# Judgments - Regina v Lyons and others (Appellants) (on appeal from the Court of Appeal (Criminal Division)

**HOUSE OF LORDS**

Lord Bingham of Cornhill Lord Hoffmann Lord Hutton Lord Hobhouse of Woodborough Lord Millett Court of Appeal: [2001] EWCA Crim 2860

**OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT**

**IN THE CAUSE**

*REGINA*

*v.*

*LYONS AND OTHERS*

*(APPELLANTS)*

*(ON APPEAL FROM THE COURT OF APPEAL (CRIMINAL DIVISION)*

*ON 14 NOVEMBER 2002*

*[2002] UKHL 44*

**LORD BINGHAM OF CORNHILL**

My Lords,

1. The four appellants appeal against the refusal of the Court of Appeal (Criminal Division) in 2001 to quash convictions recorded against them in 1990: [2002] 2 Cr App R 210, [2001] EWCA Crim 2860. They contend that their convictions should be quashed because the prosecution case against them at trial depended in significant part on answers given by them to inspectors armed with statutory power to compel answers. The admission of evidence of these answers at trial has since been held by the European Court of Human Rights, in the case of all the appellants, to infringe their right not to incriminate themselves and so to violate their right to a fair trial guaranteed by article 6 of the European Convention on Human Rights ("the

convention"). The essential question before the House is whether, in view of these rulings by the European Court, the appellants' convictions should now be quashed.

The factual background

2. In 1986 Guinness plc made an offer to buy the shares of the Distillers Company plc. The offer included an exchange of Guinness shares for Distillers shares. The higher the value of the Guinness shares, the more valuable the offer and thus the more attractive to Distillers shareholders. It was suspected that the four appellants, in different capacities and in different ways, had acted to inflate the price of Guinness shares in the market in order to promote acceptance of its offer. Inspectors were appointed to investigate the affairs of Guinness under Part XIV of the Companies Act 1985. By virtue of section 434 of that Act it became the duty of the appellants as officers or agents of Guinness to attend before the inspectors when required to do so and to give the inspectors all the assistance they were reasonably able to give. Failure to comply was punishable as contempt of court (section 436). Section 434(5) of the Act provided:

> "An answer given by a person to a question put to him in exercise of powers conferred by this section … may be used in evidence against him"

As Lord Hoffmann points out (see paragraphs 22 and 33 below), provisions and rules having this effect have a long ancestry. The appellants answered questions put to them by the inspectors.

3. An indictment containing some 24 counts was preferred charging the appellants variously with offences of conspiracy, false accounting, theft and other offences. At the appellants' trial, which lasted for some 6 months during 1990, the prosecution relied in support of its case against the appellants on transcripts of the evidence they had given to the inspectors. On 27 and 28 August 1990 the jury convicted each of the appellants on 4 or more of the counts in the indictment.

4. Before the trial there had been 2 hearings to rule on the admissibility of evidence. At the first, held in November 1989, Mr Parnes sought to exclude the transcripts relating to him on the grounds provided in sections 76 and 78 of the Police and Criminal Evidence Act 1984. Henry J ruled that the transcripts were admissible, for reasons summarised by the European Court in *Saunders v United Kingdom* (1996) 23 EHRR 313 at 319, in paragraph 28 of its judgment. At the second hearing, in January 1990, Mr Saunders sought to exclude evidence of answers given by him at the last 2 of his 9 interviews with the inspectors. In reliance on sections 76 and 78 of the 1984 Act, he contended that this evidence should be excluded because of his state of health at the time of those interviews and because they took place after he had been charged. The judge ruled, in the exercise of his discretion under section 78, that the evidence of these last 2 interviews should be excluded on the second (but not the first) of the grounds relied on. Mr Lyons and Mr Ronson did not apply to exclude evidence of their answers. At the trial, Mr Saunders, alone of the appellants, gave evidence. Mr Ronson relied on what he had said and written to the inspectors.

5. All four appellants appealed against conviction, although Mr Lyons abandoned his appeal on grounds of ill-health in December 1990. The Court of Appeal gave judgment on 16 May 1991 and dismissed the appeals, save that Mr Saunders' conviction on one count was quashed and (on appeals against sentence) certain sentences and costs orders imposed and made by the judge were reduced. At pages 27-28 of the transcript of its judgment of 16 May the Court of Appeal said:

> "At the end of counsel's submissions it was made clear to the court that counsel for Mr Parnes and for Mr Saunders might wish to address further arguments to the court as to the admissibility of statements made by these appellants in the course of their interviews with the DTI inspectors. It is now accepted, however, that the question of admissibility has been determined, as far as this court is concerned, by the decision given on 9 May 1991 by another division of this court presided over by Watkins LJ in *R v Seelig* [(1992) 94 Cr App R 17]"

Mr Seelig was a defendant charged with offences, also arising out of the Guinness takeover of Distillers, whose trial had been scheduled to follow that of the appellants. In the reported case, evidence of answers compulsorily given to inspectors was held to be properly admissible (see pages 22-23).

6. Mr Saunders made application to the Commission complaining that the use at his trial of statements made by him to the inspectors acting under their compulsory powers had deprived him of a fair hearing in violation of article 6(1) of the convention. On 10 May 1994 the Commission found, by a large majority, that there had been such a violation.

7. The appellants' case was referred back to the Court of Appeal by the Home Secretary under section 17(1)(a) of the Criminal Appeal Act 1968 and a further hearing took place over 8 days in 1995. The judgment of the court, delivered on 27 November 1995, is reported at (1996) 1 Cr App R 463. The "first broad ground of appeal" (page 473) related to the questioning of the appellants by the inspectors, the lack of protection against self-incrimination and the use of the transcripts at the trial. It was accepted for the appellants that in Part XIV of the 1985 Act Parliament had overridden privilege against self-incrimination, and that answers so obtained might be admitted as evidence in criminal proceedings, but it was submitted that the judge should have exercised his discretion to exclude the evidence under section 78 of the 1984 Act because "the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it" (page 475). The Court of Appeal first considered arguments based on the 1985 Act and then turned to the convention, of which Lord Taylor of Gosforth CJ, delivering the judgment of the court, said (at pages 477-478):

> "Mr Caplan submits that in applying section 78, the trial judge should also have had regard to Article 6 of the European Convention on Human Rights and having done so should have excluded the interviews. Article 6 does not specifically refer to the principle against self-incrimination, but relying on *Funke v France* (1993) 16 EHRR 297 Mr Caplan submitted that the Article carries the implication that a person should not be required to incriminate himself. However that may be, English courts can have recourse to the

> European Convention on Human Rights and decisions thereon by the European Court of Justice only when the law of England is ambiguous or unclear. Saunders has taken his case to Europe on this issue and the European Commission on Human Rights has referred it to the European Court in Strasbourg. Should Saunders succeed there, our Treaty obligations will require consideration to be given to the effect of the decision here. But our duty at present is to apply our domestic law which is unambiguous. Parliament has made its intentions quite clear in section 434(5). It cannot be right for a judge to exercise his discretion to exclude evidence of interviews simply on the ground that Parliament ought not to have countenanced the possibility of self-incrimination. Nor could he properly do so for the general purpose of bringing section 434(5) into line with section 2(8) of the 1987 Act, a step which Parliament has advisedly declined to take. In the course of argument, we invited counsel for the appellants to say whether they contended that on either of these grounds judges should, as a general rule, exclude under section 78 interviews by DTI inspectors. Although their arguments logically pointed to that conclusion, all counsel shied away from it when the question was posed. In our view, the admission in evidence of answers which Parliament has said may be admitted cannot be regarded as unfair *per se* under section 78 simply because of inherent features of the statutory regime under which they were obtained. However, in considering whether the particular application of the statutory regime in a given case created any unfairness, a judge can, in our view, as part of the background setting, have in mind that under that regime there is an obligation to answer the inspectors' questions on pain of sanctions. In that sense we respectfully agree with Lord Browne-Wilkinson that the judge can take those features of the regime into account. We consider later whether there was any unfairness deriving from the circumstances of the interviews in the present case."

Mr Lyons' conviction on one count was quashed, but otherwise the appeals were dismissed. Shortly after this decision Mr Lyons, Mr Ronson and Mr Parnes made complaints to the Commission to the same effect as that already made, successfully, by Mr Saunders.

8. The judgment of the European Court upholding Mr Saunders' complaint by a majority was delivered on 17 December 1996: *Saunders v United Kingdom* (1996) 23 EHRR 313. In response to this decision the Attorney General issued guidance to prosecutors, referring to section 434(5) of the 1985 Act and other statutory provisions to similar effect and indicating that, save in certain situations not relevant for present purposes, prosecutors should not normally use in evidence as part of the prosecution case or in cross-examination answers obtained under compulsory powers. Statutory effect was given to this guidance by section 59 of and Schedule 3 to the Youth Justice and Criminal Evidence Act 1999.

9. On 19 September 2000 the European Court unanimously upheld the complaints of Mr Lyons, Mr Ronson and Mr Parnes (applications nos 29522/95, 30056/96 and 30574/96) on essentially the same grounds as in Mr Saunders' case. This decision prompted Mr Lyons, Mr Parnes and Mr Ronson to make application to the Criminal Cases Review Commission which on 20 December 2000 referred Mr Lyons' case to the Court of Appeal. This decision in turn prompted Mr Saunders

to make application to the CCRC, which on 28 February 2001 referred to the Court of Appeal the cases of Mr Parnes, Mr Ronson and Mr Saunders also. All 4 cases were then, by virtue of section 9(2) of the Criminal Appeal Act 1995, to be treated as appeals under section 1 of the Criminal Appeal Act 1968.

10. On 21 December 2001 the Court of Appeal again dismissed the appellants' appeals in the judgment now under appeal: [2002] 2 Cr App R 210. In the judgment of the court delivered by Rose V-P, the crux of the court's reasoning is to be found in paragraphs 53-57. The court's conclusions, crudely summarised, were these:

> (1) the obligation of the United Kingdom under article 46 of the convention to abide by judgments of the European Court does not confer any right on these appellants;
> (2) it is doubtful whether article 46 requires the re-opening of convictions, the court having made a declaration of violation, made an award of costs and declined to make an award of damages;
> (3) since the case against each of the appellants was supported by evidence other than the compelled answers, restitutio in integrum could be achieved only by quashing the appellants' convictions and ordering a retrial, but given the lapse of time since the convictions the case is not one in which the court would in any event exercise its discretion to order a retrial;
> (4) even if failure to re-open the appellants' convictions might give rise to a violation of article 46 by the United Kingdom, the domestic statutory law of the United Kingdom precludes reliance on such violation in the circumstances since "the will of Parliament as expressed in section 434 trumps any international obligation";
> (5) the appellants' compelled answers could not have been excluded by the trial judge in exercise of his discretion under section 78 on grounds of unfairness arising from use of the compelled answers alone, since Parliament had expressly permitted such use;
> (6) the decision of Hobhouse J in *Dallal v Bank Mellat* [1986] QB 441 gives the appellants no assistance, since that case did not concern a conflict between the decision of an international tribunal and a domestic statutory provision.

While the Court of Appeal indicated, as noted in (3), that there was evidence to support the prosecution case against each of the appellants independently of the compelled answers, it also held (in paragraph 47 of the judgment, a conclusion on which the appellants rely strongly) that the court would not hold the convictions to be safe if the compelled answers were to be treated as excluded.

11. The Court of Appeal refused leave to appeal to the House but certified the following question as one of general public importance:

> "Where the Court of Appeal (Criminal Division) is called upon to determine the safety of a criminal conviction following a finding by the European Court of Human Rights that the use made at trial before 2 October 2000 of evidence obtained under powers of statutory compulsion in section 434 of the Companies Act 1985 rendered the appellant's trial unfair and in breach of Article 6 of the European Convention on Human Rights

(a) is the Crown entitled to rely after 2 October 2000 upon the evidence the use of which was held to have rendered the trial unfair in order to support the safety of the conviction; and

(b) is the Court entitled to hold the conviction safe in reliance on such evidence;

notwithstanding the United Kingdom's obligation under Article 46 of the European Convention to abide by the judgment of the European Court, and the principle of judicial comity governing the recognition and enforcement of a judgment of an international tribunal which is final and binding as between the parties to the appeal?"

*The argument for the appellants*

12. In his skilful and powerful argument for the appellants Mr Emmerson QC roundly accepted, as in the light of *R v Lambert* [2001] 3 WLR 206 [2001] UKHL 37 and *R v Kansal (No 2)* [2002] 2 AC 69, [2001] UKHL 62 he was bound to accept, that a defendant convicted before 2 October 2000 (when the main provisions of the Human Rights Act 1998 came into force) cannot rely on breaches of "the Convention rights" referred to in section 1(1) of that Act in an appeal heard after that date. He also made plain that his argument did not at all rely on the incorporation of the convention into the domestic law of the United Kingdom by the 1998 Act. Had the convention never been incorporated his argument would have been the same, since it depended on the duty of the United Kingdom, binding in international law, to comply with treaties (such as the convention) which it had made and on the general duty of the courts, as a public organ of the state, to act so far as possible in a manner consistent with the international obligations of the United Kingdom. The main steps of the argument, in brief and inadequate summary, were these:

(1) by ratifying the convention the United Kingdom undertook to give effective protection (subject to the terms of the convention) to certain specified rights, among them the right to a fair trial expressed in article 6;

(2) the obligations set out in the convention are binding in international law on member states including the United Kingdom;

(3) among the obligations binding on the United Kingdom are those expressed in articles 41 and 46, which provide

"Article 41 - Just satisfaction

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."

"Article 46 - Binding force and execution of judgments

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution;"

(4) Where a violation has occurred it is the duty of the member state concerned to make reparation to the fullest extent possible under national law;

(5) where a conviction results (or may result) from breach of the convention right to a fair trial, and the conviction cannot be upheld irrespective of that breach, full reparation can be afforded only if the conviction is quashed;
(6) national courts should, so far as they are free to do so, seek to act in a manner consistent with the obligations of the state binding in international law;
(7) while deference to the sovereignty of Parliament may preclude a United Kingdom court from giving effect to an obligation binding on the state in international law, it does not do so in present circumstances because (a) section 434(5) was expressed in permissive, not mandatory, terms, and (b) that section has now been substantially qualified so as to prevent prosecutors adducing evidence of compelled answers save in certain exceptional situations which did not obtain here;
(8) considerations of judicial comity should lead the English court to give full effect to the judgment of the European Court.

Mr Emmerson also suggested that, since the United Kingdom is party to the convention, the conduct of the crown in seeking to uphold the convictions is an abuse of the process of the court.

*The issues*

13. I am attracted by the broad thrust of Mr Emmerson's submissions numbered (1) to (6). It is true, as the Attorney General insisted, that rules of international law not incorporated into national law confer no rights on individuals directly enforceable in national courts. But although international and national law differ in their content and their fields of application they should be seen as complementary and not as alien or antagonistic systems. Even before the Human Rights Act 1998 the convention exerted a persuasive and pervasive influence on judicial decision-making in this country, affecting the interpretation of ambiguous statutory provisions, guiding the exercise of discretions, bearing on the development of the common law. I would further accept, as Mr Emmerson strongly contended, with reference to a number of sources, that the efficacy of the convention depends on the loyal observance by member states of the obligations they have undertaken and on the readiness of all exercising authority (whether legislative, executive or judicial) within member states to seek to act consistently with the convention so far as they are free to do so.

14. Mr Emmerson however accepted, as submission (7) in my summary makes clear, that a convention duty, even if found to exist, cannot override an express and applicable provision of domestic statutory law. Whether the Court of Appeal was (and the House is) subject to such a constraint is in my view the central issue in this case.

15. The jurisdiction of the Court of Appeal in criminal matters is wholly statutory. Section 2(1) of the Criminal Appeal Act 1968 (as substituted by section 2 of the Criminal Appeal Act 1995) provides

"Subject to the provisions of this Act, the Court of Appeal -

(a) shall allow an appeal against conviction if they think that the conviction is unsafe; and
(b) shall dismiss such an appeal in any other case".

Thus the Court of Appeal must decide whether it thinks a conviction unsafe: if so, it is subject to a mandatory duty to allow the appeal; if not, it is subject to a mandatory duty to dismiss it. The decision on safety must be taken with reference to the conviction (or convictions) actually recorded against the appellant. That directs attention to the trial leading to the conviction, the evidence adduced, the judge's rulings and directions, any irregularity which may have occurred, and so on. But a court called upon to decide whether a conviction is safe will make its decision at the time of the hearing before it and in the light of any fresh evidence or new argument which is then received or addressed. The old procedure under section 17(1)(a) of the 1968 Act required, and the current procedure under section 9 of the 1995 Act continues to require, that the Court of Appeal should exercise its own judgment on the question of safety, unfettered by the failure of a previous appeal or appeals, which there will almost always have been.

16. When judging the safety of old convictions the Court of Appeal has applied contemporary standards of fairness but has accepted that the case was governed by the law applicable at the date of trial. Thus, for example, in *R v Bentley (Deceased)* [2001] 1 Cr App R 307 the court found the summing-up to have been unfair but had to apply the doctrine of constructive malice because that was not abolished until the enactment of section 1(1) of the Homicide Act 1957. In the present case, if the question of fairness were at large and the trial judge had been unconstrained by any statutory or common law rule, it would have been open to the Court of Appeal to pay heed and give appropriate weight to the European Court's judgment that the conduct of the appellants' trial was rendered unfair by the admission of the compelled evidence even if the Court of Appeal had previously held the admission of such evidence to be fair. But, as Mr Emmerson fairly recognised, the situation may be different if the trial judge was obliged by law to act as he did.

17. It is plain from the terms of section 434(5), quoted in paragraph 2 above, that a prosecutor was not required to put in evidence the answers given by defendants to inspectors exercising compulsory powers. If the answers did not advance the case of the prosecution or the defence, the prosecutor did not have to adduce that evidence, which might distract and could not assist the jury. But while the prosecutor had discretion not to adduce the evidence, he also had a statutory discretion to use it against the defendant if he chose. His discretion to adduce that evidence was subject to the judge's overriding discretion to exclude it under section 78 of the 1984 Act. If it appeared to the court that, having regard to all the circumstances, including the circumstances in which the evidence had been obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it, the evidence could be excluded. Thus Henry J, for sound reasons, excluded evidence of Mr Saunders' last two interviews. There was however no taint of oppression or unfairness affecting the remainder of the compelled evidence other than the fact that it had been compelled and that it was to be used in evidence against the appellants. But these procedures had been expressly sanctioned by Parliament. Had the judge excluded the evidence on these grounds alone he would have acted unlawfully

because inconsistently with the enacted will of Parliament. The judge's duty was (and is) not only to "do right to all manner of people" but also, importantly, to do so "after the laws and usages of this realm". I consider that the law was accurately stated by the Court of Appeal in *R v Staines and Morrisey* [1997] 2 Cr App R 426 at 440-444, where the facts were different from those here but the issue (as understood by the court) was very much the same. The Court of Appeal's unreported decision in *R v Faryab* (No 98/2591/73, 22 February 1999), where reliance had been placed on compelled evidence after the date of the Attorney General's direction that such evidence should not be adduced, is explicable on its facts but lays down no principle.

18. Mr Emmerson sought to overcome the obvious problem posed by section 434(5) by pointing out that the will of Parliament has changed, as evidenced by the 1999 qualification of the section. This argument cannot avail the appellants for two reasons. First, as already pointed out, the Court of Appeal is bound, whenever an appeal takes place, to accept the substantive law as it stood at the time of the trial. It cannot proceed on the assumption that the substantive law binding on the trial court was otherwise than as it was. Secondly, although section 434(5) was very significantly qualified in 1999, in response to the judgment of the European Court, such qualification was not given retrospective effect. Nothing in the language of the 1999 enactment suggests such an intention. Nor, as the House has twice held, did Parliament intend criminal appellate courts hearing appeals after 2 October 2000 to take notice of breaches of convention rights occurring before that date: *R v Lambert* [2001] 3 WLR 206; *R v Kansal (No 2)* [2002] 2 AC 69. Thus section 434(5) as it stood at the date of the appellants' trial must be regarded as the applicable expression of Parliament's intention, subject to no derogation or qualification.

19. This conclusion is fatal to the success of the appeals, as the Court of Appeal rightly held. In the circumstances, I think it neither necessary nor desirable, despite the wealth of interesting material to which we were referred, to consider what full reparation or just satisfaction might require in a case such as the present in which (if the compelled evidence were excluded) the existing convictions could not be upheld as safe, in which there is material (irrespective of the compelled evidence) to support a case against the appellants, but in which the Court of Appeal has indicated (no doubt rightly, in view of the lapse of time, the serving or partial serving of prison sentences and the age and health of some of the appellants) that the interests of justice would not appear to require a retrial even if the appeals were allowed (see section 7(1) of the Criminal Appeal Act 1968). These are no doubt questions which the European Court or the Committee of Ministers, or both, may be called upon to address and I forbear to comment. I would however comment briefly on two of Mr Emmerson's submissions. First, I do not think that *Dallal v Bank Mellat* [1986] QB 441 assists the appellants, since in that case Hobhouse J was free to apply familiar common law principles unconstrained by any statutory enactment. Secondly, I find nothing abusive in the prosecution's resistance to these appeals. It is true that the ratification of the convention by the United Kingdom was an act of the executive. But the important aim underlying the establishment of the Crown Prosecution Service by the Prosecution of Offences Act 1985 was to emphasise its role as a public service independent of the executive, and although the Director of Public Prosecutions discharges his functions under the superintendence of the Attorney General (see section 3) both are required in this context to act as

independent ministers of justice. The Court of Appeal may not allow an appeal against conviction unless it thinks the conviction to be unsafe, and in deciding whether it is safe or unsafe the court is entitled to the professional assistance of an independent prosecuting authority.

20. The references in the certified question to reliance by the crown and the court on the compelled evidence do not seem to me entirely apt, but the thrust of the question is clear and I would answer it in the affirmative. I would accordingly dismiss the appeals.

**LORD HOFFMANN**

My Lords,

21. The question in this appeal is whether the appellants had a fair trial. Strictly speaking, it is whether their convictions are unsafe. That is the word used by section 2(1)(a) of the Criminal Appeal Act 1968 (as substituted by section 2(1) of the Criminal Appeal Act 1995) to state the only ground upon which the Court of Appeal is permitted and required to allow an appeal against a conviction on indictment. But unsafe does not mean only that the accused might not have committed the offence. It can also mean that whether he did so or not, he was not convicted according to law. As Rose LJ said in *R v Mullen* [2000] QB 520, 540: "for a conviction to be safe, it must be lawful." And what the law requires, among other things, is that the accused should have had a fair trial.

22. The appellants say that their trial was not fair because the prosecution was allowed to lead evidence of statements which they had made in answer to questions put by inspectors appointed by the Secretary of State under section 432 of the Companies Act 1985 to investigate the affairs of Guinness plc. They had been obliged by law to answer those questions. Section 436 provides that if a person refuses to answer, a court may punish him as if he had been guilty of contempt. There is no express exception for answers which tend to incriminate and in *In re London United Investments plc* [1992] Ch 578 the Court of Appeal decided, by analogy with decisions on powers of investigation in personal and corporate insolvency proceedings which went back more than a century, that no such exception was to be implied. The appellants do not challenge this decision. They accept it as showing that they had no alternative but to answer. So the appellants say that it was a denial of a fair trial for their answers to be given in evidence. It infringed the principle that they should not be required to incriminate themselves.

23. The difficulty for the appellants is that section 434(5) says in express terms that a person's answer to the inspectors "may be used in evidence against him". At the trial, they tried to get round this problem by asking the judge to exclude their statements under section 78 of the Police and Criminal Evidence Act 1984. This gives the judge a discretion to exclude admissible evidence. He may do so if it appears to him having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that he ought not to admit it. But the judge (Henry J) said that if Parliament had said in express terms that the

statements were to be admissible notwithstanding that they had been obtained by statutory compulsion, it would not be a lawful exercise of the discretion for him to exclude them solely on the ground that they had been obtained by statutory compulsion. The Court of Appeal agreed, both when the case was first referred to them in 1995 ([1996] 1 Crim App R 463, 473-478) and in the reference giving rise to this appeal. This reasoning has not been challenged in your Lordships' House.

24. What is said to make a difference is that the European Court of Human Rights ("ECtHR") has ruled on two occasions, once in relation to the appellant Saunders (*Saunders v UK* (1996) 23 EHRR 313 and then again in relation to the other three appellants (*IJL, GMR and AKP v UK* (19 September 2000) that the admission of the statements infringed the right to a "fair and public hearing" in accordance with Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). After the first of these decisions, the Attorney-General issued guidelines telling prosecutors to stop tendering such statements in evidence. Afterwards, Parliament amended section 434 of the 1985 Act. By paragraph 5 of Schedule 3 to the Youth Justice and Criminal Evidence Act 1999, it inserted two new subsections, (5A) and (5B), which provide that the answers are not to be admissible in any criminal proceedings other than for making false statements on oath. It is clear from the language of these amendments, however, that they are not retrospective. They apply only to trials taking place after they came into force on 14 April 2000.

25. The Human Rights Act 1998 also came into force in 2000. At one stage it was thought that it might also have some retrospective effect upon the question of whether the appellants had a fair trial. But in two recent decisions the House has held that it was not retrospective: *R v Lambert* [2001] 3 WLR 206 and *R v Kansal (No. 2)* [2002] 2 AC 69. I shall have something to say in due course about the 1998 Act but Mr Emmerson QC, who appeared for the appellants, did not rely upon it. He said that his arguments about the effect of the two judgments of the ECtHR would be exactly the same even if the 1998 Act had never been passed.

26. What, then, is the effect of the ECtHR rulings upon the question of whether the appellants' convictions are safe? The Convention is an international treaty made between member States of the Council of Europe, by which the High Contracting Parties undertake to "secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention." Article 19 sets up the ECtHR "to ensure the observance of the engagements undertaken by the High Contracting Parties". It has jurisdiction under Article 32 to decide "all matters concerning the interpretation and application of the Convention". And by Article 46 the High Contracting Parties undertake "to abide by the final judgment of the Court in any case to which they are parties."

27. In other words, the Convention is an international treaty and the ECtHR is an international court with jurisdiction under international law to interpret and apply it. But the question of whether the appellants' convictions were unsafe is a matter of English law. And it is firmly established that international treaties do not form part of English law and that English courts have no jurisdiction to interpret or apply them: *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418. Parliament may pass a law which mirrors the terms of the treaty

and in that sense incorporates the treaty into English law. But even then, the metaphor of incorporation may be misleading. It is not the treaty but the statute which forms part of English law. And English courts will not (unless the statute expressly so provides) be bound to give effect to interpretations of the treaty by an international court, even though the United Kingdom is bound by international law to do so. Of course there is a strong presumption in favour of interpreting English law (whether common law or statute) in a way which does not place the United Kingdom in breach of an international obligation. As Lord Goff of Chieveley said in *Attorney-General v Guardian Newspapers Ltd (No.2)* [1990] 1 AC 109, 283:

> "I conceive it to be my duty, when I am free to do so, to intepret the law in accordance with the obligations of the Crown under [the Convention]".

28. But for present purposes the important words are "when I am free to do so". The sovereign legislator in the United Kingdom is Parliament. If Parliament has plainly laid down the law, it is the duty of the courts to apply it, whether that would involve the Crown in breach of an international treaty or not.

29. At the time of the trial, therefore, section 434(5) of the 1985 Act required the court to admit the statements, whether or not this would be considered by the ECtHR to be an infringement of Article 6. Does it make any difference that today, when the appeal is being decided, the ECtHR has given its rulings and section 434(5) has been amended? Can one say that according to current notions, the appellants did not have a fair trial?

30. I do not think that one can. In *Brown v Stott* [2001] 2 WLR 817, 825 Lord Bingham of Cornhill said:

> "What a fair trial requires cannot…be the subject of a single, unvarying rule or collection of rules. It is proper to take account of the facts and circumstances of particular cases."

I respectfully agree. But that does not mean that the court is at large, assessing the fairness of the trial in each case by reference to some overarching abstract notion of fairness. A fair trial requires compliance with a collection of rules and principles. Some of the rules are highly specific; for example, the rule that at least ten jurors must agree with the verdict. Some are expressed at a more abstract level; for example, the rule that a judge should exclude evidence which would prejudice the fairness of the trial or the rule that the accused is entitled to a fair summing up. The application of these principles is very case-specific. But whether the criteria of fairness involve compliance with rules or principles, they are all legal rules and principles, derived from English statute and common law.

31. In deciding, therefore, whether the accused had a fair trial in 1990, the question is whether the trial complied with those rules and principles of English law which constitute the criteria of fairness. And in English law (as, I would imagine, in every other system of law) there is no absolute "right to silence" or privilege against self-incrimination. Instead there is what Lord Mustill in *R v Director of Serious Fraud Office, Ex p Smith* [1993] AC 1, 30 described as?

> "a disparate group of immunities, which differ in nature, origin, incidence and importance, and also as to the extent to which they have already been encroached upon by statute."

32. In the present case, the common law privilege had been expressly encroached upon by section 434(5). For the same reasons as Lord Taylor of Gosforth, on the first referral, said that the statements could not be excluded under section 78 of the 1984 Act on the ground that their admission would adversely affect the fairness of the trial, so it cannot be said on appeal that a trial in which those statements were admitted was unfair.

33. If the encroachment had been by a judge-made rule of common law or a judicial implication in a statute which did not expressly address the question, it would in theory have been open to the court to say that the previous common law rule or judicial interpretation had been wrong and that the law should rather be understood in a sense which conformed to the judgment of the ECtHR. For example, in the present case, even if there had been no section 434(5), the chances are that before the *Saunders* case the courts would have construed the statute as impliedly making the answers admissible. That was the view of the Court for Crown Cases Reserved in relation to the investigatory powers conferred by the Bankruptcy Act 1849 (see *R v Scott* (1856) Dears & B 47) and this decision has been followed in many cases concerned with individual or corporate insolvency: see, for example, *R v Erdheim* [1896 ] 2 QB 260. If the question had remained a matter of judicial decision, it would have been open to the court after the *Saunders* case to say that the decision in *Scott's* case was wrong and that the powerful dissenting judgment of Coleridge J should be preferred to Lord Campbell CJ's judgment on behalf of himself Alderson B, Willes J and Bramwell B. In that case, the appellants would have had the benefit of the declaratory theory of judicial decision-making by which the new interpretation would be treated as stating what the law had always been.

34. I do not say that the courts would necessarily have done so, particularly in the light of Parliament's 1999 decision to change the law without retrospective effect. Lord Bingham of Cornhill has referred to the case of *R v Bentley (Deceased)* [2001] 1 Cr App R 307 in which the appeal was heard nearly half a century after the trial. He says that while the Court of Appeal was able and indeed obliged to apply the current common law principles about the fairness of the summing up, it had to apply the doctrine of constructive malice because it was not abolished until the Homicide Act 1957. I am sure that is right, but it should be observed that constructive malice was a common law doctrine and it was theoretically open to the court (at least, at an appropriate level in the judicial hierarchy) to say that it was and always had been a mistake, just as the House of Lords in *R v R* [1992] 1 AC 599 overturned, with retrospective effect, the ancient marital immunity from conviction for rape. But where Parliament has prospectively amended the law, it would be an unusual case in which the courts re-examined the previous law in order to declare that it had always been different.

35. In this case, however, there is not even the theoretical possibility of the courts making a retrospective change in the law. There is no way in which section

434(5) can be reinterpreted to make it possible for the statements to have been excluded. The language does not allow it.

36. So far, I think that Mr Emmerson was inclined to accept the arguments for the Crown on the position in English domestic law. He also accepted that the Convention, as such, formed no part of English law. But he submitted that an English court should give effect to the judgments of the ECtHR in relation to these particular appellants. The United Kingdom was bound by Article 46 to abide by the judgment. Customary international law, which did form part of the English common law, required a state responsible for an internationally wrongful act to make restitution by restoring the status quo ante. (See Chapter II of Part Two of the draft articles on *Responsibility of States for internationally wrongful acts*, annexed to Resolution 56/83 adopted by the General Assembly on 12 December 2001.) Restitution would in this case require that the appellants' convictions be set aside and their criminal records expunged.

37. Mr Emmerson went on to say, more specifically, that it was the view of the Committee of Ministers of the Council of Europe, who were by Article 46.2 of the Convention entrusted with supervising the execution of judgments of the ECtHR, that compliance by a member State required that the injured party be restored to his previous position. He referred to Recommendation No R (2000) 2 of the Committee, adopted on 19 January 2000, which recited that-

> "the practice of the Committee of Ministers in supervising the execution of the Court's judgments shows that in exceptional circumstances the re-examination of a case or a reopening of proceedings has proved the most efficient, if not the only, means of achieving *restitutio in integrum*"
> and went on to encourage the Contracting Parties to -
> "examine their legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention especially where:
> (i) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and
> (ii) the judgment of the Court leads to the conclusion that
> (a) the impugned domestic decision is on the merits contrary to the Convention, or
> (b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of."

38. How do these principles impact upon the decision of a court in an English criminal appeal? Mr Emmerson argued that the court was for two reasons obliged to provide the appellants with restitution. The first was that it was an organ of the State and therefore could not act contrary to the United Kingdom's obligation to give effect to the judgments. The second was that judicial comity required it to give effect to the decision of a competent tribunal in proceedings between the same parties, even if that tribunal derived its jurisdiction from an international treaty.

Alternatively, Mr Emmerson said that the Crown, which was the organ of State entrusted with the treaty-making power and which had entered into the Convention on behalf of the United Kingdom, would be acting contrary to its obligations by supporting a conviction obtained at a trial which the ECtHR had held to be unfair.

39. My Lords, I cannot but admire the resourcefulness with which Mr Emmerson has painstakingly built this elaborate forensic structure. But I think that its foundations rest upon sand. In the end it comes to nothing more than an attempt to give direct domestic effect to an international treaty, contrary to the principle in the *International Tin Council* case [1990] 2 AC 418. The obligation to make restitution may, as Mr Emmerson says, be a developing or even established feature of customary international law. But it is in the present case ancillary to a treaty obligation. It is infringement of the treaty obligation to secure Convention rights to everyone within the jurisdiction that is said to give rise to the obligation to make restitution. Mr Emmerson himself described it as a secondary obligation in the sense used by Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 848-849. But if there is no enforceable primary obligation, how can its breach give rise to an enforceable secondary obligation?

40. The argument that the courts are an organ of State and therefore obliged to give effect to the State's international obligations is in my opinion a fallacy. If the proposition were true, it would completely undermine the principle that the courts apply domestic law and not international treaties. There would be no reason to confine it to secondary obligations arising from breaches of the treaty. The truth of the matter is that, in the present context, to describe the courts as an organ of the State is significant only in international law. International law does not normally take account of the internal distribution of powers within a State. It is the duty of the State to comply with international law, whatever may be the organs which have the power to do so. And likewise, a treaty may be infringed by the actions of the Crown, Parliament or the courts. From the point of view of international law, it ordinarily does not matter. In domestic law, however, the position is very different. The domestic constitution is based upon the separation of powers. In domestic law, the courts are obliged to give effect to the law as enacted by Parliament. This obligation is entirely unaffected by international law.

41. It should be observed, however, that despite the normal principle of international law which takes no account of the domestic distribution of powers, Article 41 of the Convention, dealing with just satisfaction, contains what appears to be an exception. It says that "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." This suggests that if the internal law does not permit full restitution (e g by quashing a conviction) the Court may have to accept this position and devise some other way of affording just satisfaction. But I refrain from speculating upon how the ECtHR or the Committee of Ministers may interpret these provisions because they involve the interpretation and application of the Convention and this is not a matter within your Lordships' jurisdiction.

42. The argument that the Crown is in breach of obligation by supporting the conviction in my view fares no better. It is true that the decision to tender the statements in evidence was a matter for the prosecution. It did not have to do so

and, as I have mentioned, the Attorney-General issued guidelines to prosecutors after the first ECtHR decision telling them to stop. It has been decided by the Court of Appeal that a conviction obtained after tendering evidence in breach of those guidelines was unsafe: see *R v Faryab* (unreported, 22 February 1999.) I reserve my position on the correctness of that decision. But there can be no doubt that the prosecution acted entirely lawfully when it tendered the evidence in 1990. When it comes to the appeal, the view of the Crown about the safety of the conviction is helpful but not determinative. It is for the Court to be satisfied that the conviction is unsafe.

43. In any case, if treaties form no part of domestic law, I do not see why an infringement of the treaty by the Crown should have more domestic significance than its infringement by Parliament or the courts. The fact that the Crown has the treaty-making power seems to me for this purpose irrelevant.

44. The argument based on judicial comity derives from the decision of Hobhouse J in *Dallal v Bank Mellat* [1986] QB 441. In that case Mr Dallal had submitted the question of whether he was owed US$400,000 by the Bank Mellat to the decision of the Iran-United States Claims Tribunal, a body set up under an international treaty. The tribunal dismissed his claim on the merits. He then commenced proceedings in England for the same sum. Hobhouse J struck out his claim as an abuse of process under the principle in *Henderson v* Henderson (1843) 3 Hare 100. Comity required that the jurisdiction of the Tribunal be recognised notwithstanding that it was set up under an international treaty. But in that case the issue sought to be relitigated was the very issue which the parties had submitted to the Tribunal, namely whether, as a matter of private law, the Bank owed money to Mr Dallal. In the present case, the issue submitted to the ECtHR was whether, as a matter of international law, the appellants' trial was in breach of Article 6. The issue now before the House is whether, as a matter of domestic law, their convictions were unsafe.

45. Finally I return to the Human Rights Act 1998. As I have mentioned, the Act was not relied upon because it has been held not to be retrospective. But even if it had been retrospective, I do not think that it would have made any difference. The obligation under section 3(1) to interpret legislation in a way compatible with Convention rights "so far as it is possible to do so" would not have been engaged because it is simply not possible to interpret section 434(5) so as to allow the statements to be excluded. Possibly a declaration might have been made (notwithstanding the present tense in which the power is expressed in section 4(2)), that section 434(5), as it then stood, was incompatible with Convention rights.

46. Whether such a declaration would have been made is hard to say. It might have been thought that as Parliament had already deliberately decided to amend the law without retrospective effect, there was little point in revisiting the question. If this difficulty had been resolved in the appellants' favour, the next question would have been whether the court considered that it ought to follow the ECtHR interpretation of Article 6. Given that Parliament had accepted the ECtHR interpretation when it passed the 1999 Act, it seems to me very likely that the courts would also have done so. If Parliament considered that the law should be changed to comply with an international obligation, it would be strange for the

courts to say that it had been unnecessary. Parliament and the courts should speak with one voice on such issues. What the position would have been if Parliament had not intervened and given guidance to the courts is more speculative. It is obviously highly desirable that there should be no divergence between domestic and ECtHR jurisprudence but section 2(1) says only that the courts must "take into account" the decisions of the ECtHR. If, for example, an English court considers that the ECtHR has misunderstood or been misinformed about some aspect of English law, it may wish to give a judgment which invites the ECtHR to reconsider the question: compare *Z v United Kingdom* (2001) 10 BHRC 384. There is room for dialogue on such matters. In the present case, the difficulties caused by the reasoning of the ECtHR have already been commented upon by my noble and learned friends Lord Steyn and Lord Hope of Craighead in *Brown v Stott* [2001] 2 WLR 817 at pp 843, 852-853 respectively. Some degree of misunderstanding is also evident in the concurring judgment of Judge Walsh (23 EHRR at p. 346) when he said:

> "The present statutory provisions which have given rise to the instant case are a post-Convention constitutional departure from common law in England but also from the principles disclosed in the various statutes referred to."

In fact express statutory provisions of the same kind go back at least to section 17 of the Bankruptcy Act 1883 and judicial interpretations of other provisions as having the same effect go back even further. On the other hand, there are other provisions which allow the questions to be asked but exclude the answers and there are others which leave the matter to the discretion of the judge. They all form part of a carefully modulated attempt by English law to strike a balance between the protection of the individual and the need of society to deal adequately with white-collar crime.

47. For present purposes, however, it is sufficient to say that there are no grounds for holding the convictions to be unsafe and I would therefore dismiss the appeals.

**LORD HUTTON**

My Lords,

48. These appeals raise the important issue whether the Court of Appeal, in deciding an appeal against a conviction, are bound to give effect to a judgment of the European Court of Human Rights ("the European Court") in favour of the appellant, when the issue arising in the appeal relates to the admission of evidence, and at the trial that issue was governed by a United Kingdom statute.

49. The appellants were convicted at the Central Criminal Court in 1990 of offences which alleged dishonest conduct during Guinness plc's takeover bid for the Distillers Company plc. Two successive appeals by the appellants against their convictions were heard by the Court of Appeal in 1991 and 1995 (the second appeal being pursuant to a reference back to the Court of Appeal by the Secretary

of State) and the appeals were dismissed (save in respect of one count against Mr Saunders in the 1991 appeal and one count against Mr Lyons in the 1995 appeal).

50. At the trial of the appellants the Crown relied on answers which they were compelled to give pursuant to section 434 of the Companies Act 1985 to inspectors appointed by the Secretary of State under section 432(2) and section 442 of the 1985 Act to investigate the affairs of Guinness plc. The appellants were unable to contend that in exercise of his discretion under section 78(1) of the Police and Criminal Evidence Act 1984 to exclude evidence unfairly obtained, the trial judge should exclude the answers on the ground that the appellants had been compelled to incriminate themselves. It was not possible for the appellants to advance this argument because section 434(5) expressly provides that the answers given to questions put by inspectors are admissible in evidence:

"(5) An answer given by a person to a question put to him in exercise of powers conferred by this section (whether as it has effect in relation to an investigation under any of sections 431 to 433, or as applied by any other section in this Part) may be used in evidence against him."

51. The reason why Parliament provided that the answers which the appellants were compelled to give were admissible in evidence was explained by Lord Taylor CJ in the judgment of the Court of Appeal which dismissed the appellants' second appeal (*R v Saunders and others* [1996] 1 Cr App R 463, 474F:

> "Mr Caplan referred to the long established common law principle that no person should be required to incriminate himself. However, there is no doubt that Parliament can override that principle. It has done so for example in the fields of insolvency and company fraud. The rationale is said to be that the unravelling of complex and devious transactions in those fields is particularly difficult and those who enjoy the immunities and privileges afforded by the Bankruptcy Laws and the Companies Acts must accept the need for a regime of stringent scrutiny especially where fraud is suspected."

52. After the dismissal of the second appeal the appellant, Mr Saunders, brought an application to the European Court in which he complained that the use at his trial of the answers which he was compelled to give to the inspectors deprived him of a fair hearing in violation of Article 6(1) of the European Convention on Human Rights ("the Convention"). This complaint was upheld by the European Court which held that there had been a violation of Article 6(1) and stated at paragraph 74 of its judgment delivered on 17 December 1996 ((1996) 23 EHRR 313):

> "[The Court] does not accept the Government's argument that the complexity of corporate fraud and the vital public interest in the investigation of such fraud and the punishment of those responsible could justify such a marked departure as that which occurred in the present case from one of the basic principles of a fair procedure. Like the Commission, it considers that the general requirements of fairness contained in Article 6, including the right not to incriminate oneself, apply to criminal proceedings in respect of all types of criminal offences without distinction, from the most simple to the most complex. The public interest cannot be invoked to justify the use of

> answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings."

53. The other appellants subsequently brought a similar application to the European Court, and in a judgment delivered on 19 September 2000 the Court again held for the reasons given by it in Mr Saunder's case that their rights under Article 6(1) had been violated.

54. On the application of the appellants the Criminal Cases Review Commission, subsequent to the judgment of the European Court in September 2000, referred the appellants' cases back to the Court of Appeal, and on 21 December 2001 the Court of Appeal again dismissed the appellants' appeals by the judgment now under appeal [2002] 2 Cr App R 210.

55. Mr Emmerson QC, in his skilful argument on behalf of the appellants, advanced two main propositions to the House which I summarise as follows. The first proposition was that the United Kingdom had entered into the Convention, an international treaty, and had agreed in Article 1 to secure to everyone within its jurisdiction the rights and freedoms (including the right to a fair trial) defined in section 1 of the Convention. Article 41 (originally Article 50) 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."

Article 46 (originally Articles 53 and 54) provides:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

Therefore the United Kingdom, including the courts of the United Kingdom, was obliged to abide by the judgments of the European Court that the rights of the appellants to a fair trial had been violated. Accordingly the Court of Appeal in hearing the appellants' third appeal after the European Court had given its judgments, should have held that the answers given to the inspectors' questions were inadmissible in evidence on the ground of unfairness and should have quashed the convictions, the court having observed in paragraph 47 of their judgment that

> "if we concluded that the compelled answers should not have been admitted in evidence, or if we concluded that we were bound to give effect to the Strasbourg Court's decision that the trial was unfair by examining anew the safety of the convictions, we would not uphold the convictions on the basis that they are safe in any event."

56. Mr Emmerson's second main proposition was that a ruling by the Court of Appeal in December 2001 quashing the convictions would not have been contrary to the will of Parliament as expressed in section 434(5) because Parliament had accepted and given effect to the judgments of the European Court by enacting section 59 of, and Schedule 3 to, the Youth Justice and Criminal Evidence Act 1999 (coming into operation on 14 April 2000)

which amended section 434 by providing in respect of offences (including those with which the appellants were charged):

> "4. The Companies Act 1985 is amended as follows.
> 5. In section 434 (production of documents and evidence to inspectors conducting investigations into companies), after subsection (5) (use of answers given to inspectors) insert—
> '(5A) However, in criminal proceedings in which that person is charged with an offence to which this subsection applies—
> (a) no evidence relating to the answer may be adduced, and
> (b) no question relating to it may be asked,
> by or on behalf of the prosecution, unless evidence relating to it is adduced, or a question relating to it is asked, in the proceedings by or on behalf of that person.' "

Mr Emmerson therefore challenged the correctness of the statement by Rose LJ in paragraph 54 of the judgment of the Court of Appeal that:

> "the will of Parliament as expressed in section 434 trumps any international obligation".

57. I consider that it is desirable to consider, first, Mr Emmerson's second main proposition, because if it is incorrect and if Rose LJ was right to state that the will of Parliament as expressed in section 434 trumps any international obligation, the appeals must fail irrespective of whether, assuming that the matter was not concluded in favour of the Crown by section 434(5), there was validity in Mr Emmerson's first main proposition.

58. Leaving aside any question as to the primacy of European Community law which does not arise in this case, Parliament is the supreme law-making body for the United Kingdom and a statute enacted by Parliament which cannot be read under section 3(1) of the Human Rights Act 1998 in a way which is compatible with the Convention prevails over any provision of the Convention or any judgment of the European Court whether the statute was passed before or after the coming into operation on 2 October 2000 of the 1998 Act which incorporated most of the provisions of the European Convention into United Kingdom law. The sovereignty of Parliament and the supremacy of an Act of Parliament over the Convention is recognised and confirmed by section 4(6) of the 1998 Act which provides that a declaration by a court that a provision of a statute is incompatible with a Convention right does not affect the validity, continuing operation or enforcement of that statutory provision.

59. Therefore, on first consideration, it appears that the Court of Appeal were clearly right in deciding that they must give effect to what Parliament had provided in section 434(5), which had not been amended at the time of the trial, and that they should hold that the admission of the answers was not unfair, notwithstanding that such a ruling was contrary to the judgments of the European Court. As Lord Bingham CJ stated in *R v Staines and Morrisey* [1997] 2 Cr App R 426, 442D in rejecting an argument similar to that advanced by the present appellants as to the unfairness of admitting answers given to inspectors exercising coercive powers of interrogation:

> "If the Court were to rule here that this evidence should be excluded, it would be obliged to exclude such evidence in all such cases. That would amount to a repeal, or a substantial repeal, of an English statutory provision which remains in force in

> deference to a ruling [by the European Court in *Saunders v United Kingdom*] which does not have direct effect and which, as a matter of strict law, is irrelevant."

Lord Bingham further stated at page 443D:

> "the section here expressly authorises the use of evidence so obtained and that, as we see it, amounts to a statutory presumption that what might otherwise be regarded as unfair is, for this purpose and in this context, to be treated as fair, at any rate in the absence of special features which would make the admission of the evidence unfair."

60. However, as I have stated in paragraph 9 above, Mr Emmerson submitted that a ruling by the Court of Appeal that the answers were admitted in evidence unfairly would not have been in breach of the will of Parliament. Section 2(1) of the Criminal Appeal Act 1968 provides:

> "Subject to the provisions of this Act, the Court of Appeal—
> (a) shall allow an appeal against conviction if they think that the conviction is unsafe; and
> (b) shall dismiss such an appeal in any other case."

Mr Emmerson emphasised that section 2(1) provides that it is the duty of the Court of Appeal to allow an appeal if they think that "the conviction is unsafe". Therefore he submitted that the question for the Court of Appeal was not, was the conviction unsafe at the time the jury returned their verdict, but was it unsafe at the time when the Court of Appeal considered the appeals and gave their decision. He further submitted that at the time when the Court of Appeal considered the appeals Parliament, by enacting section 59 of, and Schedule 3 to, the 1999 Act, had made it clear that it considered that the judgments of the European Court in the appellants' applications should be complied with in the United Kingdom and that it accepted that it was unfair to admit in evidence against them answers to questions put to persons pursuant to inspectors' powers under section 434. Therefore, rather than complying with the will of Parliament, the Court of Appeal in dismissing the appeals had acted contrary to the will of Parliament in holding that the convictions, which were substantially based on the answers admitted in evidence, were safe.

61. Recognising that the decisions of the House in *R v Lambert* [2001] 3 WLR 206 and *R v Kansal (No. 2)* [2002] 2 AC 69 established that a person who had been convicted at a trial which took place before the Human Rights Act 1998 came into operation on 2 October 2000 could not rely on the rights given by sections 6 and 7 of that Act in an appeal against conviction heard by the Court of Appeal after that date, Mr Emmerson made it clear that in advancing his submissions he was not seeking to rely on the provisions of the 1998 Act.

62. I am unable to accept Mr Emmerson's submission that the Court of Appeal would have been acting in accordance with the will of Parliament if they had quashed the convictions of the appellants. In my opinion the Court of Appeal were right to hold that it was the intention of Parliament that the admission in evidence at the appellants' trial of the answers which they had given was not to be regarded as unfair. The will or intention of Parliament is to be found in the words which Parliament has used. Parliament provided in section 434(5) that an answer given by a person to inspectors might be used in evidence against him. Subsection (5A) was appended to section 434 by the 1999 Act and that Act did not come into operation until 14 April 2000. A statute has only a prospective effect unless the contrary intention clearly

appears, and therefore the intention of Parliament in respect of the use in evidence at a trial taking place before 14 April 2000 of answers given to inspectors was that the answers should not be excluded on the grounds of unfairness. Accordingly I am in full agreement with the passage in paragraph 54 of the judgment of the Court of Appeal where Rose LJ states:

> "However, and determinatively, even if the failure to re-open the appellants' convictions might give rise to violation of Article 46, domestic law precludes reliance on any such violation in the circumstances of this case. The fact of violation could not have led to the exclusion of the answers at the trial, applying the approach available under domestic law at the time, because this would have amounted to partial repeal of legislation enacted by Parliament which authorised the use of the evidence (see *R v Staines and Morrisey* [1997] 2 Cr App R 426 at 442C, approved by Lord Hope in *Kansal* at paragraph 86 to which we return later). …. Put another way, the will of Parliament as expressed in s 434 trumps any international obligation."

63. Moreover as Parliament did not intend that the provisions of the Human Rights Act 1998 would have a retrospective effect on the validity of a conviction which took place before 2 October 2000 it is improbable that Parliament intended that the change in the law coming into operation on 14 April 2000 effected by the 1999 Act would have a retrospective effect on the validity of a conviction which took place before that date.

64. A further submission advanced on behalf of the appellants was based on the guidelines issued by the Attorney General in February 1998 which were designed to take into account the decision of the European Court in the application brought by Mr Saunders against the United Kingdom. Paragraph 1 of the guidelines stated:

> "The purpose of this note is to provide guidance for prosecuting authorities in England and Wales and in Northern Ireland about the approach to be adopted towards evidence available to prosecutors in the form of answers obtained by the exercise of compulsory powers such as those available under s 434 of the Companies Act 1985. It takes account of the judgment of the European Court of Human Rights in *Saunders v UK* (1997) 23 EHRR 313).

Paragraph 3 stated:

> "In all cases the prosecution should not normally (ie. subject to the discretionary exceptions mentioned in paragraph 4) use in evidence as part of its case or in cross-examination answers obtained under compulsory powers."

65. Mr Emmerson relied on the judgment of the Court of Appeal (Criminal Division) in *R v Faryab* (22 February 1999, unreported). In that case a trial took place in March 1998 after the Attorney General had issued his guidelines, but at the time of the trial the existence of the guidelines was not known to counsel for the prosecution or the defence or to the judge. At the trial the prosecution put in evidence and placed strong reliance on answers to questions which the defendant had been compelled to give in the course of an interview conducted pursuant to the Insolvency Act 1986. The defendant appealed against his conviction on the ground that, having regard to paragraph 3 of the guidelines, his answers should not have been admitted in evidence against him. The appeal was allowed and Gray J stated:

> "[Crown counsel] has candidly, and in our judgment inevitably, conceded that, if the existence of those guidelines had been known to those involved in the trial, then the evidence of the answers given by the appellant in his interview would probably not have been adduced. It follows from that concession and from our conclusion as to the non-availability of exception (i) in paragraph 4 of the guidelines that the jury was in the present case provided with evidence which had at least the potential to give rise to unfairness to the appellant."

Gray J further stated that the appellant's contention was valid:

> "that in the light of the decision of [the European Court in] *Saunders* and the ensuing guidelines, the appellant's answers in his compulsory interview should not have been admitted in evidence".

66. Mr Emmerson submitted that in this case the Court of Appeal should have followed the same course as that taken by the Court of Appeal in *R v Faryab* and should have held that the answers of the appellants should not have been admitted in evidence. In the alternative he submitted that the Court of Appeal should have stopped the Crown from relying on the answers in seeking to uphold the convictions. I am unable to accept either of these submissions. As I have stated in an earlier part of this opinion, section 434(5) makes it clear that the admission in evidence of the appellants' answers at the trial was not unfair either at the time of the trial or when considered at the time of the hearing of the appeals in December 2001. The issuing of guidelines by the Attorney General cannot make unfair what Parliament has stated to be fair and, moreover, the guidelines had not been issued at the time of the appellants' trial in 1990. I consider that the decision of the Court of Appeal in *R v Faryab* was largely influenced by the consideration that the Crown accepted that if prosecution counsel had known at the time of the trial of the Attorney General's guidelines, the answers of the appellant would probably not have been adduced in evidence. If the decision goes beyond that I would wish to reserve my opinion as to its correctness. I also reject the submission that the Court of Appeal in this case should have stopped the Crown from relying on the answers or should have required the Crown to acknowledge that the use of the answers in evidence at the trial was unfair. Under section 2(1)(a) of the Criminal Appeal Act 1968 the Court are only empowered to allow an appeal if they think that the conviction is unsafe, and it is for the Court of Appeal to decide this, not the prosecution: see per Lloyd LJ in *R v McIlkenny* [1991] 93 Cr App R 287, 314. If the Court do not think that the verdict is unsafe, section 2(1)(b) requires them to dismiss the appeal.

67. Therefore I am of opinion that the appeals must fail on the ground that the intention of Parliament stated in section 434(5) prevails over whatever obligations may arise from the Convention and the judgments of the European Court.

68. It is therefore unnecessary to express a concluded opinion on Mr Emmerson's first main proposition that, if the Court of Appeal were not compelled by section 434(5) to hold otherwise, they were obliged to follow the judgments of the European Court in the cases of Mr Saunders and the other appellants and to hold that the admission of their answers violated their rights to a fair trial.

69. On this issue the House had the benefit of interesting submissions from Mr Emmerson and the Attorney General on the effect of international treaties on domestic law. This House has stated that international treaties do not create rights enforceable in domestic law: see *J H*

*Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 476F - 477A, 483C, 500C-D. But the present case relates to the fairness of the appellants' trial and is not one where the appellants claim to enforce a right which is given to them only by the Convention and is not recognised by English domestic law. As Lord Woolf CJ stated in *R v Togher* [2001] 1 Cr App R 457, 467, para 30: "The requirement of fairness in the criminal process has always been a common law tenet of the greatest importance." Therefore in a case such as the present one concerned with the issue of fairness, I consider that the principle stated in *Rayner's* case does not mean that an English court should not regard a judgment of the European Court on that issue as providing clear guidance and should not consider it right to follow the judgment unless (as I would hold in the present case) it is required by statute to reach a different conclusion. As Lord Goff of Chieveley stated in *Attorney General v Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109, 283G:

> "I conceive it to be my duty, when I am free to do so, to interpret the law in accordance with the obligations of the Crown under [the European Convention on Human Rights]."

70. In his submissions Mr Emmerson laid stress on the point that these appellants were not merely relying on a principle established by a judgment of the European Court, they were relying on the fact that judgments had been pronounced by the European Court in their favour in cases in which they were the applicants. Accordingly, he submitted that the United Kingdom (including its courts) came under an express obligation under Articles 41 and 46 of the Convention to give effect to the judgments by quashing the convictions.

71. There are many judgments of the European Court which recognise in relation to Article 41 that, notwithstanding a decision by the Court that there has been a breach of the Convention, the national law of the respondent state may not permit the quashing of a conviction which is valid under national law and that the Court has no power to quash it: see *Belilos v Switzerland* (1988) 10 EHRR 466, 491 para 76, *Hauschildt v Denmark* (1989) 12 EHRR 266, 281, para 54, *Brozicek v Italy* (1989) 12 EHRR 371, *Findlay v United Kingdom* (1997) 24 EHRR 221, 247, para 88. In *Papamichalopoulous v Greece* (1995) 21 EHRR 439, 451, the European Court stated in paragraph 34:

> "The Contracting States that are parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach. This discretion as to the manner of execution of a judgment reflects the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1). If the nature of the breach allows of *restitutio in integrum*, it is for the respondent State to effect it, the Court having neither the power nor the practical possibility of doing so itself. If, on the other hand, national law does not allow—or allows only partial—reparation to be made for the consequences of the breach, Article 50 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate."

72. Mr Emmerson submitted that if Article 41 did not impose an obligation on the United Kingdom to quash the appellants' convictions, that obligation arose under Article 46 and Mr Emmerson cited a number of resolutions of the Council of Ministers which stress the importance of Member States giving effect to the judgments of the European Court.

73. In his application to the European Court Mr Saunders claimed damages for pecuniary loss in excess of £3½ million. Referring to this claim the Court stated in paragraph 83 of its judgment:

> "At the hearing before the Court, however, the applicant accepted that 'true compensation' would be a finding in his favour by the Court and the resulting vindication of his good name."

The Court dismissed the claim for pecuniary loss and stated at paragraph 86 of its judgment:

> "The Court observes that the finding of a breach in the present case concerned the criminal proceedings against the applicant and not the proceedings before the Inspectors about which no complaint was made. Moreover, it cannot speculate as to the question whether the outcome of the trial would have been any different had use not been made of the transcripts by the prosecution and, like the Commission, underlines that the finding of a breach of the Convention is not to be taken to carry any implication as regards that question.
> It therefore considers that no causal connection has been established between the losses claimed by the applicant and the Court's finding of a violation."

Mr Saunders also claimed non-pecuniary damages of £1 million to compensate him for the denial of his right to a fair trial and the resulting anxiety, anguish and imprisonment. The Court dismissed this claim and stated at paragraph 89 of its judgment:

> "The Court considers that, in the circumstances of the case, the finding of a violation constitutes sufficient just satisfaction in respect of any non-pecuniary damage sustained."

Mr Saunders also claimed a sum for costs and expenses, and the Court awarded him £75,000 in respect of this claim.

74. In the applications brought by the other appellants the European Court declined to award them pecuniary and non-pecuniary damages for the same reasons as those given in the case of Mr Saunders and the Court reserved the issue of the appellants' claims for costs and expenses.

75. In the course of his submissions the Attorney General observed that the United Kingdom had paid to Mr Saunders the costs and expenses awarded to him by the European Court and he further submitted that in pursuance of its international obligations under the Convention the United Kingdom had sought to comply with the two judgments of the European Court by amending its domestic law by the enactment of section 59 of, and Schedule 3 to, the 1999 Act which provided that answers given under compulsion should not (save in certain limited exceptions) be used in evidence against the person giving the answers.

76. The Attorney General recognised that at some future time the appellants' cases may be considered by the Council of Ministers under Article 46, and therefore I think that it would not be appropriate for this House to express an opinion on the effect of Article 46 in these cases.

77. I would add that in my opinion the appellants cannot advance an argument based on the requirements of international comity in reliance on the judgment of Hobhouse J in *Dallal v Bank Mellat* [1986] QB 441 because the issue in that case was not affected by an Act of Parliament.

78. For the reasons which I have stated I would dismiss these appeals and would answer the certified question in the affirmative.

**LORD HOBHOUSE OF WOODBOROUGH**

My Lords,

79. I am in entire agreement with the opinion of my noble and learned friend Lord Hoffmann.

80. The jurisdiction of the Criminal Division of the Court of Appeal is to allow appeals against conviction only when they consider that the conviction is unsafe. In deciding whether the conviction is unsafe, the Court is under an obligation to consider whether the trial was conducted in accordance with the law and whether it was unfair. If inadmissible evidence was admitted and the admission of such evidence made the conviction unsafe, the appeal should be allowed. But, if the evidence is admissible, the evidence should be allowed to go before the jury unless its admission would create a significant unfairness in the proceedings such that the judge should exercise his discretion under s.78 of the Police and Criminal Evidence Act 1984 to exclude it or, if confession evidence, unless it should be excluded under s.76.

81. The decision of the European Court of Human Rights is that the provision in s.434 of the Companies Act 1985 which makes a person's answers given to the inspectors admissible in evidence against him contravenes Article 6 of the Convention. This created a conflict between the Convention and the United Kingdom statute. The obligation of a Court of the United Kingdom is to apply the law of the United Kingdom. The Convention has now, substantially but not completely, been made part of the law of the United Kingdom. But the incorporation has not been retrospective and has preserved parliamentary supremacy. Therefore the position in English law remains as stated by the Court of Appeal in *R v Staines and Morrisey* [1997] 2 Cr App R 426, at 442-3.

82. Specifically in relation to the admission of the evidence in question, the fairness of the trials of the present appellants and the safety of their convictions was carefully considered by the Court of Appeal both in 1995, [1996] 1 Cr App R 463, 478 and 484, and again last year in the decision under appeal. On each occasion the Court, having recognised that the trial judge was (as were the Court of Appeal) bound by s.434, and, having carefully considered all the circumstances as required by s.78, concluded that there had been no actual unfairness in the appellants' trials and no lack of safety in the relevant convictions.

83. I accordingly agree that the appeals should be dismissed.

**LORD MILLETT**

My Lords,

84. On 27 August 1990 following a six month trial before a judge and jury at the Central Criminal Court the four Appellants were convicted of serious criminal offences involving dishonesty. The offences were committed during 1986 in the course of an illegal share support operation undertaken to assist Guinness plc in acquiring Distillers Company plc. Save as to one count against Mr Saunders, in respect of which his conviction was quashed, appeals against conviction by three of the Appellants were dismissed by the Court of Appeal in 1991. The case in respect of all four Appellants was later referred back to the Court of Appeal by the Secretary of State. Save as to one count against Mr. Lyons (who had not taken part in the earlier appeal) in respect of which his conviction was quashed the appeals were again dismissed in 1995.

85. The convictions were obtained in part by the use by the prosecution of transcripts of the answers given by the Appellants to Inspectors appointed under the Companies Act 1985 ("the Companies Act") to investigate the affairs of Guinness plc. Failure on the part of any person to attend before the Inspectors when required to do so and to give them all the assistance that he is reasonably able to give is punishable as a contempt of court: see sections 434 and 436 of the Companies Act.

86. Section 434(5) of the Companies Act as it then stood provided:

> "(5) An answer given by a person to a question put to him in exercise of powers conferred by this section … may be used in evidence against him."

Section 78(1) of the Police and Criminal Evidence Act 1984 provided:

> "(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

87. The two sections were not inconsistent. Section 78 gave the court a general power to exclude admissible evidence where its admission was considered to be unfair to the accused. Section 434(5) dealt with a particular situation where the admission of such evidence might be so considered. It made the answers given by the Appellants to the Inspectors admissible in evidence against them despite the fact that they had been obtained under compulsion and were or might be self-incriminatory. It precluded any challenge to the admission of such evidence on this ground. To this extent, but to this extent only, it limited the powers of the court under section 78 to exclude admissible evidence. Where there was some additional ground which rendered the admission of such evidence unfair to the accused, it could be excluded under Section 78. Thus transcripts of answers given by Mr Saunders to the Inspectors at interviews held after he had been charged were excluded by the trial judge. Where the sole ground of objection was that the evidence had been obtained under compulsion in the course of an investigation under the Companies Act, however, the Court was obliged to give effect to Section 434(5): the prosecution was entitled to adduce the evidence if it chose and the Court was bound to admit it.

88. In 1996 the European Court of Human Rights ("ECtHR") held that the use made at the trial of the transcripts of Mr Saunders' answers to the Inspectors infringed the rule against self-incrimination and thereby constituted a violation of his rights under Article 6(1) of the

European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). When considering what remedy to award the Court stated that it could not speculate whether the outcome of the trial would have been any different had use not been made of the transcripts by the prosecution. Accordingly, no causal connection had been established between the violation and the pecuniary damage which Mr Saunders claimed. It also ruled that in the circumstances of the case the finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage which he had sustained.

89. In 2000 the ECtHR held on the same ground that there had been a similar violation of the rights of the other three Appellants. It made the same observations as to its inability to speculate as to the outcome of a hypothetical trial and as to the sufficiency of the finding of a violation as just satisfaction in respect of any non-pecuniary damage that it had made in the case of Mr Saunders.

90. Under Article 46 of the Convention it is incumbent upon the United Kingdom to abide by judgments of the ECtHR. This requires the United Kingdom to take measures to prevent recurrence of any violations of the Convention which the ECtHR has identified and to make reparation to the victims if it is proper to do so. Full reparation involves *restitutio in integrum,* which has been variously explained either as restoring the complainant to the position he was in immediately before the violation occurred; or as restoring him to the position he would have been in if the violation had not occurred. Article 41 of the Convention enables the ECtHR to award just satisfaction in a case where the internal law of the state concerned allows only partial reparation to be made. This recognises that the state's internal law may preclude it from making full reparation, and that its obligation to abide by the judgment of the ECtHR does not require it to change its internal law retrospectively to enable it to do so.

91. Following the judgment of the ECtHR in the Saunders case, the United Kingdom took immediate measures to procure cessation of the infringements and prevent recurrence. The Attorney-General, who as a law officer of the Crown is answerable to Parliament for the exercise of discretionary powers in relation to the conduct of criminal prosecutions in the United Kingdom, issued non-statutory guidance to prosecutors directing that in future they should not make use of evidence obtained under compulsory powers in the course of criminal proceedings in the absence of special circumstances which would justify them in doing so. Statutory effect was given to these directions by Section 59 of and Schedule 3 to the Youth Justice and Criminal Evidence Act 1999. This made amendments to a number of existing statutory provisions which had formerly enabled evidence obtained by compulsory powers to be used in evidence. It left Section 434(5) of the Companies Act standing without amendment, but added a new subsection (5A) which severely limited the circumstances in which the evidence could be adduced by the prosecution in future.

92. The question which then arose was whether the Appellants' convictions ought to be quashed in view of the fact that they had been obtained in part by the admission of evidence in violation of Article 6 of the Convention. Following the judgment of the ECtHR on 19 September 2000 and the coming into force of the Human Rights Act 1998 ("the HRA") on 2 October 2000 the Appellants' cases were again referred to the Court of Appeal. Serious criminal trials in England are tried by jury, and the Court of Appeal could not retry the case itself and determine guilt or innocence on the transcripts of the evidence given at trial. Its powers are limited to quashing the conviction and, if appropriate, re-opening the proceedings by ordering a retrial before a fresh jury. Thus the Court was being called on to consider the

question which the Convention leaves to the national courts, that is to say the extent if any to which, in conformity with our domestic law, it could award non-monetary reparation or *restitutio in integrum* to the Appellants.

93. The Court examined the evidence against each of the Appellants. It concluded that the impugned evidence constituted a significant part of the evidence against them, and that it was impossible to say that the jury would still have convicted in the absence of such evidence. On the other hand there was a substantial body of other evidence against each of the Appellants, and it was impossible to say that the jury would necessarily have acquitted without the impugned evidence. The Court was thus in the same position as the ECtHR; it could not speculate on what the outcome of the trial would have been in the absence of the impugned evidence.

94. The Court also concluded, at an early stage of the hearing, that it would not be appropriate to order a retrial. A second jury trial more than 10 years after the original trial and more than 14 years after the events with which the trial would be concerned was out of the question, particularly in the light of the Appellants' age and state of health. *Restitutio in integrum* was impossible. It was not practicable to restore the Appellants to the position they were in before the violations occurred, when they were accused persons facing serious criminal charges. Nor could they be put in the position they would have been in had the violations not taken place, since this could not be known without a retrial.

95. Under Section 2(1) of the Criminal Appeal Act 1968 ("the CAA") the Court of Appeal is obliged to quash a conviction if it thinks that "the conviction is unsafe"; but otherwise it must allow the conviction to stand. The question is not whether the accused is guilty, but whether the conviction is open to possible doubt. The question whether there should be a retrial is treated as distinct from the prior question whether the conviction is unsafe. If the conviction is unsafe the Court is obliged to quash it, even though it is no longer possible to order a retrial so that the guilt or innocence of the accused may never be determined.

96. The question for the Court under Section 2(1) of the CAA is whether the convictions "are unsafe", not "were unsafe"; but this question has to be determined by reference to what happened at the trial. This was not a case where new evidence had become available since the trial. In such a case it is open to the Court to find that, in the light of the new evidence, a conviction which appeared to be safe at the time is now shown to be unsafe. Nor was it a case where the convictions were challenged on the ground that the conduct of the trial was not consistent with general notions of fairness, which change over time. In such a case, it is open to the Court to find that a trial which would have been considered to be fair by the more robust standards of a past age was conducted in a manner which is simply not acceptable today.

97. No complaint is made in the present case of the general fairness of the Appellants' original trial or the relevance and import of the impugned evidence. The trial was conducted fairly and in accordance with the substantive rules of evidence and procedure which were current at the time. The sole ground on which the convictions are said to be unsafe is that they were obtained by the use of cogent and relevant evidence the admission of which was expressly authorised by Parliament but which infringed Article 6 of the Convention.

98. Section 434(5) of the Companies Act as it stood at the time of the trial was clearly inconsistent with Article 6. It precluded any challenge to the admission of the evidence in

question in the absence of special circumstances justifying its exclusion under Section 78. Article 6 by contrast precluded the admission of such evidence in the absence of special circumstances justifying its admission. That is why Parliament amended Section 434 by adding subsection (5A). But the amendment was not retrospective. Moreover, the new subsection was directed to the conduct of the trial, not to the hearing of an appeal against conviction. It was evidently the will of Parliament that the new arrangements should apply to future trials only, and that past convictions obtained under the former law should not be disturbed.

99. By the time the appeal came before the Court of Appeal the HRA was in force. Section 6(1) of the HRA makes it unlawful for a public authority (which includes both the prosecution and the Court itself) to act in a way which is incompatible with a Convention right. But this House has twice held that the HRA is not retrospective, and the Appellants rightly did not invoke it. Indeed, they went so far as to submit that your Lordships should deal with their appeals as if it had not been passed. That is not the correct approach. The present case is a transitional one. It raises the question whether a conviction obtained by evidence which infringed Article 6 of the Convention but at a time before the HRA was in force can be treated as unsafe if an appeal is heard after it has been brought into force. The fact that the HRA is not retrospective is not without significance. As in the case of the amendments to the Companies Act, it demonstrates Parliament's continuing intention to leave past convictions undisturbed.

100. As a matter of our own domestic law, therefore, the Court of Appeal could not properly regard the convictions as unsafe by reason only of the admission of evidence which was expressly made admissible by statute in force at the time of the trial and in the face of Parliament's clear intention, twice expressed, to leave such convictions undisturbed.

101. The Appellants sought to avoid this conclusion by relying, not on the breaches of Article 6 alone, but on the fact that they have been established by judgments of the ECtHR. Article 46, they say, imposes a duty on the United Kingdom and its courts to abide by judgments of the ECtHR; this requires them not only to acknowledge any breach of the Convention which has been established by any such judgment, as they have done, but to make the fullest reparation to the victims which is available under national law, which they have not. Moreover, national courts should, if free to do so, refrain from acting in a manner which would put the United Kingdom in breach of its international obligations.

102. This argument involves the following propositions: (i) that the United Kingdom's international obligation to abide by a judgment of the ECtHR is binding on our domestic courts and directly enforceable in those courts by individuals; (ii) that the Court of Appeal was at liberty under our domestic law to quash the convictions; and (iii) that its failure to do so put the United Kingdom in breach of its international obligation to abide by the judgments of the ECtHR.

103. The argument draws an untenable distinction between those cases where the breach of the Convention right has been established by a judgment of the ECtHR and those cases where it has not, even though the United Kingdom is bound by the Convention and not merely by the judgment. But in any case I am unable to accept any of the propositions which it involves.

104. In the first place, the obligation placed upon the United Kingdom by Article 46 of the Convention to abide by a judgment of the ECtHR is an international obligation of the United

Kingdom. It has not been incorporated into our domestic law so as to be directly enforceable by individuals. An illuminating contrast may be drawn with Section 2(1) of the Civil Jurisdiction and Judgments Act 1982 ("the CJJA"), which provides that the Brussels Convention "shall have the force of law in the United Kingdom." As my noble and learned friend Lord Hoffmann observed during argument, if the primary obligation of the United Kingdom contained in Article 6 of the Convention does not form part of our domestic law enforceable directly by individuals (otherwise than through the mechanism of the HRA), how can the secondary obligation to abide by judgments of the ECtHR do so?

105. In the second place, the identification of the judicial and other organs of the state with the state itself is a principle of international law. But it has no place in the domestic jurisprudence of the state. The legal relationships of the different branches of government depend on its internal constitutional arrangements. In the case of the United Kingdom, the governing principles are the separation of powers, the supremacy of Parliament, and the independence of the judiciary. Accordingly, while a judgment of the ECtHR is binding on the United Kingdom, it is not directly binding as a matter of our domestic law on the courts. It is for this reason that Section 2 of the HRA provides only that in determining a question which has arisen in connection with a Convention right the court must "take into account" the jurisprudence of the ECtHR. By contrast Section 3(1) of the CJJA requires any question as to the meaning or effect of any provision of the Brussels Convention "to be determined in accordance with any relevant decision" of the European Court of Justice.

106. In the third place, the Convention itself distinguishes between breach and remedies for breach, and deals with the role of the national courts in providing a remedy. The international obligation of the state to provide reparation is not unqualified. It is incumbent on the state to do so but only so far as its internal law permits. When it comes to reparation, therefore, the state's internal law has primacy; it governs the extent of the reparation which the state is obliged to make. It is noticeable that in those cases where the ECtHR has made a further monetary award there has been no suggestion that the state has been in breach of its Article 46 obligation. It follows that the principle that our domestic courts will not act in a manner which would put the United Kingdom in breach of its international obligations is not engaged.

107. The Appellants also sought to rely on the decision in *Dallal v Bank Mellat* [1986] QB 441 and the principle of judicial comity to argue that our national courts should not merely "take account" of decisions of the ECtHR as the HRA prescribes but apply them, at least where the same complainants are involved. Although they eschewed reference to the doctrine of *res judicata*, they laid considerable stress on the facts that the ECtHR is a court of competent jurisdiction and that the parties are essentially the same. Their difficulty, as its seems to me, is twofold. First, even if the doctrine of *res judicata* were applicable, the present case is one where the court would be constrained by statute to disapply it. Secondly, an essential element for the application of the doctrine is absent: the issues were not the same. The issue before the ECtHR was whether the admission of the impugned evidence infringed Article 6 of the Convention. It held that it did, and its ruling has not been disputed. The issue in the present appeals is whether the internal law of the United Kingdom permits the convictions to be quashed. For the reasons which I have given, I consider that the Court of Appeal was correct to hold that it does not.

108. I am also unable to accept the Appellants' submission, essentially forensic, that the prosecution is acting incompatibly with the Convention by relying on the impugned evidence

to support the convictions. It has acknowledged throughout that the admission of the evidence in question infringed the Appellants' Convention rights. It does not "rely" in any meaningful sense on the impugned evidence to uphold the convictions. It merely contends, as it is entitled under the Convention to do, that our internal law does not permit the convictions to be quashed by reason only of the admission of the evidence in question.

109. For these reasons, as well as those given by my noble and learned friends Lord Bingham of Cornhill and Lord Hoffmann, whose speeches I have had the advantage of reading in draft, I would dismiss the appeals.