THIRD SECTION

CASE OF CONDRON v. THE UNITED KINGDOM

(Application no. 35718/97)

JUDGMENT

STRASBOURG

2 May 2000

FINAL

02/08/2000

In the case of Condron v. the United Kingdom,

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

Mr J.-P. COSTA, *President*,
Sir Nicolas BRATZA,
Mr L. LOUCAIDES,
Mr P. KŪRIS,
Mr W. FUHRMANN,
Mrs H.S. GREVE,
Mr K. TRAJA, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 25 January and 6 April 2000,

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

PROCEDURE

1. The case originated in an application (no. 35718/97) against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Irish citizen, Mr William Condron, and a British citizen, Mrs Karen Condron ("the applicants"), on 13 November 1996.

2. The applicants were represented by Mr J. Wadham, a lawyer practising in London. The Government of the United Kingdom ("the Government") were represented by their Agent, Mr C. Whomersley, of the Foreign and Commonwealth Office, London.

3. The applicants alleged that they were denied a fair hearing on account of the fact that the trial judge left the jury with the option of drawing an adverse inference from their silence during police interview.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court).

6. By a decision of 7 September 1999 the Chamber declared the application admissible[1].

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

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 25 January 2000 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*
Mr C. WHOMERSLEY, Foreign and Commonwealth Office, *Agent*,
Mr D. PANNICK QC,
Mr M. SHAW, *Counsel*,
Ms S. CHAKRABATI, Home Office,
Mr I. CHISHOLM, Home Office, *Advisers*;

(b) *for the applicants*
Mr B. EMMERSON,
Mr A. JENNINGS,

Ms P. KAUFMAN, *Counsel*,
Ms M. CUNNEEN, *Solicitor*.

The Court heard addresses by Mr Emmerson and Mr Pannick.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. THE PROSECUTION CASE AGAINST THE APPLICANTS

9. Both applicants are admitted heroin addicts. Prior to their being convicted and sentenced for drug offences they lived at 51 Cubitt House, a large block of council flats in South London. Adjacent to their flat, at
no. 50, lived a Mr James Curtis. Mr Curtis was also charged with the same offences as the applicants, namely being concerned with the supply of heroin and possession of heroin with intent to supply, but was acquitted.

10. The prosecution case was that the applicants would prepare wraps (individual sachets) of heroin for sale and pass them to Mr Curtis when he knocked on the back window of their flat whenever he had a purchaser. The prosecution alleged that wraps would be handed from the balcony at flat 51 to someone leaning out of the back window of flat 50. Mr Curtis would then sell the wraps to visitors to his flat.

11. The applicants and Mr Curtis were observed from 24 to 28 April 1995 by police and recorded on video from 25 April 1995 onwards. The applicants were seen to pass various items to Mr Curtis including a plastic bottle for smoking crack cocaine and silver foil for smoking heroin. The prosecution stated that on 26 April 1995 a man was seen at the back window of flat 50 handing an object which looked like a cigarette packet to the second applicant who was on her balcony. She went into her flat, then re-emerged and returned the packet to the man.

12. The applicants were arrested at 12.45 p.m. on 28 April 1995. In the flat were found sixteen wraps of heroin weighing between 0.07 and 0.09 g and a further quantity of heroin weighing 1.19 g. The prosecution also alleged that a polythene sheet in the flat had been used to make wraps.

B. THE POLICE INTERVIEW

13. At 10.40 a.m. on 29 April 1995 the applicants' solicitor, Mr Delbourgo, noted that the first applicant, who seemed to be in the early stages of withdrawal, was unfit to be interviewed. However, after a 10- to 15-minute examination, the Force Medical Examiner, Dr Youlten, stated that the applicant was fit for interview. The doctor's report notes that the first applicant was an opiates addict with symptoms and signs of withdrawal but that he was thinking clearly and able to answer questions. The second applicant was also seen to have withdrawal symptoms but again was stated by the Force Medical Examiner to be thinking clearly and able to answer questions.

14. The transcript of the interviews with the first applicant reveals that Mr Delbourgo was concerned that his clients were unfit to be interviewed and in some distress. In particular, he had found it difficult to get the second applicant to concentrate on what he was saying to her.

15. The applicants were interviewed separately in the presence of their solicitor. Both applicants were told by the police:

> "You do not have to say anything but it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you say may be given in evidence."

16. The applicants stated that they understood the warning. They were advised by the police that if

during the interview they felt unwell they should say so and the interview would be stopped. At no stage during interview did either of the applicants request this, even though at one point the first applicant's solicitor specifically suggested that this might happen. However, the first applicant expressly stated that he did not want the interview to stop.

17. The applicants were asked to explain their actions in apparently passing to, and being passed items from, flat 50. Both simply responded to these questions with the words “no comment”.

C. THE DEFENCE CASE FOR THE APPLICANTS

18. From 16 October to 2 November 1995 the applicants were tried before a jury at Kingston Crown Court. Both applicants were legally aided and represented by counsel. In a pre-trial hearing counsel for the applicants argued that the interviews should not be put before the jury as they had been carried out whilst the applicants were suffering from drug withdrawal symptoms. Their solicitor, Mr Delbourgo, testified that he had been of the firm view that neither should embark upon what might prove to be a very lengthy interview given their condition. However, the judge noted that the doctor had considered them fit to be interviewed, that they were thinking clearly and able to answer questions, and that both applicants had stated in response to direct questions that they understood the charges against them and the possible repercussions of failing to answer questions. He therefore considered that Mr Delbourgo had been wrong in his analysis that the applicants had been unfit to be questioned and allowed their interviews to stand as evidence. The judge further observed that the interviews had been short and were not conducted in an oppressive manner. He noted that in any event the application to exclude the evidence was premature since the defendants had not given evidence, so that it was not clear what facts were going to be relied on in their defence which might reasonably have been expected to have been mentioned. Moreover, it was a matter for the jury, properly directed, to determine the issues.

19. Both applicants gave evidence at the trial and said that the heroin found in the flat had been for their own personal use and had been purchased in bulk by the first applicant the evening before their arrest. They stated that the polythene sheet had been planted there by the police after they had been brought to the police station. When asked about the incident recorded on 26 April 1995 in which the second applicant was seen receiving and then returning a packet to the occupant of flat 50, the applicants gave explanations which they had not mentioned to the police in their interviews. The first applicant stated that no drugs had ever passed between the flats and that the packet contained either cigarettes or money; whilst the second applicant stated that it was simply an exchange of a packet of cigarettes. Other items had been passed this way since it was easier than having to go along the walkway of the front of each flat.

20. The applicants' co-accused, Mr Curtis, testified at the trial that the applicants had never given him heroin. He confirmed the applicants' account of their friendship with him and his frequent borrowing, with communication being by the balcony. When he was arrested he was told that he would not get bail which made him angry and “bloody-minded” so he decided not to help the police by answering their questions.

21. When asked why they had made no comment to police questions during interview, both applicants stated that their solicitor's advice that they were not in a condition to do so, given their withdrawal from heroin, had been conclusive.

D. THE TRIAL JUDGE'S DIRECTION TO THE JURY

22. In his summing-up the judge made reference to the jury's ability to draw inferences from the applicants' silence:

> “I turn to a new topic in our law ... It is the law that these defendants did not mention certain facts when questioned about them in interview by the police. In the past that would not have been evidence that could in any way be held against them but now it is possible that it can be though it is for you to judge whether in fact you do hold it against them.

> [The first applicant] has relied in evidence on an explanation as to the passing of that cigarette packet, which is the subject of count 1. ... Firstly, it could have been cigarettes or it could have been money. He also said in evidence to you, 'There were no drugs ever passed through our hands to Curtis'. He admits that he did not mention that when questioned under caution before being charged ...
>
> I turn now to [the second applicant] because she has relied in her own evidence on the fact that she had asked for cigarettes and was passed a packet, took a couple, and handed the packet back. She admits that she did not mention that when she was questioned under caution before being charged. ... Also in [the second applicant's] interview she was asked about another matter, and I deal with this because in her evidence she relied on the fact that on 26 April at 11.30 a.m., a little before the incident with the cigarette packet, she handed Curtis some 'sticky chewing gum' ... so the chewing gum is again not mentioned. ... She also in the course of her evidence relies on her telling you that there were only innocent, neighbourly exchanges of commonplace items from her balcony and she admits that she never mentioned those matters to the police ...
>
> The prosecution case, members of the jury, is that (and it is for you to judge whether this assists you in your judgment to reach a verdict) in the circumstances when each of these defendants were questioned on these topics, he or she could reasonably be expected to have mentioned what they said in court. The defendants explained that their 'no comment' answers, speaking generally because of course they put it in more detail, the [applicants] said they were suffering from withdrawal symptoms and relied on Mr Delbourgo, their solicitor's advice that he could see they were suffering from withdrawal symptoms and should not answer questions because in his judgment of their appearance they were unfit for interview despite the known and expressed view of the FME, which means Force Medical Examiner and is in fact a doctor, who comes along to police stations to deal with problems of this sort ...
>
> The law is ... that you may draw such inferences as appear proper from a defendant's failure to mention the points I have referred to in their respective interviews. In each case it is relevant only to the case against the defendant concerned. You do not have to hold it against him or her. It is for you to decide whether it is proper to do so. Failure to mention the points in interview cannot on its own prove guilt but depending on the circumstances you may hold it against him or her when deciding whether he or she is guilty. You should decide whether in the circumstances which existed at the time of the interview the matters were ones which the defendant concerned could reasonably be expected then to mention. Members of the jury that is all I have to say at this stage about the law."

E. THE APPLICANTS' CONVICTION AND APPEAL

23. The applicants were each convicted by a majority of nine to one of being concerned in supplying heroin and possessing heroin with intent to supply. The first applicant was sentenced to a total of four years' imprisonment. The second applicant was sentenced to a total of three years' imprisonment. James Curtis, the co-accused, was acquitted on both charges.

24. The applicants appealed to the Court of Appeal on two primary grounds: the inclusion of the police interviews and the contents of the judge's direction.

25. The applicants' counsel contended before the Court of Appeal that the trial judge should have excluded the "no comment" interviews as they were a direct result of following their solicitor's honest advice. The Court of Appeal pointed to problems with that argument in situations where solicitors advised their clients tactically or dishonestly to refuse to answer questions; the key question was the subjective reason why the applicants had not answered the questions. The Court of Appeal went on to find that the judge, as the fact-finding tribunal in the *voir dire* (submissions on a point of law in the absence of the jury), had been correct in his decision to include the notes of interviews in evidence.

26. The Court of Appeal rejected the submission that the trial judge had been wrong to allow the jury to draw adverse inferences from the applicants' failure to answer questions at the interview. Lord Justice Stuart-Smith stated on this point:

> "... both [applicants] knew that the Force Medical Examiner certified that they were fit to be interviewed and therefore that medical opinion differed from that of their solicitor. Both were clearly advised by their solicitor that if they failed to mention material facts at the proposed interview, they could be criticised if the matter came to trial. That advice was understood; he also made it plain that this was entirely their choice. At the beginning of the interview both were given the caution in its current form. ... Both indicated that they understood that caution. Both were told that if they felt unwell during the interview, they could let the interviewer know and it could be stopped. In these circumstances the fact-finding tribunal might well consider that if the [applicants] had an innocent explanation of the incriminating evidence about which they were specifically questioned, they would have mentioned it."

27. The Court of Appeal then considered the applicants' criticism of the trial judge's summing-up in so far as he omitted to remind the jury that "they could only draw an adverse inference if, in spite of any evidence relied upon to explain the failure to mention the relevant matters (or indeed in the absence of such evidence) they conclude[d] that such failure [could] only sensibly be attributed to the fact that the appellants must have fabricated the evidence subsequently". The Court of Appeal, with reference to the *dicta* of Lord Taylor CJ in *R. v. Cowan* ([1996] Queen's Bench Reports 373) (see paragraph 33 below) considered that it would have been desirable if the trial judge had directed the jury along the following lines:

> "If despite any evidence relied upon to explain his silence or in the absence of any such evidence, the jury conclude the silence can only sensibly be attributed to the defendant's having no answer or none that would stand up to cross-examination, they may draw an adverse inference."

28. However, the Court of Appeal did not find that this lacuna in the summing-up meant that the convictions were unsafe, having regard to the weight of the other evidence. Lord Justice Stuart-Smith explained in this connection:

> "We have already referred to the substantial, almost overwhelming evidence of drug supply from what was found in the [applicants'] house. Although there were no scales, all of the other paraphernalia of supply was present. All but one of the jury must have rejected the [applicants'] explanation of the police observations, much of which was recorded on video, the presence of the matching wraps in Curtis' flat and the elaborate security arrangements at the applicants' own flat. The acquittal of Curtis shows that the jury regarded the evidence of the interviews as insignificant. Curtis also failed to answer questions in interview."

29. The Court of Appeal dismissed the applicants' appeal in its judgment delivered on 17 October 1996.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. CRIMINAL JUSTICE AND PUBLIC ORDER ACT 1994

30. Section 34 of the Criminal Justice and Public Order Act 1994 provides that:

> "(1) Where in any proceedings against a person for an offence, evidence is given that the accused –
>
> (a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or
>
> ...
>
> being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, subsection (2) below applies.
>
> (2) Where this subsection applies
>
> ...
>
> (c) the court, in determining whether there is a case to answer; and
>
> (d) the court or jury, in determining whether the accused is guilty of the offence charged,
>
> may draw such inferences from the failure as appear proper.
>
> (3) Subject to any directions by the court, evidence tending to establish the failure may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention.
>
> ..."

Section 35(2) and (3) provides:

> "(2) Where this subsection applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment, in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he

chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question.

(3) Where this subsection applies, the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question."

Section 38(3) adds that:

"A person shall not ... be convicted of an offence solely on an inference drawn from such a failure or refusal as is mentioned in section 34(2) ..."

31. Guidance as to the direction which the judge should give the jury in respect of section 35 of the Criminal Justice and Public Order Act 1994 are provided by the Judicial Studies Board specimen directions and by the *dicta* of Lord Taylor CJ in *R. v. Cowan* ([1996] 1 Criminal Appeal Reports 1). The relevance of these *dicta* to directions under section 34 of the same Act was confirmed by the Court of Appeal in the instant case.

32. The Judicial Studies Board guideline direction at the time of the Court of Appeal's consideration of the applicant's appeal provided that:

"If he failed to mention ... when he was questioned, decide whether in the circumstances which existed at the time, it was a fact which he could reasonably have been expected then to mention.

The law is that you may draw such inferences as appear proper from his failure to mention it at that time. You do not have to hold it against him. It is for you to decide whether it is proper to do so. Failure to mention such a fact at that time cannot, on its own, prove guilt, but depending on the circumstances, you may hold that failure against him when deciding whether he is guilty, that is, take it into account as some additional support for the prosecution's case. It is for you to decide whether it is fair to do so."

33. The *dicta* of Lord Taylor CJ are as follows:

"We consider that the specimen direction is in general terms a sound guide. It may be necessary to adapt it to the particular circumstances of an individual case. But there are certain essentials which we would highlight:

1. The judge will have told the jury that the burden of proof remains upon the prosecution throughout and what the standard required is.

2. It is necessary for the judge to make clear to the jury that the defendant is entitled to remain silent. That is his right and his choice.

3. An inference from failure to give evidence cannot on its own prove guilt. That is expressly stated in section 38(3) of the Act.

4. Therefore, the jury must be satisfied that the prosecution have established a case to answer before drawing any inferences from silence. Of course, the judge must have thought so or the question whether the defendant was to give evidence would not have arisen. But the jury may not believe the witnesses whose evidence the judge considered sufficient to raise a prima facie case. It must therefore be made clear to them that they must find there to be a case to answer on the prosecution evidence before drawing an adverse inference from the defendant's silence.

5. If despite any evidence relied upon to explain his silence or in the absence of any such evidence, the jury conclude the silence can only sensibly be attributed to the defendant's having no answer or none that would stand up to cross-examination, they may draw an adverse inference."

34. The current specimen direction for section 34, updated in May 1999 in the light of the judgments of the Court of Appeal in *R. v. Argent* ([1997] Criminal Appeal Reports 27) and in the instant case, provides:

"[When arrested, and at the beginning of each interview] this defendant was cautioned, he was told that he need not say anything, but that it may harm his defence if he did not mention something when questioned which he later relied on in court. Anything he did say may be given in evidence.

The defendant as part of his defence has relied upon [...] (*here specify precisely the fact(s) to which this direction applies*). But [the prosecution case is] [he admits] that he did not mention this [when he was questioned before being charged with the offence] [when he was charged with the offence] [when he was officially informed that he might be prosecuted for the offence].

> The prosecution case is that in the circumstances, and having regard to the warning which he has been given, if this fact had been true, he could reasonably have been expected to mention it at that stage, and as he did not do so you may therefore conclude that [it has since been invented/tailored to fit the prosecution case/he believed that it would not then stand up to scrutiny].
>
> If you are sure that he did fail to mention [...] when he was [charged] [questioned] [informed], it is for you decide whether in the circumstances it was something which he could reasonably have been expected to mention at that time. If it was, the law is that you may draw such inferences as appear proper from his failure to do so.
>
> Failure to mention [...] cannot, on its own, prove guilt. But, if you are sure that quite regardless of this failure, there is a case for him to meet, it is something which you are entitled to take into account when deciding whether his evidence about this matter is true, i.e. you may take it into account as some additional support for the prosecution's case. You are not bound to do so. It is for you to decide whether it is fair to do so.
>
> [There is evidence before you on the basis of which the defendant's advocate invites you not to hold it against him that he failed to mention this fact when he had the opportunity to do so. That evidence is [...]. If you think this amounts to a reason why you should not hold the defendant's failure against him, do not do so. On the other hand, if it does not in your judgment provide an adequate explanation, and you are sure that the real reason for his failure to mention this fact was that he then had no innocent explanation to offer in relation to this aspect of the case, you may hold it against him.]"

35. In *R. v. Argent* the Court of Appeal confirmed that legal advice is one circumstance to be taken into account by the jury. The Court of Appeal explained six conditions that had to be met before section 34 of the 1994 Act could allow inferences to be drawn. As regards the sixth condition, Lord Bingham CJ stated:

> "The sixth condition is that the appellant failed to mention a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when questioned. The time referred to is the time of questioning, and account must be taken of all the relevant circumstances existing at the time. The courts should not construe the expression 'in the circumstances' restrictively: matters such as the time of day, the defendant's age, experience, mental capacity, state of health, sobriety, tiredness, knowledge, personality and legal advice are all part of the relevant circumstances; and those are only examples of things which may be relevant ...
>
> Like so many other questions in criminal trials this is a question to be resolved by the jury in the exercise of their collective common-sense, experience and understanding of human nature. Sometimes they may conclude that it was reasonable for the defendant to have held his peace for a host of reasons, such as he was ... worried at committing himself without legal advice, acting on legal advice, or some other reason accepted by the jury."

36. In *R. v. Roble* ([1997] Criminal Law Reports 449) the Court of Appeal stressed the defendant's right to reveal to the jury not only the fact that he remained silent on legal advice but also his right to adduce evidence before the jury (by way of oral evidence from the defendant himself and/or the solicitor who gave the advice) about the contents of the advice, that is the reason why he was so advised.

37. The approach in *R. v. Roble* was confirmed in the later cases of *R. v. Daniel* ([1998] 2 Criminal Appeal Reports 373), *R. v. Bowden* ([1999] 1 Weekly Law Reports 823) and *R. v. Fitzgerald* (judgment of 6 March 1998, unreported).

38. In *R. v. McGarry* ([1999] 1 Criminal Appeal Report 377) the Court of Appeal held that where a trial judge decides, as a matter of law, that no jury could properly conclude that the requirements of section 34 of the 1994 Act have been satisfied and, therefore, it is not open to the jury to draw an adverse inference under section 34(2), he must specifically direct the jury not to draw any inference. In *R. v. Doldur* (judgment of 23 November 1999, *The Times*, 7 December 1999) the Court of Appeal (*per* Lord Justice Auld) stated:

> "Acceptance of the truth and accuracy of all or part of the prosecution evidence may or may not amount to sureness of guilt. Something more may be required, which may be provided by an adverse inference from silence if they think it proper to draw one. What is plain is that it is not for the jury to repeat the threshold test of the Judge in ruling whether there is a case to answer on the prosecution evidence if accepted by them. The direction approved in *Cowan* has a different object. It is to remind the jury that they cannot convict on adverse inferences alone. It is to remind them that they must have evidence, which, in the sense of section 34 inferences, may include defence evidence where called and which, when considered together with any such adverse inference as they think proper to draw, enables them to be sure both of the truth and accuracy of that evidence and, in consequence, guilt."

In the Government's submission the case of *R. v. Doldur* is authority for the proposition that the jury

must be satisfied that the prosecution have established a prima facie case of guilt before inferences may be drawn under section 34 of the 1994 Act.

39. In *R. v. Birchall* ([1999] Criminal Law Reports) Lord Bingham CJ stated, with reference to section 35 of the 1994 Act:

> "Inescapable logic demands that a jury should not start to consider whether they should draw inferences from a defendant's failure to give oral evidence at his trial until they have concluded that the Crown's case against him is sufficiently compelling to call for an answer by him. ... There is a clear risk of injustice if the requirements of logic and fairness are not observed ..."

40. In *R. v. Bowden* ([1999] 2 Criminal Appeal Reports 176) the Court of Appeal confirmed that if a defendant seeks to rely on reasons given in the course of an interview by a solicitor for advising his client to remain silent this would constitute a waiver of privilege even if the solicitor was not called to give evidence at the trial.

B. CRIMINAL APPEAL ACT 1968 AS AMENDED BY THE CRIMINAL APPEAL ACT 1995

41. Section 2(1) of the Criminal Appeal Act 1968, as amended by the Criminal Appeal Act 1995, provides a single, composite ground of appeal against a criminal conviction. It states that the Court of Appeal

> "shall allow an appeal against conviction if it thinks that the conviction is unsafe".

In *R. v. Chalkey and Jeffries* ([1998] 2 Criminal Appeal Reports 79) the Court of Appeal recognised that the omission of the word "unsatisfactory" which had been contained in the former section 2 of the 1968 Act had changed the law. A conviction will not be liable to be quashed on account only of procedural irregularity, or abuse of process or a failure of justice to be seen to be done. However in *R. v. Mullen* ([1999] 2 Criminal Appeal Reports 143), the Court of Appeal held that "unsafe" was to be given a broad meaning, favourable to defendants. The Court of Appeal stated that the term was not limited to the safety of the conviction itself but encompassed the prior prosecution process. The Court of Appeal should look at all the circumstances of the case including questions of law, abuse of process and questions of evidence and procedure.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

42. The applicants contended that the decision of the trial judge to leave the jury with the option of drawing an adverse inference from their silence during police interview resulted in the denial of their right to a fair trial in breach of Article 6 § 1 of the Convention, which provides as relevant:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ..."

43. The Government disputed this argument.

A. ARGUMENTS OF THE PARTIES

1. THE APPLICANTS

44. The applicants accepted that the right to silence is not an absolute right. However they averred that before an adverse inference may be drawn from silence, safeguards must be in place which are in keeping with the particular circumstances at issue in any given case. The need for safeguards was particularly compelling where, as in their case, the right was exercised in police custody on the advice of

a solicitor and at a time when they were extremely vulnerable and confused since they were suffering from heroin withdrawal symptoms.

45. The applicants requested the Court to have particular regard to the fact that although the trial judge had accepted that their solicitor genuinely believed that they were unfit to be interviewed and might prejudice their defence through the incoherence of any answers they might volunteer to the police, he nevertheless left the jury with the option of drawing an adverse inference from their silence. In the applicants' submission, it is inconsistent with the rights guaranteed by Article 6 of the Convention to penalise them in this manner for having relied on conscientious legal advice, all the more so when they were obliged to subject themselves to cross-examination on the content of that advice in a way which was at variance with respect for the confidentiality of lawyer/client communications.

46. The applicants highlighted the fact since they were tried before a jury it was impossible to ascertain whether their silence at the police station played a significant part in its decision to convict. Juries' verdicts are not accompanied by reasons which are amenable to review on appeal. This fact in itself required that the trial judge approach the issue with the utmost caution. However, the terms of his direction were defective since he failed to advise the jury that it should only draw an adverse inference if it concluded that their silence was attributed to their having no answer to the charges or none that would stand up to cross-examination. The end-result of the direction was to leave the jury free to draw an adverse inference even if it was satisfied that the reason why the applicants held their silence was because they were withdrawing from heroin and were acting on the firm advice of their solicitor, reasons which, moreover, could not in any way be construed as probative of their guilt.

47. The applicants submitted in addition that the inadequacy of the direction was further compounded by, firstly, the absence of any reference to the requirement for the prosecution to prove a prima facie case before an adverse inference could be drawn from their silence and, secondly, the failure of the trial judge to warn the jury that their silence may not be the sole or main basis for their conviction. They recalled that the Court in the John Murray v. the United Kingdom judgment of 8 February 1996 (*Reports of Judgments and Decisions* 1996-I), identified these requirements as important safeguards for the accused. Quite apart from the fact that they were not lucid at the time when the caution was administered at the police station, the terms of the caution never put them on clear notice of the full legal implications of remaining silent during interview, in particular that their silence could contribute to the prosecution case against them.

48. The Court of Appeal had acknowledged that there had been a crucial defect in the trial judge's direction. However, it proceeded to speculate on the safety of their conviction with reference to the weight of the evidence adduced by the prosecution. In the applicants' submission that approach was flawed for the very reason that it was impossible to gauge the effect which their silence had on the jury's thinking.

49. The applicants requested the Court to find that on the facts there had been a violation of Article 6 § 1 of the Convention.

2. THE GOVERNMENT

50. The Government, with reference to the principles laid down in the John Murray judgment cited above, stressed that the applicants in the instant case enjoyed sufficient procedural safeguards under English law against unfairness even though, unlike Mr Murray, a jury rather than a judge drew inferences from their silence and did not provide written reasons for its decision. The Government emphasised that a jury has to be given directions in respect of many aspects of a criminal trial, including the relevance and weight to be attached to evidence and the ingredients of the offence with which an accused is charged. It does not give reasons for the decisions it reaches on such matters. There was no reason to doubt that a properly directed jury can be fairly entrusted with the issue of whether it is proper to draw adverse inferences from an accused's silence during interview.

51. The Government emphasised that the police administered a clear statutory warning to the applicants before they were questioned and both applicants acknowledged that they understood its implications and the allegations against them. The applicants were advised by the police that if during

the interview they felt unwell they should say so and the interview would be stopped. At no stage did either of the applicants make such a request, even though at one point the first applicant's solicitor specifically suggested that the interview may have to be stopped. Indeed, the first applicant expressly stated that he did not want the interview stopped (see paragraph 16 above).

52. The Government further maintained that if the applicants' silence was due, or may have been due, to them not understanding the consequences of silence because of withdrawal symptoms, then an adverse inference would not have been drawn under English law. The Government highlight in this connection that the Court of Appeal specifically rejected the applicants' argument that they were unable to understand the consequences of remaining silent because of withdrawal symptoms, and upheld the trial judge's finding that the doctor's assessment that they were fit to be interviewed was to be preferred to their solicitor's view of their condition at the time. Furthermore, the applicants had the opportunity to give and call evidence about the contents of the legal advice they had received and why it was given. In deciding whether to draw an adverse inference the jury were directed to take this consideration into account.

53. The Government observed that the following safeguards must also not be overlooked in assessing whether it was appropriate to leave the jury with the possibility of drawing an adverse inference from the applicants' silence at the police station: the burden of proof rested with the prosecution throughout to prove the applicants' guilt beyond reasonable doubt; the jury were specifically directed that the applicants' silence could not on its own prove their guilt; the trial judge had to satisfy himself that there was a case to answer before directing the jury on the issue of the applicants' silence; the jury could only draw an adverse inference if they were sure beyond reasonable doubt that the applicants' silence during police interview could only sensibly be attributed to their having no answer or none that would stand up to cross-examination; finally, the jury were under no duty to draw an adverse inference.

54. The Government further observed that the applicants received a fair hearing even though the trial judge failed to give the jury a proper direction on the correct approach to the drawing of inferences. They highlight in this respect that the Court of Appeal concluded that the applicants' conviction was safe despite the lacuna in the trial judge's direction, having regard to the fact that there was almost overwhelming evidence against them.

B. THE COURT'S ASSESSMENT

55. The Court notes that it is common ground between the parties that the starting-point for its examination of the issues raised by the applicants' complaint is constituted by the principles laid down in the John Murray judgment cited above. The applicants have not sought to argue that the right to silence must be considered an absolute right in the context of a jury trial. They maintain, however, that the absence of basic safeguards against the drawing of adverse inferences from their silence during police interview, coupled with the failure to take into account the particular circumstances of their case, undermined that right. For the Government, safeguards were in place, were respected and any deficiency there may have been in the trial judge's direction was cured on appeal.

The Court observes that it must confine its attention to the facts of the case and consider whether the drawing of inferences against the applicants under section 34 of the Criminal Justice and Public Order Act 1994 (“the 1994 Act”) rendered the applicants' trial unfair within the meaning of Article 6 of the Convention. It notes that the section at issue has been the subject of much interpretation by the domestic courts, has been complemented by specimen guidelines on how it should be applied and that those guidelines have themselves been developed in line with judicial interpretation. The relevant law is, accordingly, still undergoing development and new principles are emerging.

56. The Court recalls that in its John Murray judgment cited above (pp. 49-50, § 47) it proceeded on the basis that the question whether the right to silence is an absolute right must be answered in the negative. It noted in that case that whether the drawing of adverse inferences from an accused's silence infringes Article 6 is a matter to be determined in the light of all the circumstances of the case, having regard to the situations where inferences may be drawn, the weight attached to them by the national

courts in their assessment of the evidence and the degree of compulsion inherent in the situation (ibid.).

The Court stressed in the same judgment that since the right to silence, like the privilege against self-incrimination, lay at the heart of the notion of a fair procedure under Article 6, particular caution was required before a domestic court could invoke an accused's silence against him. Thus it observed that it would be incompatible with the right to silence to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. Nevertheless, the Court found that it is obvious that the right cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution (ibid.).

57. The Court observes that there are features of the applicants' case which distinguish it from that of the applicant John Murray. In particular, unlike John Murray, the applicants gave evidence at their trial and their case was conducted before a jury which required direction by the trial judge on how to approach the issue of their silence during police interview. Moreover, the applicants, contrary to the stance adopted by John Murray at his trial, offered an explanation at their trial for their silence at the police station. For the Court, these and other distinguishing features fall to be considered from the standpoint of "all the circumstances of the case" (see paragraph 56 above). Accordingly, the fact that the applicants' exercised their right to silence at the police station is relevant to the determination of the fairness issue. However, that fact does not of itself preclude the drawing of an adverse inference, it being observed that the principles laid down in the John Murray judgment addressed the drawing of inferences under both Articles 4 and 6 of the Criminal Evidence (Northern Ireland) Order 1988. Similarly, the fact that the issue of the applicants' silence was left to a jury cannot of itself be considered incompatible with the requirements of a fair trial. It is, rather, another relevant consideration to be weighed in the balance when assessing whether or not it was fair to do so in the circumstances.

58. The Court notes that the domestic law and practice of the respondent State attempts to strike an appropriate balance between the exercise by an accused of his right to silence during police interview and the drawing of an adverse inference from that fact at a jury trial.

59. It observes, in line with the Government' submissions, that the applicants were under no legal compulsion to cooperate with the police and could not be exposed to any penal sanction for their failure to do so. The police were required under domestic law to administer a clear warning to the applicants about the possible implications of withholding information which they might later rely on at their trial. The Court does not accept the applicants' argument that the caution was ambiguous or unclear as to the consequences of their refusal to answer police questions. Furthermore, the question whether the applicants were sufficiently lucid at the material time to comprehend the consequences of their silence, as opposed to their fitness for interview, is a separate consideration which must be examined from the standpoint of the trial judge's direction on this matter.

60. It must also be observed that the applicants' solicitor was present throughout the whole of their interviews and was able to advise them not to volunteer any answers to the questions put to them. The fact that an accused person who is questioned under caution is assured access to legal advice, and in the applicants' case the physical presence of a solicitor during police interview, must be considered a particularly important safeguard for dispelling any compulsion to speak which may be inherent in the terms of the caution.

For the Court, particular caution is required when a domestic court seeks to attach weight to the fact that a person who is arrested in connection with a criminal offence and who has not been given access to a lawyer does not provide detailed responses when confronted with questions the answers to which may be incriminating (see the John Murray judgment cited above, p. 55, § 66). At the same time, the very fact that an accused is advised by his lawyer to maintain his silence must also be given appropriate weight by the domestic court. There may be good reason why such advice may be given. The applicants in the instant case state that they held their silence on the strength of their solicitor's advice that they were unfit to answer questions. Their solicitor testified before the domestic court that his advice was motivated by his concern about their capacity to follow questions put to them during interview (see

paragraph 18 above). As with the issue of the applicants' lucidity at the time of interview, the question whether the trial judge gave sufficient weight to the applicants' reliance on legal advice to explain their silence at interview must equally be examined from the standpoint of his directions on this matter. The Court would observe at this juncture that the fact that the applicants were subjected to cross-examination on the content of their solicitor's advice cannot be said to raise an issue of fairness under Article 6 of the Convention. They were under no compulsion to disclose the advice given, other than the indirect compulsion to avoid the reason for their silence remaining at the level of a bare explanation. The applicants chose to make the content of their solicitor's advice a live issue as part of their defence. For that reason they cannot complain that the scheme of section 34 of the 1994 Act is such as to override the confidentiality of their discussions with their solicitor.

61. It is to be noted that the trial judge directed the jury on the issue of the applicants' silence in accordance with the terms of the relevant specimen direction at the time (see paragraph 32 above). The Court notes, however, that the formula employed by the trial judge cannot be said to reflect the balance which the Court in its John Murray judgment sought to strike between the right to silence and the circumstances in which an adverse inference may be drawn from silence, including by a jury. It reiterates that the Court stressed in that judgment that, provided appropriate safeguards were in place, an accused's silence, in situations which clearly call for an explanation, could be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution against him (see paragraph 56 above). The Court further noted, with reference to Articles 4 and 6 of the Criminal Evidence (Northern Ireland) Order 1988, that those provisions only permitted a judge to draw common-sense inferences which he considered proper in the light of the evidence against the accused (ibid., pp. 50-51, § 51).

However, in the instant case the applicants put forward an explanation for their failure to mention during the police interview why certain items were exchanged between them and their co-accused, Mr Curtis (see paragraph 19 above). They testified that they acted on the strength of the advice of their solicitor who had grave doubts about their fitness to cope with police questioning (see paragraph 21 above). Their solicitor confirmed this in his testimony in the *voir dire* proceedings (see paragraph 18 above). Admittedly the trial judge drew the jury's attention to this explanation. However he did so in terms which left the jury at liberty to draw an adverse inference notwithstanding that it may have been satisfied as to the plausibility of the explanation. It is to be observed that the Court of Appeal found the terms of the trial judge's direction deficient in this respect (see paragraph 27 above). In the Court's opinion, as a matter of fairness, the jury should have been directed that it could only draw an adverse inference if satisfied that the applicants' silence at the police interview could only sensibly be attributed to their having no answer or none that would stand up to cross-examination.

62. Unlike the Court of Appeal, the Court considers that a direction to that effect was more than merely “desirable” (see paragraph 27 above). It notes that the responsibility for deciding whether or not to draw such an inference rested with the jury. As the applicants have pointed out, it is impossible to ascertain what weight, if any, was given to the applicants' silence. In its John Murray judgment the Court noted that the trier of fact in that case was an experienced judge who was obliged to explain the reasons for his decision to draw inferences and the weight attached to them. Moreover, the exercise of the judge's discretion to do so was subject to review by the appellate courts (ibid.). However, these safeguards were absent in the instant case. It was thus even more compelling to ensure that the jury was properly advised on how to address the issue of the applicants' silence. It is true that the judge was under no obligation to leave the jury with the option of drawing an adverse inference from their silence and, left with that option, the jury had a discretion whether or not to do so. It is equally true that the burden of proof lay with the prosecution to prove the applicants' guilt beyond reasonable doubt and the jury was informed that the applicants' silence could not “on its own prove guilt” (see paragraph 22 above). However, notwithstanding the presence of these safeguards, the Court considers that the trial judge's omission to restrict even further the jury's discretion must be seen as incompatible with the exercise by the applicants of their right to silence at the police station.

63. The Court does not agree with the Government's submission that the fairness of the applicants' trial was secured in view of the appeal proceedings. Admittedly defects occurring at a trial may be

remedied by a subsequent procedure before a court of appeal and with reference to the fairness of the proceedings as whole (see the Edwards v. the United Kingdom judgment of 16 December 1992, Series A no. 247-B, pp. 34-35, §§ 34 and 39). However, as noted previously, the Court of Appeal had no means of ascertaining whether or not the applicants' silence played a significant role in the jury's decision to convict. The Court of Appeal had regard to the weight of the evidence against the applicants. However it was in no position to assess properly whether the jury considered this to be conclusive of their guilt.

64. The Court is not persuaded either that the fact that the co-accused, Mr Curtis, who also remained silent during police interview (see paragraph 28 above), was acquitted indicates that the jury attached little weight to the applicants' silence in finding them guilty. It cannot be excluded that the jury accepted Mr Curtis's explanation for his silence and did not therefore draw an adverse inference against him; it cannot be excluded either that the jury may have accepted the applicants' defence to the charges, for example their claim that the police had planted incriminating evidence in their flat (see paragraph 19 above) and that the evidence against them was not as overwhelming as the Court of Appeal considered. In any event, it is a speculative exercise which only reinforces the crucial nature of the defect in the trial judge's direction and its implications for review of the case on appeal.

65. The Court must also have regard to the fact that the Court of Appeal was concerned with the safety of the applicants' conviction, not whether they had in the circumstances received a fair trial. In the Court's opinion, the question whether or not the rights of the defence guaranteed to an accused under Article 6 of the Convention were secured in any given case cannot be assimilated to a finding that his conviction was safe in the absence of any enquiry into the issue of fairness. In the Edwards case cited above, the Court of Appeal considered in detail the impact of the information withheld from the defence (p. 35, § 35). It was able to assess for itself the probative value of that information in the light of the arguments of the defence which was by that stage in possession of the information and to determine whether the availability of that information at trial would have disturbed the jury's verdict (see *Rowe and Davis v. the United Kingdom* [GC], no. 28901/95, § 65, ECHR 2000-II). Accordingly, the rights of the defence were secured by the review conducted on appeal.

66. However, in the case at issue it was the function of the jury, properly directed, to decide whether or not to draw an adverse inference from the applicants' silence. Section 34 of the 1994 Act specifically entrusted this task to the jury as part of a legislative scheme designed to confine the use which can be made of an accused's silence at his trial. In the circumstances the jury was not properly directed and the imperfection in the direction could not be remedied on appeal. Any other conclusion would be at variance with the fundamental importance of the right to silence, a right which, as observed earlier, lies at the heart of the notion of a fair procedure guaranteed by Article 6. On that account the Court concludes that the applicants did not receive a fair hearing within the meaning of Article 6 § 1 of the Convention.

67. The Court observes that the applicants also challenge the terms of the direction on other grounds: firstly, as regards the omission of a reference to the requirement that the prosecution establish a prima facie case before an adverse inference may be drawn; secondly, as regards the judge's failure to mention that their silence could not constitute the “main” basis for their conviction. The applicants relied on the principles set out in the John Murray judgment. At the oral hearing before the Court, the applicants' lawyer conceded that these points had not been taken on appeal. He maintained however that, as grounds of appeal, they would have had little prospects of success. The Government argued in reply that, having regard to the facts that the Court of Appeal accepted their main ground for challenging the direction and that the law in this area was evolving at the time of their appeal, the applicants should have included these issues in their grounds of appeal. For its part, the Court considers that it does not have to take a stand on the issues raised by the applicants having regard to its earlier finding on the main defect on which they rely.

68. In view of the above considerations the Court concludes that the applicants were denied a fair hearing, in violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

69. The applicants complained that the trial judge's direction to the jury infringed their right not to incriminate themselves guaranteed by Article 6 § 2 of the Convention, which states:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

70. The applicants asserted that they were in effect compelled to answer questions since the trial judge allowed the jury to draw an adverse inference in circumstances where they remained silent on the basis of their solicitor's advice.

71. The Government, with reference to their submissions under Article 6 § 1, disputed this argument.

72. The Court considers that the applicants' argument amounts to a restatement of their case under Article 6 § 1 of the Convention. For this reason, it concludes that no separate issue arises under this head.

III. ALLEGED VIOLATION OF ARTICLE 6 § 3 (B) AND (C) OF THE CONVENTION

73. The applicants alleged that the trial judge's direction in effect left the jury free to draw adverse inferences even though they concluded that the applicants refused to answer police questions solely in reliance on their solicitor's advice. They invoked Article 6 § 3 (b) and (c) of the Convention, which provide as relevant:

> "Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself ... through legal assistance of his own choosing ..."

74. The applicants submit that there is an overwhelming need to exercise caution in drawing adverse inferences when the explanation for a defendant's silence in the face of police questioning is that he was following legal advice.

75. The Government referred to their submissions in response to the applicants' complaint under Article 6 § 1 of the Convention.

76. The Court recalls that the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair hearing set out in paragraph 1 (see *Rowe and Davis* cited above, § 59). Having regard to its finding on the applicants' complaint under Article 6 § 1, the Court considers that the issues which they raise from the standpoint of paragraph 3 (b) and (c) amount in reality to a complaint that they did not receive a fair hearing. For that reason, it concludes that it is unnecessary to examine them.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

77. Article 41 of the Convention provides:

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

A. COSTS AND EXPENSES

78. The applicants did not submit any claim for pecuniary or non-pecuniary damage. They claimed by way of costs and expenses the sum of 23,774.16 pounds sterling (GBP) inclusive of value-added tax ("VAT"). The applicants' claim comprised the fees charged by the two counsel who worked on the case (GBP 14,452.50) and the costs and expenses incurred by Liberty in processing the application before the Convention institutions (GBP 9,321.66).

79. The Government disputed the basis used by the applicants for the calculation of their Article 41 claim. In their submission the fees claimed by counsel, as well as the estimated number of hours they

devoted to the case, were too high. They contended that an award of GBP 6,920 would represent a more reasonable sum in the circumstances. As to the claim made on behalf of Liberty, the Government proposed that this be reduced to GBP 3,550 in order to reflect a more realistic view of Liberty's contribution to the case.

80. In the Government's opinion a total amount of GBP 10,500 would be an appropriate award.

81. Making an assessment on an equitable basis, the Court awards the applicants the sum of GBP 15,000, in addition to any VAT that may be payable.

B. DEFAULT INTEREST

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

2. *Holds* that the applicants' complaint under Article 6 § 2 of the Convention does not give rise to any separate issue;

3. *Holds* that it is unnecessary to examine the applicants' complaint under Article 6 § 3 (b) and (c) of the Convention, having regard to its conclusion on their complaint under Article 6 § 1 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, for costs and expenses, GBP 15,000 (fifteen thousand pounds sterling), in addition to any value-added tax that may be chargeable;
   (b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;

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

Done in English, and notified in writing on 2 May 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ J.-P. COSTA
Registrar President

1. *Note by the Registry*. The Court's decision is obtainable from the Registry.

CONDRON V. THE UNITED KINGDOM JUDGMENT