FOURTH SECTION

CASE OF HANIF AND KHAN v. THE UNITED KINGDOM

(Applications nos. 52999/08 and 61779/08)

JUDGMENT

STRASBOURG

20 December 2011

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Hanif and Khan v. the United Kingdom,

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

Lech Garlicki, *President,*
David Thór Björgvinsson,
Nicolas Bratza,
Päivi Hirvelä,
George Nicolaou,
Nebojša Vučinić,
Vincent A. De Gaetano, *judges,*
and Lawrence Early, *Section Registrar,*

Having deliberated in private on 29 November 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in two applications (nos. 52999/08 and 61779/08) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two British nationals, Mr Ilyas Hanif ("the first applicant") and Mr Bakish Allah Khan ("the second applicant"), on 13 October 2008 and 15 December 2008 respectively.

2. The first applicant was represented by Howells, a firm of solicitors based in Sheffield. The second applicant was represented by Favell Smith and Lawson, a firm of solicitors also based in Sheffield. The United Kingdom Government ("the Government") were represented by their Agent, Ms H. Upton, Foreign and Commonwealth Office.

3. The applicants alleged that they did not receive a fair trial by an independent and impartial tribunal as a result of the presence of a police officer on the jury which tried their case.

4. On 15 September 2009 the President of the Chamber decided to give notice of the applications to the Government. It was also decided to rule on the admissibility and merits of the applications at the same time (Article 29 § 1).

5. The first applicant requested an oral hearing but the Chamber decided not to hold a hearing in the case.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The first applicant was born in 1967 and at the time of the lodging of his application was detained in HM Prison Moorlands. He was expected to be released on 1 September 2010. The second applicant was born in 1978 and is currently detained in HM Prison Dovegate.

7. The first applicant is a taxi driver. On 31 August 2006, he drove from Sheffield to Luton. On his way back to Sheffield from Luton, he was arrested in the context of a police investigation into the supply of unlawful drugs. He had been followed on his journey in both directions by police officers. Six kilograms of heroin were found in the boot of his car. The case against him was that he had collected the consignment of drugs in Luton and was transporting it back to Sheffield when he was arrested.

8. The first applicant's defence was that he did not know anything about the drugs found in his car. He said that he had taken a passenger named Paul with him on the journey from Sheffield to Luton at the request of Mr Younas, one of the alleged members of the conspiracy to supply unlawful drugs. Paul had used the first applicant's mobile telephone while in the car and the calls to another of the individuals in the alleged conspiracy, Mr Rasul, had been made by Paul. Calls to Mr Younas and a third member of the alleged conspiracy, Mr N. Khan, were made by the first applicant: calls to Mr

Younas were to check directions and calls to Mr N. Khan related to a dispute about an unpaid taxi fare. Paul had left the car shortly after arrival in Luton. The first applicant argued that he must have left the drugs in the car when he left the vehicle.

9. In August 2006, the second applicant was charged with conspiracy to supply heroin. The case against him was that he was involved in making arrangements for the payment of the drugs to be transported from Luton to Sheffield. The prosecution relied on telephone analysis to establish a link between the second applicant and the other alleged conspirators. Cash amounting to GBP 18,955 was found in the second applicant's cellar. The money had been in contact with heroin.

10. The second applicant's defence was that he was a cousin of Mr N. Khan and a friend of Mr Younas and was therefore in close contact with them. However, he had not taken part in the conspiracy. His telephone contacts with them on the relevant days had been innocent. The cash found at his home derived partly from the sale of a car and partly from former heroin dealings for which he had been convicted in 2003.

11. The applicants were subsequently tried together on charges of conspiracy to supply heroin. The trial commenced on 3 January 2007 and the jury was sworn. On the following day the court heard evidence from the police officers who had followed the first applicant from Sheffield to Luton and back, one of whom was M.B. The police officers testified that the first applicant did not have a passenger with him at any point during that journey and that no-one had alighted from the vehicle in Luton.

12. During the evidence of M.B., the first of the police officers to testify, one of the jurors, A.T., sent a note to the judge indicating that he, A.T., was a serving police officer and that he knew M.B., although he had not worked with him for two years. The judge read the note to counsel and agreed with them a series of questions to be put to A.T. The judge then questioned A.T. in the absence of the other jurors but in the presence of the applicants. A.T. confirmed that he was a police dog handler near Doncaster, some distance from Sheffield. He said that he had known M.B. for approximately ten years and that on three occasions they had worked on the same incident, although not in the same team. They had never worked at the same station and did not know each other socially. He was asked if he knew anything about M.B. which would affect his ability to judge M.B.'s evidence impartially or his ability to judge the case in accordance with the oath he had sworn. He replied that he did not.

13. The defence made an application to the judge to discharge A.T. on the grounds that there was a conflict of evidence between the police and the first applicant which the jury would have to resolve, that it would therefore be unfair for the jury to include a police officer and that justice would not be seen to be done if the police officer continued to serve on the jury. They also argued that there was a risk that A.T. knew of the second applicant's previous conviction for dealing in heroin. On 4 January 2007, setting out his decision on the application, the judge concluded that:

> "Jurors are entitled, when called, to try the cases before them, and are not to be asked to withdraw ... unless there is a proper reason, one of which clearly concerns prejudice to an accused, or the appearance of any prejudice. I am wholly satisfied in this case that there is no prejudice to either defendant if this juror remains, nor indeed, if anyone were to hear his questioning, any appearance of unfairness. This is a juror who honestly and frankly has brought to the court's attention his knowledge of a witness and, in answering the questions posed to him as he has, has clearly indicated that his knowledge is slight and, no matter what the extent of his knowledge, not something that will in any way adversely affect his judgment of this particular case.
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> ... I appreciate that there is a conflict between the witness and the defendant, and that that is a conflict of some importance within the case but, in my judgment, this juror is well capable of dealing with the matter in a proper and impartial way."

14. The application to discharge A.T. was rejected. A.T. subsequently became the jury foreman.

15. In the trial proceedings before the court, the prosecution relied on the fact that the other co-accused in the conspiracy had pleaded guilty in order to establish the existence of a conspiracy. They also relied on evidence of the second applicant's bad character and previous conviction for dealing in heroin.

16. The first applicant, in his defence, called a witness who testified that she had seen him leave Sheffield at the start of his journey with a passenger in the car.

17. On 12 January 2007, the applicants were convicted of conspiracy to supply heroin. The first applicant was sentenced to eight years' imprisonment. The second applicant was sentenced to 17 years' imprisonment. This was to take place consecutively to a period of two years and five months'

imprisonment, the period outstanding under a previous conviction for supplying heroin in respect of which he had been released on licence.

18. After the trial, the applicants' counsel realised that A.T. had been involved in recent drugs operations in the area and had given evidence at other drugs trials in which counsel for the second applicant had appeared.

19. The applicants applied for leave to appeal against their convictions on the ground that the presence of the police officer on the jury, and in particular his role as jury foreman, led to an appearance of bias in the trial proceedings. Leave to appeal was granted and the appeal was heard on 29 January 2008.

20. Handing down its judgment on 14 March 2008, the Court of Appeal noted:

> "10. Where an impartial juror is shown to have had reason to favour a particular witness, this will not necessarily result in the quashing of a conviction. It will only do so if this has rendered the trial unfair, or given it an appearance of unfairness. To decide this it is necessary to consider two questions:
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> i) Would the fair minded observer consider that partiality of the juror to the witness may have caused the jury to accept the evidence of that witness? If so
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> ii) Would the fair minded observer consider that this may have affected the outcome of the trial?
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> If the answer to both questions is in the affirmative, then the trial will not have the appearance of fairness. If the answer to the first or the second question is in the negative, then the partiality of the juror to the witness will not have affected the safety of the verdict and there will be no reason to consider the trial unfair."

21. The court referred to the recent change in the law which had allowed persons previously ineligible for jury duty, including police officers, to sit on juries (see paragraphs 38-42 below). However, it observed that the change had simply removed the automatic disqualification of such persons: disqualification was still possible on a case-by-case basis where the particular circumstances of the case were such as to suggest apparent bias.

22. After considering the judgment of the House of Lords in *Abdroikof and Others* (see paragraphs 43-54 below) which concerned the compatibility of police officer jurors with Article 6 of the Convention, the court concluded on the general issue of bias:

> "... the fact that a police juror may seem likely to favour the evidence of a fellow police officer will not, automatically, lead to the appearance that he favours the prosecution. If the police evidence is not challenged or does not form an important part of the prosecution case, we do not consider that it will normally do so. None the less it will be appropriate to quash the conviction if, but only if, the effect of the juror's partiality towards a brother officer puts in doubt the safety of the conviction and thus renders the trial unfair."

23. As to the applicants' appeals, the court emphasised that there was no question of the juror having any connection with those responsible for the prosecution of the case. The investigation had been carried out by the Serious Organised Crime Agency without the involvement of local police forces. The prosecution was conducted by the Organised Crime Division of the Crown Prosecution Central Casework Directorate without contact with the local Crown Prosecution Service branch.

24. The court set out the starting point for consideration of the applicants' appeals as follows:

> "If one starts, as one must, from the premise that police officers are not, by reason simply of their occupations, considered to be biased in favour of the prosecution, we do not consider that the fact that a police officer has taken part in operations involving the type of offence with which a defendant is charged, gives rise, of itself, to an appearance of bias on the part of the police officer. Most police officers are likely to have had experience of most of the common types of criminal offence, not least drug dealing. We do not consider that familiarity with the particular offence charged against an offender would lead the objective observer to suspect a police juror of bias."

25. As regards the first applicant, the court noted that three police officers, one of whom was M.B., gave evidence of keeping him under observation at different stages of his journey from Sheffield to Luton and that each of the officers said that he saw no passenger in the car. The court further noted that the challenge to the officers' evidence was on the basis that it was inaccurate and that it was not suggested to the witnesses in cross-examination that their evidence was untruthful. It further observed that such a suggestion would not have been likely to be fruitful as the officers' accounts were no doubt supported by contemporary records made at a time when they would have attached no significance to the fact that the first applicant had no passenger in the car. As to the witness called by the first applicant who spoke to glimpsing a passenger in the back of his car as it passed her in Sheffield, the court commented that she was not a witness of good character and that it

was the prosecution case that she was not to be believed. It continued:

> "54. Hanif's explanation for the records of the use of his mobile phone and for being found with the heroin in the back of his car bordered on the farcical. The mobile phone records showed that, if his explanation was true, his phone must have been being passed to and fro between himself and his passenger like a yo-yo. Equally unlikely was the suggestion that the conspirators, Younas and [N. Khan], would have been having repeated telephone conversations with him about his taxi charges at a time when they were busy arranging for a drug delivery. Finally it is hard to believe that, if his passenger had been carrying a valuable consignment of heroin, he would have left it in the back of the taxi.
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> 55. Quite apart from these matters, Hanif's evidence had significant inconsistencies with earlier statements made to the police. It was the prosecution's case that his evidence had been tailored to accommodate the police evidence.
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> 56. In the light of these facts we turn to consider the two questions set out at paragraph 10 above. The material evidence of the three police witnesses was that they had seen no passenger in Hanif's car. Insofar as there was an issue in relation to this evidence it was whether it was possible that there might have been a passenger unobserved by the police. As to that issue, the jury plainly concluded that it was not. No fair minded observer would believe, however, that this conclusion might have been brought about as a result of partiality on the part of the police juror to his fellow officers and, in particular, to [M.B.] who was known to him. Thus the question is answered in the negative and the second question does not arise."

26. The court accordingly concluded that the first applicant's conviction was not rendered unsafe by the fact that the foreman of the jury was a police officer who was acquainted with M.B. and dismissed the first applicant's appeal against conviction.

27. The court also rejected the second applicant's contention that, because of A.T.'s involvement in drugs operations, he might have become aware of the second applicant's previous conviction for dealing in heroin, noting:

> "49. ... there was nothing to support this surmise. Had the juror known anything about any of the defendants we think that he would clearly have made this fact known to the judge, as he did his knowledge of [M.B.]. Furthermore, Bakish Alla Khan's previous conviction was placed before the jury."

28. The court observed that at trial there was no challenge to the prosecution evidence in respect of the second applicant and that no police witnesses were called. The issue was whether the jury was satisfied that the explanations advanced by the second applicant for the undisputed evidence were untrue and that this evidence demonstrated his guilt. The Court of Appeal considered that the jury's verdict showed that it was satisfied of this. It therefore concluded that the allegation of jury bias made on behalf of the second applicant was not made out and dismissed his appeal against conviction.

29. The Court of Appeal made the following concluding remarks:

> "It is undesirable that the apprehension of the jury bias should lead to appeals such as those with which this court has been concerned. It is particularly undesirable if such appeals lead to the quashing of convictions so that re-trials have to take place. In order to avoid this it is desirable that any risk of jury bias, or of unfairness as a result of partiality to witnesses, should be identified before the trial begins. If such a risk may arise, the juror should be stood down.
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> We considered attempting to give guidance in this judgment as to the steps that should be taken to ensure that the risk of jury bias does not occur. However, it seems to us that these will involve instructions to be given by the police, prosecuting and prison authorities to their employees coupled with guidance to court officials. It would be ambitious to attempt to formulate all of this in a judgment without discussion with those involved. There is one matter, however, that should receive attention without any delay. It is essential that the trial judge should be aware at the stage of jury selection if any juror in waiting is, or has been, a police officer or a member of the prosecuting authority, or is a serving prison officer. Those called for jury service should be required to record on the appropriate form whether they fall into any of these categories, so that this information can be conveyed to the judge. We invite all of these authorities and Her Majesty's Court Service to consider the implications of this judgment and to issue such directions as they consider appropriate."

30. The second applicant's appeal against sentence was successful and the sentence of 17 years was reduced to 15 years.

31. The applicants were refused leave to appeal to the House of Lords on 17 June 2008.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Jury selection

32. Pursuant to section 1 of the Juries Act 1974 as amended ("the 1974 Act"), all persons aged eighteen to seventy who are registered as parliamentary or local electors and have been ordinarily resident in the United Kingdom for a period of at least five years since the age of thirteen are eligible for jury service and are therefore under a duty to attend court if summoned.

33. Certain individuals are ineligible for jury duty, including for example those who suffer from a mental disorder. Other narrowly defined groups, although eligible for jury duty, are entitled to be excused, such as persons who have served as jurors in the recent past and full-time members of the armed forces whose absence from duty would be prejudicial to the efficiency of the service.

34. The trial judge has the power to question jurors in order to establish that they are qualified for jury service or to ensure that they are not unsuitable to try the case, for example, on the ground of bias. A juror who is not qualified or is otherwise unsuitable will be excused. Both prosecution and defence are entitled to challenge as many individual jurors as they wish for cause. A juror may be challenged on the basis that he is ineligible for jury service or on the basis that he may reasonably be suspected of being biased.

B. Eligibility of police officers to serve on juries

1. The historic position

35. Pursuant to the Juries Act 1870 and a series of later statutes, a number of occupational groups were exempted from jury service, including the elected members of representative assemblies, ministers of religion, officers in the armed services, medical practitioners, various classes of public servants, holders of certain offices related to the sea and all who could not satisfy a threshold property qualification.

36. A review of jury service was undertaken by a departmental committee chaired by Lord Morris of Borth-y-Gest ("the Morris Committee"), which reported in 1965. The Morris Committee considered that those professionally concerned in the administration of the law and the police should continue to be ineligible for jury service. The Morris Committee noted:

> "103. The present law exempts many of those who practise the law or are concerned with the business of the courts. It seems to us clearly right that such persons, and all others closely connected with the administration of law and justice, should be specifically excluded from juries ... If juries are to continue to command public confidence it is essential that they should manifestly represent an impartial and lay element in the workings of the courts. It follows that all those whose work is connected with the detection of crime and the enforcement of law and order must be excluded, as must those who professionally practise the law, or whose work is concerned with the functioning of the courts. It is impossible, whether desirable or not, to ensure that jurors have no previous knowledge of the law before they begin to hear a case. Many persons without formal legal training, for example, know enough about the way our courts function to be able to make a shrewd guess as to whether the accused has a previous criminal record; and one cannot entirely prevent by legislation the use of such knowledge in the jury room.
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> 104. Nevertheless, it seems to us necessary to secure the exclusion from juries of any person who... 'because of occupation or position, has knowledge or experience of a legal or quasi-legal nature which is likely to enable him to exercise undue influence over his fellow jurors'. If justice is not only to be done but to be seen to be done, such persons must not be allowed to serve on juries lest the specialist knowledge and prestige attaching to their occupations might cause them to be what has been described to us as 'built-in leaders'"

37. As to civilian employees of the police, the Morris Committee said:

> "110. ... we think there is much force in the contention of the Association of Chief Police Officers that 'all civilian employees in the police service who have been employed for some length of time, no matter in what capacity, become identified with the service through their everyday contact with its members. As such they become influenced by the principles and attitudes of the police, and it would be difficult for them to bring to bear those qualities demanding a completely impartial approach to the problems confronting members of a jury'. We find this convincing, and we have little doubt that civilian employees in the police service, including traffic wardens, should be ineligible."

38. The Juries Act 1974 implemented a number of the Morris Committee's recommendations and included a provision rendering police officers and other involved in the administration of justice ineligible to serve on juries.

2. The Auld Review and subsequent legislative amendment

39. In September 2001 the issue of jurors' eligibility was reviewed by Lord Justice Auld in the

context of his "Review of the Criminal Courts of England and Wales" ("the Auld Review"). He considered the concerns which arose when individuals connected in a professional capacity with the criminal justice system were permitted to serve on juries:

> "There is also the anxiety voiced by some that those closely connected with the criminal justice system, for example, a policeman or a prosecutor, would not approach the case with the same openness of mind as someone unconnected with the legal system. I do not know why the undoubted risk of prejudice of that sort should be any greater than in the case of many others who are not excluded from juries and who are trusted to put aside any prejudices they may have. Take, for example shopkeepers or house-owners who may have been burgled, or car owners whose cars may have been vandalised, many government and other employees concerned in one way or another with public welfare and people with strong views on various controversial issues, such as legalisation of drugs or euthanasia. I acknowledge that there may be Article 6 considerations in this. But it would be for the judge in each case to satisfy himself that the potential juror in question was not likely to engender any reasonable suspicion or apprehension of bias so as to distinguish him from other members of the public who would normally be expected to have an interest in upholding the law. Provided that the judge was so satisfied, the overall fairness of the tribunal and of the trial should not be at risk."

40. He concluded:

> "Thus, in my view, there is a strong case for removing all the present categories of ineligibility based upon occupation, that is, ... the Judiciary, ... others concerned with the administration of justice and ... the clergy ... Any difficulty or embarrassment that the holding of any such office may pose in a particular case can be dealt with under the courts' discretionary power of excusal."

41. He further considered developments in the state of New York, where the automatic ineligibility of occupational groups to serve had been removed (see paragraphs 121-122 below) and the positive experience of those involved in the administration of justice who had served on juries there**.** Accordingly, he recommended that everyone should be eligible for jury service, save the mentally ill.

42. Following this recommendation, section 321 and schedule 33 to the Criminal Justice Act 2003 ("the 2003 Act") amended the 1974 Act to remove the automatic disqualification of those involved in the administration of justice from jury duty (see paragraphs 32-33 above).

3. Abdroikof and Others in the House of Lords

43. The compatibility of the change in the law introduced by the 2003 Act with Article 6 of the Convention was considered prior to the applicants' appeal hearing by the House of Lords in *R v. Abdroikof and Others* [2007] UKHL 37, which concerned three appeals against conviction. The first two involved trials in which serving police officers had sat as jurors; the third concerned a trial where an employee of the Crown Prosecution Service was a juror and is therefore not of direct relevance to the present case.

44. Lord Bingham of Cornhill confirmed that the test of bias under the common law was no different from the requirement under Article 6 of the Convention for an independent and impartial tribunal. He further observed:

> "23. It must in my view be accepted that most adult human beings, as a result of their background, education and experience, harbour certain prejudices and predilections of which they may be conscious or unconscious. I would also, for my part, accept that the safeguards established to protect the impartiality of the jury, when properly operated, do all that can reasonably be done to neutralise the ordinary prejudices and predilections to which we are all prone ..."

45. In relation to the first appeal, he found as follows:

> "25. In the case of the first appellant, it was unfortunate that the identity of the officer became known at such a late stage in the trial, and on very short notice to the judge and defence counsel. But had the matter been ventilated at the outset of the trial, it is difficult to see what argument defence counsel could have urged other than the general undesirability of police officers serving on juries, a difficult argument to advance in face of the parliamentary enactment. It was not a case which turned on a contest between the evidence of the police and that of the appellant, and it would have been hard to suggest that the case was one in which unconscious prejudice, even if present, would have been likely to operate to the disadvantage of the appellant, and it makes no difference that the officer was the foreman of the jury. In the event, confronted with this question at very short notice, defence counsel raised no objection. I conclude, not without unease, that having regard to the parliamentary enactment the Court of Appeal reached the right conclusion in this case, and I would dismiss the appeal."

46. As regards the second appeal, however, Lord Bingham considered:

"26. The second appellant's case is different. Here, there was a crucial dispute on the evidence between the appellant and the police sergeant, and the sergeant and the juror, although not personally known to each other, shared the same local service background. In this context the instinct (however unconscious) of a police officer on the jury to prefer the evidence of a brother officer to that of a drug-addicted defendant would be judged by the fair-minded and informed observer to be a real and possible source of unfairness, beyond the reach of standard judicial warnings and directions. The second appellant was not tried by a tribunal which was and appeared to be impartial. It cannot be supposed that Parliament intended to infringe the rule in the *Sussex Justices* case [that justice should not only be done, but should manifestly and undoubtedly be seen to be done], still less to do so without express language. I would allow this appeal, and quash the second appellant's conviction."

47. Lord Rodger of Earlsferry dismissed both appeals. He was of the view that while the notional observer's first reaction to the news that police officers could serve on juries might well be that it was possible that a police officer on the jury would tend to prefer the evidence of any police or prosecution witnesses to the defence evidence, and be thus, consciously or subconsciously, biased in favour of the prosecution, this perception did not withstand closer scrutiny:

"32. ... [B]eing fair-minded and informed, the observer will think a little more about the matter. He will reflect that, up and down the land, day in day out, we take risks when we hand the critical decisions on guilt or innocence to juries. We take the risk that, consciously or subconsciously, men on juries may be unduly sympathetic to a man charged with rape who claims that he and the woman just got carried away by their physical urges. We take the risk that, consciously or subconsciously, a juror who has herself been the victim of sexual abuse may tend to side with the woman who claims that she was sexually assaulted by the defendant. We take the risk that, consciously or subconsciously, a gay juror may tend to believe the gay man who says that he was assaulted by the defendant in a homophobic attack. We take the risk that, consciously or subconsciously, a homophobic juror may just reject the gay man's evidence. We take the risk that, consciously or subconsciously, a juror who is an undergraduate may sympathise with a victim who is an undergraduate at the same university. We take the risk that, consciously or subconsciously, a black juror may tend to believe the evidence of a black witness as opposed to the account given by an Asian defendant. We take the risk that, consciously or subconsciously, a juror who was convicted of drug dealing and was sentenced to four years in prison in the early 1990s may sympathise with a defendant accused of supplying drugs. Having reflected on these and similar situations, the observer will realise that, in effect, Parliament has now added two to the long list of situations where there is indeed a risk, where it is indeed possible, that, consciously or subconsciously, a juror may be partial. But he will also realise that Parliament must have considered that in these two situations, like so many others, the risk is manageable within the system of jury trial as we know it."

48. He continued:

"33. It would, after all, be wrong to pretend that in these various situations there is not a real, as opposed to a fanciful, possibility that the jurors in question may be biased. For instance, there is plainly a real possibility, in the sense of it being something that could well happen, that a homophobic juror may just reject the gay man's evidence. But the law regards that risk as being manageable and, so, acceptable. The law caters for the risk. It takes steps to minimise it by making jurors take an oath or affirm that they will 'faithfully try the defendant and give a true verdict according to the evidence'. It makes them sit and listen to the evidence in a solemn setting. It requires the judge to give them a direction that they must assess the evidence impartially. Of course, it would be naïve to suppose that these safeguards will always work with every juror. The law is not naïve: it stipulates that there should be 12 men and women on a jury. The assumption is that, among them, the twelve will be able to neutralise any bias on the part of one or more members and so reach an impartial verdict – by a majority, if necessary. If any of the jurors consider that the jury will be unable to do so, then they must tell the judge, who can then deal with the matter – by discharging the jury, if necessary. So the mere fact that there is a real possibility that a juror may be biased does not mean that there is a real possibility that the jury will be incapable of returning an impartial verdict."

49. He considered that the jury system operated, not because those who served were free from prejudice but despite the fact that many of them would harbour prejudices of various kinds when they entered the jury box. However, he accepted that there would be an unacceptable risk of a juror going wrong if, *inter alia*, he was a friend of one of the witnesses, was having an affair with a witness or had worked alongside one of the witnesses. In such a case he agreed that the person should be discharged from sitting on the jury.

50. As to the first appeal, Baroness Hale concluded:

"54. The Abdroikof case was tried at the Old Bailey, which hears cases from all over London and sometimes further afield. There was no particular link between the court and the station where the police juror served. No important issue turned on a conflict between police and defence evidence and there was no closer link between the police witnesses and the police juror than that they all served in the Metropolitan Police. It would be possible, perhaps, to conclude that Parliament had intended that no police officer should serve on a jury involving police witnesses from the same police force as that in which he served. Given the independence of each police force, that

would have the attraction of consistency with the approach adopted earlier in relation to the CPS and other prosecuting bodies. With some hesitation, however, but because of the greater distance between the police and the prosecution process, I feel able to agree with my noble and learned friend, Lord Bingham of Cornhill, that there is not sufficient to raise the appearance of bias in this case. Hence this appeal should be dismissed ..."

51. She identified further considerations arising in the second appeal which required the conviction to be quashed, noting as follows:

"53. In the Green case there are two factors which make the connection between the police and prosecution too close for comfort. One is that the victim of the alleged crime was himself a police officer and the case depended to some extent on his evidence of how the accused was searched and what was said at the time. The officers were serving in the same borough at the time of the trial although not in the same police station. Another is that the juror was posted to a police station which committed its cases to the Crown Court where the case was tried. Officers in his station will have had regular dealings with the CPS conducting prosecutions in the same court."

52. Lord Carswell noted at the outset that the changes relating to jury service enacted in the 2003 Act reflected the changes in the sophistication of jurors and in the willingness of Parliament to trust in their impartiality and ability to recognise and put aside their prejudices. He continued:

"67. Unconscious prejudices and bias can be insidious in their operation on people's minds, but the number and diversity of people on a criminal jury constitute a safeguard against such prejudice or bias on the part of any one juror exercising sufficient influence to determine the outcome of the trial. To a certain extent they are inescapable in human society, but it is generally reckoned that they are balanced out in the jury's deliberation and subsumed in the general attempt to reach a consensus ...

68. I accordingly consider that the fair-minded and informed observer would not necessarily conclude that the mere presence on a jury of a police officer or CPS staff member would create such a possibility of bias as to deny the defendant a fair trial. Such an observer would in my view wish to know more about the circumstances of the case, the issues to be decided, the background of the juror in question and the closeness of any connection which he or she might have to the case to be tried. I think that it is for this reason that the Metropolitan Police has instructed its officers that, where possible, they should not serve as jurors in a court where their Operational Command Unit carries out its work ..."

53. Lord Carswell agreed with Lord Rodger that both appeals should be dismissed.

54. Lord Mance agreed with Lord Bingham and Baroness Hale and concluded:

"83. With regard to the case of the second appellant, as Lord Bingham and Baroness Hale point out ..., the police sergeant who was the alleged victim and whose evidence was relevant shared the same local service background as, and was as a result the 'brother officer' of, the policeman on the jury. Further, the juror was posted to a station which committed its cases to the Crown Court of trial – a factor which Metropolitan Police Notice 20-2004 Item 1 identified as one to be avoided ... Absent such considerations, I do not agree that it follows automatically that a police officer is disqualified as a juror, even in a case of significant conflict of evidence between a police witness and a defendant."

4. Guidance regarding police officers and jury service

55. The Metropolitan Police, by Notice 20-2004 Item 1, informed police officers and staff that they were no longer exempt from jury service. The notice advised that:

"Where possible, police officers should not attend the court where their Operational Command Unit commits its work".

56. In 2009, after the applicants' appeal had been dismissed, Her Majesty's Court Service issued *Guidance for summoning officers when considering deferral and excusal applications.* The guidance notes, *inter alia*:

"18. Members of the judiciary or those involved in the administration of justice who apply for excusal or deferral on grounds that they may be known to a party or parties involved in the trial should normally be deferred or moved to an alternative court where the excusal grounds may not exist. If this is not possible, then they should be excused ...

There are additional considerations which apply to certain categories of potential jurors involved in the administration of justice. Those categories are:

(1) employees of the prosecuting authority;

(2) serving police officers summoned to a court which receives work from their police station or who are likely to have a shared local service background with police witnesses in the trial.

(3) serving prison officers summoned to a court, who are employed at a prison linked to that court or who are

likely to have special knowledge of any person, involved in a trial.

Potential jurors falling into category (1), (2) or (3) should be excused from jury service unless there is a suitable alternative court/trial to which they can be transferred. For example an employee of the Crown Prosecution Service should not serve on a trial prosecuted by the CPS. However, they can serve on a trial prosecuted by another prosecuting authority, such as the Revenue and Customs Prosecution Office. Similarly, a serving police officer can serve where there is no particular link between the court and the station where the police juror serves."

5. Other recent judicial consideration of the amended 1974 Act

a. *R v. Ingleton* [2007] EWCA Crim 2999

57. Following the judgment in *Abdroikof and Others*, but prior to the Court of Appeal judgment in the applicants' case, the Court of Appeal handed down judgment in the case of *R v. Ingleton*. The appeal against conviction had been lodged in light of the fact that one of the jurors was a police officer who knew all the officers in the case, including the four who had given evidence.

58. The Court of Appeal considered the judgment of the House of Lords in *Abdroikof and Others* and summarised the position as follows:

"29. In all cases the test is one of apparent bias. This will depend on the facts. If, for example, a potential juror knows a witness personally, it is common for such a juror to stand down. Where, however, the witness he knows is not contentious and not to be called, but is taken simply as read as an agreed statement, there may well be no possibility of bias. It is therefore necessary for the judge to make all appropriate factual enquiries. Usually, this is by posing questions, either in court or in writing to the potential juror. The manner in which the questions are asked will depend on the circumstances. Sometimes a few questions in open court will suffice. In other cases, where the information might be sensitive, or more detail is required, the matter may have to be dealt with in writing.

30. The results of the factual inquiry should be made known to counsel, who will then be in a position to make submissions to the court. Here, it would have been helpful to have known how well the juror knew the police officers. Had he ever worked with them on any particular matter or in a particular project? How often did he see them in the course of his work? How and in what circumstances did he meet him? All such inquiries can be dealt with by very brief questions, briefly stated and briefly answered. They are not complicated ..."

59. The Court of Appeal was of the view that although the evidence of the police officers in the case would not have been vigorously challenged even if the policeman had not been on the jury, the evidence was nevertheless a relevant part of the background to the case. It noted that it was simply not known how important the evidence was to the jury's deliberations and in what light they considered the evidence or what views the police officer juror expressed, if any, on his colleagues' evidence. It concluded:

"33. In these circumstances, we have no doubt that there was here a real possibility of bias arising from the presence on the jury of a police officer who knew the police witnesses. The possibility that he might be likely to accept the words of his colleagues, irrespective of the dispute between the parties is one which can only be described as real. We know no more than that and there is no suggestion the police officer was actually biased. None at all. Justice must not only be done but must be seen to be done. We fear that on the facts of this case that did not occur."

60. As to the point at which the juror ought to have been discharged, the court noted:

"34. ... We consider that caution should have caused [the trial judge] to exclude as a juror the officer who knew all four of the police witnesses who were going to give evidence, particularly in view of the fact that he could not be certain as to the precise scope, when all the evidence was given, of their evidence and how it might emerge, and not forgetting that this was the third attempt, it appears, to bring this matter to trial.

35. ... [T]he police officer juror should, in our judgment, have been asked to stand down at the outset, as should normally occur where a policeman or indeed any other potential juror knows witnesses who are to be called to give oral evidence, unless it can be said with certainty that the evidence of the witnesses who are known will play no contested part in the determination of the matter.

36. We venture to suggest, if it cannot be so determined with certainty, the potential juror who knows witnesses personally should be asked to stand down, whether he be a policeman or not a policeman. In other words, in many cases, if not most, where a potential juror knows witnesses who are likely to be called, it is the case that an enquiry always has to take place, albeit a brief one. When that enquiry has taken place, then the judge will act upon it, but we reiterate, unless it can be said with certainty that the known witnesses to be called will play no contested as opposed to an agreed part in the determination of the issues, a juror who personally knows a witness or witnesses should normally be asked to stand down. Once the juror was not excluded, we accept [defence counsel's] submission that the judge had a continuing obligation to keep that decision under review. When facts emerge which

might change the situation, having decided not to exclude the juror, the judge is under an obligation to consider such facts and here, it is in the view of this Court when it became apparent there was potential significance of the police evidence, that the jury should have been discharged, as it simply could not be known how the juror would deal with the witnesses as against the defendant's case ..."

b. *R v. C* [2008] EWCA Crim 1033

61. Following the judgment of the Court of Appeal in the applicants' case, the Court of Appeal dismissed an appeal in the case of *R v. C*, where a juror with experience as a police officer serving in a child protection or child abuse team and of conducting interviews with those who made complaints of such behaviour sat at a trial involving offences of sexual abuse against the defendant's daughter. The judge had refused to discharge the juror, noting that the juror had indicated in her note to the judge that she felt able to give a proper judgment on the evidence.

62. The Court of Appeal reiterated that the fact that a police officer was a juror did not in itself give rise to an appearance of bias. However, an appearance of bias could arise where a police officer juror shared some connection, for example, by way of place of service, with a police officer in the case whose evidence was going to be in dispute.

63. The court noted that the evidence of the police officer in the case was not in dispute, although there was some criticism of the conduct of the interview which was alleged to have been aimed at eliciting rather than challenging what the complainant was saying. However, the court found that this was insufficient to give rise to an appearance of bias, noting that those who investigated matters of sexual abuse might believe some complainants or disbelieve them and that it was impossible to say that the occupation carried an inherent risk of an assumption that the allegations were truthful.

c. *R v. Burdett and Smith* (2009) [2009] ECA Crim 543

64. The Court of Appeal subsequently dismissed two appeals against conviction for money laundering offences in *R v. Burdett and Smith*. The evidence against the defendants consisted of bank account evidence of cheques cashed; nothing had been found to link them to knowledge of the particular underlying fraud. At trial, the prosecution had called only one witness, a police officer, to read the defendants' interviews. He was cross-examined principally to show that there was no evidence directly linking either of the defendants to the underlying fraud.

65. After the jury had been empanelled but before the prosecution witness was called, it was discovered that one of the jurors was a policeman. The two officers worked for different police forces some distance apart, and the police officer juror was a road traffic officer. An application was made by the defence to discharge the jury, but the application was refused. The juror became the jury foreman. At trial, a dispute arose between the police officer witness and one of the defendants.

66. The court reiterated the relevant principles, and concluded:

"It seems to us that it is clear there was no connection between the two officers. It would therefore follow that no right-thinking person would think there would be bias. Secondly, and more crucially in this case, it is clear that the point raised on behalf of [one of the defendants] was not an important part of the prosecution case, nor a serious issue between the defence and the prosecution. It was a small part of [his] case. We cannot therefore consider that this ground of the appeal has any merit at all. It can be dismissed simply by the application of now the well-established principles to the facts. The answer is clear."

d. *R v. Yemoh and Others* [2009] EWCA Crim 930

67. In *R v. Yemoh and Others*, the Court of Appeal dismissed the appeals of a number of appellants complaining about the presence of a police officer on the jury at their trial concerning a stabbing. At trial, evidence was heard from two police officers who had arrived at the scene of the crime in the London borough of Hammersmith shortly after the victim had collapsed. The evidence of one of the officers, which strongly supported the theory of a group attack on the victim, was challenged by all defendants.

68. A few days after the trial started, the judge learned that a police officer was sitting on the jury. He did not inform the parties until the jury had retired to deliberate. At that point, he informed counsel of the fact that a serving police officer was a member of the jury, and that he appeared to be its foreman. He explained that the police officer juror was based in the area of Wembley, London, and had indicated that he knew nothing about the case. The judge was accordingly satisfied that he

should serve on the jury. He also indicated that he had had in mind that the police evidence was "really less than contentious" and that had that not been the case, he would have reported the matter to counsel immediately. Counsel for the defence requested that the jury be discharged, noting that Hammersmith and Wembley were not very distant from one another geographically and that youth gang violence was a problem affecting both areas. The judge refused the application.

69. Summarising the relevant passages of the judgments in *Abdroikof and Others* and the applicants' case, the Court of Appeal noted:

> "111. Although it might have been preferable for the judge to have asked more questions of the juror, it seems to us that we should accept the answer as conveyed to the judge that the juror knew nothing about the case, and by that we mean in his professional position. If he had inside information about the case or the background to the case as a result of his position as a police officer in Wembley, we take the view that he would have told the court official. Likewise the judge made it clear in his summing up that the jury had to decide the case on the evidence and we imagine he had said that on other occasions. If the juror was aware of information which did not form part of the evidence in the case then it seems likely to us that he would have publicly made that clear. Unlike in the United States, jurors are only rarely questioned in this country. Jurors are often told the names of witnesses in case they know them and are usually questioned before being empanelled on long complex trials, such as terrorism and fraud cases, but not otherwise. The system here proceeds on the assumption that a juror will reveal any difficulties that he or she may have in impartially approaching the case being tried and that other jurors will play a role in ensuring impartiality. No appeal would succeed on the speculative basis that a juror may have been partial towards a witness. We see no need for any further enquiries to be made."

70. The Court of Appeal further observed that the factual evidence of the two police officer witnesses differed on the contested point, and that there were other witnesses on the same issue. It considered that this removed the basis for an allegation of bias, emphasising in particular that:

> "...there is absolutely no logical reason why, and no evidential basis for contending that, the juror would have preferred the evidence of [the police officer who gave the contested evidence] (and persuaded the other jurors to accept it) over [the second police officer] merely because the juror was a policeman."

e. *R v. Syed Shadat Ali* [2009] EWCA Crim 1763

71. Following his conviction for having an offensive weapon, the defendant appealed on the basis that his jury had included a police officer, based at Bethnal Green police station in London. Two police officers, based at Limehouse police station, London, had given evidence at his trial, and the defendant challenged the evidence they gave. All officers were members of the Metropolitan Police.

72. The Court of Appeal summarised the position as follows:

> "16. ... First, the question is obviously one of fact and degree and there is a measure of judicial discretion at the margins. Second and obviously each case will depend on its own facts. Third, again at the margins it is difficult to deduce clear cut principles which are to be applied."

73. The court recalled that Parliament had decided that generally speaking police officers should not be disqualified from serving on juries and continued:

> "17. ... We take note of the fact that the Metropolitan Police is a huge organisation, and we consider that it would be contrary to the Parliamentary intention if no Metropolitan Police officer could serve on a London jury in any case where significant evidence of a Metropolitan Police officer was challenged. The expression used in *Abdroikov*, 'the same local service background', cannot extend to service in any part of the whole of the Metropolitan Police area. In the case before the House of Lords where the appeal succeeded the officers served in the same borough. Mere casual contact with a London police station should not alone be regarded as significant since no doubt police officers from time to time make enquiries all over London and beyond. Certainly, in the present case there was a conflict of evidence, central to the issue in the case, between police officers and the appellant. It was, however, a conflict as to the officer's accuracy not as to their truthfulness and it was, we think, generally speaking a strong case and there was some support for the police account ... Lord Mance did not regard such a significant conflict of evidence as an automatic ground for disqualification and in this respect, he may be seen as having been in a majority with Lord Roger of Earlsferry and Lord Carswell who dissented in the result."

74. The court therefore concluded:

> "18. The judge is not therefore, in our judgment, to be regarded as being in error, in exercising his discretionary judgment to reject the submission because, first of all, although there was a significant conflict of evidence between the police officers and the appellant, Lord Mance did not consider that that was an automatic ground for disqualification, and secondly, because these officers were not within our understanding of *Abdroikov* from the same local service background. They were merely and only, for present purposes, all members of the Metropolitan Police."

75. The court also commented on the applicant's failure to challenge the presence of the police officer juror before the trial had commenced:

> "19. There is an added feature in this case. We are concerned with the putative view of the fair-minded observer. Such a putative person would have known that the fact that the juror was a police officer was published before the trial when the jury were being selected. The defendant then raised no objection although the nature of the impending evidential conflict must have been well known to him and those representing him. We think that the fair-minded observer would reckon that it was rather late in the day to take the point at a later stage which should have been taken, if at all, at the outset. The fact that the point was taken when it was is not fatal but it colours the court's approach to its persuasiveness. For these reasons the appeal against conviction is dismissed."

f. *R v. Tregalles* [2009] EWCA Crim 1638

76. In *R v. Tregalles*, the applicant appealed against his conviction of sixteen offences of rape, buggery and indecent assault involving his children. A member of his jury was a police officer, and she became the jury foreman. Prior to trial, she had advised the summoning officer of her occupation, but this information was not passed on to the judge and none of the participants of the trial were aware of it until after the jury had returned their verdicts and been discharged. When it became known, the police officer was questioned by the judge in the presence of counsel. She explained that she served in the Bolton Division of the Greater Manchester Police Force.

77. The Court of Appeal accepted that the defendant's evidence involved allegations of improper conduct in 1981 and 1991 by police officers of the Greater Manchester Police Force, although the officers appeared to have worked in different divisions to the police officer juror. The court noted that for the jury to accept that the defendant was telling the truth required them to accept that the police had behaved improperly on both occasions. However, it observed that the case did not involve contested police evidence, let alone a crucial dispute of evidence between the defendant and police witnesses: the police officers concerned in the events of 1981 and 1991 were not called as witnesses and their identities were not even known. It continued:

> "31. ... Thus the presence of a serving police officer on the jury cannot give rise to any question of partiality towards a witness (and there is not, and could not be, any suggestion of partiality towards the prosecution). The question of apparent bias depends in this case, as it seems to us, simply on whether a serving officer might be influenced to reject the appellant's evidence concerning events in 1981 and 1991 out of a sense of loyalty to the police and an unwillingness to accept the possibility of improper conduct on the part of another police officer, rather than making a fair assessment of the appellant's credibility on the basis of the evidence in the case."

78. In this regard, the court noted that the defendant's evidence regarding the police officers formed a relatively small part of the evidence as a whole. It further noted that the police officer on the jury served, so far as was known, in a different division from the officers concerned; she did not know who those officers were; and it was conceded by defence counsel that in the light of her apparent age she could not herself have been a serving officer at the time. It observed:

> "33. ... Those factors all militate against her assessment of the appellant's evidence ... being influenced by her position as a serving officer."

79. The Court concluded:

> "34. Taking all those matters into account, we have reached the conclusion that the case of apparent bias is not made out. We are satisfied that in the circumstances of this case a fair-minded and informed observer would not consider there to be a real possibility of bias arising out of the occupation of the juror. It is unfortunate that the juror's occupation was not communicated to the trial judge before the trial proceeded. It is likely that, out of an abundance of caution, the judge would have asked her to stand down if the position had been known. In the event, however, her presence on the jury did not affect the fairness of the appellant's trial or render the convictions unsafe."

g. *R v. L* [2011] EWCA Crim 65

80. In the case of *R v. L* the applicant was convicted of one count of attempted burglary and two counts of burglary. At trial, five police officers had given evidence as to his movements over the period in which the offences had taken place. Following the lodging of an appeal, the Court of Appeal invited the Registrar of Criminal Appeals to investigate the membership of the jury, and in particular the occupations of its members. These inquiries revealed that one juror was an employee of the Crown Prosecution Service ("CPS"), a second was a serving police officer and a third was a

retired police officer. As to the police officers, the serving police officer's role was administrative and he was non-operational. He had no knowledge of the defendant and no connection with those conducting the surveillance operation. He assumed that the Metropolitan Police was generally responsible for the operation which had led to the defendant's arrest and he was a member of that force. The retired police officer retired from the City Police in 2003. He had no connection with the surveillance operation in the case or with the Metropolitan Police.

81. The court explained that it was normal practice for the attention of the judge to be drawn to any information about potential jurors with specific occupations, such as the police, the Crown Prosecution Service and the Prison Service, whose role might be regarded as directed to and part of the overall prosecution of offences. It further observed that the form for the jury summons had been amended since the trial to include the following question:

> "If you are, or have been in the last five years, employed by any Police Force, Her Majesty's Prison Service or any prosecuting authority, please state your occupation, your employer and work place location. We may need to contact you about this."

82. The court acknowledged that what had happened in relation to the selection and empanelling of the jury in the appellant's case was unclear. It continued:

> "17. ... We know from the transcript that before the jury was sworn the Common Serjeant raised the issue with counsel. We have studied the transcript. He asked defence counsel whether there was any 'attack on police officers' so as to enable him to decide whether to 'enquire whether any of the jury members are serving officers or part of the prosecution services'. Counsel responded that there might well be criticism of the police and that it might be advisable to avoid any potential risks, and so the necessary enquiries should be made. Counsel accepted, however, that there would be no direct attack on any individual police officer, although he later said that there would be suggestions that police officers were 'incorrect factually or otherwise'. He then added that there would be observations that he would make towards the end of the case which would not fall 'particularly kindly on police ears'. In answer to a further direct question by the Common Serjeant, counsel confirmed that there was 'certainly not going to be any accusation of deliberate fabrication'. That response led the Common Serjeant to observe that this represented the dividing line on the issue. As we have indicated, counsel's answer at this stage was unfortunate. The reality was that, however uncomfortable it might be forensically, it was, as we look at the case now with the benefit of hindsight, inevitable that at least one of the officers would have to be addressed directly on the basis that his evidence was not true.
>
> 18. Counsel for the Crown suggested that if the issue was that police officers were mistaken rather than lying, then it 'may be proper' that police officers should be allowed to sit on the jury. With this information the Common Serjeant decided that no further steps should be taken in relation to the jury panel, and no further comments were made to the jury about the subject."

83. On appeal, defence counsel told the court, and the court accepted, that he had not been aware of any of these facts at the time. He submitted that he should have been informed of the occupations and that if he had known, quite apart from any specific objections to individual jurors, he would also have objected to a jury a quarter of whose members consisted of three individuals involved in or linked with "the prosecuting arm of the criminal justice system".

84. The court then turned to the facts of the case, addressing first the position of the two police officer jurors:

> "24. ... The retired former police officer did not have, and never had, any connection whatever with the police force, let alone any individual officers involved in the surveillance operation or who gave evidence at trial. There was no link whatever between him and the prosecution process. He was indeed long-retired.
>
> 25. The serving police officer is in a different position because he was at the time still a serving officer. However, he, too, had no link at all with the case or the prosecution witnesses or the surveillance operation, and in particular no contact or link with the only police witness whose evidence was to be challenged (even if not head-on), or the police station involved in the process, or the court to which the case had been committed. So, in accordance with the principles outlined in *Abdroikov* and [the applicants' case], we can see no reason why the position of either of these two jurors should cause any further concern or interest."

85. The appeal was in the event upheld on the ground of the participation of the CPS juror. However, having upheld the appeal on this limited basis, the court went on to consider the defence argument that the cumulative effect of the employments of the three jury members should have led to the quashing of the conviction. On this point, it noted:

> "33. ... In the context of random jury selection, questions of eligibility or disqualification or excusal are directed to individual potential jurors, not to the jury as a whole. It might be possible to envisage very exceptional

circumstances in which the end result of the random process could give rise to concerns about the appearance of jury impartiality even when, taking each individual juror on his or her own, there would be none. [Counsel for the defence] suggested in argument the possibility of twelve jurors, each one of whom was a serving police officer, about whom each one taken individually there could be no concern in the context of disqualification or excusal. It would, he suggested, not be unreasonable for the defendant at such a trial (or in the event of a conviction, the appellant), as well as properly informed, reasonable members of the public, to question the fairness of the process, again preferably before the trial started, or, if the fact only emerged after conviction, after trial.

34. We shall deal with the submission briefly. In the criminal justice process it is never wise to say 'never'. In the context of a situation which does not arise for decision, we simply record that this problem should be examined if and when it occurs. We have already indicated that it would be a very exceptional case if it were to occur. Given the valuable *Courts Service Guidance* and the provisions of the *CPS Code of Conduct* for its employees in the context of their potential as jurors, we think that the exceptional circumstances that we have in mind are most unlikely to arise."

C. Relevant aspects of a jury trial

1. The juror's oath

86. Once selected for jury duty, jurors must swear an oath or affirmation that they will:

"faithfully try the defendant and give a true verdict according to the evidence. "

2. Guidance to the jury

87. Prospective jurors and those called to sit as jurors are provided with guidance to ensure that they are alert to the need to bring any concerns about fellow jurors to the attention of the trial judge.

88. Jurors are also warned, by directions of the trial judge, of the importance of not discussing the case with anyone outside their number and are further directed to try the case on the basis of the evidence.

89. In *Montgomery v Her Majesty's Advocate* [2003] 1 AC 641, Lord Hope of Craighead noted:

"...the entire system of trial by jury is based upon the assumption that the jury will follow the instructions which they receive from the trial judge and that they will return a true verdict in accordance with the evidence."

3. Power to discharge jurors

90. The judge may discharge a juror whether due to illness or any other reason. The remainder of the jury may complete the hearing of the case and return a verdict provided that their number is not reduced below nine.

4. Secrecy of jury deliberations

91. Section 8(1) of the Contempt of Court Act 1981 states that it is a contempt of court to obtain, disclose or solicit any particulars of any statements made, opinions expressed, arguments advanced or votes cast by members of the jury in the course of their deliberations.

5. Verdicts

92. The jury's verdict is given in open court in the presence of all the jurors and the parties to the proceedings. Majority verdicts are possible. The minimum majorities possible are 11-1 or 10-2. In the case of a jury which has been reduced in number to ten or eleven members, the minimum permissible majorities are 9-1 or 10-1 respectively. A jury of nine members must be unanimous.

III. APPROACH IN OTHER RELEVANT JURISDICTIONS

A. Scotland

93. Jury selection in Scotland is governed by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 as amended. Section 1(1)(d) provides that those listed in Part I of Schedule 1 to the Act are ineligible for jury service. Part I of Schedule 1 includes the judiciary and others concerned with the administration of justice. The latter category in particular covers, inter alia, "constables of any police force".

94. In September 2008 the Scottish Government published a consultation paper on "The Modern Scottish Jury in Criminal Trials". The consultation paper sought views on whether the categories of ineligible persons should be maintained or amended. In December 2009, it published a follow-up paper, "The Modern Scottish Jury in Criminal Trials – Next Steps". It indicated that it did not intend to amend the list of ineligible persons as the responses to the consultation did not indicate a strong appetite for change. The paper further noted that there was:

> "... a strong indication from respondents that it would be unwise to open up jury duty to those who work within the justice system ..."

B. Northern Ireland

95. By virtue of article 3(3) of the Juries (Northern Ireland) Order 1996, persons listed in Schedule 2 to that Order are ineligible for jury service. Schedule 2 includes police officers.

C. Ireland

96. The Juries Act 1976 as amended regulates juries in Ireland. Section 7 of the Act provides that the persons specified in Part I of the First Schedule to the Act are ineligible for jury service. Part I of the Act lists persons concerned with the administration of justice and includes members of the *Garda Síochána*, the Irish police force.

97. In March 2010 the Law Reform Commission in Ireland published a consultation paper on jury service as part of its Third Programme of Law Reform 2008-2014. It considered the developments in other jurisdictions, commenting in particular on the New York Jury Project (see paragraph 121 below); the Morris Committee report (see paragraphs 36-37 above), the Auld Review and subsequent legislative changes in England and Wales (see paragraphs 39-42 above); the recent consultation exercise in Scotland (see paragraph 94 above); and the activities of the Law Reform Commissions of New South Wales and Western Australia (see paragraphs 110-111 and 112-115 below).

98. In its discussion of the ineligibility of police officers, the Commission noted, as regards the New York Jury Project:

> "3.70 The New York Jury Project concluded that the exemption of police officers from jury service was no longer justified on the basis that a large number of cases are not connected to the special training or presumed biases of police officers in that jurisdiction. This is particularly the case in terms of a large number of civil trials in the state of New York. However, this is not the situation in Ireland where the vast majority of cases requiring juries involve serious criminal offences." (footnotes omitted)

99. The paper concluded:

> "3.82 The Auld Review suggested that the trial judge, on a case-by-case basis, should resolve cases of this nature. However, this can only be achieved where the judge is aware of the presence of such jurors and is familiar with any possible connection to the case. The fact that this decision by the House of Lords was a majority decision suggests that the difference picked out in the cases does not provide any hard and fast rules. Having considered this issue at some length, the Commission has provisionally concluded that, since members of police forces have strong occupational cultures, there is scope for a likelihood of at least a perception of bias if Gardaí were permitted to serve on juries.
>
> 3.83 The Commission therefore considers that members of An Garda Síochána should continue to be ineligible for jury service. The Commission has come to this decision on the basis that the overwhelming majority of jury trials in this jurisdiction relate to the prosecution of criminal offences. It is possible that Garda jurors might legitimately have access to information about accused persons which would be inadmissible as evidence at trial and which would not be available to other jurors. Additionally, the Commission considers that it is important to maintain community confidence in the impartiality, fairness and unbiased nature of the jury system. The Commission considers that confidence in trial by jury will be called into question if members of the An Garda Síochána were eligible for selection as jurors ..."

100. The Commission therefore provisionally recommended that the exclusion be retained.

D. Malta

101. Article 604 of the Maltese Criminal Code provides that some occupational groups are exempted from serving as jurors. The list of exempted occupations includes police officers. Pursuant to Article 606, if the name of an exempted person is drawn to serve on a jury, it is not taken into

account and is considered as if it had not been drawn.

E. France

102. Pursuant to Articles 255 and 257 of the French Code on Criminal Procedure, police officers are not able to serve on juries.

F. Belgium

103. Article 224 of the Belgian Judiciary Code lists various occupations and functions which are excluded from jury service. While certain civil servants are excluded, the list does not refer to "police officers" as such. An assessment of whether individual officers fell within any other category listed would have to be made on a case by case basis.

104. Article 289 of the Code of Criminal Procedure allows an accused to challenge between six and twelve jurors without providing reasons.

G. Norway

105. Section 71(5) of the Administration of Courts Act 1915 (*domstolloven*) provides that police officers are not eligible for jury service.

H. Austria

106. Section 3 of the 1990 Act on Juries of Assizes and Lay Judges excludes police officers from serving on juries.

I. New Zealand

107. In New Zealand, the criteria for eligibility for jury service are set out in the Juries Act 1981. Section 8 of the Act contains a list of "certain persons not to serve", which includes police officers.

108. In February 2001, the New Zealand Law Commission published a report on Juries in Criminal Trials. It made a series of recommendations regarding jury services, but did not address whether police officers should continue to be excluded. A prior discussion paper published in July 1998, which highlighted aspects for consideration, did not suggest a possible reform of the police officer exclusion, although it did invite submissions on whether lawyers and barristers should continue to be excluded from jury service.

J. Australia

109. In each of the six Australian states as well as in its two major mainland territories police officers are ineligible for jury service.

110. In a report of September 2007, the New South Wales Law Reform Commission considered the developments in England and Wales and in New York. As to the New York Jury Project in particular, it noted the conclusion there that the exemption of police officers was not justified because of the large number of cases that did not implicate the special training or presumed biases of police officers, on which they could sit without any problem at all. The Commission continued:

> "This is not the case in NSW, where the vast majority of jury trials are of criminal matters."

111. It concluded:

> "4.71 It is our view that serving members of the core law enforcement agencies mentioned at the commencement of this section who are actually engaged in criminal investigation and law enforcement should continue to be ineligible. This follows from the fact that the vast majority of jury trials are criminal, and from the further fact that the primary job of these officers is the detection and charging of crime, so that it is likely that they would be aware of, or have access to, information concerning suspects that would not be available to private citizens and could not be adduced in evidence. In our view, it is important to maintain the community confidence in the impartiality and fairness of the jury system, which might be threatened if police or those centrally involved in criminal law enforcement were permitted to serve as jurors."

112. The Law Reform Commission of Western Australia reached a similar conclusion. In a discussion paper published in September 2009, the Commission discussed the changes in England and Wales following the Auld Review. It considered that there were good reasons for the exclusion

of justice-related occupations, noting that the integrity of the jury system depended upon its independence from government and impartiality to inspire public confidence in the criminal justice system. It further observed that, while some US states had abolished occupation-based exclusions, these jurisdictions had also established rigorous jury vetting practices to ensure that juries were as impartial and independent as possible. Such practices existed neither in Australia nor in England. It continued:

> "The failure of the Auld review (and the subsequent Criminal Justice White Paper) to properly appreciate the importance of the rationales underlying justice-related occupational exclusions has left the jury system in England vulnerable to criticism that it is not properly independent or impartial ...
>
> ... It is the Commission's strongly held view that, even without the attendant practical difficulties, the underlying rationale of juror independence from the justice system and the status of the jury as an impartial lay tribunal preclude adoption of the English approach in this jurisdiction. The Commission notes that various English judges and commentators have expressed the view that the fair trial of the accused is potentially at risk where judicial officers, police officers and lawyers can sit on juries. More importantly, the English House of Lords has found that the potential of bias in some cases where police officers and prosecutors have served on juries is such that the jury's verdict must be considered unsafe and the conviction quashed." (footnotes omitted)

113. Taking into account the experience in England, the Commission expressed the view that the current exclusion of police officers from jury service during the term of their employment and for five years thereafter should remain in place. It found the following points to be persuasive:

> "• the integral role that police officers play in the detection and investigation of crime and prosecution of criminal charges;
>
> • the fact that police officers have ready access to information that may concern an accused or witness and that is not available to lay jurors and may not be adduced in evidence;
>
> • the potential for partiality of police-jurors toward the prosecution or the evidence of fellow officers, whether real or apparent;
>
> • the risk of unsafe verdicts should a police-juror know or be known to a witness or prosecutor or an accused in a trial;
>
> • the appearance to an accused that he or she would not receive a fair trial where a police-juror was empanelled; and
>
> • the need to preserve public confidence in the impartial administration of criminal justice." (footnotes omitted)

114. In its final report of April 2010, the Commission noted that, as to its proposal to maintain the ineligibility of police officers to service on juries, the vast majority of submissions it received in reply supported the proposal. Indeed, the only submission opposing it came from the Department of the Attorney-General, on the basis that the removal of the exclusion would increase the size of the jury pool as well as its representative nature.

115. The Commission concluded:

> "Studies undertaken in this area suggest that a police culture of 'group loyalty' does exist and that it is both widespread and influential ... As mentioned earlier, the English Court of Appeal has warned that the potential for a police-juror to accept at face value a fellow officer's evidence where that evidence is disputed may be enough to put in doubt the safety of a verdict to convict.
>
> Taking into account the perception by the accused that he or she would not receive a fair trial if a police officer were empanelled on the jury, the potential for unsafe verdicts and the need to maintain public confidence in the jury system, the Commission considers that the risks of permitting a police officer to serve on a jury far outweigh any benefit that can be gained by a small increase to the jury pool ..." (footnotes omitted)

116. A discussion paper published by the Queensland Law Reform Commission in June 2010 also reviewed the developments which had occurred in other jurisdictions. As to the ineligibility of police officers to serve, the paper noted:

> "7.157 Where police officers have a connection with the case at hand, or are known to the witnesses, prosecutors, defendant or other participants in the trial, their presence on a jury would constitute a clear case of potential bias which ought to be avoided.
>
> 7.158 Aside from specific instances like those, however, it may be thought that police officers would be no more susceptible to prejudices or biases than any other potential juror. Lord Justice Auld suggested as much in recommending that police officers be made liable to perform jury service in England and Wales:

...

7.159 A significant body of research has, however, demonstrated that 'police as a group are generally suspicious and primed to see deception in other people' and 'tend to make prejudgments of guilt, with confidence, that are frequently in error'. In the United States, police training has been found to enhance this 'guilt-presumptive process': trained investigators 'were significantly less accurate, more confident, and more biased toward seeing deception'. Thus, police officers may not merely be prone, like everyone else, to any number of a range of personal prejudices or biases but predisposed, by virtue of their profession, to assume guilt. This is not a criticism of police, but a reflection of the nature of their profession and training.

7.160 ... Regardless of whether an individual officer is directly connected with a particular case or a trial's participants, and whether or not he or she personally is biased towards the prosecution, it would seem to be inimical to include those identified with one of the two opposing sides of the adversarial contest in the pool of ordinary community members whose task is to judge – with impartiality and independence – the contest between those two sides." (footnotes omitted)

117. The Law Reform Commission's provisional recommended that police officers should continue to be ineligible for jury service.

K. Canada

118. In nine of the ten provinces of Canada (excluding Quebec, where the right to a jury trial is an exceptional one), legislation provides that police officers are excluded from jury service.

L. United States of America

119. The Jury Selection and Service Act 1968 is the federal legislation which governs juries in the United States. Section 1863(6) sets out three categories of persons who are not permitted to serve on juries on the ground that they are exempt from service, namely members in the active service of the armed forces, members of the fire or police department and public officers in the executive, legislative or judicial branch of federal, state or local government actively involved in the performance of official duties.

120. Paragraph 1866(c)(3) provides that any person summoned for jury service may be excluded upon peremptory challenge, i.e. challenge without cause shown, as provided by law. Paragraph 1866 (c)(4) provides that a person may be challenged pursuant to the procedure specified by law upon a challenge for good cause shown.

121. In the state of New York, a report to the Chief Judge, *The Jury Project*, was published on 31 March 1994 ("New York Jury Project"). The report proposed that all automatic exemptions and excusals from jury service be eliminated. It noted that New York had the most extensive list of occupational and related exemptions in the United States, and that half of the states outside New York had either reduced or completely abolished occupational jury exemptions. As regards the exemption of police officers, the report explained:

"Other occupational exemptions (notably those for doctors and law enforcement officers) are often justified on the ground that these individuals would not be appropriate jurors in particular cases (physicians in malpractice and some tort cases; police officers in criminal cases). Putting aside the dubiousness of this proposition, there are obviously a large number of cases that do not implicate the special training or presumed biases of doctors and police officers, on which they could sit without any problem at all." (footnotes omitted)

122. The New York Judiciary Law now contains no automatic exemption for police officers. However, the possibility for the defence to make a number of peremptory challenges remains, pursuant to Article 270.25 of the Criminal Procedure Law.

M. Hong Kong

123. Section 5 of the Jury Ordinance exempts from service as jurors members of the Hong Kong Police Force.

124. A June 2010 report by the Law Reform Commission of Hong Kong reviewed the applicable criteria for service as jurors. It considered the position in other common law jurisdictions and examined the Auld Review and the subsequent legislative amendment in England and Wales to allow police officers to serve on juries. The report noted:

"5.107 Members of the Hong Kong Police Force... are generally perceived as part of the prosecution process ...

> We took the view in our consultation paper that these persons should be excluded from jury service to avoid a perception of bias ...
>
> 5.108 We received strong support for this recommendation and maintain our view that members of the Hong Kong Police Force... should be exempt from jury service."

125. The Law Reform Commission accordingly recommended that members of the police force should continue to be exempt from service as jurors.

THE LAW

I. JOINDER

126. Given their similar factual and legal background, the Court decides that the two applications should be joined pursuant to Rule 42 § 1 of the Rules of Court.

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

127. The applicants complained that the presence of a police officer on the jury denied them the right to a fair trial by an independent and impartial tribunal as provided in Article 6 § 1 of the Convention, which reads as follows:

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

128. The Government contested that argument.

A. Admissibility

129. The Court notes that the applications are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

a. The applicants

130. The applicants clarified that they did not consider the participation of police officers on juries in itself to violate Article 6 § 1 of the Convention. However, in the view of the first applicant, there would be a breach where a police officer was a member of the jury and the evidence of police officers called as witnesses was important to the prosecution case and likely to be challenged in cross-examination. The second applicant made a slightly different submission, contending that there would be a breach where a police officer was on the jury and the trial involved evidence gathered by police officers with whom the police officer juror would have, at the very least, some form of collegiate interest. Both applicants argued that the relevant circumstances arose in the present case.

131. They considered that the assumption that a jury would follow the instructions of the trial judge and decide the case on the evidence before them did not prevent cases where juries failed to do so. In particular, they contended that the ability of directions to counter jury bias was limited, and emphasised the prohibition on inquiring into the jury's deliberations (see paragraph 91 above). Further, the random selection of the jury and the fact that they served for a limited period had, in their view, no bearing on the potential bias of police officers on juries.

132. The applicants referred to the Morris Committee report of 1965 (see paragraphs 36-37 above), which expressed strong opposition to the idea of police officers serving on juries, as more helpful than the recent Auld Review (see paragraphs 39-41 above). While they accepted that people might no longer defer to professionals or to those holding a particular office to the extent that they previously did, there was in their view no doubt that a police officer with experience of dealing with

searches in drugs cases would have knowledge and experience which would enable him to exert undue influence over his fellow jurors by reference to matters within his knowledge that were not in evidence before the jury. They also relied on the views of the Association of Chief Police Officers summarised in the Morris Committee report (see paragraph 37 above) and considered that it was unclear what had changed between 1965 and 2003 to remove this fundamental objection to police officers serving on juries.

133. The applicants further argued that A.T. did not act openly and responsibly in his disclosure to the trial judge. Indeed, they contended that A.T. misled the court by stating only that he was a dog handler and making no mention of his work as a handler of drugs detection dogs and his own participation in searches of premises for drugs on a number of occasions (see paragraphs 12 and 18 above). In doing so, he gave the impression that his own line of work was far removed from the sort of case that the jury was trying when it was clear that A.T. had specialist knowledge of the way in which drug dealers operate. It made no difference that the evidence of M.B. was being challenged as inaccurate, rather than untruthful (see paragraph 25 above). Further, although the evidence of M.B. was supported by other witnesses, it was important to recall that these witnesses were also police officers (see paragraph 11 above) and thus could not be considered to address concerns regarding impartiality.

b. The Government

134. The Government emphasised that the subjective impartiality of juries had to be presumed until there was proof to the contrary (citing *Kyprianou v. Cyprus* [GC], no. 73797/01, ECHR 2005-XIII). As to objective impartiality, they referred to the Auld Review and to the findings of Lord Bingham, Lord Rodger and Lord Carswell in *Abdroikof and Others* (see paragraphs 39-41, 43, 47-49 and 52 above) to support their contention that the participation of police officers was not in itself incompatible with Article 6 § 1. Whether there was a real possibility of bias was a matter to be determined on the facts of the particular case. The Government further observed that police officers were called for jury service in their capacity as citizens required to perform an important civic duty, and not in their capacity as police officers.

135. The Government submitted that there was no violation of Article 6 § 1 as a result of the presence of A.T. on the jury in the present case. Referring to the case-law of the Court on the question of the impartiality of juries in the United Kingdom, they emphasised that the essential question was whether the applicants' doubts were objectively justified and, in this connection, account had to be taken of the part played by the judge and the measures which were designed to ensure, so far as possible, that the applicants would receive a fair trial.

136. The Government argued that it would be illogical and unprincipled to suggest that a police officer from a particular police force could not serve as a juror in any case where another officer from that force or any other force was to give evidence, regardless of the nature of the evidence or the connection between the officers. They further considered that A.T. had acted openly and responsibly by sending the note to the trial judge and disclosing that he was a police officer and that he knew M.B. (see paragraph 12 above). When questioned, A.T. explained that he did not know M.B. socially and that they had worked together on only three occasions but not in the same duty group nor at the same police station. Significantly in the Government's view, A.T. stated that he did not know anything about M.B. which would affect his ability to judge M.B.'s evidence impartially or to return a true verdict according to the evidence (see paragraph 12 above). Further, there was no question of A.T. having any connection with those responsible for the conduct of the prosecution. It was also important to recall that A.T. would have received directions from the trial judge to determine the case solely on the evidence.

137. In light of the evidence in the case and the Court of Appeal's comments regarding the first applicant's almost "farcical" explanation for his mobile phone records (see paragraph 25 above), the Government concluded that there was no possibility that a fair-minded observer would consider that the jury's decision to convict was based on any alleged partiality on the part of A.T. As regards the second applicant, he made no challenge to the prosecution evidence and no police witnesses were called to establish his guilt (see paragraph 28 above); there was accordingly no evidence of partiality.

2. The Court's assessment

a. General principles

138. The Court recalls that it is of fundamental importance in a democratic society that the courts inspire confidence in the public and above all, as far as criminal proceedings are concerned, in the accused. To that end it has constantly stressed that a tribunal, including a jury, must be impartial from an objective as well as a subjective point of view (see *Hauschildt v. Denmark*, 24 May 1989, § 46, Series A no. 154; *Kyprianou*, cited above, § 118; *Pullar v. the United Kingdom*, 10 June 1996, § 30, *Reports of Judgments and Decisions* 1996-III; and *Gregory v. the United Kingdom*, 25 February 1997, § 43 *Reports* 1997-I).

139. Further, the personal impartiality of a judge or a jury member must be presumed until there is proof to the contrary (see *Piersack v. Belgium*, 1 October 1982, § 30, Series A no. 53; *Kyprianou*, cited above, § 119; *Sander v. the United Kingdom*, no. 34129/96, § 25, ECHR 2000-V; and *Szypusz v. the United Kingdom*, no. 8400/07, § 80, 21 September 2010).

140. As to whether the court was impartial from an objective point of view, this Court must examine whether in the circumstances there were sufficient guarantees to exclude any objectively justified or legitimate doubts as to the impartiality of the jury bearing in mind that the misgivings of the accused, although important, cannot be decisive for its determination (see *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98, 39651/98, 43147/98 and 46664/99, § 194, ECHR 2003-VI; *Gregory*, cited above, § 45; *Sander*, cited above, § 27; and *Szypusz*, cited above, § 81). While the need to ensure a fair trial may, in certain circumstances, require a judge to discharge an individual juror or an entire jury it must also be acknowledged that this may not always be the only means to achieve this aim. In other circumstances, the presence of additional safeguards will be sufficient (see *Gregory*, cited above, § 48; and *Szypusz*, cited above, § 81).

141. Finally, the Court has previously held that it does not necessarily follow from the fact that a member of a tribunal has some personal knowledge of one of the witnesses in a case that he will be prejudiced in favour of that person's testimony. In each individual case it must be decided whether the familiarity in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal (see *Pullar*, cited above, § 38).

b. Application of the general principles to the facts of the case

142. As noted above, the personal impartiality of a jury member is presumed until there is proof to the contrary. The Court observes that there is no evidence of actual partiality on the part of A.T. during the trial and it will accordingly examine whether there were sufficient guarantees to exclude any objectively justified doubts as to his impartiality.

143. The Court recognises at the outset that there were a number of safeguards present in the applicants' case. First, A.T. was one of twelve jurors, selected at random from the local population. Second, before commencing service, he was required to swear an oath or to make a solemn affirmation that he would faithfully try the case and give a true verdict according to the evidence (see paragraph 86 above). Third, he and his fellow jurors would have been advised, in accordance with the standard jury guidance, to bring any concerns to the attention of the trial judge and not to discuss the case with anyone outside the jury (see paragraphs 87-88 above). Fourth, in line with normal practice, A.T. would have received directions from the trial judge as to how to approach the case and the evidence presented (see *Pullar*, cited above, § 40). Fifth, A.T. drew to the attention of the trial judge the fact that he was a police officer and knew M.B. and the trial judge arranged for A.T. to be questioned, allowing more detailed information as to his acquaintance with M.B. and his knowledge of the applicants to be ascertained (see paragraph 12 above). Thus far, the safeguards operated in the manner intended to guarantee the applicants' right to a fair trial. The effectiveness of such safeguards can be seen in cases such as *Gregory* and *Pullar*, both cited above. The question in the present case is whether these safeguards were sufficient to exclude objectively justified concerns regarding the jury's impartiality arising from the continued presence of A.T. on the jury.

144. The Court observes that the recent amendment to the legislation of England and Wales allowing police officers to serve on juries resulted in a departure from the approach followed in most of the jurisdictions examined above (see paragraphs 93-125). Indeed, of the jurisdictions surveyed, only in New York and Belgium are police officers permitted to serve on juries (see paragraphs 103

and 121 above), and it is to be recalled that in both jurisdictions, unlike in England, peremptory challenges are permitted (see paragraphs 104 and 122 above). Significantly, within the United Kingdom, the Scottish Government, following a consultation exercise conducted after the changes in England and Wales had entered into force, decided against making any change to the Scottish legislation which precludes police officers from serving (see paragraph 94 above). In Northern Ireland, as recently as 1996 it was decided to exclude police officers from jury service (see paragraph 95 above) and that remains the position today. The Court further observes that the question of participation of police officers on juries has been examined in detail by several law reform commissions since the introduction of the amended legislation in England and Wales (see paragraphs 97-100, 110-117 and 124-125 above). Both the Irish and New South Wales commissions pointed to the high number of civil trials in New York compared to their respective countries, where a greater proportion of trials were of criminal matters (see paragraphs 98 and 110 above). The Law Reform Commission of Western Australia highlighted the rigorous jury vetting practices in place in the United States, which did not exist in England or in Australia (see paragraph 112 above). Other reports commented on studies demonstrating the existence of a police culture of group loyalty and a tendency to assume guilt and on the problems encountered in England since the amendment of the 1974 Act (see paragraphs 99, 112, and 115-116 above). None of the commissions recommended allowing police officers to serve as jurors (see paragraphs 100, 108, 111, 115, 117 and 125 above).

145. The Court is therefore persuaded that the effect on the applicants of the change in the law requires particularly careful scrutiny. However, it notes in this regard that the applicants are not seeking to challenge the legislation which permits police officers to participate in jury service (see paragraph 130 above). The Court is therefore not required in the present case to assess the extent to which the legislative changes to jury service in England and Wales comply with the requirements of Article 6 § 1 of the Convention but must examine whether, in the circumstances of the applicants' case, the service of A.T. on the jury was compatible with Article 6 § 1.

146. Turning to the case of the first applicant, the Court notes that his defence depended to a significant extent upon his challenge to the evidence of the police officers, including M.B., that there was no passenger in his car during his journey from Sheffield to Luton. There was therefore a clear dispute between the defence and the prosecution regarding the evidence of the police officers, a dispute which the trial judge considered to be "a conflict of some importance within the case" (see paragraph 13 above).

147. The Court recalls that, in quashing the conviction in the second appeal in *Abdroikof and Others*, Lord Bingham noted that there was a crucial dispute on the evidence between the appellant in that case and the police officer witness and that the officer witness and the officer juror, although not personally known to one another, shared the same local service background (see paragraph 46 above). Similarly, in allowing the second appeal Baroness Hale also emphasised the connection between the officer witness and the officer juror (see paragraphs 50-51 above), as did Lord Mance (see paragraph 54 above), and in refusing the first appeal, Baroness Hale observed that no important issue in that case turned on a conflict between police and defence evidence.

148. The Court is of the view that, leaving aside the question whether the presence of a police officer on a juror could ever be compatible with Article 6, where there is an important conflict regarding police evidence in the case and a police officer who is personally acquainted with the police officer witness giving the relevant evidence is a member of the jury, jury directions and judicial warnings are insufficient to guard against the risk that the juror may, albeit subconsciously, favour the evidence of the police. In the present case, A.T. had known M.B. for ten years and although not from the same station, had on three occasions worked with him in the investigation of the same incident (see paragraph 12 above). Further, the other witnesses who supported M.B.'s account of events were also police officers (see paragraph 11 above). The Court recalls the conclusion of the Court of Appeal that the first applicant's defence witness was not a witness of good character and that his explanation for the records of the use of his mobile phone and the discovery of heroin in his car "bordered on the farcical" (see paragraph 25 above). However, it is not for this Court to make its own assessment of the evidence presented at trial and, in particular, of the first applicant's explanation for the evidence against him. Such assessment was for the members of the jury, who were required pursuant to Article 6 to be impartial.

149. The Court accordingly finds that there has been a violation of Article 6 § 1 of the

Convention in respect of the first applicant as he was not tried by an impartial tribunal.

150. The Court recalls the applicants were co-defendants in one set of criminal proceedings and that they were convicted by the same jury. In these circumstances, the Court considers that, having found in its examination of the first applicant's complaint that the jury in the case could not be considered to constitute an "impartial tribunal" in light of A.T.'s presence, it would be artificial to reach a different conclusion regarding the "tribunal" which tried the second applicant. Thus, notwithstanding the fact that the jury was required to try the case against each applicant separately and was permitted to come to different verdicts in respect of each applicant, the Court considers that there has also been a violation of Article 6 § 1 in respect of the second applicant.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

151. 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. Damage

152. The first applicant claimed 100,000 pounds sterling (GBP) and the second applicant claimed GBP 200,000 in respect of non-pecuniary damage caused by the suffering and distress occasioned by their imprisonment.

153. The Government contended that the applicants' claims were misconceived as the Court had frequently made it clear that it was unwilling to speculate as to whether the outcome of domestic proceedings would have been different had they complied with Article 6 (citing *Findlay v. the United Kingdom*, 25 February 1997, §§ 85 and 88, *Reports* 1997-I; and *Saunders v. the United Kingdom*, 17 December 1996, § 86, *Reports* 1996-VI). In any case, the applicants' claims were not particularised and the basis for the figures was unclear. The Government invited the Court to conclude that the finding of a violation would constitute sufficient satisfaction in the circumstances of the case.

154. The Court recalls that it has found a violation of Article 6 § 1 of the Convention in that the applicants were not tried by an impartial tribunal. However, it does not follow from this finding that the applicants were wrongly convicted and it is impossible to speculate as to what might have occurred had there been no breach of the Convention (see *Findlay*, cited above, § 88; *Perote Pellon v. Spain*, no. 45238/99, § 58, 25 July 2002; *Edwards and Lewis v. the United Kingdom* [GC], nos. 39647/98 and 40461/98, §§ 46 and 49, ECHR 2004-X; and *Popovitsi v. Greece*, no. 53451/07, § 36, 14 January 2010).

155. The Court considers that the finding of a violation constitutes sufficient just satisfaction in this case and rejects the applicants' claims in respect of non-pecuniary damage.

B. Costs and expenses

156. The first applicant claimed GBP 4,112.50, inclusive of VAT, for the costs and expenses incurred by counsel in the proceedings before the Court. This sum represented ten hours' work charged at GBP 350 per hour. He further claimed solicitors' costs of approximately GBP 375, plus VAT. The second applicant claimed GBP 587.50, inclusive of VAT, for solicitors' fees and GBP 1,175, inclusive of VAT, in respect of counsel's fees.

157. The Government considered that the sum claimed in respect of the first applicant's counsel was unreasonable and excessive. They noted in particular that the written observations by the first applicant were almost identical to those submitted by the second applicant. They further observed that the first applicant's solicitors' costs were not particularised. As regards the second applicant, they accepted that the amount claimed represented a reasonable sum.

158. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, although the first applicant failed to provide any detailed breakdown of the costs allegedly incurred by his solicitors, the Court notes that he has

been represented by solicitors throughout the proceedings. In the circumstances the Court considers it reasonable to award the sum of EUR 500 in respect of solicitors' fees and EUR 4,000 in respect of counsel's fees for the proceedings before the Court. The Court considers it reasonable to award the costs and expenses requested by the second applicant in full and therefore makes an award of EUR 2,000 under this head.

C. Default interest

159. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join the applications;

2. *Declares* the applications admissible;

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

4. *Holds*
   (a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 4,500 (four thousand five hundred euros) to the first applicant and EUR 2,000 (two thousand euros) to the second applicant in respect of costs and expenses, both sums to be inclusive of any tax that may be chargeable and to be converted into pounds sterling at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 20 December 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early Lech Garlicki
Registrar President

HANIF AND KHAN v. THE UNITED KINGDOM JUDGMENT