was any consideration of whether anyone should be charged or not, each suspect had been formally interviewed and their version of events obtained. Accordingly the versions were given without any promise of reward held out by the investigators. Only after this stage was there any discussion about inducements, ie assistance in return for immunity.

1 [2001] EWCA Crim 3012, [2001] All ER (D) 253 (Dec).

4.52 Keene LJ stated:

> 'If the more significant criminals are to be prosecuted, it may be necessary to get lesser offenders to come to court and give evidence against them and that may require the prosecuting authorities, in some instances, to agree not to prosecute. There may be situations where the continuing pressure or inducement on a witness or witnesses to give evidence against the defendant is so strong, even by the stage of trial, that the judge forms the view that it would be wrong for a jury to place any reliance on such evidence. He would then exclude the evidence and might, in appropriate cases, stay the proceedings. There will be other cases where the situation is less extreme, and where the jury can properly hear the evidence of such a witness, and hear evidence also about the circumstances in which that witness came to make a witness statement, and then make up their minds about the honesty of the witness.
>
> In the present case we are not persuaded that the police abused their powers. The procedure generally adopted was one where the person arrested was interviewed on tape, before a caution was discussed. That, in our judgment, is an important safeguard and one which accords with the national guidance on this matter. Once that situation has been reached, there is no reason why the willingness of a suspect to co-operate with the police should not be taken into account by the police, when deciding whether to caution or not'.

4.53 Investigators and prosecutors will need always to be mindful of allegations of collusion and improper inducement in a trial where an important prosecution witness against whom there was sufficient evidence of criminality to mount a prosecution has nonetheless never been prosecuted.

NON-DISCLOSURE ABUSE

Non disclosure and unfairness

4.54 It is trite law that an accused's right to fair disclosure is regarded as inseparable from his right to a fair trial. An accused must be in a position to fairly advance his arguments by way of fair disclosure of material in the Crown's possession. In *R v Togher*[1] the Court of Appeal held that where an accused's right to a fair trial was vitiated, for example because of non-disclosure, this would almost invariably result in the quashing of the conviction. Woolf CJ held 'If they could establish an abuse, then this court would give very serious consideration to whether justice required the conviction to be set aside'[2].

1 [2001] 1 Cr App Rep 457.
2 At 468.

4.55 Recent developments have underlined that the right to disclosure is regarded as a fundamental condition or hallmark of fairness. The Attorney-General's Guidelines on the disclosure of information in criminal proceedings[1] were introduced in an attempt to improve the operation of the current statutory disclosure regime. The opening paragraph declares:

> 'Every accused person has a right to a fair trial, a right long embodied in our law and guarantee under article 6 of the European Convention on Human Rights. A fair trial is the proper object and expectation of all participants in the trial process. Fair disclosure to an accused is an inseparable part of a fair trial'.

1 (29 November 2000).

4.56 These laudable words are followed up, in para 5 of the guidelines, with an unequivocal warning to investigators and disclosure officers, namely:

> 'A failure to take action leading to proper disclosure may result in a wrongful conviction. It may alternatively lead to a successful abuse of process argument or an acquittal against the weight of the evidence'.

4.57 The guidelines were produced in response to concerns about the operation of the disclosure provisions in the Criminal Procedure and Investigations Act 1996, and the accompanying Code. Two detailed studies into the workings of the disclosure system expressed concerns by judges, prosecutors and defence practitioners: first, the CPS Inspectorate's Report on 'The thematic review of the disclosure of unused material'[1], which concluded that CPIA 1996 neither worked as Parliament intended, nor did its operation command the confidence of criminal practitioners. Sir Robin Auld's report 'Review of the Criminal Courts' noted[2] that the review highlighted:

> 'the failure of police officers to prepare full and reliable schedules of unused material; undue reliance by the prosecutors on disclosure

officers' schedules and assessment of what should be disclosed; and the "awkward split of responsibilities, in particular between the police and the Crown Prosecution Service", in the task of determining what should be disclosed'.

Second, the report by Plotnikoff and Woolfson[3], undertaken on behalf of the Home Office, similarly confirmed the above-mentioned defects in the disclosure regime.

1 Thematic Report 2/2000 (March 2000).
2 At p 463 of the Report under the heading 'Defects of the present system'.
3 'A Fair Balance?' (2001).

4.58 Responding to such concerns the CPS initiated a review of the Joint Operational Instructions on Disclosure (JOPI) which provides guidance to investigators and prosecutors alike. A new revised JOPI taking into account difficulties identified in the above surveys and also the wording of the Attorney-General's guidelines has been published. Unlike its predecessor, this edition of JOPI is publicly available and so it should become familiar to practitioners. A proven violation of the letter or spirit of JOPI is likely to be highly relevant to any complaint of prosecution non-disclosure.

The CPIA 1996; prosecution failures to comply with the service of 'primary' and/or 'secondary' disclosure

4.59 Under the CPIA 1996, primary disclosure, namely material which in the view of the prosecutor might undermine the case for the prosecution, should be served automatically. Secondary disclosure (namely material which might reasonably be expected to assist the accused's defence) is dependent upon the disclosure of a defence case statement by the accused. Clearly those accused who have set out their defences in interview, have served full defence case statements (with annexed specific requests for secondary disclosure and/or for various lines of inquiry to be pursued), followed up by chasing letters to the prosecution in correspondence, are in the best position to maximise their disclosure opportunities. Where a judge finds that the defence have been deprived of material which undermines the prosecution case or assists the defence case, the next stage would be to determine how this may impact on the fairness of the proceedings.

4.60 Before considering an abuse of process application, defence practitioners should first exhaust the CPIA 1996 disclosure routes, and, in particular, the opportunity to make section 8 applications. The applications are founded upon the submission that there is reasonable

cause to believe there is 'prosecution material which might be reasonably expected to assist the accused's defence as disclosed by the defence statement', which has not been disclosed. Adverse findings against the prosecution, on such a section 8 application, may also become a factor for a judge to take into account on a subsequent abuse application. For example the judge may conclude that the prosecution's non-sensitive disclosure schedule was incomplete in material respects.

The problems encountered

4.61 Unfairness can, of course, result in many ways. Examples of disclosure-related problems have included:

(a) failures by the prosecution properly to comply with their obligations to provide 'primary' and/or 'secondary' disclosure;
(b) exceptionally late disclosure of primary and/or secondary material;
(c) failures by investigators and/or disclosure officers to properly advise prosecuting solicitors and/or counsel as to the proper state of disclosure;
(d) the inadvertent or deliberate misleading of prosecuting solicitors and/or counsel, in relation to non-sensitive, sensitive or public interest immunity material;
(e) the consequent inadvertent misleading of judges tasked to determine the disclosure to which the defence may be entitled.

4.62 In practice, most of the above defects are capable of cure within the trial process, without resort to a stay of proceedings. Some complaints of non-disclosure will be met with disclosure, others by the granting of adjournments to the defence when faced with very late disclosure, or by the exclusion of evidence or suitable judicial directions. Non-disclosure and abuse will generally only be intertwined where there is a complaint of deliberate violation of the accused's right to disclosure.

Examples of non-disclosure giving rise to abuse

4.63 In *R v Blackledge*[1], following pleas of guilty to breach of export controls concerning arms to Iraq, it transpired via the Scott Inquiry that exculpatory material had been withheld from the defence. This material, whilst not affording a defence to the offence charged, would have enabled the accused to mount a probably unassailable abuse application; that the exports of weapons had been secretly approved or deliberately overlooked by the DTI. The Court of Appeal promptly quashed the convictions of all accused on the ground of non-disclosure.

1 [1996] 1 Cr App Rep 326.

4.64 In *R v Osei-Bonsu*[1] the Court of Appeal considered an appeal based on non-disclosure, following a conviction for a minor assault offence. At trial, the defence unsuccessfully contended there had been an abuse of process following non-disclosure of police officers' notebooks and various computer-aided dispatch messages. The Court of Appeal, with the benefit of further information on the 'deplorable' conduct of the police and CPS in relation to disclosure, concluded that the case disclosed an abuse of process and quashed the conviction. The abuse arose from the non-disclosure of material that may have assisted the defence, clear breaches of the CPIA Codes of Practice and a breach of the trial judge's order in relation to disclosure.

1 (22 June 2000, unreported), CA.

4.65 In *R v Humphreys*[1] eight defendants, including a Detective Sergeant in the National Crime Squad, stood trial for conspiracy to supply cannabis resin. After some 10 weeks of preliminary argument HHJ Crush stayed the indictment as an abuse of process on both limbs of the *Beckford* test. The judge based his decision principally on numerous breaches by the prosecution in relation to their disclosure obligations under the CPIA 1996 and its Code of Practice, particularly in relation to material evidence regarding a co-conspirator who was to give evidence on behalf of the Crown. The court branded the prosecution with a 'culture of non-disclosure', which entailed substantial failures to retain and record relevant material, repeatedly late disclosure, 'selective' disclosure and the flouting of judicial orders in relation to disclosure. The cumulative effect was found to undermine the confidence in, and respect for, the rule of law.

1 (14 February 2000, unreported), Maidstone CC.

4.66 In *R v Docker*[1] a stay was granted following a ruling by the trial judge that 'the police had been significantly at fault in the disclosure process'. Disapproval of police misconduct, amongst allegations of fabricating evidence, coupled with non-disclosure by the police acted as the apparent basis for the stay.

1 (28 September 1993, unreported), Judge Gibbs QC at Wolverhampton CC, referred to in *Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 435, HL.

Prosecution disclosure

4.67 Section 10(2) of CPIA 1996 relates to failures by a prosecutor to make primary or secondary disclosure within the prescribed time limits. Where the prosecution have consistently failed to adhere to time limits,

perhaps finally serving material of crucial significance at trial itself, this s 10 concession or qualification may be yet another contributing factor relevant to the judicial discretion to stay on, for example, a principally non-disclosure abuse application.

RELEVANT ECHR JURISPRUDENCE

4.68 The practitioner submitting on abuse of process may also seek to draw upon the arguably wider duties of disclosure imposed upon the prosecution by the European Convention on Human Rights, article 6 rather than those under the CPIA 1996. Indeed, the making of parallel abuse and article 6 submissions is now commonplace, given the inevitable overlap in the arguments.

4.69 In addition to the fair trial guarantee under the ECHR, article 6(1), the specific article 6(3)(b) guarantee is frequently relied upon, for it states the right 'to have adequate time and facilities for the preparation of his defence'. In *Kaufman v Belgium*[1] the Commission stated that:

> 'everyone who is a party to ... proceedings should have a reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent...'

1 (1986) 50 DR 98.

4.70 In *Jespers v Belgium*[1] the Commission stated that the now enshrined 'equality of arms' principle imposes on prosecution and investigating authorities an obligation to disclose any material in their possession. The obligation is applicable to any material to which they could gain access which may assist the accused in exonerating himself[2]. The duty is said to be necessary to remedy the inequality of resources between the prosecution and defence, and the principle applies equally to material which might undermine the credibility of a prosecution witness.

1 (1981) 27 DR 61.
2 An important principle which finds some reflection in the CPIA 1996 Code para 3.4 duty on police to follow up all reasonable lines of inquiry.

4.71 The European Court has also been prepared to condemn lack of defence access to prosecution papers in the most inferior courts, notably in the decision of *Foucher v France*[1]. In *Foucher* the applicant and his father were prosecuted for insulting behaviour towards public service employees, the case being tried in the local police court where they chose

to represent themselves. Against a background of the prosecutor refusing them access to their files (on the basis it could only be supplied to a lawyer not a private individual), the court found a violation of article 6(1) and 6(3)(b).

1 (1997) 25 EHRR 234.

4.72 Whilst the ECtHR has made it clear in the *Edwards v United Kingdom* decision[1], and in a string of subsequent cases, that article 6 generally requires the prosecution to disclose to the defence all material evidence for or against an accused, nevertheless, it is also clear that the entitlement to disclosure of relevant evidence is not an absolute right. In *Van Mechelen v Netherlands*[2] the court adopted a principle of 'strict necessity' in this regard; one which permits on necessity grounds some non-disclosure of otherwise disclosable material. Justifications which have been accepted as falling within this include national security, the protection of vulnerable witnesses and the keeping secret of police methods of investigation[3]. Clearly this principle is analogous to our domestic doctrine of public interest immunity. So far as the ECtHR is concerned, in *Fitt v United Kingdom*[4] the court held that the ex parte system did not contravene the defendant's right to a fair trial.

1 (1992) 15 EHRR 417.
2 (1997) 25 EHRR 647.
3 See *PG and JH v United Kingdom* [2002] Crim LR 308; and *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1.
4 (2000) 30 EHRR 480. See also *Jasper v United Kingdom* at 441.

4.73 Finally, it is worthy of note that the duty of disclosure under article 6 of the Convention is not reliant upon service of a defence case statement, which, by contrast, is so required under the CPIA in order to seek to trigger secondary disclosure.

PUBLIC INTEREST IMMUNITY

4.74 The principles underlying public interest immunity are well-known. Where the prosecution contend that it would be detrimental to the public interest for certain otherwise disclosable material to be disclosed to the accused, they must seek judicial permission for such non-disclosure. Such decisions must be made by a judge and never by a member of the prosecution team. The forum for such an application for non-disclosure is known as a public interest immunity hearing where only the prosecution are represented and make submissions.

4.75 In order that the prosecution do not abuse their right to seek a public interest immunity/non-disclosure order concerning material it is

obviously vital that true and full representations concerning the material's relevance and sensitivity are made to the judge. The motivation for such a hearing should never be to withhold material from the defence which might embarrass the prosecution or strengthen a defence application or worse still, to prevent the accused from receiving a fair trial. In essence, if the sole or dominant motive for the making of such an application is to gain a forensic advantage then it should never be made. Without doubt if any or similar motivation influences the prosecution and leads it to seek non-disclosure this will amount to a serious abuse of power falling squarely within the abuse doctrine.

4.76 An ex parte or one-sided application in an adversarial regime confers a heavy responsibility upon the prosecution to ensure that the judge hearing it is furnished only with accurate information and all points of relevance are clearly made. Inevitably a judge, who may not be the trial judge, in such a hearing is heavily dependent upon the prosecutor's submissions and if they are inaccurate, either accidentally or deliberately, then an injustice results. As a recent commentator noted:

> 'It is well established that the judge's role in overseeing disclosure of such material is vital in guaranteeing a fair trial, and this depends on there being scrupulously accurate information provided to the judge ... The effect of the trial judge being denied the true picture is to render meaningless any assessment of whether that material should be disclosed to the defence'[1].

1 See *R v Patel* [2002] Crim LR 304.

4.77 The duty on the Crown to ensure that only accurate information is presented to the judge during an ex parte application, was underlined in *R v Jackson*[1]. In that case, prosecuting counsel, relying on inaccurate information supplied by the officer in the case, misled the trial judge in an ex parte public interest immunity hearing. The extreme danger of this was demonstrated in *Jackson* because it was purely fortuitous that the error was uncovered when, post conviction, the error came to the attention of the prosecuting counsel in the course of a different case.

1 [2000] Crim LR 377; see commentary to the report.

4.78 *Jackson* illustrates that the inherent danger of one-sided public interest immunity hearings is that if wrong information is conveyed to the court during one, there is a substantial danger that it will never be identified as such. The defence are excluded and the trial judge is ill-equipped to probe what is said to him/her. It is obviously a matter of concern that absent the appointment of an amicus acting in the interests of the defence, there are inadequate safeguards to either prevent or identify mistakes of the kind which happened in *Jackson* from recurring. The only