



Difficulties for defence caused by infiltration and observation methods were counterbalanced by adequate procedural safeguards

In today's Chamber judgment¹ in the case of [Van Wesenbeek v. Belgium](#) (application no. 67496/10) the European Court of Human Rights held:

unanimously, that there had been no violation of Article 6 § 1 (right to a fair hearing) of the European Convention on Human Rights, on account of a lack of access to a confidential case file, and

by four votes to three, that there had been no violation of Article 6 §§ 1 and 3 (d) (right to examine witnesses) of the Convention on account of the applicant's inability to examine undercover officers, or have them examined,.

The case concerned the use of special methods of searching, observation and infiltration during an investigation against the applicant.

The Court found in particular that the lack of access to the confidential case file had been justified and sufficiently compensated for by the supervision of the Indictments Division.

It took the view that there were serious grounds to justify the refusal of the Belgian courts to call the undercover officers for examination by the defence. While the admission of their written statements might have caused difficulties for the defence, those difficulties had been counterbalanced by adequate procedural safeguards.

Principal facts

The applicant, Adrianus Van Wesenbeek, is a Dutch national who was born in 1961 and lives in Beveren (Belgium).

On 10 May 2006 the Crown Prosecutor of Hasselt agreed to a proactive investigation against the applicant and a number of other suspects, on suspicion of drug trafficking, participation in an international criminal organisation and money laundering, among other offences. The proactive investigation involved special observation and infiltration methods.

In accordance with Articles 47septies § 1 and 47nonies § 1 of the Code of Criminal Procedure, a separate, confidential case file was constituted. Two reports containing details of the evidence gathered through the use of those special measures were added to the ordinary criminal case file.

On 18 September 2008 the Crown Prosecutor requested the investigating judge of the Court of First Instance of Hasselt to open a judicial investigation. The judge then headed a "conventional" investigation. The observation and infiltration continued until 14 June 2009, when a number of suspects, including Mr Van Wesenbeek, were arrested and remanded in custody.

The Indictments Division of the Antwerp Court of Appeal had the task of verifying the conformity of the confidential file with the evidence in the criminal case file and of ensuring that there was no

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

irregularity. In an interlocutory judgment of 20 May 2010 it took the view that some documents concerning the special measures should be added to the case file, which was the case for the prosecutor's decisions confirming the existence of authorisations for observation and infiltration, respectively, and a report giving details of the criminal organisation and the confirmations obtained by using those special investigative methods. In a judgment of 24 June 2010 the Indictments Division decided that the file was complete and that there was no nullity, irregularity or breach of any statutory or Convention provision; nor had any irregularities proceeded from the implementation of the special investigation methods.

Mr Van Wesenbeeck appealed on points of law, complaining that the criminal case file did not contain the report on the basis of which the Crown Prosecutor had opened a proactive investigation or the documents about the latter. The Court of Cassation dismissed his appeal.

Mr Van Wesenbeeck was committed to stand trial. In a judgment of 16 March 2011 of the Hasselt Court of First Instance, he was sentenced to ten years' imprisonment and a fine of 137,500 euros for drug trafficking, participation in a criminal organisation and money laundering. The Antwerp Court of Appeal upheld the judgment on 23 June 2011 and the Court of Cassation dismissed the applicant's appeal on 20 March 2012.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to a fair hearing), the applicant complained about the lack of access to the confidential file. Under Article 6 § 3 (d) (right to examine witnesses), he complained that he had been unable to examine the undercover officers, or to have them examined.

The application was lodged with the European Court of Human Rights on 19 November 2010.

Judgment was given by a Chamber of seven judges, composed as follows:

Işıl **Karakaş** (Turkey), *President*,
Julia **Laffranque** (Estonia),
Paul **Lemmens** (Belgium),
Valeriu **Griţco** (the Republic of Moldova),
Ksenija **Turković** (Croatia),
Stéphanie **Mourou-Vikström** (Monaco),
Georges **Ravarani** (Luxembourg),

and also Hasan **Bakırcı**, *Deputy Section Registrar*.

Decision of the Court

[Article 6 § 1 and Article 6 § 3 \(d\)](#)

The Court observed that the defence's inability to consult a separate, confidential file, containing authorisations and reports on special investigation methods, was compatible with the requirements of Article 6 § 1.

First, the confidential file had been necessary to protect the anonymity and therefore the safety of the undercover officers and to ensure that the methods used were kept secret. Secondly, the Belgian legislature had limited the evidence in the confidential file to documents that were likely to compromise the identity and safety of the individuals concerned and the very use of the special methods.

As to the fact that the confidential file was kept by the public prosecutor and that it was for a senior officer (*officier de police judiciaire*) to sort through the confidential reports in order to find any

evidence that could be transferred to reports for the case file, the Court noted that the lawfulness of the implementation of the special investigation methods had been subject to the supervision of the Appeal Court's Indictments Division. The Court found that this Division had been able to examine whether evidence in the confidential file should not be added to the case file. In the Court's view, the supervisory role of the Indictments Division, an independent and impartial body, constituted a significant safeguard.

As to Mr Van Wesenbeeck's alleged inability to verify whether there had been entrapment on the part of the undercover officers, the Court found that the applicant had not backed up his allegations with facts. It was therefore not persuaded that the situation fell within the category of entrapment.

The Court concluded that the restriction of defence rights had been justified and sufficiently compensated for by the supervisory role of the Indictments Division. There had therefore been no violation of Article 6 § 1 of the Convention.

As to the refusal of the Belgian courts to grant the applicant's request to call the undercover officers for examination by the defence, the Court pointed out that it had previously found that it was an essential tool in the fight against organised crime to enable undercover police operatives to supply information anonymously. However, anonymous witness could only be used in exceptional circumstances. In the present case the domestic courts had taken the view that the safety of the undercover officers and the importance of anonymity with a view to their work on other cases had precluded their examination in court. For the Court these were serious and legitimate grounds which, moreover, were based on objective and concrete factors.

In assessing the degree of importance of the written statements of the absent witnesses, the Court found that the domestic courts had also based their view on other evidence in order to establish the truth and justify a guilty verdict. That being said, it was convinced that the statements in question had undoubtedly been given weight and that their admission in evidence might have caused difficulties for the defence.

The Court thus turned to the question of procedural safeguards during the trial, to ascertain whether or not there were adequate compensatory elements to counterbalance those difficulties. It observed that the Indictments Division had not examined the undercover officers but had checked their identity and reliability in ensuring the lawfulness of their actions. In addition, it had been possible to compare the reports drawn up by the two officers and their results and the defence had been able to call witnesses, some of whom had been examined as to the allegations about the undercover officers

The Court thus found that Mr Van Wesenbeeck had been able to challenge the evidence gathered through the intervention of the undercover officers and that there were adequate procedural safeguards to counterbalance the difficulties caused to the defence. There had thus been no violation of Article 6 §§ 1 and 3 (d) of the Convention.

Separate opinion

Judges Karakaş, Laffranque, and Turković expressed a separate opinion, which is annexed to the judgment.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.