



Decision to restrict communication between lawyer and accused on the grounds of protecting State secrets was contrary to the Convention

The case of [M v. the Netherlands](#) (application no. 2156/10) concerned a former member of the Netherlands secret service who had been charged with leaking State secrets. The applicant, Mr M, complained before the European Court of Human Rights that the ensuing criminal proceedings had been unfair.

In today's Chamber judgment¹, the Court held, unanimously, that there had been a **violation of Article 6 §§ 1 (right to a fair trial) and 3 (c) (right to legal assistance of own choosing)** of the European Convention on Human Rights. The Court found that as a result of the threat of prosecution should Mr M divulge State secrets to his lawyers, communication between him and his counsel was not free and unrestricted as to its content, thus irretrievably compromising the fairness of the proceedings against him.

However, the Court further held, unanimously, that there had been **no violation of Article 6 §§ 1 (right to a fair trial) and 3 (b) and (d) (right to adequate time and facilities for preparation of defence and right to obtain attendance and examination of witnesses)** of the Convention. In particular, the refusal of members of the secret services to answer questions put to them by the defence because of their duty of secrecy had not been contrary to Article 6 §§ 1 and 3 (d). The applicant explained that his strategy had been to demonstrate that someone else could have divulged the classified information, and that that line of defence had been compromised as he couldn't properly question the witnesses from the secret services. The Court noted that this was a perfectly legitimate defence strategy in theory. However, considering the sheer volume of evidence linking him to the crime, he had not been entitled to make specious demands for information in the hope that an alternative explanation might present itself.

The Court observed that a new trial or the reopening of the domestic proceedings at the request of the applicant represents an appropriate way to redress the violation.

Principal facts

The applicant, Mr M, is a Netherlands national.

He is a former member of the Netherlands secret service, the AIVD (*Algemene Inlichtingen- en Veiligheidsdienst*, General Intelligence and Security Service). He was employed by the AIVD as an audio editor and interpreter. In this capacity, he had access to classified information which he was under strict instruction not to divulge. This duty of secrecy continued even after he left the service.

In 2004, he was charged with having disclosed State secrets to unauthorised persons, including terrorist suspects. Prior to his trial, he was informed by the AIVD that it would be constitutive of a further criminal offence if he were to discuss matters covered by his duty of secrecy with anyone, including his counsel. Restrictions were also put on the defence's access to documents, with some only being provided in a redacted form.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

During the initial proceedings, the applicant's counsel protested against the restrictions affecting the defence, particularly regarding the communication between themselves and the applicant. A conditional exemption was therefore granted by the AIVD which permitted Mr M to disclose, only to his lawyers, information strictly necessary for his defence.

During the appeal proceedings, the applicant further complained unsuccessfully about the fact that he was not permitted to give the names of the AIVD members he wished to call as witnesses to the Court of Appeal. Any AIVD members who did appear as witnesses were allowed to refuse to answer questions from the defence that might compromise the secrecy of AIVD intelligence. Furthermore, their voices and appearances were disguised in order to conceal their identities.

The applicant was convicted by the Regional Court and sentenced to four years and six months' imprisonment, which sentence was reduced by the Court of Appeal to four years and by the Supreme Court to three years and ten months.

Complaints, procedure and composition of the Court

Relying on Article 6 §§ 1 (right to a fair trial) and 3 (b), (c) and (d) (right to legal assistance of own choosing, right to adequate time and facilities for preparation of defence and right to obtain attendance and examination of witnesses), Mr M complained that the AIVD had exercised decisive control over the evidence, restricting his and the domestic courts' access to it and controlling its use, thus preventing him from instructing his defence counsel effectively. Consequently, he believed that his trial had been unfair.

The application was lodged with the European Court of Human Rights on 7 January 2010.

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

Helena Jäderblom (Sweden), *President*,
Branko Lubarda (Serbia),
Luis López Guerra (Spain),
Helen Keller (Switzerland),
Pere Pastor Vilanova (Andorra),
Alena Poláčková (Slovakia) and,
Egbert Myjer (Netherlands), *ad hoc Judge*,

and also Fatoş Aracı, *Deputy Section Registrar*.

Decision of the Court

[Article 6 §§ 1 and 3 \(b\) - the redaction and alleged withholding of documents](#)

The Court considered that the documents that had been made available by the AIVD in a redacted form were perfectly acceptable. The documents in question contained details of the State secrets that the applicant was alleged to have revealed and the sensitive nature of the material could be adequately proven even in its redacted state. Moreover, the National Public Prosecutor for Counter-Terrorism confirmed that the documents contained in the case file had been copies of the classified documents they purported to represent, which Mr M did not dispute. The remaining legible information was sufficient for the defence to adequately prepare its case. In respect of the internal AIVD investigation file which the applicant alleged had been withheld from the defence, the Court noted that it had neither been in the hands of the prosecution, nor could the Court of Appeal establish that it had actually existed. Consequently, any benefit Mr M had intended to derive from it was merely hypothetical. For these reasons, the Court considered that the redaction and alleged withholding of certain documents had not amounted to a violation of Article 6 §§ 1 and 3(b).

[Article 6 §§ 1 and 3 \(c\) - the restriction of the right to give information and instruction to counsel](#)

The Court accepted that there was no reason in principle why secrecy rules should not be applicable when a former member of the security services was being prosecuted for revealing State secrets. However, the question for the Court was how a ban on divulging secret information affected Mr M's right to defence. It held that, without professional advice, an individual who was facing serious criminal charges could not be expected to weigh up the benefits of disclosing his case in full to a lawyer against the risk of further prosecution for doing so. Consequently, there had been a violation of Article 6 §§ 1 and 3 (c) as the fairness of the proceedings had been irretrievably compromised by the interference with communication between Mr M and his lawyer.

[Article 6 §§ 1 and 3 \(d\) - the refusal to call certain AIVD members as witnesses and the conditions imposed on others](#)

The Court held that the Court of Appeal could not be said to have acted unreasonably or arbitrarily as regards the applicant's right to examine and obtain the attendance of witnesses. Mr M complained that the conditions the AIVD put on the manner in which their members gave evidence had denied him access to information that would have been capable of casting doubt on his guilt. However, the Court held that although it was, in itself, a perfectly legitimate defence strategy in criminal cases to create doubt as to the authorship of a crime by demonstrating that the crime could well have been committed by someone else, this did mean that a suspect had the right to make specious demands for information in the hope that perchance an alternative explanation might present itself. In reality, the evidence on which the Court of Appeal had based its conviction comprised no fewer than 53 different items, including several linking Mr M directly to the leaked documents and to the unauthorised persons found in possession of them. In the circumstances, therefore, there had been no violation of Article 6 §§ 1 and 3(d).

[Article 41 \(just satisfaction\)](#)

The Court held that the Netherlands was to pay the applicant 732 euros (EUR) in respect of costs and expenses.

The finding of a violation constituted in itself sufficient just satisfaction in respect of any non-pecuniary damage sustained by Mr M. However, it was further observed that as the original domestic proceedings entailed a breach of the requirements of Article 6, a new trial or the reopening of the proceedings at the request of the applicant represents an appropriate way to redress the violation.

The judgment is available only in English.

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