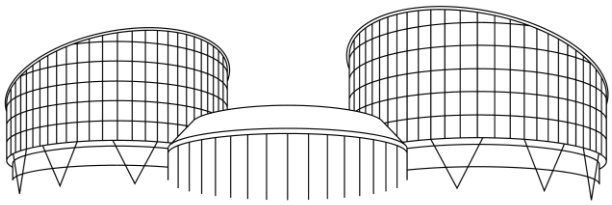

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

Applications nos. 67318/09 and 22226/12
John Anthony TWOMEY and Glenn Macdonald CAMERON
against the United Kingdom
and
Bianca GUTHRIE against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 28 May 2013 as a Chamber composed of:

Ineta Ziemele, *President,*
David Thór Björgvinsson,
Päivi Hirvelä,
Ledi Bianku,
Vincent A. De Gaetano,
Paul Mahoney,
Faris Vehabović, *judges,*

and Françoise Elens-Passos, *Section Registrar,*

Having regard to the above applications lodged on 3 December 2009 and 17 March 2012 respectively,

Having deliberated, decides as follows:

THE FACTS

The first and second applicants, Mr John Anthony Twomey and Mr Glenn Macdonald Cameron, are an Irish and a British national, who were born in 1948 and 1959 respectively. They were represented before the Court by Mr G. Bromelow, a lawyer practising in London. The third applicant, Ms Bianca Guthrie, is a British national, who was born in 1975 and lives in London. She is represented before the Court by Mr J. Edwards

of Westgate Chambers and Mr S. Gehan of Criminal Defence Solicitors, lawyers practising in Lewes and London respectively.

A. The circumstances of the case

The facts of the case, as submitted by the applicants, may be summarised as follows.

1. John Twomey and Glenn Cameron

a. The first trial

1. On 6 February 2004 an armed robbery occurred at a warehouse near Heathrow Airport. In March 2005 the trial began before Judge R, sitting with a jury, of Mr Twomey and six other defendants charged with offences related to the robbery. In the course of the trial, an application by counsel for one of the other defendants required the judge to investigate a substantial volume of material under public interest immunity conditions; that is, in a closed hearing without disclosure of the contents of the documents to the defence. The judge decided that the material was inadmissible as evidence and indicated that some was highly prejudicial to the first applicant. Subsequently, the first applicant became ill and the jury was discharged from returning a verdict against him. At the end of the trial two of the remaining defendants were acquitted altogether, but the jury was unable to agree on a verdict in relation to the other four and a re-trial was ordered.

b. The first re-trial

2. The first re-trial began against Mr Twomey and two others in June 2007, again before Judge R and a jury. This trial lasted over six months. By the date of the summing up the jury had been reduced to ten members. After a retirement lasting two days, the trial judge was notified by the jury that they had reached "on all defendants on all counts, a very strong majority decision". The judge said that he would not accept a majority verdict at that stage. However he added that to assist the defence considering what submissions should be made about the timing of the majority direction, he would indicate that the verdicts were likely to be adverse to them. Nine jurors returned to court after the weekend, but the tenth juror refused to return to court and was discharged. The jury was unable to reach unanimous verdicts. With only nine jurors, a majority verdict could not be taken. A second re-trial was ordered.

c. The second re-trial and the allegation of jury tampering

3. Meanwhile, Mr Cameron was arrested and indicted to stand trial with Mr Twomey and the other defendants. The second re-trial began on 30 June 2008, again before Judge R and a jury. On 5 December 2008, under closed

conditions, the prosecution informed the judge that they were in possession of material which showed that improper approaches were being made to two members of the jury. This material was not disclosed to the defence. On 8 December 2008 the judge informed the parties that he was minded to discharge the jury because of alleged jury tampering. The amount of information which he could give about the allegations was, as he put it in his open judgment, "necessarily limited". He considered representations from the defence, but concluded that no alternative to the discharge of the jury was available. Accordingly on 9 December 2008 the jury was discharged.

4. Judge R then reflected whether he should make an order under section 46(3) of the Criminal Justice Act 2003 ("the 2003 Act": see paragraph 23 below), that the trial should continue before him sitting alone without a jury. He addressed a complaint made on behalf of the defendants that they were not being allowed to see the material on which his conclusion that jury tampering had taken place at the aborted trial was based, which prevented them from addressing the question whether a "real and present" danger of jury tampering existed. Judge R expressed sympathy with this submission, but said in express terms that "the law does not permit me to disclose the detail of the information upon which I acted in discharging the jury". He repeated his entire satisfaction that a determined attempt had been made at jury tampering and added that even if the defence counsel had been allowed to see the material, there was no prospect that any consequent submissions could have altered his conclusion. Next, he reminded himself of the undisclosed material relating to the first applicant which he had seen in the course of the 2005 trial. He concluded that his knowledge of that material would make it unfair for him to return a verdict on the first applicant, and that this would have a "knock-on effect" on the other defendants, whose cases were inextricably linked to his. He considered that a "serious attempt at jury tampering" had taken place during the trial, and that there was "clearly a real and present danger" of the same thing happening again. He decided that the question whether the next re-trial should be by judge and jury or by judge alone should be considered by the President of the Circuit, the High Court Judge C.

d. The decision to hold the third re-trial before a judge sitting alone

5. In a closed session, with the assistance of counsel for the Crown, Judge C examined the undisclosed material concerning the allegations of jury tampering which had originally been put before Judge R. He invited submissions in open court from defence counsel. He also examined the open and closed court judgments and heard evidence from police officers about possible jury protection. Judge C noted that the problems caused to the defence by the lack of disclosure. However, he concluded that the public interest demanded that it remain confidential. He indicated that cases in

which this course might be appropriate would be likely to be cases where the danger of jury tampering was at its "most extreme". He added that if he were to conclude that the defendants should be informed of the matters of which they were ignorant then, notwithstanding the public interest that demanded that the information should be withheld, the entire object of the provisions intended to address jury tampering would be defeated. Judge C agreed with Judge R that there was a real and present danger that a future jury would be tampered with, and that the danger would persist from the moment when any new trial before a jury started until its conclusion. Nonetheless he considered that sufficient police protection could be provided, thus making it possible to conduct the re-trial with a jury.

6. The prosecution appealed to the Court of Appeal. On 5 June 2009, in accordance with the provisions of sections 44-48 of the 2003 Act, the Court of Appeal ordered that the third re-trial should be conducted by a judge alone without a jury (*R v. Twomey and Others* [2009] EWCA Crim 1035). It confirmed the conclusions of Judges R and C that the evidence established to the criminal standard that there was a real and present danger to the integrity of a future jury trial and that the danger of jury tampering and subversion of the process of trial by jury was very significant. They considered that the protective measures envisaged by Judge C would be inadequate in the circumstances to obviate these risks and that, in any event, the consequent impact on individual jurors of such a package of security measures would be unfair.

e. The final re-trial and appeal

7. Judge T was appointed to act as the trial judge and to conduct the trial on his own. None of the material relating to jury tampering was relied on by the prosecution, and Judge T made it clear that he would not examine it, although as trial judge he remained under a continuing obligation to review whether it was fair not to disclose any other public interest immunity material which related to the issues at trial, on the ground that it would assist the defence or undermine the case for the prosecution. On 31 March 2010 he gave judgment convicting both applicants and two others of robbery, possessing firearms and other linked offences. The first applicant was sentenced to 20 years' and six months' imprisonment and the second applicant was sentenced to 15 years'.

8. Between 9 and 11 November 2010 the Court of Appeal heard the applicants' appeal against conviction and sentence (*R v Twomey and others* (No 2) [2011] EWCA Crim 8). The main issue canvassed in the appeal was the fairness of the process by which the decision was made to conduct the retrial without a jury, and in particular the use of undisclosed evidence in that process. In its judgment dated 20 January 2011, the Court of Appeal dismissed the appeal. The Lord Chief Justice commenced the judgment with the following observations:

"4. This remains the only case in this jurisdiction where trial on indictment by judge alone has taken place to nullify the risk of 'jury tampering' or jury nobbling. For the time being, although the statutory provisions relating to trial on indictment by judge alone have been in force for some years, this case is unique, and we must hope that it will remain so. The proper operation of the criminal justice system requires that the verdicts returned by a jury, as with any other court, must be true verdicts in accordance with the evidence. Verdicts returned by a jury which has been nobbled cannot represent true verdicts. If criminals choose to subvert or attempt to subvert the process of trial by jury they have no justified complaint if they are deprived of it. That is the consequence they face. The certain way of avoiding trials by judge alone where trial by jury would otherwise be available is for jury tampering to stop: it is as stark and simple as that.

5. Notwithstanding that trial by jury has been forfeited, the requirement that trial by judge alone should be fair is undiminished. All that has changed is the constitution of the tribunal. There is nothing in the common law, or in any of the provisions of the European Convention of Human Rights which suggests that trial by judge alone must, of itself, be deemed to be unfair, or that where an order for trial by judge alone is made, the subsequent trial offends the principle that every defendant facing any criminal charge is entitled to a fair trial. And it has not been suggested in argument that an order for trial by judge alone is or should be deemed to be an unfair trial. The fairness of any trial by judge alone is, of course, subject to review in this court, and if on examination it appears that the trial judge had acted unfairly, or in breach of the ordinary rules which govern judicial conduct, this court would have no hesitation in quashing any subsequent conviction. As it is, as we emphasise, no suggestion of unfairness has been directed at [Judge T's] conduct of this trial, and indeed the verdicts were returned after a trial which was conducted with conspicuous fairness."

The Lord Chief Justice commented as follows on the choices faced by a trial judge following a decision to discharge a jury mid-trial:

"21. ... The judge is then faced with two alternatives, either to continue with the trial or to terminate it. As we have narrated, in this case [the trial judge] brought the trial to an end. We understand his reasons, and what follows is not intended to be seen as criticism of the decision. However, given that one of the purposes of this legislation is to discourage jury tampering, and given also the huge inconvenience and expense for everyone involved in a re-trial, and simultaneously to reduce any possible disadvantage accruing to those who are responsible for jury tampering or for whose perceived benefit it has been arranged by others, and to ensure that trials should proceed to verdict rather than end abruptly in the discharge of the jury, save in unusual circumstances, the judge faced with this problem should order not only the discharge of the jury but that he should continue the trial. The fact that he has been invited to consider material covered by [public interest immunity] principles, whether during the trial, or in the course of considering the application, should not normally lead to self-qualification."

He continued by considering the impact of the judgment of the House of Lords in *Secretary of State for the Home Department v. AF and others (No. 3)* [2009] UKHL 28, which concerned non-derogating control orders under the Prevention of Terrorism Act 2005, involving significant restrictions on liberty. The House of Lords decided that it was inconsistent with the right to a fair hearing under Article 6 of the Convention to make a control order on the basis of material which was undisclosed to the subject

and his advisers and which could not, therefore, effectively be challenged by them. In the present case, the Court of Appeal rejected the applicants' argument that it followed from the judgment in *AF (No. 3)* that they were entitled to disclosure of the evidence which had formed the basis for the decision to proceed to retrial without a jury, for the following reasons:

> "32. Attractively advanced as it was, this submission failed to grapple with the reality that the question whether the trial of the defendants should proceed as a trial by judge and jury or trial by judge alone was concerned exclusively with the mode of trial. It was not itself a criminal proceeding in the sense that the exercise of the jurisdiction to order a trial on indictment by judge alone might create or have the potential to create adverse consequences of the kind involved in control orders. No restriction on any individual defendant's liberty, nor any other form of punishment, nor any sanction could follow from an order for trial by judge alone. Equally the order did not and could not constitute any form of interference with his property rights. The 'right' engaged in the present appeal is confined to the mode of trial, not its fairness."

f. The request for certification

9. Once the decision of the Court of Appeal was known, the first applicant asked the Court of Appeal to certify the following question as "points of law of general public importance", such as would have allowed the Applicants to apply to the Supreme Court for an appeal against the Court of Appeal's decision:

> "In a criminal trial is the use of Closed Material Procedure by a Court for a particular purpose and/or in a particular circumstance lawful without there being in existence statutory provision granting the Court jurisdiction to use Closed Material Procedure for such purpose and/or in such circumstance?"

10. On 13 October 2011 the Court of Appeal refused to certify a point of law, effectively ending the domestic avenues of appeal.

2. Bianca Guthrie

11. The applicant, together with her mother "CJW", sister "CG", brother "RG" and another defendant, stood trial between February and March 2011 on six counts of conspiracy to defraud. The prosecution case was that, by adopting false identities, the defendants dishonestly involved themselves in fraudulent applications for housing benefit and council tax benefit in relation to various properties in different London boroughs, giving an estimated profit of GBP 112,000, which they used to purchase more property. Bianca Guthrie and her co-accused denied the charges.

12. The jury were sworn in on 7 February 2011. On 4 March 2011 one of the jurors complained that the previous day, when she was waiting for a pre-arranged lift outside the court house, a woman whom she had seen in the public gallery approached her and asked her a question about her telephone. At that point, Bianca Guthrie and CG walked past. The applicant walked on with the woman from the public gallery but CG stopped and asked the juror whether they had seen each other at a gay club and asked her

for her telephone number. The juror panicked and gave her a false number. The following morning she told two other jurors what had happened. When she informed court staff, they isolated these three jurors until the trial judge had questioned each of them individually. The judge ascertained that each of the jurors felt able to continue with the case and to remain impartial. She then informed the parties what had happened. She revoked CG's bail. When questioned, CG maintained that she had thought she recognised the woman from somewhere but had not realised she was a juror in her case.

13. Subsequently, the applicant's brother, RG, made an application for the jury to be discharged on the ground that they were likely to view CG's approach as an attempt improperly to influence them. The trial judge rejected this application, relying on the firm assertions of the three jurors who knew about the incident.

14. The jury retired on 11 March. On 15 March they acquitted one defendant. One juror was then discharged, because of a longstanding holiday commitment.

15. On 16 March 2011, after the jury had been sent back out to continue their deliberations, the trial judge was informed by the prosecution *ex parte* in chambers that one of the police officers involved in investigating the case had become aware of material that indicated that there had been possible interferences with the jury, intended to affect their deliberations. As a result, further inquiries were made but no disclosure was made to the defence on grounds of public interest immunity. It was decided to arrest SL, a former female companion of CG, who was alleged to have been implicated in the jury tampering.

16. The following morning the jury were sent away for the day. SL attended court in the afternoon and was arrested. At that point, it was disclosed to the defence that an allegation had been made that SL had been in contact with a member of the jury and that CJW, CG and Bianca Guthrie were aware of what had taken place. The three defendant members of the Guthrie family who were still at liberty were then remanded in custody.

17. On 18 March 2011 an *inter partes* hearing took place in chambers, to determine whether or not the trial judge should discharge the jury under the provisions of section 46(1) of the Criminal Justice Act 2003 (see below). Bianca Guthrie, together with RG, opposed the suggestion that the jury should be discharged and asked for the decision to be postponed until further inquiries could be made. However, the trial judge considered that any further delay would have an unsettling effect on the jury and that, since they had already retired, any further questioning would impinge upon the confidentiality of the jury room. She concluded that material had been placed before her in a cogent and compelling format which indicated that jury tampering had taken place, and that there was a "high degree of need" for the jury to be discharged.

18. On 24 March 2011 the gist statement already disclosed to the defence was amended and extended to provide as follows:

> "(i) An allegation has been made that a third party [SL] has been in contact with a female member of the jury in an attempt to ensure that the juror returned a not guilty verdict; and was contacting the juror about how deliberations were going. (ii) The jury member allegedly discussed jury voting and deliberations in the course of this contact. (iii) This contact is alleged to have taken place following the remand of [CG] on the 4th March 2011 up to and including the time when the jury were in retirement to consider their verdict. (iv) The contact between [SL] and the juror is alleged to have taken place 'face to face', with one of those meetings said to have taken place after the court had risen for the day and in close proximity to the court building and/or its grounds. This meeting may have been witnessed by another member of the jury. However [SL] is also alleged to have had the mobile telephone number of the juror. Contact is alleged to have taken place between [SL] and the juror on approximately 3 occasions. (v) It is understood that [CG], [the applicant] and the third party [SL] have been in communication since contact was made with the juror. (vi) [CJW] has also been involved. (vii) There is presently no direct evidence of the contact between [SL] and the juror. (viii) [SL] was arrested and interviewed in relation to this allegation."

A transcript of the interview with SL was also provided to the defence.

19. On 28 March 2011 the trial judge heard submissions from the prosecution and the representatives of the defendants on the issue whether the trial should continue without a jury, in accordance with section 46(3) of the Criminal Justice Act 2003 (see paragraph 23 below). With reference in particular to the Court of Appeal's judgment in *Twomey* (see paragraph 8 above), the judge held that the right to trial by jury was not absolute under domestic law and was not required by Article 6 of the Convention. The judge next considered the question whether there would be a risk of bias if she were to continue with the trial, having already examined undisclosed material relating to the allegation of jury tampering, and having made rulings adverse to the defence on the basis of this material, including remanding the defendants in custody. She concluded that there was no real danger of a perception of bias, since the undisclosed material she had examined was not related to the criminal charges against the defendants, but only to the allegation of jury tampering. It was not unusual in a trial of such length for a judge to have made a number of rulings adverse to the defence and if the fact of having made such rulings disqualified her from proceeding with the trial under section 46(3) of the 2003 Act, it would be possible so to proceed only in very rare cases. Furthermore, of the eight or so rulings she had made so far, approximately half had been favourable to the defence. She held that, having undertaken a rigorous and thorough examination of the evidence, she was satisfied that jury tampering had taken place requiring the jury to be discharged, but that it would not be unfair to any of the defendants to continue with the trial without the jury.

20. The trial judge also gave leave for an interlocutory appeal on this issue, which took place on 10 May 2011. The Court of Appeal, having

examined the undisclosed material which had been seen by the trial judge, gave its judgement on 26 July 2011, upholding the trial judge's ruling. It observed that nothing considered by the trial judge under public interest immunity principles should have been disclosed to the defence; the gist statement provided to the defence accurately summarised the effect of that material; there was nothing in the material to suggest that the trial judge should have disqualified herself from continuing with the trial. The legislation did not suggest that the trial judge who examined evidence and made findings relating to the discharge of the jury should then recuse himself and it would be "strange if it were possible for a criminal or group of criminals to take extreme steps to undermine the process of trial by jury, and then to argue that the judge who had made the necessary findings would then have to disqualify himself".

21. Subsequently, on 14 July 2011, the trial judge convicted all four remaining defendants of all the charges against them.

22. On 28 September 2011 the Supreme Court refused leave to appeal against the interlocutory judgment of the Court of Appeal.

B. Relevant domestic law

23. Section 46 of the Criminal Justice Act 2003 provides as follows:

"(1) This section applies where –

(a) a judge is minded during a trial on indictment to discharge the jury, and

(b) he is so minded because tampering appears to have taken place.

(2) Before taking any steps to discharge the jury, the judge must –

(a) inform the parties that he is minded to discharge the jury,

(b) inform the parties of the grounds on which he is so minded, and

(c) allow the parties an opportunity to make representations.

(3) Where the judge, after considering any such representations, discharges the jury, he may make an order that the trial is to continue without a jury if, but only if, he is satisfied –

(a) that jury tampering has taken place, and

(b) that to continue the trial without a jury would be fair to the defendant or defendants;

But this is subject to subsection (4).

(4) If the judge considers that it is necessary in the interests of justice for the trial to be terminated, he must terminate the trial.

(5) Where the judge terminates the trial under subsection (4), he may make an order that any new trial which is to take place must be conducted without a jury if he is satisfied in respect of the new trial that both of the conditions set out in section 44 are likely to be fulfilled.

(6) Subsection (5) is without prejudice to any other power that the judge may have on terminating the trial.

(7) Subject to subsection (5), nothing in this section affects the application of section 43 or 44 in relation to any new trial which takes place following the termination of the trial."

COMPLAINTS

24. The applicants in both applications complained under Article 6 of the Convention that, in each of their cases, the reliance of the judge on undisclosed material when determining the question whether jury tampering had taken place deprived them of a fair trial during the hearings to determine whether the final retrial should be held by a judge sitting without a jury. They further complained about the lack of any clear statutory regulation of the use of such closed material. In addition, Ms Guthrie complained about the risk of bias inherent in the decision of the trial judge, having seen the undisclosed evidence of jury tampering, to continue without a jury to determine whether the applicant was guilty of the offence charged. All three applicants also complained under Article 6 about the refusal by the Court of Appeal to certify a point of law, thus depriving them of access to the Supreme Court.

THE LAW

A. Joinder of the applications

25. The Court considers that, pursuant to Rule 42 § 1 of the Rules of Court, the applications should be joined, given their common factual and legal background.

B. Alleged violation of Article 6 § 1 of the Convention

26. All three applicants complained that the procedures which led to their standing trial by a judge sitting without a jury and the Court of Appeal refusing certification fell short of the requirements of Article 6 § 1, which provides:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal ..."

27. The applicants submitted that the "right" to trial by jury was important and long-standing in English domestic law. Relying on an

analogy with the right to an appeal in criminal cases, they reasoned that although the Convention did not include any right to jury trial, once a Member State had chosen to allow such a right to those accused of serious crime, it could only be removed by a process compliant with Article 6. However, in their cases, the decision to deprive them of trial by jury was taken by the court on the basis of closed material, which they did not have the opportunity to see or challenge. Moreover, there was no statutory system to regulate the procedure for disclosure of evidence to be used by a court when deciding whether there had been jury tampering.

28. The third applicant, Ms Guthrie, argued in addition that in her case the judge who had seen the partially undisclosed, but clearly incriminating, evidence relating to jury tampering went on to decide the guilt of the accused on the criminal charges against them, in breach of the guarantee of trial by an independent and impartial tribunal.

29. Finally, all three applicants complained that, following the rejection of their appeals against conviction by the Court of Appeal, that same court refused to certify a point of law, effectively barring their access to the Supreme Court. In their submission, this was a breach of the fundamental principle of not being a judge in one's own cause.

30. The Court observes that the Contracting States enjoy considerable freedom in the choice of the means calculated to ensure that their judicial systems are in compliance with the requirements of Article 6 and there is no right under Article 6 § 1 of the Convention to be tried before a jury. As was noted in *Taxquet v. Belgium* [GC], no. 926/05, § 84, ECHR 2010, several Council of Europe member States have a lay jury system, guided by the legitimate desire to involve citizens in the administration of justice, particularly in relation to the most serious offences. The jury exists in a variety of forms in different States, reflecting each State's history, tradition and legal culture; variations may concern the number of jurors, the qualifications they require, the way in which they are appointed and whether or not any forms of appeal lie against their decisions. However, this is just one example among others of the variety of legal systems existing in Europe and it is not the Court's task to standardise them. A State's choice of a particular criminal justice system is in principle outside the scope of the supervision carried out by the Court at European level, provided that the system chosen does not contravene the principles set forth in the Convention. The Court's task is to consider whether the method adopted to that end has led in a given case to results which are compatible with the Convention, while also taking into account the specific circumstances, the nature and the complexity of the case. In short, it must ascertain whether the proceedings as a whole were fair (see *Taxquet*, cited above, §§ 84-85).

31. In recognition of these principles, the applicants do not complain that the determination of guilt in their cases was made by a judge sitting alone. Instead they complain that the decision to proceed without a jury was

made on the basis of material which was not disclosed to them. In this connection, the Court recalls that it has held on many occasions that it is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. The entitlement to disclosure of relevant evidence is not, however, an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. Nonetheless, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1. Furthermore, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities. In cases where evidence has been withheld from the defence on public interest grounds, it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them. Instead, it must scrutinise the decision-making procedure to ensure that, as far as possible, the procedure complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused (see *Rowe and Davis v. the United Kingdom* [GC], no. 28901/95, §§ 60-62, ECHR 2000-II; *Jasper v. the United Kingdom* [GC], no. 27052/95, § 53, 16 February 2000; *Edwards and Lewis v. the United Kingdom* [GC], nos. 39647/98 and 40461/98, § 46, ECHR 2004-X).

32. In *Jasper*, cited above, where the trial judge examined evidence in closed proceedings and decided that it should not be disclosed to the defence on grounds of public interest, the Court found no violation of Article 6 §§ 1 or 3(b) or (d) because the trial judge was able to give that decision under review in full knowledge of the issues relevant to the trial and also because the jury, who were responsible for finding the facts, did not have knowledge of the undisclosed evidence. In contrast, in *Edwards and Lewis*, cited above, the trial judge sitting alone had to decide on a defence application to exclude prosecution evidence which it was claimed had been obtained as a result of improper incitement by undercover police officers. Had the application been successful, the prosecution would have been discontinued. The Court found a violation of Article 6 § 1

because, before deciding this issue, which was of determinative importance to the applicants' trials, the judge had examined evidence which may have supported the prosecution case but which was not disclosed to the defence.

33. Turning to the facts of the present case, it is important to note that the undisclosed material did not concern the applicants' guilt or innocence of the charges in the indictments against them, but instead had a bearing on the separate issue whether there had been any attempt by one or more of the defendants or their associates to contact one or more members of the jury. The undisclosed material was, therefore, relied on by the prosecution solely in relation to the procedural question whether the jury should be discharged and the trial proceed before a judge sitting alone. As noted above, subject to the public interest considerations also discussed above, Article 6 requires that the steps taken to decide procedural issues during a criminal trial should be adversarial in nature and afford equality of arms between the prosecution and the defence. Nonetheless, when deciding whether adequate safeguards were provided to the defence in this case, the fact that what was at stake was the mode of trial rather than conviction or acquittal must weigh heavily in the balance.

34. The procedure followed, under section 46 of the 2003 Act (see paragraph 23 above), has two stages. First, under section 46(2), the judge must inform the parties that he is minded to discharge the jury and of his grounds for so doing, and give each side the chance to make representations.

At the trial of Mr Twomey and Mr Cameron, the trial judge decided that the material given to him by the prosecution relating to the allegation of jury tampering could not be disclosed to the defence on public interest grounds. As stated in paragraph 30 above, this decision is not open to review by the Court, which must accept the trial judge's assessment that there were compelling reasons for keeping the material confidential. It is true that the lack of disclosure, and the absence of any gist statement indicating the nature of the allegations, entailed that the defence had no real possibility to challenge them. Nonetheless, the defence was given the opportunity to make representations as to whether or not the jury should be discharged.

At Ms Guthrie's trial, she and the other defendants were provided with a gist statement prior to the *inter partes* hearing to decide whether the jury should be discharged, and also given the opportunity to make submissions (see paragraph 16 above).

35. The second stage of the procedure under Article 46 is set out in subparagraphs (3) to (5), which give the judge a discretion to make an order that the trial should continue (or a new trial take place) without a jury if he or she is satisfied that jury tampering has taken place and that to continue would be fair to the defendants and not contrary to the interests of justice. In the trial against Mr Twomey and Mr Cameron, this stage of the procedure was considered by Judge C and on two occasions by the Court of Appeal (see paragraphs 5, 6 and 8 above). On each of these occasions, the defence

remained in the same position, in that the evidence of jury tampering was not disclosed and no gist statement was provided. However, as Judge C made clear, there were strong public interest reasons for keeping the material confidential and disclosure to the defence would have defeated the object of the provisions intended to address jury tampering. For these reasons, Mr Twomey and Mr Cameron were again prevented from challenging the judge's view that tampering had taken place. However, at each of these hearings, they were able to make full submissions on the fairness of continuing without a jury. In Ms Guthrie's trial, a more detailed gist statement was provided to the defence before the judge heard submissions on the question whether the trial should continue (see paragraph 19 above). This issue was also the subject of an interlocutory appeal, where the applicant was again able to make submissions.

36. The Court considers that, in each case, the above procedure afforded the defence sufficient safeguards, taking into account, on one hand, the important public interest grounds against disclosing the relevant evidence to the defence and, on the other hand, the fact that all that was to be determined was whether the trial should continue before a judge sitting alone or a judge sitting with a jury, two forms of trial which are in principle equally acceptable under Article 6. If the defence had been able to identify any reason why a trial by judge alone would have caused unfairness, they had the opportunity to put their arguments. While the circumstances in which evidence relating to jury tampering can be withheld from the defence are not set out in section 46 of the 2003 Act or in other statutory form, this did not, in the Court's view, cause unfairness to the defence, since at each stage the judge made it clear that he or she was ordering non-disclosure on public interest grounds. The categories of material covered by public interest immunity do have an adequate legal base, in that they are well established in common law (see the summary of the case-law set out in *Edwards and Lewis*, cited above, §§ 34-42). For this reason, the absence of statutory rules on disclosure as regards measures taken under section 46 of the 2003 Act does not, as the applicants contend, give rise to a violation of Article 6.

37. The third applicant, Ms Guthrie, in addition argued before the domestic courts and in her application to this Court that there was inherent in the trial judge's decision to continue alone a risk of bias as regards the determination of the charge against her, since the judge had previously seen the undisclosed evidence relating to the alleged attempt by the applicant and two of her co-accused, through their friend SL, to contact one of the jurors. The situation was different in respect of Mr Twomey and Mr Cameron, since the first trial judge, Judge R, decided to recuse himself following his discharge of the jury, because at any earlier stage he had seen undisclosed material that was relevant to Mr Twomey's culpability of the offences charged (see paragraph 4 above). The closed evidence relating to the

allegation of jury tampering was examined in addition by Judge C and the Court of Appeal (see paragraphs 5-6 above), but the final trial judge, who convicted both applicants, did not see the closed material.

38. The Court does not consider this part of the complaint well founded either. First, it does not consider that that there was a real risk that the trial judge who convicted Ms Guthrie was biased, nor any appearance of such a risk. She had not seen any undisclosed material that was related to one of the elements of the offences charged and, as an experienced criminal judge, perfectly understood that a conviction could be entered only where the prosecution evidence met the standard of proof beyond reasonable doubt. The legislative provisions in question serve the interests of justice, in that individuals accused of criminal offences should not be permitted to escape justice through any attempt to interfere with the jury. Whether, after discharge of the jury, the trial proceeds before the original judge or recommences before a new judge, as occurred in the case of Mr Twomey and Mr Cameron, that judge will know that there has been strong evidence of jury tampering at an earlier stage. Any prejudice thereby caused to the defence in either of the present applications was, in the Court's view, negligible and was, moreover, justified by the public interest at stake.

39. Finally, with regard to the complaints about the certification procedure before the Court of Appeal, the Court recalls that an identical complaint was considered and rejected in *Dunn v. the United Kingdom* (dec.), no. 62793/10, 23 October 2012.

40. It follows that these applications must be rejected under Article 35 §§ 3 and 4 of the Convention on the grounds that they are manifestly ill-founded.

For these reasons, the Court unanimously

Decides to join the two applications and

Declares them inadmissible.

Françoise Elens-Passos
Registrar

Ineta Ziemele
President