva grave minaccia nei confronti della società Tetra.

Il giornalista, inottemperante, fu allora rinviato a giudizio e condannato al pagamento di un'ammenda ai sensi dell'art. 10 e 14 legge 1981 sul contempt of court..

Contro tale decisione, il giornalista adiva la Corte Europea dei Diritti dell'Uomo, lamentando la violazione dell'art.10 CEDU.

Diritto:
La Corte è chiamata a verificare se, nel caso di specie, l'ingerenza dell'autorità giudiziaria possa essere giustificata anche in rapporto al secondo paragrafo dell'art. 10 CEDU. Infatti, le misure adottate dall'autorità giudiziaria inglese costituiscono una chiara violazione alla libertà di espressione garantita dall'art. 10 par.1 CEDU; tuttavia il secondo paragrafo dello stesso articolo prevede la possibilità di sottoporre tale libertà alle formalità, condizioni, restrizioni o sanzioni previste dalla legge, purché costituiscano misure necessarie, in una società democratica, per il perseguimento di uno scopo legittimo.

Con riguardo alla necessità della previsione di legge, i giudici di Strasburgo ritengono che il diritto interno, nel prevedere delle limitazioni, deve essere formulato con precisione sufficiente allo scopo di consentire alle persone interessate di prevedere le conseguenze che possono derivare da una determinata azione; in ogni caso una legge che conferisce un potere discrezionale non entra in conflitto con tale requisito, a condizione, però, che l'estensione e le modalità di esercizio di tale potere siano definite con precisione sufficiente, tenuto conto dello scopo legittimo in gioco, per fornire all'individuo una protezione adeguata contro l'arbitrio. Nel caso di specie, la Corte ha ritenuto che le misure adottate discendono dall'art.10 della legge del 1981 che prevede la possibilità del Tribunale di ordinare di divulgare la fonte se la divulgazione sia necessaria nell'interesse della giustizia. Tale legge così come formulata non conferisce ai Tribunali una libertà assoluta garantendo agli individui una protezione adeguata contro l'arbitrio.

Tuttavia, la Corte precisa che la libertà di espressione costituisce uno dei fondamenti essenziali di una società democratica e che tra le garanzie accordate alla stampa un'importanza particolare riveste la protezione delle fonti dei giornalisti; infatti, l'assenza di una tale protezione potrebbe

dissuadere le fonti dei giornalisti dall'aiutare la stampa ad informare il pubblico su questioni d'interesse generale. Alla luce di ciò, un'ordinanza di divulgazione della fonte, in una società democratica, rischierebbe di avere un effetto negativo sull'esercizio della libertà di stampa di talché solo l'esigenza di raggiungere uno scopo legittimo potrebbe giustificare una tale restrizione. Il compito di valutare l'esistenza di un'esigenza sociale imperativa che giustifichi una restrizione della libertà di stampa spetta alle autorità giudiziarie nazionali, che godono di un margine discrezionale, alla Corte spetta solo giudicare se le motivazioni addotte dalle autorità nazionali per giustificare un'ingerenza nella libertà di stampa appaiano necessarie per realizzare uno scopo legittimo.

Nel caso di specie, la Corte giudicando l'ordinanza di divulgazione una semplice misura rafforzativa dell'ingiunzione volta a vietare la pubblicazione di qualsiasi notizia tratta dal piano di sviluppo ha ritenuto tale restrizione non giustificata da motivi legittimi, ai sensi dell'art. 10 CEDU.

Inoltre, i giudici di Strasburgo, considerando gli interessi della Tetra non sufficienti per prevalere sull'interesse pubblico rappresentato dalla protezione della fonte del giornalista, hanno concluso dichiarando contraria all'art.10 CEDU l'ordinanza di divulgazione imposta al giornalista e la conseguente condanna al pagamento di un'ammenda per non avere ottemperato all'ordine imposto dal giudice nazionale.