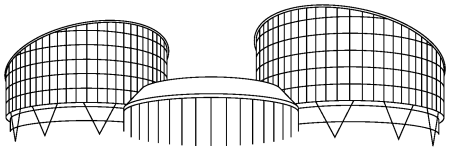

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF DALLAS v. THE UNITED KINGDOM

(Application no. 38395/12)

JUDGMENT

STRASBOURG

11 February 2016

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Dallas v. the United Kingdom,

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

Mirjana Lazarova Trajkovska, *President,*
Guido Raimondi,
Kristina Pardalos,
Linos-Alexandre Sicilianos,
Paul Mahoney,
Aleš Pejchal,
Robert Spano, *judges,*

and André Wampach, *Deputy Section Registrar,*

Having deliberated in private on 19 January 2016,

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

PROCEDURE

1. The case originated in an application (no. 38395/12) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Greek national, Ms Theodora Dallas ("the applicant"), on 13 June 2012.

2. The applicant was represented by Mr C. Parry, counsel, of Pump Court Chambers, London. The United Kingdom Government ("the Government") were represented by their Agent, Ms M. Addis, of the Foreign and Commonwealth Office.

3. Relying on Article 7 of the Convention in particular, the applicant alleged that she was found guilty of a criminal offence on account of an act which did not constitute a criminal offence at the time when it was committed.

4. On 11 November 2013 the application was communicated to the respondent Government.

5. The Greek Government did not exercise their right to intervene in the proceedings before the Court (Article 36 § 1 of the Convention and Rule 44 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1977 and lives in Luton.

A. The background facts

7. The applicant was summoned to attend jury service at the Crown Court on 4 July 2011.

8. On the morning of the 4 July the jurors were shown a video in relation to their service and were given verbal instruction from the court's jury officer that they were not permitted to research their cases on the Internet or to research the defendants or any of the individuals involved in the trial. Notices in the jury waiting room contained the following warning:

> "You may also be in contempt of court if you use the internet to research details about any cases you hear along with any cases listed for trial at the Court ..."

9. The notices made it clear that contempt of court was punishable by a fine or by imprisonment.

10. The applicant was selected to serve on a jury in a trial of a defendant charged with grievous bodily harm with intent. The trial commenced that afternoon. When the jury were sworn, the applicant took an oath or affirmation that she would faithfully try the defendant and give a true verdict according to the evidence.

11. Before the case was opened by the prosecution, the judge gave a number of directions to the jury. These underlined the importance of deciding the case only on the basis of what the jury saw and heard in the courtroom. Two consequences were identified by the judge. The first was that they should not speak about the case to anybody. He continued:

> "The second consequence is a newer one: that you do not go on the internet. You have probably read in the last few weeks about a juror who did go on the internet; went on Facebook and severe problems followed for that juror. I am sure you will not want any of those. So, the rule is – and it is told to every jury – that not only do you not discuss it, but you do not go on the internet; you do not try and do any research of your own; you do not discuss it on Facebook; you do not tweet about it; or anything of that nature. So, simply, once you leave this room you do not talk about it or deal with it in any way with anybody.
>
> We ask you to observe what goes on in this room. The evidence has been carefully considered. It is put before you in a carefully considered way. That is why you are not to discuss it with anybody else or do your own research, or discuss it on Facebook – because it is carefully controlled ..."

12. The trial continued on 5 and 6 July 2011. On 5 July the trial judge allowed a prosecution application to adduce evidence of the defendant's bad character. The disclosure gave details of a previous sentence for assault occasioning actual bodily harm. It was not disclosed that the defendant had also been charged with rape in respect of the same offence but had been acquitted.

13. On 6 July 2011 the jury retired to consider their verdict. At the end of the court day the judge sent the jury home to return on 8 July 2011.

14. After the court had risen, one of the jurors in the case informed the court usher that a juror, whom she identified as the applicant, had been on the Internet and had found out about the previous conviction and that it involved rape. The trial judge was informed.

15. On 8 July 2011, after hearing from the juror in court, the judge summoned the jury foreman, who confirmed that there had been some reference to the matter to which the juror had referred. The judge then called the applicant into court. He informed her of what had been said and that she should not say anything at that stage. He gave her the opportunity, which she accepted, of speaking to a barrister in order to take advice on the question of contempt of court. After discussion with the applicant, the barrister informed the court that the applicant's position was that her behaviour regarding the Internet was not deliberate. She therefore claimed to have a defence to the allegation of contempt of court. The judge explained to her that the matter would be referred to the Attorney General and that there would be a police investigation.

16. The judge subsequently discharged the jury and the trial was aborted.

17. The police obtained statements from the eleven other jurors at trial. The statements showed that during the jury deliberations the applicant stated that she had conducted Internet research and that her research had showed that the previous conviction also included an allegation of rape. Most of the other jurors had reacted to this by making it clear that the applicant had introduced extraneous and impermissible facts into their discussion, contrary to the instructions and directions that they had been given.

18. On 26 July 2011 the police interviewed the applicant under caution. During the interview, the applicant explained what had happened at the commencement of the trial and set out her recollection of what the trial judge had said as follows:

> "The judge said ... that we should not look, we should not publish anything on Facebook, on Twitter, we should not tell anybody outside the court about the case ..."

19. She said that did not recall that the judge had instructed jurors not to do Internet research.

20. She explained that she had seen a newspaper article concerning the defendant on the Internet on the evening of 5 July 2011. When asked what she was doing on the Internet, she replied that, as she was Greek, she had wished to know the exact translation of the charge facing the defendant. She had therefore searched for "grievous bodily harm". She had then wished to see how frequent such incidents were in Luton so added "Luton" to the search terms. The article concerning the defendant's previous conviction had appeared in the list of results. She explained that her recollection was hazy but that she did not remember searching for the defendant by name. She admitted that she had informed the other members of the jury of the

information she had found. She said that she was not aware that she had missed any element of the judge's instructions and that she had had "absolutely no intention" of going against the instructions or directions of the judge.

B. The domestic proceedings

21. The Attorney General subsequently applied to the Divisional Court for permission to make an application for an order of committal under Order 52 of the Rules of the Supreme Court ("SCR" – see paragraphs 45-46 below). The applicant was informed of the application by letter dated 3 November 2011.

22. On 29 November 2011 the Divisional Court granted permission to make a committal application.

23. On 2 December 2011 a claim form was issued by the Attorney General seeking an order of committal against the applicant for:

> "contempt of court in conducting Internet research on the case she was trying as a juror in the Crown Court and thereafter in disclosing the extraneous information she had obtained to other members of the jury."

24. The grounds on which the applicant's committal was sought were that

> "her acts created a substantial risk of seriously prejudicing and/or impeding the course of justice in the proceedings with which she was concerned."

25. Reference was made to further details set out in a sworn affidavit by a legal adviser at the Attorney General's office. In the affidavit, it was submitted that the evidence in the case demonstrated that the applicant:

> "deliberately and in breach of instructions given by the jury officer, a warning contained in a written notice, her jury oath or affirmation and directions given by the trial judge, (a) conducted internet research on the case she was trying, and thereby obtained extraneous information about the case, and (b) imparted that extraneous information to other members of the jury whilst the jury were in deliberation."

26. In her position statement dated 5 December 2011, the applicant accepted that she had searched on the Internet for the words "grievous" and "Luton" while the trial was underway and that she had discussed with other jurors a newspaper report concerning the defendant. She did not accept a specific intent to impede or to cause a real risk of prejudice to the due administration of justice.

27. In a note on behalf of the Attorney General dated 9 January 2012, the test for contempt was set out as follows:

> "At common law, a contempt of court is an act or omission which creates a real risk of prejudice to the administration of justice, done with the intent of creating such a risk."

28. The note went on to claim that the applicant's Internet research and subsequent conduct in relation to it had created a real risk of prejudice to the administration of justice and had been done with the intent of creating such a risk.

29. In written submissions on behalf of the applicant dated 10 January 2012, it was submitted that the offence of contempt of court could be stated as follows:

> "Where a person knowingly does an act which he specifically intends to impede, or create a real risk of prejudicing, the due administration of justice ..."

30. On 19 January 2012 the application for committal was heard. Counsel for the applicant submitted that the key element that the prosecution had to prove was "specific intent", that is intent to impede or create a real risk of prejudicing the due administration of justice. He referred to the Attorney General's position that intent could be inferred from foresight of the consequences and indicated that, while that might be appropriate in some cases, it did not sit so easily with the kind of intent required in the applicant's case. An exchange then took place between the court and counsel for the applicant, as follows:

> "[Court]: Can we get this down to the reality of the case. The Crown's case is that your client deliberately disobeyed the order of the judge. Is that not the same as what you are saying? You disagree with it and you are going to submit to us why the Crown's case is wrong, but if a juror deliberately disobeys the order if a judge, is that not contempt of court?
>
> [Counsel]: Certainly, yes.
>
> [Court]: The 'deliberate' is the point that matters.
>
> [Counsel]: Yes. Yes."

31. The Attorney General was subsequently asked whether he accepted that in the context of the case he had to satisfy the court, to the criminal standard, that the applicant had deliberately disobeyed the order of the judge. He confirmed that he did.

32. At the conclusion of the evidence and submissions, and after the court had already adjourned, the judges returned to seek further clarification of the correct test for contempt of court. The following test was put to counsel by the bench:

> "It is a contempt in the context of jury misconduct within the jury room, for a juror deliberately to disobey the direction of the judge and create a risk of prejudice to the due administration of justice."

33. The judge added:

> "What that removes is a specific intent in relation to the creation of the risk. The intent is directed at the deliberate disobedience."

34. The Attorney General expressed himself to be content with the test proposed. Counsel for the applicant requested that the word "thereby" be

added following "disobey the direction of the judge and ...", in order to create a link between the two elements. The Attorney General fully accepted the proposed modification. Counsel for the applicant was pressed on whether he was content with a definition whereby the intent was the deliberate act of disobeying the order, which then had a causative link in creating the risk. It was noted by the judge that this was a slightly different test from the one counsel had earlier proposed. He replied that he was content with the proposed test, and added:

> "I am reacting as I stand. I hope I can venture to submit that actually, if this is the test, it is perhaps redefining an old law but it is new."

35. On 23 January 2012 an order for committal was made. The Divisional Court summarised the applicant's version of events as follow:

> "36. On her account, effectively, she came across the newspaper reference to [the defendant's] previous conviction in the local newspaper in Luton by following a route from the word 'grievous' through to 'Luton' and 'crime' and in effect, somehow she stumbled across the newspaper entry."

36. However, the court rejected her account, explaining:

> "37. We do not believe that the defendant did not seek information about [the defendant] on the internet. Her inability to remember this particular feature of the case, when she has a detailed recollection of so much else, was not credible. We do not believe that she could have just stumbled across the link to [the defendant's] previous conviction in the way she described."

37. The court concluded:

> "38. We have no doubt that the defendant knew perfectly well, first, that the judge had directed her, and the other members of the jury, in unequivocal terms, that they should not seek information about the case from the internet; second, that the defendant appreciated that this was an order; and, third, that the defendant deliberately disobeyed the order. By doing so, before she made any disclosure to her fellow jurors, she did not merely risk prejudice to the due administration of justice, but she caused prejudice to it. This was because she had sought to arm and had armed herself with information of possible relevance to the trial which, although not adduced in evidence, might have played its part in her verdict. The moment when she disclosed any of that information to her fellow jurors she further prejudiced the administration of justice. In the result, the jury was rightly discharged from returning a verdict and a new trial was ordered. The unfortunate complainant had to give evidence of his ordeal on a second occasion. The time of the other members of the jury was wasted, and the public was put to additional unnecessary expense. The damage to the administration of justice is obvious."

38. It found that the contempt had been proved to the criminal standard. On sentence, the court explained that misuse of the Internet by a juror was always "a most serious irregularity" and that an effective custodial sentence was virtually inevitable to ensure that the integrity of the process of trial by jury was sustained. A sentence of imprisonment for six months was imposed. The judge noted that pursuant to rules on early release, the applicant would serve three months in prison.

39. Following the handing down of the judgment, an exchange took place between the applicant's counsel and the bench. The applicant's counsel sought clarity on the test for contempt of court, explaining:

> "I am concerned that the test that I was addressing – that we were addressing in preparation of this case – was a different test. We conducted the defence to a different test, and the reasons why it was a different test, I suggest, are threefold. First, the intention is different. Secondly, the risk has been diluted from 'real risk' – and, after all, 'risk' on the authorities simply means 'a possibility of occurrence' to 'risk'. Thirdly, may I make this submission? This is the first occasion – I do this with some hesitation for I can find no authority – where there has been a contempt of court flowing from a judicial direction.
>
> ... It has always historically been the order which has attracted contempt, not the direction, and the idea that a judge gives directions to a jury in the summing-up which could attract contempt and imprisonment is, in my submission, a novel one.
>
> I therefore submit this question rhetorically: whether this reformulation that this court has applied in this case is consistent with the common law of contempt."

40. The court retired to consider the matter before confirming that the appropriate test was applied in paragraph 38 of its judgment (see paragraph 37 above), and that it had been understood that applicant's counsel had agreed to that test. Leave to appeal was refused.

41. The applicant applied for permission to appeal to the Supreme Court. She argued, *inter alia*, that the test of contempt of court reformulated by the Divisional Court was not consistent with the common law of contempt of court; and that the reformulation of the offence, after evidence had been led and final submissions concluded, was not compatible with human rights principles and in particular with Articles 6 and 7 of the Convention.

42. On 26 January 2012 the applicant's petition to appeal to the Supreme Court was refused because the application did not raise an arguable point of law. In particular, the Supreme Court concluded that a suggested distinction between a "direction" and an "order" was not tenable since the meaning of each depended on the context and both could mean the same; and that the deliberate disobedience of a specific order of the judge not to use the Internet in connection with the case unquestionably amounted to contempt of court at common law.

43. From 23 January 2012 to 20 April 2012 the applicant was detained at HMP Holloway.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Proceedings for contempt of court

44. In England, contempt of court may occur in a number of different ways, sometimes under common law and sometimes based on a statutory provision. It may be a civil or a criminal offence.

45. The applicable procedure for contempt of court proceedings was at the relevant time set out in Order 52 RSC at Schedule 1 of the Civil Procedure Rules. Rule 1 of the Order provided in so far as relevant:

> "(1) The power of the High Court or Court of Appeal to punish for contempt of court may be exercised by an order of committal.
>
> (2) Where contempt of court–
>
> (a) is committed in connection with–
>
> ...
>
> (ii) criminal proceedings, except where the contempt is committed in the face of the court or consists of disobedience to an order of the court or a breach of an undertaking to the court; ...
>
> ...
>
> then ... an order of committal may be made only by a Divisional Court of the Queen's Bench Division."

46. Rule 2 required that permission be sought before an application was made to the Divisional Court.

B. Relevant case-law on contempt of court

1. Attorney-General v. Newspaper Publishing Plc *[1987] 3 WLR 942*

47. The case arose in the context of proceedings to prevent a former officer of the British Secret Services from publishing confidential information in his memoirs. Injunctions were granted to prevent two newspapers from publishing excerpts pending trial, but the excerpts were published by others newspapers. A question arose as to whether the newspapers had the requisite "intent" to impede or prejudice the administration of justice. The Court of Appeal explained:

> "Such an intent need not be expressly avowed or admitted, but can be inferred from all the circumstances, including the foreseeability of the consequences of the conduct. Nor need it be the sole intention of the contemnor."

2. Attorney-General v Sport Newspapers Ltd *[1991] 1 WLR. 1194*

48. The case concerned the publication by a newspaper of details of the previous convictions of an absconded suspect in a murder investigation, despite a prior warning from the police that any such publication was likely to prejudice future criminal proceedings. The Divisional Court explained that a common law contempt was committed if there was publication of an article which caused a real risk of prejudice to the due administration of justice and it had been published with the specific intent to cause such a risk to the administration of justice.

3. R. v. Schot and Barclay *[1997] 2 Cr. App. R. 383*

49. The case concerned proceedings for contempt of court brought against two jurors who had been identified by the jury as having declined to reach a verdict against the accused for personal reasons. The trial judge found both jurors guilty of contempt, holding that they had intentionally disrupted the entire trial by their refusal to reach a verdict. The finding was later overturned by the Court of Appeal. The court explained:

> "[C]ontumacious refusal to reach a verdict because of reluctance to judge another person, may, in an appropriate case, establish the *actus reus* of contempt, though it may be difficult or impossible to prove. The *mens rea*, namely an intention to impede or create a real risk of prejudicing the administration of justice, must also be proved ... This can be established by foreseeability of consequence. But the judge in the present case does not appear to have given any consideration to this, save to say 'both of them in their own way have intentionally disrupted the entire trial by their refusal'. In the light of Barclay's evidence that she did not want to disrupt the court's process or be disrespectful towards the court, and Schot's evidence that she wanted, or had tried, to reach a verdict, this is a difficult conclusion to sustain in the absence of any finding by the judge that he rejected that evidence ..."

4. Attorney General v. Fraill and Sewart *[2011] EWCA Crim 1570*

50. Following acquittal verdicts in respect of one of the defendants in a criminal trial (Ms Sewart), and while the deliberations were continuing in respect of other defendants and charges, one of the jurors (Ms Fraill) contacted Ms Sewart on Facebook, a social networking site. They had a conversation over that site. It later emerged that Ms Fraill had also researched one of the defendants on the Internet. Contempt of court proceedings were subsequently brought against Ms Fraill and Ms Sewart.

51. Ms Fraill pleaded guilty to contempt of court. In its judgment handed down on 16 June 2011, shortly before the present applicant commenced her jury service, the Divisional Court said that there was nothing new about the proposition that a juror may be in contempt of court. Referring to the obligation of jurors to swear an oath to "give true verdicts according to the evidence", the court described as "elementary" the conclusion that a verdict not given by each juror conscientiously in accordance with her assessment of the evidence at trial constituted a breach of that promise. The court emphasised that the jury's deliberations, and ultimately their verdict, had to be exclusively based on the evidence given in court, a principle which applied as much to communication with the Internet as it did to discussions by members of the jury with individuals not on the jury. Information provided by the Internet was not evidence and its use by a juror exposed her to the risk of being influenced. This, the court explained, offended "our long held belief that justice requires that both sides in a criminal trial should know and be able to address or answer any material (particularly material which appears adverse to them) which may influence the verdict".

52. The court noted:

> "35. Fraill is, as she has admitted, guilty of contempt of court because as a juror she communicated with Sewart via the internet and conducted an online discussion about the case with her when the jury deliberations had not been completed and verdicts had not been returned. During the course of the discussion she provided Sewart with information about the state of the jury's deliberations. This conduct contravened the provisions of section 8 of the [Contempt of Court Act] 1981 ... and disobeyed the clear and unequivocal series of directions given by the trial judge prohibiting such conduct. She was also guilty of contempt of court for conducting research on the internet into the defendants in the criminal trial in which she was sitting as a juror for the purpose of obtaining further information of possible relevance to the issues at trial."

5. Attorney General v. Davey and Beard *[2013] EWHC Admin 2317*

53. Mr Davey had posted a Facebook message which set out his view about the case he was trying and Mr Beard had conducted research on the Internet. In its judgment of 29 July 2013, the Divisional Court said:

> "2. The law in relation to proof of contempt at common law is well settled. First the Attorney General must prove to the criminal standard of proof that the respondent had committed an act or omission calculated to interfere with or prejudice the due administration of justice; conduct is calculated to interfere with or prejudice the due administration of justice if there is a real risk, as opposed to a remote possibility, that interference or prejudice would result: see *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191; *Attorney General v Times Newspapers Ltd* [1974] AC 273.
>
> 3. Second an intent to interfere with or prejudice the administration of justice must also be proved ..."

54. The Court referred to the findings of the Divisional Court in the applicant's case and continued:

> "Lord Judge CJ set out at paragraph 38 four elements which would ordinarily establish the two elements of contempt in cases where there had been deliberate disobedience to a judge's direction or order.
>
> i) The juror knew that the judge had directed that the jury should not do a certain act.
>
> ii) The juror appreciated that that was an order.
>
> iii) The juror deliberately disobeyed the order.
>
> iv) By doing so the juror risked prejudicing the due administration of justice."

C. Law Commission report on contempt of court

55. In its report no. 340 on *Contempt of Court (1) Juror Misconduct and Internet Publications*, published on 9 December 2013, the Law Commission identified problems with the law and procedure for dealing with jurors who sought extraneous information about the case that they were trying. It noted that the relevant conduct was treated as contempt because it was a breach of the order made by the judge at the start of the trial instructing jurors not to undertake research into the case, but that there was no specific form of

words that judges had to use. As a consequence, the scope of the criminal contempt depended on the exact wording that each judge adopted in warning the jurors at the start of the trial. Further, while the prohibition on searching for extraneous material was explained to jurors as forbidden because it was "a contempt of court", the Law Commission doubted whether, from the point of view of a layperson, it was obvious what "a contempt" was or what the implications of this were. It considered that the message would be clearer for jurors if they were told that such conduct was a crime. Finally, the Law Commission pointed to doubt whether extraneous research by jurors was a contempt by its own nature or only because it was a breach of the directions given by the judge. This, the Law Commission said, was a further source of confusion. It continued:

> "3.20 We consider that providing consistency in the prohibitions on juror misconduct, with the subsequent sanction for breach, is best done by legislation rather than by standardised court orders. The creation of criminal offences by statute allows the terms of the offence to be debated in Parliament. It allows the legislature to set down with clarity the elements of the offence, and to debate publicly the mischief which the offence seeks to address. The Parliamentary process and the fact that the offence has been enshrined in statute adds to the legitimacy of any offence created and the sanction which committing the offence attracts."

56. Following the recommendations of the Law Commission, the Criminal Justice and Courts Act 2015 was enacted. That Act amended the Juries Act 1974 to make it an offence for a juror to conduct research into a case on which he is sitting as a juror and to disclose such research to other jury members (sections 20A and 20B of the 1974 Act). The modifications took effect from 13 April 2015.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 7 § 1 OF THE CONVENTION

57. The applicant complained under Article 6 §§ 1 and 3 (a) of the Convention about the alleged failure to particularise the offence until judgment was given and to inform her promptly of the nature and cause of the contempt application. Under Article 7 she complained that she was found guilty of a criminal offence on account of an act which did not constitute a criminal offence at the time when it was committed.

58. The Court is master of the characterisation to be given in law to the facts of the case. It considers that these complaints essentially cover the same ground and finds it appropriate to examine the applicant's allegations solely under Article 7 § 1 of the Convention, which reads as follows:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

59. The Government contested the applicant's arguments.

A. Admissibility

60. The Court is satisfied that the complaint raises arguable issues under Article 7 § 1 of the Convention, so that it cannot be rejected as manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. The Court further considers that the complaint is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' observations

(a) The applicant

61. The applicant emphasised that sufficient accessibility and precision of the criminal law was a key principle of Article 7. Although that Article did not prevent the clarification or adaptation of existing law, it required that the interpretation of the law conform to the principle of reasonable certainty. The test for contempt of court at common law was clear: it required specific intent to impede, or create a risk of prejudicing, the due administration of justice. The application, in her case, of a test which required only "deliberate disobedience of a direction by the judge" and creating a risk to the due administration of justice was a separate and distinct test which, she argued, equated with a "breach-of-an-order" test. She argued that Order 52 expressly excluded the jurisdiction of the Divisional Court in cases where contempt was committed in connection with criminal proceedings and the alleged contempt was in breach of an order. She considered that the Government's submissions did not adequately address the distinction between specific intent and basic intent, but rather elided "specific intent" with the deliberate disobedience of a court order and did not explain how such a change in the law was compliant with Article 7.

62. The applicant rejected the Government's claim that her counsel had agreed to the formulation of the test by the Divisional Court. She emphasised that her case from the first had been that the "specific intent" test was the law, and she had not agreed to any revised test. In her submission, the whole exchange between her counsel and the court had to be taken into account: on a proper reading of this exchange there was not agreement to a different test (see paragraphs 30-34 and 39-40 above). In any

case it was wrong to suggest that counsel had the authority to agree a course which compromised a person's human rights.

63. The applicant further considered that for a finding of contempt of court for breach of an order to comply with Article 7, the order had to be lawful, clear and unambiguous. In particular, the nature of the contempt had to be defined with precision. Oral directions to the jury formulated on a case-by-case basis lacked consistency. Since Internet use varied widely, there was a need for a clear definition of what was permitted. In her case, there were several possible interpretations of the direction or order. The words "go on the internet", used in the judge's direction (see paragraph 11 above), were not adequately defined. She further argued that a penal warning was necessary because it was not clear which directions, if breached, could attract a criminal penalty and which would not. The reference to the "severe problems" of a juror who had done so was equally insufficient to meet the requirements of an order with a penal notice. An oral direction to persons unfamiliar with court procedure required simplicity and considerable clarity to be properly understood.

64. The applicant concluded that the interference with her rights was not in accordance with the law. For the Divisional Court to move to a "breach-of-an-order" test in these circumstances was not foreseeable, even with legal advice, since it was unprecedented, it removed constituent elements of the offence which essentially changed its legal character, the test had not been applied since her case and it had led to an extensive construction of the law to her detriment. In developing the law by application and interpretation in a common law system, the court's law-making function had not remained within reasonable limits.

(b) The Government

65. The Government accepted that Article 7 § 1 was applicable in the present case since the contempt of court was criminal in nature and the applicant's committal by the Divisional Court amounted to a finding that she was guilty of a criminal offence for the purposes of that Article.

66. In finding the applicant guilty of contempt of court at common law, the Divisional Court had applied well-established law. The applicant, in complaining that it had formulated a new test of liability, had mischaracterised and misunderstood the domestic judgment and domestic law. In particular, the court had applied the well-established mental element required, namely an intent to impede or prejudice the due administration of justice. It had merely reformulated the law to the specific facts of the applicant's case. The nature of the order in her case was a prohibition on doing an act which was inherently and inevitably prejudicial to the fairness of the proceedings, prejudicial to the administration of justice and contrary to the jury oath or affirmation. In these circumstances, the question whether the applicant had intended to prejudice the administration of justice was

indistinguishable from the question whether she had deliberately disobeyed the order of the court. Her counsel had agreed that there was no distinction between these two questions (see paragraphs 32-34 above). The approach of the court was uncontroversial: it was the approach that the Divisional Court had previously taken in *Fraill* (see paragraphs 50-52 above); it was supported by the Supreme Court in the applicant's case when refusing permission to appeal (see paragraph 42 above); and it was clear from the subsequent case of *Davey and Beard* (see paragraphs 53-54 above) that, in the applicant's case, the court had done nothing more than find that the requisite intent had been proved by reference to the particular issues in her case. Even if it were possible to formulate an academic argument that there was a distinction between proof of deliberate disobedience of the judicial order and proof of an intent to impede or prejudice the due administration of justice, the application of the former test would not violate Article 7. Liability based on disobedience of such an order was obviously foreseeable, having regard to the fact that it had a foundation in domestic case-law, including in the *Fraill* judgment (see paragraph 50-52 above).

67. The Government further disputed the suggestion that there was a lack of clarity in the judge's direction. The clarity of the direction was a matter of fact and had been determined by the Divisional Court, which had found that the jury had been directed in "unequivocal terms" not to seek information about the case from the Internet. It had also held that the judge's direction was an order and that the applicant's disobedience of it was deliberate. The prohibition imposed by the judge was consistent with the information given by the jury officer, the written notices in the jury room and the applicant's oath or affirmation. The Divisional Court did not believe the applicant's claim that there was a lack in clarity in her mind as to the order and concluded that she had understood its scope "perfectly well" (see paragraph 37 above). The fact that the order was not in writing and did not contain a penal warning was irrelevant.

68. Finally, it was also irrelevant for the purposes of domestic law and for the purposes of any analysis under Article 7 whether the prohibition imposed by the judge was characterised as a direction, an order or both. First, as matter of domestic law, there was no doubt that Internet research by a juror in disobedience of a direction given by a judge constituted contempt of court. Second, as a matter of domestic law, the meaning of "direction" and "order" depended on the context and both could mean the same. Third, the Divisional Court had held that in the context of the applicant's case the judge's direction was an order and that the applicant appreciated that it was an order (see paragraph 37 above).

2. The Court's assessment

(a) The general principles

69. Article 7 should be construed and applied in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment. Among its guarantees, it lays down the principle that the criminal law must not be extensively construed to an accused's detriment. It follows that offences must be clearly defined by law. When speaking of "law", Article 7 implies qualitative requirements, notably those of accessibility and foreseeability. This requirement is satisfied where the individual can know from the wording of the relevant provision, if need be with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and omissions will make him criminally liable (see *Del Río Prada v. Spain* [GC], no. 42750/09, §§ 77-80 and 91, ECHR 2013; *S.W. v. the United Kingdom*, 22 November 1995, §§ 34-35, Series A no. 335‑B; and *C.R. v. the United Kingdom*, 22 November 1995, §§ 32-33, Series A no. 335-C).

70. The progressive development of criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition in the United Kingdom. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see *Del Rio Prada*, cited above, §§ 92-93; *S.W.*, cited above, § 36; and *C.R.*, cited above, § 34).

71. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. It is not the task of this Court to substitute itself for the domestic courts as regards the assessment of the facts and their legal classification, provided that these are based on a reasonable assessment of the evidence. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention (see *Rohlena v. the Czech Republic* [GC], no. 59552/08, § 51, ECHR 2015).

(b) The application of the general principles to the facts of the case

72. The applicant contested the accessibility and foreseeability of the law of contempt of court in her case. There is no dispute between the parties as to the correct test for common law contempt of court. The test required, in particular, that two elements be present: first, there had to be an act which created a "real risk" of prejudice to the administration of justice; and second, there had to be an intention to create that risk (see paragraphs 27 and 29 above). It is true that, in its summary of the test, the Divisional Court omitted the word "real" from its description of the risk (see paragraph 32 above). However, it subsequently held that the applicant had caused "actual

prejudice" to the due administration of justice, and not merely a risk of such prejudice (see paragraph 37 above). It is not, therefore, arguable that the Divisional Court in her case applied a lower threshold than the test required. Further, the summary of the test in the subsequent case of *Davey and Beard* shows that the court in the applicant's case did not alter the nature of the risk which had to be demonstrated (see paragraph 54 above).

73. As to the question of intent, the Divisional Court decided that, in the circumstances of the applicant's case, if it was proved that she had deliberately disobeyed the judge's direction prohibiting the obtaining of extraneous information relating to the trial, an intent to impede or prejudice the due administration of justice would also have been proved (see paragraph 37 above).

74. The Court considers that it must be quite evident to any juror that deliberately introducing extraneous evidence into the jury room contrary to an order of the trial judge amounts to intending to commit an act that at the very least carries a real risk of being prejudicial to the administration of justice. In deciding that specific intent could be derived from the foreseeability of the consequences of certain actions, the Divisional Court was not replacing the specific intent test with a test of "breach of an order" or with a more basic intent test. Rather, it was finding the specific intent test to be met in the circumstances of the applicant's case. This approach to proof of specific intent had clear precedent (see paragraph 47 above). While it was open to the applicant's counsel to argue, as it appears that he to some extent did, that it was not appropriate to proceed in this way in her case (see paragraph 30 above), it cannot reasonably be suggested that the approach of the Divisional Court was not foreseeable, having regard to existing case-law on this question. Thus, by stating that intent could be demonstrated by the foreseeability of consequences, the court did not overstep the limits of what can be regarded as an acceptable clarification of the law.

75. The applicant also criticised the clarity of the judge's direction. The Court cannot accept that the direction given by the judge, especially when taken in the context of the other information provided to the applicant by the jury officer, the notices posted around the court building and her oath or affirmation at the start of the trial (see paragraphs 8-10 above), was ambiguous. The jury members were clearly told, twice, that they were not to "go on the internet". They were told not to "try and do any research of [their] own" and that, once they left the courtroom, they were not to deal with the case in any way (see paragraph 11 above). While the judge's direction was in broad terms, it is not argued that the applicant understood the direction as prohibiting any use of the Internet whatsoever. Had she done so, she could have sought clarification from the trial judge. The judge further alluded to the *Fraill* case (see paragraphs 50-52 above) and warned the jurors of the severe problems which arose for a juror who went on the Internet (see paragraph 11 above). The fact that no explicit penal warning

was included in the direction does not affect the clarity of the instruction given by the judge. Such a warning is not required under domestic law and had the applicant wished to know further details of the sanctions applicable to a breach of the direction, she could again have sought clarification from the judge. The consequences of contempt of court by Internet research were also made clear in the notices in the jury waiting room (see paragraph 9 above). The applicant went on the Internet to conduct research into the previous conviction of the defendant in the case in which she was sitting as a juror. On any interpretation of the judge's direction, such action was clearly prohibited.

76. Finally, as to the applicant's argument concerning the difference between a direction and an order, the Court considers such arguments to be untenable for the reasons given by the Divisional Court (see paragraph 37 above) and the Supreme Court (see paragraph 42 above).

77. The foregoing considerations are sufficient to enable the Court to conclude that the test for contempt of court applied in the applicant's case was both accessible and foreseeable. The law-making function of the courts remained within reasonable limits: the judgment rendered in her case can be considered, at most, a step in the gradual clarification of the rules of criminal liability for contempt of court through judicial interpretation. Any development of the law was consistent with the essence of the offence and could be reasonably foreseen.

78. There has accordingly been no violation of Article 7 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

79. In the applicant's submission there had been a violation of Articles 6 and 7 of the Convention and, as a consequence, her detention did not fall within the "lawful grounds" set out in Article 5 § 1.

80. The Court, having decided to examine the matters complained of by the applicant under Article 7 only, has found no violation of the Convention to be established. The applicant's complaint under Article 5 § 1 is therefore manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 7 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 7 of the Convention.

Done in English, and notified in writing on 11 February 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach Deputy Registrar	Mirjana Lazarova Trajkovska President