CACC 237/2015

[2019] HKCA 135

**IN THE HIGH COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**COURT OF APPEAL**

CRIMINAL APPEAL NO 237 OF 2015

(ON APPEAL FROM DCCC 325/2014)

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BETWEEN

HKSAR Respondent

and

YU LIK WAI WILLIAM (余力維) 1st Applicant

CHEUNG ALBERT (張鼎) 2nd Applicant

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Before: Hon Macrae VP, McWalters JA and Poon JA in Court

Dates of Hearing: 26 September 2017, 14 and 15 August 2018

Date of Judgment: 1 February 2019

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J U D G M E N T

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Hon McWalters JA (giving the Judgment of the court):

**A. Introduction**

1. The applicants were tried in the District Court on a Charge Sheet containing three charges. The first charge was a joint charge of conspiracy for an agent to solicit an advantage, contrary to section 9(1)(a) of the Prevention of Bribery Ordinance, Cap 201 and section 159A of the Crimes Ordinance, Cap 200 (Charge 1). The second charge, also a joint charge, was for dealing with property known or believed to represent the proceeds of an indictable offence, contrary to section 25(1) and (3) of the Organized and Serious Crimes Ordinance, Cap 455 (Charge 2). The third charge was against the 1st applicant alone and charged him with attempted fraud, contrary to section 16A of the Theft Ordinance, Cap 210 and sections 159G and 159J of the Crimes Ordinance, Cap 200 (Charge 3).
2. The applicants pleaded not guilty to all the charges that they faced. On 30 June 2015, after a trial before District Judge CP Pang (“the judge”), the applicants were convicted of Charges 1 and 2 while the 1st applicant was acquitted of Charge 3. On 2 July 2015, the 1st applicant was sentenced to a total period of 2 years and 6 months’ imprisonment and the 2nd applicant was sentenced to a total period of 2 years and 3 months’ imprisonment.
3. The applicants subsequently applied for leave to appeal against their convictions and these applications were heard by Lunn VP on 26 and 29 August 2016, and judgment refusing leave to both applicants was handed down on 30 September 2016. On 12 October 2016, the 2nd applicant filed a Notice of Renewal of Application to renew his application for leave to appeal (Form XIII). On 9 December 2016, the 1st applicant also filed a Form XIII, but by then was out of time. His solicitor filed an affirmation on 12 December 2016 and explained that the delay was caused by his inadvertence in paying attention to the time limit in filing a Form XIII after the handing down of judgment by Lunn VP and was not the fault of the 1stapplicant. Effectively, it amounts to neglect by his solicitor with no actual fault by the 1st applicant. We accept the explanation. That being so we grant the 1st applicant the extension of time that he needs to renew his application for leave to appeal his conviction.
4. At the hearing on 26 September 2017, we raised five questions concerning the operation and construction of section 61 of the Interception of Communications and Surveillance Ordinance, Cap 589 (“ICSO”).[[1]](#footnote-1) In order that these questions could be properly addressed, the case was adjourned for the parties to file further written submissions.
5. At the subsequent hearing of the application on 14 and 15 August 2018 we reserved our judgment. This is our judgment.

**B. The trial below**

**B.1 The prosecution case**

1. As the issues in the appeal are purely legal ones we shall set out only briefly the facts underlying the charges. In a nutshell the prosecution concerned a secret commission solicited by the applicants from the prospective operator of a restaurant in a hotel the 1st applicant was employed to manage. The investigation which led to this prosecution was very much a pro-active, intelligence-led investigation with the prosecution evidence coming into existence as a result of an Independent Commission Against Corruption (“ICAC”) undercover investigation that flowed from information provided by a paid informant who was not called to testify and who at trial was referred to as X.
2. In the undercover operation three ICAC officers posed as middlemen and investors interested in the operation of a restaurant of the Gloucester Hotel (“the Hotel”) in Wanchai. The Hotel building was owned by Wideland International Limited (“Wideland”) and Wideland was owned by Mr Lai Wing To (“PW1”) and his wife.
3. Mr Chung Siu Pang (“PW2”) was interested in the project and he set up two companies, namely, Million Success Management Limited (“MS”) and Big Faith Management Limited (“BF”) jointly with the 1st applicant. Both PW2 and the 1st applicant were appointed as directors of the companies. On 12 April 2012, PW1, representing Wideland, granted BF a lease for a term of 20 years which commenced on 1 April 2012. The 1st applicant signed on BF’s behalf.
4. MS was responsible for the operation and management of the Hotel and the 1st applicant was appointed as the Chairman and CEO of the Hotel, receiving from MS a monthly payment of HK$50,000, which was later reduced to HK$30,000. PW2 was responsible for funding the project and, with other investors, injected monies into it. At trial, there was no dispute that the 1st applicant was an agent of MS and BF at all material times.
5. The 2nd applicant was a friend of the 1st applicant and assisted him to look for interested parties to operate a restaurant on the ground floor and first floor of the Hotel. An undercover officer of the ICAC, codenamed Ah Chi, posed as a middleman and was introduced to the applicants by X. Other undercover ICAC officers, codenamed Ray and Tony, were later introduced to the applicants as investors.
6. A total of eight meetings were conducted between the undercover ICAC officers and the applicants. Five of those meetings were covertly recorded by the undercover ICAC officers pursuant to prescribed authorizations granted under the provisions of the ICSO.
7. The ICSO creates two different types of authorization for two different types of covert surveillance to be issued. The two different types of covert surveillance are defined in the ICSO as “Type 1 surveillance” and “Type 2 surveillance”. The authorization for the latter is issued by a senior officer of a law enforcement agency and is known as an executive authorization and the authorization for the former is issued by a judge and is known as a judge’s authorization. Applications for a judge’s authorization must be supported by an affidavit whereas an application for an executive authorization need only be supported by a statement in writing.
8. By section 2(3) of the ICSO “any covert surveillance which is Type 2 surveillance under the definition of ‘Type 2 surveillance’ in subsection (1) is regarded as Type 1 surveillance if it is likely that any information which may be subject to legal professional privilege will be obtained by carrying it out.”
9. In respect of the five meetings, three executive authorizations (Type 2) and two judge’s authorizations (Type 1) were issued on the basis of, respectively, three statements in writing and two affirmations made and affirmed by ICAC officers. Redacted versions of these documents were disclosed to the applicants.
10. A summary of the eight meetings is as follows:

|  |  |  |  |
| --- | --- | --- | --- |
| Date | Persons Present | Whether Covertly Recorded | What took place |
| 8 December 2012  (1st meeting) | X, Ah Chi and the 2nd applicant | No | X introduced Ah Chi, an undercover ICAC officer, to the 2nd applicant. The 2ndapplicant told Ah Chi that his friend, the 1stapplicant, was looking for a caterer to run a restaurant in a hotel which the 1stapplicant was responsible for running. He said the caterer needed to pay a licence fee of $1.08 million which was rent for 4 years, out of which the 1st applicant could get $400,000. Ah Chi told the 2nd applicant he had a friend who would be interested in this proposal. |
| 10 December 2012  (2nd meeting) | The 2nd applicant and Ah Chi | No | This meeting was for the purpose of Ah Chi introducing a second ICAC undercover officer to the 2ndapplicant but this undercover officer did not appear. |
| 17 December 2012  (3rd meeting) | The 2ndapplicant, Ah Chi and Ray (second ICAC undercover officer) | Yes | Ray introduced himself as a commercial agent knowing many investors. The 2ndapplicant explained that the 1st applicant would charge the selected caterer $1.08 million which was calculated by reference to the market rent for 4 years. He described this money as an “under-the-table figure” and said that the 1st applicant would take the money personally and that he, the 2nd applicant, would get a share of it. The sum would not be entered into the account book and would not be stated in the catering agreement.  Only a nominal rent of $1 would be stated in the contract. The $1.08 million would be accounted for as the renovation fee. |
| 19 December 2012  (4th meeting) | The 2nd applicant, Ah Chi and Ray | Yes | The 2nd applicant said the $1.08 million was to be dealt with privately and half of it had to be paid before the signing of the catering contract. |
| 16 January 2013  (5th meeting) | The 1st and 2ndapplicants and Ray | Yes | The 2nd applicant said Ray’s side should pay $400,000 first and then the catering contract would be prepared. When Ray referred to the $400,000 as “under-the-table money” the 1stapplicant said “call it consultation fees.” When Ray asked how the money should be paid the 2ndapplicant said he could enter it in the accounts as renovation by inflating the renovation fees. |
| 25 February 2013  (6th meeting) | The 2nd applicant and Ray | No | As the 1st applicant wanted to have a right to terminate the catering agreement after one year he would reduce the under-the-table money to $980,000. |
| 9 April 2013  (7th meeting) | The 1st and 2ndapplicants, Ray and Tony (a third ICAC undercover officer) | Yes | Tony played the role of an investor. The 2ndapplicant said the $1 million under-the-table money was actually the rent for 5 years and that it could be entered as renovation costs by exaggerating these costs. When Tony said he could give part of it to show his sincerity the 2nd applicant said he should give half of it. |
| 16 April 2013  (8th meeting) | The 1st and 2ndapplicants, Ray and Tony | Yes | Tony passed an envelope containing $250,000 to the 1st applicant. Tony asked how a receipt would be given for it. The 2nd applicant suggested either issuing the receipt as a renovation payment, consultant fee or design fee. The 1st applicant said he had to ask the boss.  The two applicants were then arrested. |

1. The prosecution’s allegation in respect of Charge 1 was that the applicants solicited this payment of HK$1.08 million, later reduced to HK$0.98 million, as a secret commission to be paid by the selected caterer in return for awarding him the contract to operate the restaurant at the Hotel. PW2 was not aware of the applicants’ solicitation, while MS and BF never granted any permission to the 1st applicant to accept a commission from investors.

**B.2. Disclosure and admissibility**

1. As is readily apparent, the prosecution case relied very heavily on the evidence of the undercover officers and of the covert recordings. At trial, both applicants sought disclosure of the redacted parts of the statements in writing and affirmations that had been used to obtain the issue of the executive and judge’s authorisations. They also objected to the admissibility of the evidence of the meetings between them and the ICAC undercover officers on the grounds that this evidence had been obtained by way of entrapment and they would be deprived of a fair trial if this unfairly obtained evidence was admitted. Furthermore, their right to privacy and their right against self-incrimination were breached. Adopting the alternative procedure, the judge declined to order the disclosure of the materials sought, ruled the evidence admissible and refused to exercise his discretion to exclude it.

**B.2.1 The judge’s ruling on disclosure**

1. Prior to the opening of the prosecution case, Ms Cindy Lee, counsel for the 2ndapplicant, applied to the judge for an order directing the prosecution to disclose the redacted parts of the three statements in writing and the two affirmations. Mr Graham Harris SC and Ms Kitty Lau, counsel for the 1st applicant, supported this application. The prosecution opposed the application for the redacted parts to be disclosed, asserting that section 61(2) of the ICSO applied to those parts.
2. Because of the importance of Section 61 of the ICSO in this appeal it is necessary to set it out in full.

“**61. Non-admissibility of telecommunications interception product**

(1) Any telecommunications interception product shall not be admissible in evidence in any proceedings before any court other than to prove that a relevant offence has been committed.

(2) Any telecommunications interception product, and any particulars as to a telecommunications interception carried out pursuant to a relevant prescribed authorization, shall not be made available to any party to any proceedings before any court (other than any such proceedings instituted for a relevant offence).

(3) In any proceedings before any court (other than any such proceedings instituted for a relevant offence), any evidence or question which tends to suggest any of the following matters shall not be adduced or asked—

(a) that an application has been made for the issue or renewal of a relevant prescribed authorization, or the issue of a relevant device retrieval warrant, under this Ordinance;

(b) that a relevant prescribed authorization has been issued or renewed, or a relevant device retrieval warrant has been issued, under this Ordinance;

(c) that any requirement has been imposed on any person to provide assistance for the execution of a relevant prescribed authorization or a relevant device retrieval warrant;

(d) that any information has been obtained pursuant to a relevant prescribed authorization.

(4) Notwithstanding subsection (2) or any other provision of this Ordinance, where, for the purposes of any criminal proceedings (whether being criminal proceedings instituted for an offence or any related proceedings), any information obtained pursuant to a relevant prescribed authorization and continuing to be available to the department concerned might reasonably be considered capable of undermining the case for the prosecution against the defence or of assisting the case for the defence—

(a) the department shall disclose the information to the prosecution; and

(b) the prosecution shall then disclose the information to the judge in an ex parte hearing that is held in private.

(5) The judge may, further to the disclosure to him of the information under subsection (4)(b), make such orders as he thinks fit for the purpose of securing the fairness of the proceedings.

(6) Where any order is made under subsection (5) in any criminal proceedings, the prosecution shall disclose to the judge for any related proceedings the terms of the order and the information concerned in an ex parte hearing that is held in private.

(7) Notwithstanding subsection (5), no order made under that subsection authorizes or requires anything to be done in contravention of subsections (1), (2) and (3).

(8) In this section—

‘judge’ (法官), in relation to any proceedings, means the judge or magistrate before whom those proceedings are or are to be heard, or any other judge or magistrate having jurisdiction to deal with the matter concerned;

‘party’ (一方), in relation to any criminal proceedings, includes the prosecution;

‘related proceedings’ (有關法律程序), in relation to any criminal proceedings, means any further proceedings (including appeal proceedings) arising from, or any proceedings preliminary or incidental to, those proceedings;

‘relevant device retrieval warrant’ (有關器材取出手令) means a device retrieval warrant for the retrieval of any of the devices authorized to be used under a relevant prescribed authorization;

‘relevant offence’ (有關罪行) means any offence constituted by the disclosure of any telecommunications interception product or of any information relating to the obtaining of any telecommunications interception product (whether or not there are other constituent elements of the offence);

‘relevant prescribed authorization’ (有關訂明授權) means a prescribed authorization for a telecommunications interception;

‘telecommunications interception product’ (電訊截取成果) means any interception product to the extent that it is—

(a) any contents of a communication that have been obtained pursuant to a relevant prescribed authorization; or

(b) a copy of such contents.”

1. Mr Bernard Yuen, of counsel, prosecuting on fiat, applied for an *ex parte* hearing under section 61(4) so that he could disclose the protected product to the court. The judge, after hearing from the parties, ordered that an *ex parte* hearing pursuant to section 61(4) would take place.[[2]](#footnote-2) In preparation for this hearing the judge gave the following direction:

“COURT: Yes. I would direct the prosecution to identify each and every paragraph in the five documents and with specific confirmation of the prosecution that whether they are within the scope of section 61, or the prosecution is relying on other grounds. I agree with Mr Harris that if the objection is taken on a ground other than section 61, then it should be a matter of another argument.”[[3]](#footnote-3)

1. This *ex parte* hearing took place on 5 November 2014. Ms Alice Chan, Senior Assistant Director of Public Prosecutions, and Ms Joey Ma, Acting Senior Public Prosecutor, appeared with Mr Yuen for the prosecution. The judge’s notes of that hearing are as follows:

“1. Ms Chan appears in response to Court’s direction for counsel from Department of Justice to appear in the ex parte hearing.

2. Ms Chan applies for leave to withdraw the application for ex parte hearing on the ground that the initial criteria under S.61(4) of ICSO is not fulfilled. The reason is that the ICAC and the Prosecution both hold the view that the material requested to be disclosed, being information subject to the provision under S.61, might not reasonably be considered capable of undermining the prosecution case or assisting the defence case. The Prosecution is of the view that such information should not have been disclosed to the Prosecution at the outset.

3. To remedy the situation, the Prosecution will return the documents to the ICAC. As a result, S.61(2) will come back to the picture, i.e. the material should not be made available to the parties, and the redacted material will remain redacted. Prosecution will make the application for withdrawal of the ex parte hearing formally in open court.”[[4]](#footnote-4)

The court then adjourned to 7 November 2014 to resume the *inter partes* proceedings.

1. At that resumed hearing Mr Harris sought to resolve the disclosure issue by asking for an assurance from the prosecution that the redacted parts “did not touch upon the two defendants in the trial.”[[5]](#footnote-5) The case was adjourned to 28 November 2014 at which time Mr Harris indicated that the prosecution could not give the assurance he had sought.
2. On 28 November 2014 it became clear from a letter written by Ms Chan on behalf of the prosecution that disclosure was not being refused on the basis of just section 61(2) but rather reading section 61(2) in conjunction with section 61(4). A view had been reached of the redacted material that it did not fall within the test for disclosure contained in section 61(4) of being information that “might reasonably be considered capable of undermining the case for the prosecution against the defence or of assisting the case for the defence.”
3. In view of the stance adopted by the prosecution, Mr Harris complained that there had not been a proper performance by the prosecution of its disclosure obligation but otherwise did not press the matter. Ms Lee, however, did wish to pursue disclosure of the redacted parts and to mount an argument that the test for disclosure should be the common law test as set out in the judgment of the Court of Final Appeal in *HKSAR v Lee Ming Tee & anor*[[6]](#footnote-6). Ms Lee also wished the judge to inspect the redacted parts and apply the disclosure test to them in a way that is similar to the determination of a claim of public interest immunity. Mr Yuen opposed such a hearing and submitted that under section 61(2) the prosecution should not be required to provide the materials to the court.
4. The case was then adjourned to 16 January 2015 at which time further submissions were made by the parties on the operation of section 61 of the ICSO. Ms Lee indicated that she took no issue with the constitutionality of section 61(7) which prohibits the court from making any order that would breach section 61(2). However, Mr Harris did submit that section 61(7) did not sit comfortably with section 61(5) and that it should not be construed as preventing the court from disclosing the redacted parts to the defence if the judge, after himself examining the redacted parts, concluded that disclosure to the defence was necessary in order to secure a fair trial.
5. Mr Yuen, for the prosecution, emphasized that he was making no concession that the redacted parts were relevant but rather was basing his refusal to make disclosure on the statutory regime contained in section 61. Mr Yuen reminded the court that under that regime the test for disclosure was not the common law test, which is based on a concept of relevance to an issue in the trial, but the statutory test laid down in section 61(4). However, upon being pressed by the judge Mr Yuen stated:

“Your Honour, in answer to your Honour’s question I would say the redacted materials are possibly relevant to the issues at trial but definitely they do not satisfy the conditions under subsection (4). In fact, that has all along been the prosecution’s position.”[[7]](#footnote-7)

1. There then followed an exchange between Mr Yuen and the judge which brought sharply into focus the question of whether the *Lee Ming Tee* common law test of disclosure is wider than the statutory test contained in section 61(4). Nevertheless, at the end of the exchange the judge was left with the impression that the prosecution was adopting an equivocal position. The judge himself was of the view that the *Lee Ming Tee* test and the section 61(4) test were the same. The submissions ended with the following exchange:

“COURT: I agree with you, Mr Harris. The prosecution’s position is equivocal. At least to my understanding it’s not clear. I would have thought, subject to of course argument, that the test under subsection (4) is simply the test under Lee Ming Tee. So if it satisfies the Lee Ming Tee test that you are not required to disclose the information in any case, whether section 61 is applicable or not, then you don’t have to disclose.

In any case, it doesn’t matter whether section 61 comes into play. So the simple question now being asked is whether this information, without the benefit of section 61, is relevant or not under Lee Ming Tee’s test.

MR YUEN: Yes, then the simple answer is no.

MR HARRIS: Okay.

COURT: It is not relevant.

MR YUEN: Yes.

COURT: Thank you. Right, that answers your question, Mr Harris.

MR HARRIS: It does. Thank you, your Honour.

COURT: Right. Any further submission from Miss Lee?

(No audible answer)

COURT: Thank you. I adjourn till 3 o’clock for ruling.”[[8]](#footnote-8)

1. The judge gave his ruling on the application later that day. He refused the application for disclosure and refused the application for him to hold an *ex parte* hearing under section 61(4) and inspect the redacted material. He said he would give his reasons for his rulings at a later date and this he did in his Reasons for Verdict.
2. In the reasons for his ruling, as set out in his Reasons for Verdict, the judge started from the position that:

“109. I do not need to rule whether S 61 is inconsistent with the Basic Law and the Bill of Rights Ordinance. If the common law principles of disclosure are in conflict with S 61, the latter would prevail unless it is repealed.”[[9]](#footnote-9)

1. In considering whether the prosecution’s decision not to disclose was reviewable by the court, he concluded:

“111. At common law, when a dispute as to disclosable material arises, it is for the court, not prosecuting counsel, to decide the question and to rule on the grounds relied upon to justify the withholding of disclosure of relevant material. The discretion of prosecuting counsel is reviewable by the trial judge, subject to the restriction under the common law principles such as privilege and public interest immunity and statutory restrictions.

112. In my judgment, the Prosecution’s discretion not to disclose in this case is reviewable by the court, insofar as the court’s order does not infringe the provisions in S61.”[[10]](#footnote-10)

1. The judge went on to consider section 61. He noted the complaints of Mr Harris and accepted that section 61 “is indeed a piece of draconian legislation.”[[11]](#footnote-11) Nevertheless, he concluded that a judge was not powerless in ensuring that a defendant would receive a fair trial and noted that, if all else failed, the judge could order a stay of proceedings.
2. The judge then turned to section 61(2) and said that the word “party” in that subsection did not include the judge. He said:

“126. In my view, it is unarguable that ‘party’ in the context of S 61 would include the judge in the proceedings. The plain meaning of the word cannot include the adjudicator in the proceedings.  Such an interpretation is contrary to the ordinary meaning of the word and fair administration of justice.

127. In my judgment, if a judge has no jurisdiction to inspect document for relevance, an accused’s right to a fair trial might be unreasonably and disproportionately infringed. I therefore find that S61(2) does not prohibit an order of disclosure by the judge of the protected information to himself.

128. In conclusion, I rule that the Prosecution’s discretion not to disclose is reviewable by the court.”[[12]](#footnote-12)

1. The judge then turned to the question of whether the prosecution had properly discharged its disclosure obligation and whether he should inspect the redacted parts of the documents. He thought the disclosure test at common law was the same as the test in section 61(4) but made no formal determination on this point. He said that he had “no reason to doubt the Prosecution’s assessment on the relevance of the protected information to the Prosecution case.”[[13]](#footnote-13)
2. As to the possible relevance of the redacted material to the defence case he said he adopted the approach that it was for the defence to show that there was a reasonable possibility of relevance and that had not been done. He said:

“140. It must first be noted that the protected information was vetted not only by a directorate officer of the ICAC but also by a panel judge for the Type 1 surveillance application in the subsequent applications.  On the face of the documents, I did not see any irregularity.  There was no evidence or concrete ground put forward by the Defence to suggest that the protected information could reveal any illegality or impropriety of the whole surveillance operation or any individual ICAC officers.  Miss Lee failed to identify the precise relevance to her case of the material she requested.  I could not see any basis to support the assertion that the surveillance operation or any part of it was illegal, unauthorized or improper.

141. In my judgment, the asserted relevance was only speculative.  I failed to see any potential relevance of the protected information to the issues raised by the Defence.  The application for disclosure must be dismissed.”[[14]](#footnote-14)

**B.2.2 The judge’s ruling on admissibility**

1. Objection was taken at trial on behalf of both applicants to the admissibility not only of the covert audio recordings of the five meetings but also of the other meetings and all other contacts between the undercover ICAC officers and the applicants. The grounds for this objection were that the evidence was obtained through entrapment, a fair trial could not take place because the evidence had been obtained unfairly and there had been a breach of the applicants’ right to privacy and right against self‑incrimination[[15]](#footnote-15). The judge ruled the evidence admissible and declined to exercise his discretion to exclude it. He, again, gave his reasons for this ruling in his Reasons for Verdict.
2. He said there was no entrapment as:

“177. Neither X nor ICAC officers initiated or incited the solicitation.  The UCs only provided an unexceptional opportunity to the defendants to do what they had planned and agreed to do.”[[16]](#footnote-16)

1. On the complaint that the evidence had been unfairly obtained, the judge said that the law recognised that law enforcement agencies must sometimes employ deceit and trickery in the investigation of serious crime. He said that it will very often be a question of proportionality involving a consideration of the nature and seriousness of the suspected crime. Corruption offences are serious crimes and the public interest in combatting them is high. He concluded:

“… Given the serious nature of the crime and the difficulty to detect such crime, the ICAC surveillance and undercover operation to gather evidence confirming veracity of the information and to uncover the on-going criminal activities was entirely proper.”[[17]](#footnote-17)

1. In respect of the submission that the undercover operation breached the applicants’ right against self-incrimination he said that before the right of silence of a suspect can be breached, something must take place which prompts the suspect to talk and that generally interrogation is not allowed. The conversation may take on the character of an interrogation where the natural flow of the conversation is interrupted by the undercover officer persistently directing the conversation back to a discussion of incriminating matters. Directing himself in this way the judge concluded:

“Upon careful examination of the transcript of the meetings, I did not find interrogation, prompting or any kind of improper means by any of the UCs.”[[18]](#footnote-18)

1. Finally, the judge addressed the applicants’ argument that there had been a breach of their right to privacy. The judge noted that Article 30 of the Hong Kong Basic Law (“the Basic Law”) allowed an exception, namely that “relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences.” He said that the ICSO provides “the machinery and framework for striking the balance of public interest and interest of individuals.”[[19]](#footnote-19) Here, there was compliance with the provisions of the ICSO and so any infringement of the applicants’ right to privacy “was in accordance with legal procedures to meet the needs of investigation into serious crimes.”[[20]](#footnote-20)
2. As the applicants’ counsel had also asked the judge to exercise his residual discretion to exclude the evidence if he found it admissible, the judge then addressed this submission. In terms of the law he directed himself in accordance with the legal principles set out in the judgment of the Court of Final Appeal in *HKSAR v Muhammad Riaz Khan*[[21]](#footnote-21). Applying those principles to the facts of this case he found that there was no unfairness and declined to exercise his discretion to exclude the evidence.

**B.3. The defence case**

1. The 1st applicant elected to give evidence at trial. His defence was that he honestly believed that he had lawful authority or reasonable excuse, in the form of permission, to receive the money that had been solicited. He said he understood from PW2 that he could deal with the restaurant premises in his way so long as it was to the benefit of the Hotel. The 1st applicant asked the 2nd applicant to look for investors to operate the restaurant who should invest a total sum of HK$2.2 million, including an operation cost of about HK$1.6 million or HK$1.7 million and a sum of HK$0.5 million or HK$0.6 million as a “consultation fee”. The 1st applicant claimed that he was entitled to the consultation fee for his work done for the design, recruitment, quality control of renovation works and his management of the operation of the restaurant. He agreed that he did not inform PW2 of his negotiations with the undercover ICAC officers as he believed that PW2 would not have objected to it.
2. The 2nd applicant also elected to give evidence at trial. He claimed that he acted on the instructions of the 1st applicant and knew nothing about PW2’s interest in the project. He believed that the 1st applicant was in charge and had the final say in everything in respect of the project. The 2nd applicant claimed he honestly believed that the 1st applicant had the authority to receive the HK$1.08 million from the potential investors.

**B.4 Verdict**

1. The judge identified the issue in the case as being whether the applicants honestly believed that they were entitled to do what they were doing. He said that the court had to consider what their beliefs were and whether these beliefs in the circumstances of the case amounted to the defence of lawful authority or reasonable excuse.
2. In terms of their evidence the judge found both applicants not to be credible as witnesses and rejected their evidence.
3. Regarding the 1st applicant, the judge found that he owed a fiduciary duty to the two companies and the investors in the project and that he needed permission to receive the consultation fee. The judge further found that the 1st applicant did not seek prior permission, made no disclosure of the consultation fee to PW2 and did not believe that permission to receive the money would be given. On the basis of these findings the judge concluded that the 1st applicant had no lawful authority or reasonable excuse to solicit the advantage[[22]](#footnote-22).
4. In regard to the 2nd applicant, the judge said the only reasonable and irresistible inference was that the 2nd applicant knew the 1st applicant had to account for and needed to get permission to solicit and accept the HK$1.08 million and that the 1st applicant had no authority to solicit and receive the money[[23]](#footnote-23).
5. In relation to Charge 2, the judge found that both applicants knew that the envelope contained cash of HK$250,000 when the undercover ICAC officers handed it over. Both applicants discussed the way a receipt should be prepared and the judge concluded that they were receiving the money in a joint enterprise knowing that it was being given as a bribe. Receiving the money was a dealing with it and so all the elements of Charge 2 were proven.

**C. The Grounds of Appeal**

**C.1. The 1st applicant’s Amended Perfected Grounds of Appeal**

1. The 1st applicant relies on two grounds of appeal by reason of which he says he did not receive a fair trial.
2. In his first ground of appeal he complains that the judge erred in refusing to order disclosure of the redacted parts of the three statements in writing and two affirmations which grounded the three Type 2 authorizations and two Type 1 authorizations which enabled the covert surveillance to take place.
3. The second ground of appeal asserts that the procedure set out in section 61(4) of the ICSO, and the judge’s consequent refusal to grant the disclosure application, contradicts Article 10 of the Hong Kong Bill of Rights Ordinance, Cap 383[[24]](#footnote-24) (“HKBORO”), and disregards the common law duty of disclosure owed by the prosecution.
4. In support of these grounds Mr Richard Donald, counsel for the 1st applicant submitted, in his written submission, that it is clear from the Court of Final Appeal’s judgment in *Lee Ming Tee*, that the legal principles relating to the prosecution’s obligation of disclosure include the following:

(a) disclosure extends to all relevant material including inadmissible material;

(b) the balance between fairness to the defendant and protecting the public interest in the detection and punishment of crime is not to be achieved by reducing the scope of disclosure rules, but by restricting the collateral use of the materials; and

(c) disclosure as required by the Basic Law and the HKBORO (in guaranteeing the right to a fair trial) is at the very least congruent with the common law principle of disclosure.

1. Therefore, Mr Donald submitted, where section 61 of the ICSO prevents the disclosure of potentially useful material to defendants in criminal proceedings, the provision itself is a derogation of the right to full disclosure under the common law and is in conflict with the Basic Law and Articles 10 and 11 of the HKBORO. He argued that it does not satisfy the proportionality test and represents an unconstitutional restriction on the principles of disclosure and the 1st applicant’s right to a fair trial.
2. He noted that the constitutionality of section 61 of the ICSO was considered by Wright J in the case of *HKSAR v* *Ying Jim Ming Jimmy*[[25]](#footnote-25), a decision relied on by the respondent. He accepted that the prohibition on disclosure under section 61 may satisfy the rationality criteria as propounded by Wright J, but argued that it does not satisfy the proportionality criteria. He submitted that Wright J’s analysis of the proportionality of the provision in *Ying Jim Ming Jimmy* did not address all the problems arising out of the prohibition.
3. In ruling that the provision was proportional Wright J relied on the fact that neither party is permitted under section 61 to use the restricted telecommunications interception evidence at trial. Mr Donald argued that this does not make the blanket prohibition proportional for, as happened in the present case, the telecommunications interception evidence can still be used by the investigatory body to obtain warrants authorizing covert surveillance, which in turn leads to admissible evidence being obtained. Yet, the subject of the covert surveillance is denied the opportunity to use the same material to uncover evidence which may be helpful to the defence. Such an outright prohibition on disclosure to the defence exceeds what is necessary and is neither proportional nor fair. A restriction on collateral use, he argued, would be consistent with what was said by the Court of Final Appeal in *Lee Ming Tee* and would be proportional.
4. Mr Donald also argued that Wright J’s reliance in *Ying Jim Ming Jimmy* on the fact that a defendant who had been the subject of covert surveillance “would be aware of its contents” did not address the issue of such a defendant not knowing what information, derived from telephone interception, was used to obtain the warrants authorizing the covert surveillance.
5. Mr Donald submitted that neither of the two matters on which Wright J relied was sufficient to satisfy the proportionality criteria for derogating the right to disclosure and did not address the potential harm that was created by denying a defendant access to potentially useful, albeit, inadmissible information.
6. Mr Donald also took issue with the way section 61 left it to the investigatory body to assess the relevance of the restricted telecommunications interception material before deciding whether or not to even reveal the material to the prosecution and the court, which he said only exacerbated the problem.
7. Based on these submissions, Mr Donald asserted that the judge’s refusal to order the disclosure of the redacted materials resulted in a derogation of the 1st applicant’s right to a fair trial as guaranteed under the Basic Law and the HKBORO.
8. As the 2nd applicant relies on the same grounds of appeal, Mr Donald did not advance any oral submissions in support of his grounds of appeal and was content to adopt the oral submissions of Mr Andrew Bruce SC who, together with Mr Phillip Ross, appeared for the 2nd applicant.

**C.2. The 2nd applicant’s Perfected Grounds of Appeal**

1. The 2nd applicant relies on three grounds of appeal. His first ground of appeal asserts that the covertly recorded audio recordings of three meetings, namely those on 17 and 19 December 2012 (the 3rd and 4thmeetings), and 16 January 2013 (the 5th meeting), were obtained contrary to Article 14(1) of the HKBORO[[26]](#footnote-26) because:

(i) they were issued by a Senior ICAC officer who is a person who is not capable of acting judicially and were granted on material which was not made on oath; and

(ii) no judicial officer had the power to inspect the product of any authorization or the product of any interception.

1. The second ground of appeal claims that there was a breach of Article 10 of the HKBORO as a consequence of the judge refusing to order the disclosure of the non-redacted copies of the statements in writing and affirmations. This breach occurred when:

(i) the judge relied on section 61(4) of the ICSO to refuse the application in circumstances where the prosecutor could not see the material unless the department possessing it was satisfied it passed the threshold test and the prosecutor could not disclose it to the judge; and

(ii) in applying the common law test for disclosure, the judge declined to inspect the documents himself because he accepted an assertion by the prosecutor that the threshold test had not been met even though the prosecutor had not, himself, inspected the documents.

1. The third ground of appeal complains that the evidence of the undercover meetings that took place after the third meeting should have been excluded as unfair since there was sufficient evidence after the 3rd meeting to charge the 2nd applicant and no caution was administered to the 2ndapplicant reminding him of his right to remain silent. Further, the evidence ought to have been excluded as having been unfairly obtained in that one of the ICAC officers, Ah Chi and the person described at trial as X, a person well known to the 2nd applicant, had ingratiated themselves with the 2nd applicant, so as to cause him to surrender his right to silence.
2. In respect of the applicant’s first ground of appeal Mr Bruce emphasized the importance of the right of privacy and the expectation that persons have that their private conversations will not be the subject of intrusive surveillance techniques by government officials. He referred to the judgment of Cheung JA in *HKSAR v Lam Hon Kwok Popy and Anor*[[27]](#footnote-27) at paragraph 14 which he said sets out the principle on which he relies. In this paragraph Cheung JA quoted with approval the distinction drawn by La Forest J of the Supreme Court of Canada in *R v Duarte*[[28]](#footnote-28) between two risks. One risk is that in a conversation with another person, that person might disclose to others what had been discussed and the other risk is that law enforcement might, by electronic surveillance techniques, acquire a permanent electronic recording of the words spoken.[[29]](#footnote-29)
3. He said that his central contention is that it is contrary to the right of privacy, and therefore unconstitutional, for there not to be a judicial authorization for covert surveillance. He submitted that executive authorizations for covert surveillance are unconstitutional as a law enforcement officer cannot be seen to act independently and cannot bring a sufficiently impartial approach to the determination of the prerequisite conditions for the issue of the authorization. He argued that someone within the same law enforcement agency who is tasked with issuing an executive authorization for covert surveillance will have the same aims, goals and interests of his colleague who is applying to him to be granted the right to conduct covert surveillance. The consequence of his submission is ‍that any covert recordings obtained pursuant to such an authorization are ‍obtained unlawfully since Article 17 of the ICCPR, when read with Article ‍39 of the Basic Law, renders s 15(1)(a) of the ICSO (the power of an authorizing officer of a law enforcement agency to issue an executive authorization) unconstitutional.
4. Mr Bruce contended that “the basic requirement for law enforcement authorities to observe so that reasonable, and so legitimate restrictions, are made on the right to privacy”[[30]](#footnote-30) is that there be prior authorization of the privacy breach by a judge or a person acting judicially. In support of this argument Mr Bruce relied on the Canadian Supreme Court case of *Hunter v Southam Inc.* (1984) 11 DLR (4th) 641 where it was said:

“The purpose of a requirement of prior authorization is to provide an opportunity, before the event, for the conflicting interests of the State and the individual to be assessed, so that the individual’s right to privacy will be breached only where the appropriate standard has been met, and the interests of the State are thus demonstrably superior…At common law the power to issue a search warrant was reserved for a justice…The person performing this function need not be a judge, but he must at a minimum be capable of acting judicially.”

1. Mr Bruce submitted that a person “capable of acting judicially” means a person independent of the body seeking access to the power and requires impartiality.
2. He relied on the comment in *Hunter*’s case, that:

“… In cases like the present, reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search, constitutes the minimum standard, consistent with s. 8 of the Charter, for authorizing search and seizure…”

1. He submitted that, in terms of human rights law, this is a proportionality issue. No issue is taken with there being a legitimate aim or with there being a rational connection with this aim. The only issue is with necessity.
2. He also submitted that there is no meaningful distinction between a search warrant and a covert surveillance authorization as there is no realistic distinction between the levels of intrusiveness and the degrees of privacy.
3. Mr Bruce argued that the default position should be that an authorization is issued by a judicial officer, or a person capable of acting judicially, with a provision for the urgent issue of an authorization by a law enforcement officer, as is allowed under the ICSO in respect of telephone interception warrants.
4. Mr Bruce also relied on judgments of the European Court of Human Rights (“ECtHR”). One such judgment was *Klass v Federal Republic of Germany*[[31]](#footnote-31), in which it was said in respect of surveillance conducted by the executive that:

“… it is essential that the procedures established should themselves provide adequate and equivalent guarantees safeguarding the individual’s rights. In addition, the values of a democratic society must be followed as faithfully as possible in the supervisory procedures if the bounds of necessity, within the meaning of Article 8(2), are not to be exceeded. One of the fundamental principles of a democratic society is the rule of law, which is expressly referred to in the Preamble to the Convention. The rule of law implies, *inter alia*, that an interference by the executive authorities with an individual’s rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure.”

1. Mr Bruce further submitted that, although there is no decision interpreting the ICCPR right to privacy as it applies to covert surveillance, the UN Human Rights Committee had, in monitoring ICCPR members’ compliance reports, commented unfavourably that for at least five member states, interception or surveillance powers contained no requirement for the exercise of the powers to be conditional on judicial approval, or at least approval by a person independent of the executive.
2. Mr Bruce also argued that the supervisory role of the Commissioner on Interception of Communications and Surveillance appointed under section 39 of the ICSO (“the Commissioner”) is limited in its effectiveness as a check and balance on the conduct of law enforcement officers as the Commissioner is not authorized under the ICSO to inspect and listen to the products of covert surveillance[[32]](#footnote-32). Even though the ICSO was amended on 24 June 2016 to enable the Commissioner to require the production of both interception and surveillance products, in the present case the recordings all occurred before this date.
3. Mr Bruce argued that although the ICSO provides for judicial supervision in the form of the Commissioner, his powers are not such as to compensate for the lack of judicial supervision at the authorization stage of the process. He has no role in determining whether to proceed or when to stop. All he can do is compile a report which will be tabled before the Legislative Council. Because of the limitations on the role of the Commissioner it is important that the authorizations be judicially issued. Mr Bruce submitted that the position of the Hong Kong Commissioner is vastly different from his counterpart in the United Kingdom.
4. Furthermore, under the ICSO the reason for issuing a judicial authorization instead of an executive authorization is because “it is likely that any information which may be subject to legal professional privilege will be obtained.” However, as there is no distinction in the ICSO as to what information might be collected under either authorization, Mr Bruce argued that there is no justification for lessening the restrictions on issuing an executive authorization by not requiring the authorization to be supported by an affirmation.
5. In support of the 2nd applicant’s second ground of appeal Mr Bruce submitted that the judge erred in following the judgment of Wright J in *Ying Jim Ming, Jimmy* in which he decided that section 61 of the ICSO was not in conflict with the Basic Law or with Article 10 of the HKBORO. Mr Bruce contended that Wright J erred in relying on the judgment of the majority of the court in *Jasper v United Kingdom*[[33]](#footnote-33)*.* In that case, unlike the applicant’s case, the judge had inspected the material which had not been disclosed. Furthermore, section 61 of the ICSO was not identical to section 6 of the UK’s Interception of Communications Act 1985 as section 6 did not prohibit the trial judge from inspecting the edited materials of his own volition.
6. He argued, like Mr Donald, that a total prohibition on disclosure was disproportionate and that there were alternatives available, such as the provision of edited material or the use of a special advocate, which could be employed.
7. As section 61 of the ICSO provides detailed procedures whose effect was to prohibit disclosure to a trial judge, Mr Bruce said it serves as a code for disclosing interception material to the trial judge and in doing so abrogates the common law power of disclosure. In abrogating the common law duty of disclosure, section 61 removes the prosecutor as gatekeeper of the disclosure process. It is not he who decides whether “the information” satisfies the disclosure test; rather it is the law enforcement agency and if it concludes that the test is not satisfied then the prosecutor will not be informed of the existence of the information. The effect of section 61 is to transform the role of the prosecutor from that of a Minister of Justice to a mere conduit for the law enforcement agency.
8. In respect of section 61(5), Mr Bruce submitted that it does not provide the judge with any real power. The judge cannot order disclosure of the information because of section 61(7) nor can he order a prosecutor to do something in relation to how he conducts his prosecution.
9. To the extent that the court is only granted disclosure of these documents in the limited circumstances set out in section 61(4) of the ICSO, without the court being able itself to decide whether the documents disclose material useful to the defence, the section operates as an indirect and unjustifiable restriction on a defendant in the conduct of his defence and is, therefore, unconstitutional as it gives rise to an unfair trial.
10. Mr Bruce also argued that the judge erred in ruling that it was for the defence to show a reasonable probability of relevance before disclosure could be ordered. He relied on the judgment of the Supreme Court of Canada in *Dersch v Canada (Attorney-General)*[[34]](#footnote-34), where the court said:

“… *Prima facie* misconduct is not required to be shown by the accused applicant who seeks access to the sealed packet. The assertion, as in this case, that the admission of the evidence is challenged and that access is required in order to permit full answer and defence to be made is sufficient.”

1. Mr Bruce submitted that in order to have a fair trial under Article 14(1) of the ICCPR, or to have adequate facilities for the preparation of a defence under Article 14(3)(b) of the ICCPR, the applicant is not required to put forward a reasonably arguable basis for having the edited material disclosed to him.
2. In respect of the 2nd applicant’s third ground of appeal Mr Bruce contended that under Article 14(3)(g) of the ICCPR an accused has the right “not to be compelled to testify against himself or to confess guilt.” Once the 2nd applicant had mentioned that the payment sought was an “under-the-table” payment, the undercover ICAC officers ought to have revealed their identity and cautioned the 2nd applicant. At that stage, the undercover ICAC officers had sufficient evidence to charge the 2nd applicant in respect of Charge 1, albeit they would have had no evidence to support Charge 2.
3. Mr Bruce argued that by the 3rd meeting, there was sufficient evidence to charge the applicants but the officers persisted with five more meetings to bolster their case. The judge erred in relying on the contents of the 4th and subsequent meetings.
4. Mr Bruce also complained that the judge made no finding in respect of the 2nd applicant’s evidence that the ICAC officers had ingratiated themselves with the applicants. The conduct by X, whom the 2nd applicant treated as a very good friend, in inducing the 2nd applicant to accept the undercover ICAC officer codenamed Ah Chi as trustworthy, had the effect of causing the 2nd applicant to surrender his right to silence and for this reason should have been excluded.
5. Mr Bruce relied on the South Australian Supreme Court judgment in *R v Smith Turner & Altintas*[[35]](#footnote-35) and the Queensland Court of Appeal case of *R v O’Neill*[[36]](#footnote-36), where Fitzgerald P in his dissenting judgment said:

“The appellant was deliberately tricked into surrendering her right to silence at the instance of law enforcement personnel by an implicit misrepresentation that Lally sought her confidence as a friend, not a police agent. That being so, in my opinion, it was unfair to the appellant to receive evidence of her recorded statements to Lally at the appellant’s trial.”

**C.3 The respondent’s submissions**

1. At the hearing of this appeal the respondent was represented by Mr David Perry QC leading Mr Martin Hui SC, Deputy Director of Public Prosecutions, Ms Audrey Parwani, Senior Public Prosecutor and Ms Karen Ng, Public Prosecutor.
2. Before addressing the different grounds of appeal Mr Perry submitted that it is necessary for this court to understand how the ICSO replicates certain policies and features of the United Kingdom’s legislation. He traced the legislative history of the United Kingdom’s telephone interception regime from the Interception of Communications Act 1985 to RIPA. RIPA, he noted, contains in its section 18(7) a provision similar to the ICSO’s section 61(4). However, the ICSO he submitted, is narrower in scope than RIPA and is much more precise and focused in who can access the powers contained in it.
3. Mr Perry went on to demonstrate how both pieces of UK legislation had survived challenges to them in the ECtHR and the English courts.
4. Most recently, in *Kennedy v United Kingdom*[[37]](#footnote-37), the ECtHR gave RIPA, in Mr Perry’s terms, “a clean bill of health.” In this case, the ECtHR re‑affirmed[[38]](#footnote-38) the principles that any interference with the right to respect for private life had to be “in accordance with the law” in that (i) the impugned measure must have some basis in domestic law; (ii) the domestic law must be compatible with the rule of law and accessible to the person concerned; and (iii) the person affected must be able to foresee the consequences of the domestic law for him. The ECtHR had regard to the safeguards against abuse in the procedures as well as the more general safeguards offered by the supervision of the Interception of Communications Commissioner and the review of the Investigatory Powers Tribunal established by the RIPA, and held that the surveillance measures were justified and there had, accordingly, been no violation of Article 8 of the European Convention on Human Rights (“ECHR”).
5. Mr Perry submitted that if these principles were applied to the regime enacted by the ICSO, both in terms of authorization and disclosure, the regime would be found to be constitutionally justified, and that there had not been any infringement of the applicant’s rights to privacy or fair trial.
6. In respect of Canadian human rights jurisprudence Mr Perry submitted that one must be mindful of the difference in both the language and legal context in which the provisions under consideration are found. Mr Perry referred to *Lee Ming Tee* where the Court of Final Appeal noted that Canadian case law developed in a highly specific context, responding to the peculiar statutory and constitutional needs and values of that jurisdiction. It was Mr Perry’s submission that the Canadian jurisprudence does not reflect the position in the United Kingdom or under the ECHR.
7. Mr Perry emphasized that in addressing the grounds of appeal and in answering the five questions posed by the court it is necessary to have regard to the statutory purpose underlying the legislative scheme of the ICSO as the statutory purpose provides the key to the proper construction and operation of section 61. This requires a consideration not just of section 61 but of the ordinance as a whole.
8. He argued that the primary purpose underlying the ICSO in respect of telephone interception is to maintain secrecy of any interception and this purpose is achieved by prohibiting the introduction of any evidence about the existence or absence of an authorization, thereby preventing the disclosure of the existence or absence of an interception. The intercept could only be used for the purpose of the detection of crime and not as evidence in any court.
9. Mr Perry then turned to various provisions of the ICSO to show how they reflect the dual policy decisions made by government in respect of telephone interception, namely maintaining secrecy of the interception and not making evidential use of the interception product.
10. Grounds 1 and 2 of the 1st applicant’s grounds of appeal and Ground 2 of the 2nd applicant’s grounds of appeal are the applicants’ grounds of appeal which attack the constitutionality of section 61(4) and the impact of the judge’s rejection of the disclosure application on the fairness of the trial.
11. In relation to these grounds, Mr Perry argued that the policies underlying the legislation and how they are advanced through other provisions in the ICSO provide the necessary legislative context and purpose to enable this court to construe section 61. He argued that sections 59 and 61 should be seen as the key sections in the ICSO that implement the policy of secrecy.
12. Section 59 of the ICSO is entitled “Safeguards for protected products” and, in subsection (1)(c)(i), mandates that the protected product “is destroyed as soon as its retention is not necessary for the relevant purpose of the prescribed authorization, ...” Section 59(3)(b)(ii) states that for the purposes of section 59 something is necessary for the relevant purpose of a prescribed authorization:

“(b) in the case of subsection (1)(c) –

...

(ii) *except in the case of a prescribed authorization for a telecommunications interception*, at any time before the expiration of 1 year after it ceases to be necessary for the purposes of any civil or criminal proceedings before any court that are pending or are likely to be instituted.” (Emphasis added.)

1. By exempting telecommunications interception product from section 59(3)(b)(ii) the ICSO creates a distinction between that product and the product of covert surveillance in respect of what may be done in relation to them. For telephone interception product the obligation to destroy it in accordance with section 59(1)(c)(i) continues, but the covert surveillance product may be preserved for use in legal proceedings.
2. Section 61 preserves the secrecy of the interception, and of any product acquired from it. Section 61(1), prohibits the evidential use of any telephone interception product.
3. Section 61(2) makes it clear that the fact that interception has taken place and the existence of any product from it shall not have any forensic use by mandating that the particulars of an interception and any product from it “shall not be made available to any party to any proceedings before any court…”
4. Section 61(3), which prohibits the adducing of any evidence or the asking of any question pertaining to telephone interception, supplements section 61(1) and (2) and further advances the policy of secrecy of telephone interception.
5. Section 61(4), Mr Perry submitted, creates an exception to the general prohibition in section 61(2) and has its origins in section 18(7) of RIPA. Mr Perry informed the court that section 18(7) of RIPA was derived from an obiter observation of Lord Mustill in *R v* *Preston*[[39]](#footnote-39) when he said that he could not see that there was anything on the face of the Interception of Communications Act 1985 that prevented the law enforcement authority providing to prosecuting counsel or the prosecuting authority any information that might have a bearing on the fairness of the proceedings.
6. Based on Lord Mustill’s observation a practice then developed whereby the investigating authority would brief prosecuting counsel of the existence of information derived from the interception product. This informal non-statutory procedure became known as a “Preston briefing” and it enabled the prosecutor to review his case in the light of what he had been told and to take such steps as be considered necessary to ensure that he did not present his case on an incorrect basis.
7. Section 61(4) relates only to “information obtained pursuant to a relevant prescribed authorization” and only where such information is “continuing to be available to the department concerned”. On the assumption that the department who has sought the telephone interception has complied with section 59(1)(c)(i) then the protected product will no longer be available but those involved in the criminal investigation may have made records of intelligence or information derived from the protected product that they consider useful to their investigation.
8. What section 61(4) does in respect of this information is to provide for a limited form of disclosure within a very tightly drafted regime. Mr Perry argued that the Hong Kong legislature, by enacting section 61, clearly intended to create an exception to the common law duty of disclosure and to create within the ICSO a specific disclosure regime which sought to strike a balance between protecting the secrecy of the investigative process and a defendant’s right to a fair trial. The legislature recognised that there was an inevitable tension between the common law duty of disclosure and the ICSO because of the obligation in the ICSO to destroy telephone interception product. As Mr Perry put it “you cannot disclose what you have already destroyed.”
9. There are two restrictions to section 61(4) disclosure. The first is that it is only “for the purposes of any criminal proceedings” and the second is that the information pass a test of relevancy to those proceedings. The test is expressed as being that the information “might reasonably be considered capable of undermining the case for the prosecution against the defence or of assisting the case for the defence.” Mr Perry accepted that it is clear from what the section then requires to be done if this test is satisfied that the question of whether the test is satisfied, is determined by the law enforcement agency. Although, he pointed out, there is nothing in section 61 which would preclude the law enforcement agency from seeking legal advice from the Director of Public Prosecutions on how to determine whether the information satisfies the test.
10. If the law enforcement agency, referred to in the ICSO as “the department”, determines the information does satisfy the test then it:

“(a) … shall disclose the information to the prosecution; and

(b) the prosecution shall then disclose the information to the judge in an *ex parte* hearing that is held in private.”

1. Subsection (5) empowers the judge, upon such disclosure being made to him, to “make such orders as he thinks fit for the purpose of securing the fairness of the proceedings.” But, under subsection (7), the judge is prevented from making any order under subsection (5) that “authorizes or requires anything to be done in contravention of subsections (1), (2) and (3)”.
2. He submitted that:

“The type of orders that might be made by a judge include:

(i) An order requiring the prosecution to put its case in a particular way so as to avoid giving a misleading impression;

(ii) An order requiring the prosecution not to rely on certain evidence;

(iii) An order requiring the prosecution to make an admission of fact.”

1. Of this limited power of disclosure Mr Perry submitted:

“The significance of this limited power to disclose information obtained as a result of an interception authorisation is that it excludes the possibility of any wider power of disclosure to the judge as well as the possibility of any disclosure to any other party to the proceedings.”

1. He argued that any wider duty of disclosure would require retention of the protected product and “this would run counter to the obligation to destroy interception products as soon as practicable after it has served its statutory purpose.” Furthermore, sight should not be lost, he submitted, of the obligation imposed by the Secretary for Security on officers of law enforcement agencies to look out for and report any exculpatory materials found in the course of interception operations and to seek legal advice if necessary. This obligation can be found in paragraph 180 of the Code of Practice issued by the Secretary for Security in compliance with section 63 of the ICSO.
2. Mr Perry also referred to the cases of *Jasper v United Kingdom* and *Kennedy v United Kingdom* where the ECtHR held that the entitlement to disclosure of relevant evidence was not an absolute right. There were circumstances where it was appropriate to withhold evidence from the defence in the public interest so as to ensure the secrecy of police investigation methods. The court accepted the general principle evolving in the national case law that some discretion must be given to the prosecution to put before the court only those documents which it considers as material on the basis of relevance. The court also accepted that since both the prosecution and defence were prohibited from making any use of the fact of interception the principle of equality of arms was respected.
3. He also relied on the decision of Wright J in *Ying Jim Ming Jimmy*, where, after considering the cases of *Jasper* and *Preston*, Wright J held that section 61 does not conflict with the Basic Law and Article 10 of the HKBORO.
4. In the present case, the prosecution was not seeking to rely on intelligence gathered from intercepts nor the applications for authorization (which were served on the defence as unused material), thus there was no unfairness to the defence.
5. He submitted that the policy of secrecy in respect of telephone interception is not inconsistent with the principle of equality of arms as both sides are prevented from making any evidential use of the telephone intercept product. Nor is the principle of equality of arms infringed, so Mr Perry submitted, by allowing the law enforcement agency to use the telephone intercept product for an intelligence purpose to assist its criminal investigation. This, after all, he pointed out, was the whole purpose of conducting the telephone interception.
6. Also relevant, as providing a further safeguard against the secrecy of interception prejudicing the fairness of a criminal trial, is the provision for the Commissioner whose role is to have supervisory oversight on the operation of the legislation and compliance with its provisions. Mr Perry took the court through the provisions in Part 4 of the ICSO in order to demonstrate that the Commissioner is a person independent of the executive and formerly of high judicial office who is vested with considerable powers to ensure he is able to provide an effective and stringent supervision of the conduct of departments in complying with the ICSO.
7. Mr Perry also submitted that it was up to the applicants to demonstrate how the redacted material was relevant to their defence and as a consequence needed to be disclosed to them. Reliance was placed on the decision of *R v GS*[[40]](#footnote-40), where the defence had sought disclosure of material placed before the Surveillance Commissioner when seeking approval and renewals of authorizations to conduct intrusive surveillance. The defence argued that this was to enable them to make applications to exclude evidence of covertly made recordings which were authorized. In refusing the application, the court noted:

“16. In seeking that material, defence counsel, …did not point to any particular aspects of the authorisation procedure giving them cause for concern. It was essentially a ‘fishing expedition’ to enable them to discover whether they might have a case for seeking exclusion of the recorded conversations as unfair, by reason of unlawfulness of the authorisation procedures adopted or as to compliance with them, or otherwise under section 78 of PACE.”

1. In regard to the 2nd applicant’s first ground of appeal arguing that the lack of independence in obtaining the executive authorizations invalidated them and caused the covert surveillance to be an unlawful breach of the right of privacy, Mr Perry submitted that the Legislature had enacted a two-tier system of authorization, which the ICSO describes as Type 1 and Type 2 authorizations, as it was persuaded that judicial and other safeguards would be sufficient to guarantee the independence of the authorization process and that applications for authorizations would be considered impartially[[41]](#footnote-41). This was apparent from statements made to the Legislative Council by the Administration.
2. He emphasized that there was a profound distinction between telephone interception and covert surveillance in the impact that each may have on the right to privacy. For example, in an investigation where telephone interception is employed, there could be interception across a range of individuals over a period of months generating huge amounts of material with a high risk of a “mass of collateral intrusion.” Furthermore, the different levels of intrusiveness by which covert surveillance can be conducted is reflected in the distinction drawn by the ICSO between Type 1 surveillance and Type 2 surveillance.
3. This distinction is reflected in the different means by which the powers to conduct telephone interception and covert surveillance are accessed. Mr Perry drew attention to section 7 of the ICSO to emphasize that it is not anyone within the law enforcement agency who is entitled to authorize covert surveillance. It has to be someone who is of equivalent rank to a Senior Superintendent of Police.
4. In respect of the legislature’s use of executive authorizations, Mr Perry said this is a policy choice to reflect the realities of law enforcement and the judicial resources available. The volume of undercover operations taking place on a daily basis makes it impractical to require that each and every piece of covert surveillance involved in them should be judicially authorized. What the legislature did was to recognise this reality and put in place, through the role and duties of the Commissioner, after-the-event supervision. The Commissioner’s duty to enquire into, and report on, the operation of the ICSO acts as a check and balance on the conduct of those involved in applying for and granting authorizations for covert surveillance.
5. Mr Perry also mentioned how, under RIPA, there is a scheme of non-judicial authorizations by senior police officers which had been commented upon by Hugh J in *R v Hardy and Anor*[[42]](#footnote-42)*.* In giving the judgment of the English Court of Appeal, he said, at paragraph 48, of the ECHR:

“That Convention does not require judicial authority. It requires a system in which surveillance is regulated by law in a manner which the citizen can understand and which gives adequate protection against arbitrary interference with his rights.”

1. Mr Perry emphasised that none of the ECtHR jurisprudence said that there *must* be judicial authorization. As regards the decision of the ECtHR in *Klass*, he pointed out that this was a decision dealing with procedures relating to telephone interception and the ICSO provides judicial authorization for this form of surveillance. Furthermore, the ECtHR did not say that there had to be judicial authorization but only that some form of judicial supervision was desirable and in Hong Kong there was after-the-event judicial supervision of Type 2 surveillance by the Commissioner.
2. He also submitted that as Type 2 surveillance is less intrusive and is utilised in surveillance situations where there is a lower expectation of privacy, it is appropriate that it need not be authorized by a judicial officer so long as the authorizing officer is capable of “acting judicially”. An authorizing officer of the ICAC, above the rank of Principal Investigator, it was asserted, is capable of acting judicially given the safeguards provided for in the ICSO.
3. In replying to the case of *Lam Hon Kwok Popy* on which the 2nd applicant relied, Mr Perry submitted that this case did not assist the applicant as it was decided before the ICSO came into force. In any event, in that case Tang JA, as Tang NPJ then was, found that the case involved participant monitoring and this had nothing to do with the kind of privacy which the law aimed to protect. He held that evidence obtained in breach of privacy was not inadmissible per se, and the crucial question was the fairness of the proceedings.
4. As to Ground 3 of the 2nd applicant’s grounds of appeal, the respondent submitted that the judge was well aware of the principles in *Secretary for Justice v* *Lam Tat Ming* *and Anor*[[43]](#footnote-43) and that evidence obtained in breach of an accused’s constitutional right could be excluded. In determining the issue the judge had correctly considered the three-part test expounded in *HKSAR v Muhammad Riaz Khan*[[44]](#footnote-44), where the court held that evidence obtained in breach of a defendant’s constitutional right can nevertheless be received if, upon careful examination of the circumstances, its reception (i) is conducive to a fair trial, (ii) is reconcilable with the respect due to the right concerned, and (iii) appears unlikely to encourage any future breaches of that, or other, rights. Bokhary PJ said at paragraph 21:

“21. …At the time when the recording was made, there was no sufficient legal framework in place for the interception of communications and surveillance. Since then the Interception of Communications and Surveillance Ordinance (Cap. 589) has supplied the necessary framework. And a recording such as this one can certainly be authorised under that Ordinance. Even if the recording had been adverse to the appellant and even on the assumption that there existed a sufficient expectation of privacy in the circumstances, the discretion could nevertheless have been properly exercised to receive it in evidence.”

1. In *Lam Tat Ming*, the Court of Final Appeal recognized that the use of undercover operations played an important role in combating crime, and that they will unavoidably involve elements of subterfuge, deceit and trickery. Here, the judge considered whether the undercover ICAC officers had intercepted the natural flow of the conversation so as to cause it to amount to an interrogation and concluded they had not. The three-part test was carefully applied and any challenge to his refusal to exercise his discretion to exclude the evidence was not reasonably arguable.

**D. The five questions raised by the court**

1. At paragraph 4 of this judgment we referred to five questions which we raised with the parties and on which we said we would like their assistance. These 5 questions are:

(1) whether the trial judge was correct in his decision that in considering an application for disclosure of the redacted material, he need not look at the material in order to determine whether section 61 is invoked;

(2) whether the statutory test under section 61(4) of the ICSO is the same as the common law test of disclosure or whether the common law test is, in fact, wider;

(3) whether there has been any material change in the law in the United Kingdom concerning disclosure since the coming into force of the Regulation of Investigatory Powers Act 2000 (“RIPA”), the legislation on which the ICSO provisions are based;

(4) how ought the Court of Appeal to proceed if the court concludes that the trial judge ought to have inspected the material which the prosecution sought to withhold under section 61 of the ICSO, in particular:

(a) should the Court of Appeal inspect the material for the purpose of deciding whether section 61 is invoked; or

(b) should the Court of Appeal adopt a special procedure analogous to the special advocate arrangement to determine the issues of disclosure and fairness; and

(5) whether it was fair to admit the covert audio recordings into evidence when the applications for the authorizations and the corresponding approvals were not themselves part of the evidence?

1. The applicants and the respondent all provided answers to these questions in the course of their submissions.

**D.1 The applicants’ answers to the five questions**

1. Mr Donald for the 1st applicant adopted the answers to the court’s 5 questions that are proposed by Mr Bruce for the 2nd applicant and had nothing to add to them. In respect of the first question Mr Bruce submitted that the judge was correct in not looking at the redacted materials but incorrect in purporting to exercise a discretion to decline to do so. This is because under section 61(4) the trial judge has no power to look at materials on his own initiative. He can only access the materials if shown them by the prosecutor and the prosecutor can only show them to the judge if he, the prosecutor, has been shown them by the law enforcement agency. As the prosecutor was never given the redacted materials on the basis that they might reasonably be considered as undermining the prosecution case or assisting the defence case the prosecutor had no authority to provide them to the judge and consequently the judge had no power to inspect them.
2. In respect of the second question Mr Bruce submitted that the common law test is wider than the section 61(4) test as the common law test encompasses material that is not helpful to an accused.
3. In answering the third question Mr Bruce referred to the more recent Investigatory Powers Act 2016 but said that it contained, in essence, a similar prohibition on disclosure of interception related product.
4. As to the fourth question concerning how this court should proceed, it was Mr Bruce’s position that the Court of Appeal can only inspect the withheld material in the limited circumstances, which do not apply in the present case, that are set out in section 61(6) of the ICSO.
5. Mr Bruce’s answer to the fifth question, in a nutshell, was “No”. He said that under the section 61 regime there is no procedure that enables a defendant to become aware of at least the gist of what is in the redacted materials. Under this regime the prosecutor cannot properly act as a Minister for Justice in looking at the materials and his role is confined to being an administrative one, merely passing on materials to the judge but only doing so when they have first been passed to him.
6. The judge cannot protect a defendant’s interests as he does not see the redacted materials unless they are passed to him. Even when that occurs, the power of the judge is limited in terms of what he can do to secure the fairness of the trial. The main power is the power to stay the proceedings and that is a power that is only sparingly used.

**D.2 The respondent’s answers to the five questions**

1. On the issue of whether the judge was correct in his decision not to look at the material in order to determine whether section 61 of the ICSO was invoked, Mr Perry submitted that the disclosure of the material to a court for the purposes of determining whether section 61 was invoked is inconsistent with the overall scheme of the ICSO. The public interest in securing a fair trial and avoiding injustice is secured by strict adherence to the statutory regime which imposes discrete responsibilities on those who are responsible for the operation of the telecommunication interception process. The responsibility of the prosecution is to ensure that the prosecution case does not proceed in a manner inconsistent with the content of any intercepted material. Hence, no question of disclosure should have arisen for determination at trial and the judge should not have sought to review the prosecution’s decision not to disclose the redacted information.
2. Mr Perry referred to the Attorney General’s Guidelines in the United Kingdom which make clear that it is for the prosecutor to decide on the action to be taken, and this is just one aspect of the duty placed on prosecuting counsel to act as a Minister of Justice. The essential point is that disclosure, other than within the strict confines of section 61(4) of the ICSO, is not permitted in a scheme which is based on the necessity for secrecy and the need to keep the interception product out of the public domain.
3. On the question of whether the statutory test under section 61(4) of the ICSO is the same as the common law test for disclosure, Mr Perry submitted that the section 61(4) test of information which “might reasonably be considered capable of undermining the case for the prosecution against the defence or of assisting the case for the defence” is clearly narrower than the common law test.
4. He argued, however, that the difference in the respective tests, and the fact that section 61(4) of the ICSO operates only in rare situations, has no impact on the safety of the convictions.
5. On the question of whether there has been any material change in the law in the United Kingdom concerning disclosure since the coming into force of RIPA, Mr Perry informed the court that the position remains unchanged and the operation of the interception regime has withstood challenges both domestically and in Strasbourg.
6. On the question of how this court should proceed if it is of the view that the judge ought to have inspected the material which the prosecution sought to withhold under section 61 of the ICSO, Mr Perry submitted that this issue would only arise if this court disagreed with the respondent’s submission that the legislation simply is not designed to allow intercept material to become part of the criminal process and that disclosure to the trial court or the Court of Appeal would be contrary to the legislative scheme and the safeguards contained in section 59. However, if this court did disagree with the respondent’s submissions then, he accepted that, in principle, the Court of Appeal could view the material on an *ex parte* basis.
7. In answer to the question whether it was fair to admit in evidence the covert audio recordings when the applications for the authorizations and corresponding approvals were not themselves part of the evidence, Mr Perry submitted that there was no irregularity on the face of the documents and they were vetted not only by a directorate officer of the ICAC and, in respect of the Type 1 authorizations, by a panel judge. Furthermore, there was no evidence to suggest that the protected information would reveal any illegality or impropriety on the part of the ICAC. Mr Perry noted that this type of argument was rejected by the House of Lords in *Preston* and, as Lord Jauncey of Tullichettle observed in that case, it is likely that intercept product will incriminate rather than exculpate one or other of the parties to the intercepted conversation and would be more likely to be of assistance to the prosecution if it was available in evidence.

**E. Discussion**

**E.1 Policy considerations underlying the ICSO**

1. There are number of key policy considerations underlying any enactment dealing with telephone interception and covert surveillance. For present purposes it is only necessary to mention three. They are:

(i) how the powers to conduct telephone interception and covert surveillance are to be accessed;

(ii) what, if any, mechanism is put in place to monitor and supervise compliance with the legislation; and

(iii) what use may be made of the product of the telephone interception and the covert surveillance.

1. In the ICSO the answer to the first policy question above is that it depends on the power to be accessed. For telephone interception the power can only be accessed on the approval of a panel judge, who is a judge of the Court of First Instance of the High Court. For covert surveillance the answer is not so straightforward as it depends on the type of covert surveillance for which authorization is sought and whether it is likely that any information which may be subject to legal professional privilege will be obtained by carrying out the covert surveillance. Where such material is not likely to be obtained and where other conditions are satisfied that go to the intrusiveness of the covert surveillance then it will fall into the category of Type 2 surveillance and such surveillance may be authorized by a senior officer of the department which wishes to carry it out. If the nature of the covert surveillance falls within the category of Type 2 surveillance but it is likely that information which may be subject to legal professional privilege will be obtained by carrying out the covert surveillance, then the Type 2 surveillance is elevated to Type 1 surveillance and must be authorized by a panel judge.
2. The answer to the second policy question is that the ICSO establishes the position of the Commissioner and stipulates that the person who occupies this position must be or have been a judge or Justice of Appeal of the High Court or have been a permanent judge of the Court of Final Appeal. The ICSO sets out the duties of this person and the powers he shall possess in carrying out those duties.
3. The answer to the third policy question is that the product of telephone interception may only be used for an intelligence purpose to assist the department which is conducting it in furthering the purpose of preventing or detecting serious crime or protecting public security. However, the product of covert surveillance may be used in court proceedings, which is, of course, what happened in the present case.
4. It is not contested that, in respect of telephone interception, the underlying policy of the ICSO is to maintain secrecy, both in relation to whether or not it has taken place and in relation to any product generated by it. As Mr Perry pointed out, this policy is implemented by the various provisions contained in sections 59 and 61.
5. However, before considering these sections it is perhaps helpful to emphasise what legal issues are not in dispute. It is not being disputed that government can adopt policy decisions of maintaining secrecy in respect of telephone interception activities by departments and of prohibiting any evidential use of the telephone interception product. The issue is whether in implementing these policies and dealing with the consequences that flow from them the ICSO goes beyond what is necessary and, in different provisions, enacts a disproportionate response in dealing with matters that are a consequence of pursuing the legitimate goals that underlie it. The consequences of the legislation are that intercept product is usually destroyed before it is known whether a prosecution will take place and that what may remain cannot be disclosed through the normal disclosure process as that would undermine the secrecy of the interception. This has led to a separate disclosure regime whose features are the subject of the constitutional challenge.
6. The policy goals that lie behind destruction of the product are to maintain secrecy in respect of the interception and to protect the privacy interests of those affected by it. These are legitimate policy goals and legitimate public interests.
7. There is nothing in the human rights case law which suggests that in a telecommunication interception statutory regime which prohibits the evidential use of intercept product, the intercepting authority must nevertheless preserve the product solely so that it can be disclosed to a future defendant who may face trial in a prosecution flowing from an investigation for which the intercept product was acquired. A defendant is not deprived of a fair trial simply because the telephone interception product has been deliberately destroyed before a prosecution obligation to make disclosure arises.
8. The destruction requirement in the ICSO is clearly in conflict with the common law duty of disclosure. As Mr Perry pointed out “you can’t disclose what you have already destroyed.” However, it has been argued that the non-disclosure of what remains is inconsistent with *Lee Ming Tee* which, it is said, recommends disclosure with a prohibition on collateral use and that it results in an inequality of arms.
9. The *Lee Ming Tee* argument can be quickly addressed. Sir Anthony Mason NPJ said in *Lee Ming Tee* that:

“Striking the appropriate balance between fairness to the defendant and protecting the public interest in the detection and punishment of crime is to be achieved not by reducing the scope of the disclosure rules but by restricting the collateral use of disclosed material …”[[45]](#footnote-45)

1. When Sir Anthony Mason NPJ made this statement he was responding to an argument being advanced on behalf the Secretary for Justice that the disclosure duty, being a duty imposed on the prosecution, should be confined to materials in the possession of the prosecution. It was in rejecting that argument that he referred to the prohibition on collateral use and the comment has to be understood in the context of that particular case where the Securities and Futures Commission withheld the undisclosed material from the prosecution. The comment was clearly designed to assuage any concerns which investigating agencies might have that the duty of disclosure could lead to the undesirable consequence of information being more widely disseminated than the investigating agency would like. However, the comment was not intended to remove or in any way dilute the right of the prosecution to withhold information from a defendant in accordance with the law, such as through the process of public interest immunity, or where, as here, there is a particular statutory process that has been enacted by the legislature.
2. That is not to say that Sir Anthony Mason NPJ’s comments do not have relevance to this issue; they clearly do and this is something to which we will return later in this judgment.
3. In relation to the argument in respect of equality of arms it must be remembered that this principle is confined to the process of trial and has no relevance to the investigation stage. In *McLean v Buchanan* *(PC)*[[46]](#footnote-46) Lord Hope of Craighead explained the principle of equality of arms as follows:

“39. The principle that there must be an equality of arms on both sides is clearly established in the jurisprudence of the Strasbourg Court: see *Dombo Bebeer BV v The Netherlands* (1993) 18 EHRR 213, 229, para 33. What this principle requires is that there must be a fair balance between the parties. In civil cases the accused must be afforded an opportunity to present his case under conditions which do not place him at a substantial disadvantage as compared with his opponent: *De Haes and Gijsels v Belgium* (1997) 25 EHRR 1, 56-57, para 53. In criminal cases the requirement that there be a fair balance is no less important. As I said in *Montgomery v HM Advocate* [2001] 2 WLR 779, 809D‑E, however, the purpose of article 6 is not to make it impractical to bring those accused of crime to justice. It does not require the matters with which it deals to be resolved with mathematical accuracy. The essential question is whether the alleged inequality of arms is such as to deprive the accused of his right to a fair trial.

40. At first sight there is bound to be some measure of inequality of arms as between the prosecutor, who has all the resources of the state at his disposal, and an accused who has to make do with the services that are available by way of criminal legal aid. … What has to be demonstrated is that the prosecutor in this case will enjoy some particular advantage that is not available to the defence or that would otherwise be unfair.”

1. We do not see that the fact that the law enforcement agency enjoys an investigative benefit from making use of intelligence acquired from telephone interception product creates an inequality of arms at trial when no evidential use is made by the prosecution of that product. This has been the consistent view of both Strasbourg and English jurisprudence and we see no reason to hold otherwise. There is no inequality of arms arising from the defence being denied the opportunity of using it, pre-trial, for speculative investigative purposes. But there is a potential risk of injustice from the defence not being aware of actual matters that may assist the defendant in some way and which he can use to advance his case at trial. It is that potential risk of injustice that the ICSO disclosure regime is designed to prevent.
2. Because of the statutory safeguards in relation to destruction of the product, it is unlikely that the original product will continue to exist by the time of any trial flowing from the investigation. In the course of the investigation the product will have been listened to by investigators and notes made of any useful intelligence. Perhaps parts will be transcribed. By the time of trial all that may remain may be the notes made by the officers who listened to the recordings. Hence, the word used to describe the disclosable material is “information”. This is a broad word and is clearly deliberately chosen to reflect what should have happened with the telephone interception product as a consequence of compliance with the destruction requirement.
3. Once it is accepted that the right to a fair trial does not require the extreme step of preserving the interception product for later disclosure, then the only issue is how disclosure of what remains should take place. Here the policy goal of secrecy will rub against the right of a defendant to a fair trial, as disclosure is part of that right. If maintaining secrecy is a legitimate policy goal, as it clearly is, then disclosing the product but prohibiting collateral use of it is not a practical option and, as we have already explained, the law does not require that this option must be employed. It is, therefore, necessary to devise a disclosure regime which can accommodate both the policy goal of maintaining secrecy and the right of the defendant to receive a fair trial. To meet this need the legislature enacted section 61.

**E.2 The statutory regime under section 61**

1. Before examining section 61 it is well to remind ourselves what it is that human rights law requires of a disclosure regime in terms of ensuring equality of arms and a fair trial. This was explained by Lord Hope of Craighead in *Sinclair v H.M. Advocate*[[47]](#footnote-47) when he distilled a number of propositions from the cases:

“33. … I would take from them the following propositions. First, it is a fundamental aspect of the accused’s right to a fair trial that there should be an adversarial procedure in which there is equality of arms between the prosecution and the defence. The phrase ‘equality of arms’ brings to mind the rules of a mediaeval tournament – the idea that neither side may seek an unfair advantage by concealing weapons behind its back. But in this context the rules operate in one direction only. The prosecution has no Convention right which it can assert against the accused. Nor can it avoid the accused’s Convention right by insisting that the duty does not arise unless the accused invokes it first. Secondly, the prosecution is under a duty to disclose to the defence all material evidence in its possession for or against the accused. For this purpose any evidence which would tend to undermine the prosecution’s case or to assist the case for the defence is to be taken as material. Thirdly, the defence does not have an absolute right to the disclosure of all relevant evidence. There may be competing interests which it is in the public interest to protect. But decisions as to whether the withholding of relevant information is in the public interest cannot be left exclusively to the Crown. *There must be sufficient judicial safeguards in place to ensure that information is not withheld on the grounds of public interest unless this is strictly necessary.*” [Emphasis added.]

1. The last sentence in the passage quoted above resonates with the more recent statement of the ECtHR in *Kennedy v United Kingdom*[[48]](#footnote-48) where the court explained the principle as follows:

“184. The Court reiterates that according to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent. The Court has held nonetheless that, even in proceedings under art. 6 for the determination of guilt on criminal charges, there may be restrictions on the right to a fully adversarial procedure where strictly necessary in the light of a strong countervailing public interest, such as national security, the need to keep secret certain police methods of investigation or the protection of the fundamental rights of another person. *There will not be a fair trial, however, unless any difficulties caused to the defendant by a limitation on his rights are sufficiently counterbalanced by the procedures followed by the judicial authorities.*” [Emphasis added.]

1. In enacting section 61, the legislature recognized that a different disclosure regime was needed for the ICSO and so created one which sought to protect the public interests of maintaining the secrecy of the interception, and the product generated by it, and limiting the intrusion into the privacy rights of others and yet would not deprive a defendant of a fair trial. The question we have to address is whether the limited disclosure regime, and its various elements, is a proportional response to the policy goals sought to be achieved by the ICSO. In the words of Lord Hope in *Sinclair* whether there are “sufficient judicial safeguards in place to ensure that information is not withheld on the grounds of public interest unless this is strictly necessary.” Answering this question will require an examination of the various components of the section 61(4) disclosure regime.
2. However, before doing so it is well to remember what it is about the disclosure regime of which complaint is being made. It is said that section 61 impacts so adversely on the disclosure process and the openness of the trial that the trial can no longer be fair. The adverse impact of section 61 is in marginalizing the role of the prosecutor in the disclosure process, excluding the defendant from that process and in limiting the role and powers of the judge in that process. It is argued by the applicants that the provisions of section 61 that cause these adverse impacts are not necessary in order to achieve the legislative purpose of maintaining secrecy and are, therefore, a disproportionate response to the legitimate aim of the legislation.
3. We shall firstly examine the statutory disclosure test that is contained in section 61(4). Both parties agree that it is narrower than the common law test. For Hong Kong the common test was set out by the Court of Final Appeal in its judgment in *Lee Ming Tee*. In that judgment the court did use language that would appear to be taken from the test that was enacted in the United Kingdom in the Criminal Procedure and Investigations Act 1996 but it did also specifically adopt the test which had been accepted in England as representing the common law test for disclosure. In discussing the development of the law relating to disclosure in England Sir Anthony Mason NPJ, with whose judgment the other members of the court agreed, said at page 383C-391F:

“143. The prosecution’s duty of disclosure has its foundation in the right of the defendant to a fair trial. The right to a fair trial entails adequate knowledge of the case to be made by the prosecution (***R v Brown*** [1998] AC 367 at p.374G, *per* Lord Hope of Craighead). What is fair must be determined in the light of the general principle of open justice (***R v Keane*** [1994] 1 WLR 746 at p.750G, *per* Lord Taylor of Gosforth CJ), a principle which was described by Lord Hope of Craighead in *R v* ***Brown*** (at p.374G) as ‘the great principle of open justice’. It would be contrary to that great principle if the prosecution were to withhold from the defence material which might undermine the case against the defendant or which might assist the defence case (*R v* ***Brown*** at p.374G). It is therefore the duty of the prosecution to disclose to the defence ‘all relevant material which may assist the defence subject to the exception ... of public interest immunity’ (***R v Mills*** [1998] AC 382 at p.402H, *per* Lord Hutton).

144. It has been recognised for a long time that prosecutors, in conducting a criminal trial, should ‘regard themselves’ rather ‘as ministers of justice’ assisting in its administration than as advocates (see ***R v Banks*** [1916] 2 KB 621 at p.623, *per* Avory J). But the modern emphasis on the defendant’s right to a fair trial and on the principle of openness has resulted in an expanded duty of disclosure. …

145. Since then the modern authorities have explained the scope of the prosecutor’s duty of disclosure. In ***R v Keane*** [1994] 1 WLR 746*,* Lord Taylor of Gosforth CJ adopted (at p.752A-C) a test which had been suggested earlier by Jowitt J in ***R v Melvin* (unrep.,** 20 December 1993). Jowitt J said:

‘I would judge to be material in the realm of disclosure that which can be seen on a sensible appraisal by the prosecution: (1) to be relevant or possibly relevant to an issue in the case; (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; (3) to hold out a real (as opposed to a fanciful) prospect of providing a lead on evidence which goes to (1) and (2).’

146. The Court of Appeal confirmed this test in *R v Brown* [1994] 1 WLR 1599 and gave further consideration to the expression ‘an issue in the case’ and the disclosure of oral information. …

…

148. On appeal, Lord Hope of Craighead (with whom the other Law Lords concurred) affirmed (at p.377C–D) that the expression ‘an issue in the case’ must be given a broad interpretation as must also the phrase ‘all relevant evidence of help to the accused’ in Lawton LJ’s judgment in *R v Hennessey* (1979) 68 Cr App R 419 at p.426, which was adopted in *R v Ward* [1993] 1 WLR 619 at p.645. …

…

152. While the principles just discussed are expressed in terms of the prosecutor’s duty to the defence, when a dispute as to disclosable materials arises, it is for the court, not prosecuting counsel, to decide such questions and to rule on any asserted legal ground relied upon to justify the withholding of disclosure of relevant material. So much was decided in *R v Ward* [1993] 1 WLR 619 and *R v Davis* [1993] 1 WLR 613. See also *R v Preston* [1994] 2 AC 130 at p.153B, *per* Lord Mustill.

…

155. The principles relating to disclosure articulated by the English courts are based on the defendant’s common law right to a fair trial and on the principle of openness. It is, therefore, appropriate that this Court should have regard to them in ascertaining the common law of Hong Kong. The principles recognise that the prosecution is under a duty of disclosure to the defence which extends to material in the possession or control of the prosecution which may undermine its case or advance the defence case. …

156. An additional foundation for the application of these principles in Hong Kong is provided by arts.39 and 87 of the Basic Law and by art.11(2) of the Hong Kong Bill of Rights (which forms Pt.II of the Hong Kong Bill of Rights Ordinance (Cap.383)). …

…

159. The duty rests with the prosecution or prosecuting counsel. The duty should be considered as one imposed upon the prosecution generally (so in this case it was the DOJ), though it is generally performed by counsel who is briefed and conducts the prosecution. It would be unduly restrictive to say that the duty is confined to prosecuting counsel. See *R v Preston* [1994] 2 AC 130 at p.152G–H, *per* Lord Mustill.

…

163. Mr Michael Thomas SC for the appellant argues for a more limited duty of disclosure, one which is confined to material in the possession or control of the prosecution. If the investigating agency withholds material information from the prosecution, the prosecution can be under no duty to disclose what it does not know and is known only to the agency. This proposition has support in the English cases (see, for example, *R v Maguire* [1992] QB 936 at p.957G). To confine the duty in this way would be to reduce substantially the important part which the prosecutor’s duty of disclosure plays in securing a fair trial and to compromise the principle of openness. Mr Thomas seeks to overcome this objection by submitting that an appellate court would set aside a conviction where material evidence was not led at the trial, although the absence of knowledge of its existence was not due to any breach of duty or fault on the part of the prosecution. Even if this be so, it is not a convincing reason for limiting the duty in the manner suggested.

164. Fairness to the defendant requires wide disclosure. Striking the appropriate balance between fairness to the defendant and protecting the public interest in the detection and punishment of crime is to be achieved not by reducing the scope of the disclosure rules but by restricting the collateral use of disclosed material (*Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177 at p.218C–D, *per* Lord Hope of Craighead).

165. A strong obligation of disclosure will preserve the criminal trial as the appropriate forum for determining the truth or falsity of criminal allegations. …

…

168. … The prosecution’s duty will extend to material in the possession or control of any other government department or agency if there are particular circumstances suggesting that it may have such material.

…

171. The *Melvin* categories may be accepted as a broad statement of what, on a sensible appraisal by the prosecutor, is subject to disclosure. …”

1. What is said by Sir Anthony Mason NPJ at paragraph 171 of his judgment, in the context of the discussion which precedes it, leaves us in no doubt that the Court of Final Appeal adopted the *Melvin* categories as the common law test of disclosure for Hong Kong.
2. There are a number of matters that can be drawn from this discussion of disclosure by Sir Anthony Mason NPJ that need to be emphasized:

(i) the purpose of disclosure is to contribute to the openness of the justice process and to ensure the fairness of the trial;

(ii) the duty is on the prosecution;

(iii) the duty is a pro-active one which requires the prosecution to make enquiries of anyone who might reasonably be in possession of disclosable material;

(iv) what is disclosable is extremely wide and it is now clear that it extends to information which might be known to a person but which has not been recorded.

1. The fact that section 61(4) replaces the wide common law test as laid down in *Melvin* with a narrower test is a clear indication that it was thought that the width of the *Melvin* test was unsuited to the legislative purpose of maintaining secrecy of telephone interception and that a narrower test is necessary. We do not understand the applicants to be arguing that the narrower test in section 61(4) is a disproportionate response to the legislature’s desire to balance the need to maintain secrecy with the need to protect the fairness of the trial. Such an argument, in any event, we would regard as unsustainable. The statutory test still provides adequate protection for the interests of the defendant and does not undermine the twin goals of open justice and a fair trial.
2. We agree with the parties that, because of the way section 61(4) is drafted, the disclosure test is applied by the department and not by the prosecutor. Nor is there any requirement in the section or in the Code of Practice that this test should be applied by officers of the department independent of the investigation. Whether substituting officers of the department for the prosecutor in applying the disclosure test is necessary for maintaining secrecy is something to which we shall return later in this judgment.
3. If the officer of the department performing the disclosure test concludes that there is no information to which the test applies then he says nothing to the prosecution. If he concludes otherwise then he discloses the information to the prosecution.
4. The information referred to in section 61(4)(b) is the information which the department has passed to the prosecutor after the department has itself concluded that this information passes the disclosure test. But, and here we agree with Mr Perry, once in the hands of the prosecution the prosecution must then, itself, apply the disclosure test to it and the prosecution only discloses the information to the judge if it, the prosecution, concludes that the information “might reasonably be considered capable of undermining the case for the prosecution against the defence or of assisting the case for the defence.” We do not agree with Mr Bruce that section 61(4)(b) makes the prosecutor a mere conduit for the department, simply passing on to the judge what has been passed to it by the department.
5. As any disclosure to the judge is in an *ex parte* hearing the defendant and his legal representatives will not be aware that information that might reasonably be considered capable of being helpful to their case exists and is being made known to the judge.
6. In response to this disclosure to him the judge may “make such orders as he thinks fit for the purpose of securing the fairness of the proceedings.” But, because these orders cannot require contravention of section 61(1)-(3) it is unlikely that the defendant or his legal representatives will be aware of the existence of the orders, let alone the reason why they have been made.

**E.3 The constitutional challenge**

1. Against this backdrop of how the section 61 regime operates, it is necessary to address the argument that its provisions are unconstitutional. As we have earlier mentioned in this judgment, Mr Bruce does not dispute that the infringements or restrictions encompassed by section 61 pursue a legitimate societal aim and are rationally connected with advancing that aim. What he does contest is that the infringements or restrictions are no more than is necessary to accomplish the legitimate aim. In order to do this Mr Bruce invites us to conduct a proportionality analysis of section 61.
2. The circumstances in which such an analysis needs to be conducted and how it is to be conducted were the subject of detailed discussion by Ribeiro PJ in his judgment, with which the other members of the Court of Final Appeal agreed, in the case of *Hysan Development Co Ltd v Town Planning Board*[[49]](#footnote-49). In his judgment Ribeiro PJ quoted with approval the following summary of the questions that need to be answered before the proportionality issue is addressed. The summary is from the joint judgment of Fok PJ and Stock NPJ in *Official Receiver v Zhi Charles*[[50]](#footnote-50):

“22. There is a well-established sequence of questions that must be addressed when an issue of constitutionality is raised before a court. The first question is concerned with the identification of a constitutional right and asks whether such a right is engaged. If not, the constitutional challenge fails *in limine*. The next question is whether the legislative provision or conduct complained of amounts to an interference with, or restriction of, that right. Again, if the answer is no, the challenge fails without further inquiry. If, on the other hand, the answer to that question is yes, then it is necessary to consider whether those rights are absolute, in which case no infringement or restriction is permitted and no question of proportionality arises, or, if not absolute, whether the relevant infringement or restriction can be justified on the proportionality analysis.”

1. At first glance it may be thought that the constitutional right that is engaged in the present case is the Article 30 right to privacy for that is the right upon which the provisions of the ICSO encroach. As Ribeiro PJ noted in *Ho Man Kong v Superintendent of Lai Chi Kok Reception Centre*[[51]](#footnote-51):

“… the right is infringed by some third person gaining access to the content of the communication so that it loses its quality of privacy. Where a law enforcement agency seeks authority to breach such privacy the court’s role is to balance the right to privacy of communications against the public interest in protecting public security and in investigating crime. The ICSO provides the machinery and framework for striking that balance.”

1. Article 30 is engaged as a consequence of the argument that covert surveillance can only be lawfully authorized by a judicial officer or person capable of acting judicially. Should this argument be correct, then an executive authorization issued by an officer within the department conducting the covert surveillance does not legitimize an infringement of the Article 30 right. This argument is the subject of a separate ground of appeal and requires its own proportionality analysis. This we shall do later in this judgment.[[52]](#footnote-52)

**E.3.1 Right to fair trial engaged**

1. However, the right that is engaged by the measures contained in section 61 is the right to a fair trial under Article 87 of the Basic Law and Articles 10 and 11(2) of the HKBORO. These fair trial articles are engaged because section 61(4) alters in a significant way the disclosure regime under the common law and, as we have seen, disclosure and openness are integral components of a fair hearing. The section 61(4) regime alters these components by:

(i) restricting the openness of the hearing;

(ii) limiting what the judge can do to ensure the fairness of the trial;

(iii) replacing the much wider common law test of disclosure with a narrower statutory test; and

(iv) transferring the duty of disclosure, in relation to the application of the new disclosure test, from the prosecutor to the investigator.

1. Having identified the constitutional right, and having confirmed that it is engaged by the impugned measure, it is then necessary to consider whether the legislative provision amounts to an interference with or restriction of that right. There is no dispute that section 61 amounts to an interference with the right to a fair trial. That just leaves the final question to be asked which is whether the right is absolute.
2. The right to a fair trial is an absolute right and so no derogation from it is permitted. However, components or elements of a fair trial may be interfered with as long as any such interference does not prevent a fair trial from taking place. An obvious example, around which much case law has developed, is the interference with the presumption of innocence by the creation of reverse burden offences. Another, more relevant, example are the procedures, developed at common law, for resolving claims of public interest immunity in respect of otherwise disclosable material.[[53]](#footnote-53)

**E.3.2 Proportionality analysis**

1. We shall, therefore, now conduct a proportionality analysis of the measures contained in section 61. What is involved in such an analysis was explained by Fok PJ and Stock NPJ in the *Zhi Charles* case as follows:

“23. The proportionality analysis in a case like the present involves asking, first, whether the infringement or restriction pursues a legitimate societal aim; secondly, whether the infringement or restriction is rationally connected with that legitimate aim; and thirdly, whether the infringement or restriction is no more than is necessary to accomplish that legitimate aim.”[[54]](#footnote-54)

This is sometimes referred to as a three step inquiry.

1. In his judgment in *Hysan* Ribeiro PJ referred to two standards that could be applied in determining whether a particular measure is a proportionate means of achieving a particular aim. He described these as the “no more than necessary” standard and the “manifestly without reasonable foundation” standard.
2. He explained the “no more than necessary” standard in the following way:

“… the Courts endeavour to accommodate acceptable limitations of constitutional rights in the pursuit of a legitimate societal interest while preserving to the maximum extent the guarantees laid down in the constitution. However, the words ‘no more than necessary’ do not lay down a strict, bright line test. They lay down a test of *reasonable*, not *strict*, necessity.”[[55]](#footnote-55)

When summarizing his conclusions later in his judgment he said of this standard:

“This must be understood to be a test of reasonable necessity. If the Court is satisfied that a significantly less intrusive and equally effective measure is available, the impugned measure may be disallowed.”[[56]](#footnote-56)

1. The “manifestly without reasonable foundation” standard is related to the concept of “margin of appreciation” that is found in the Strasbourg jurisprudence. It has been adopted in the United Kingdom. This standard recognises “the different constitutional roles of the judiciary on the one hand and the legislative and executive authorities on the other”[[57]](#footnote-57) and has regard to whether, on democratic grounds, the judiciary should defer to the opinion of the elected body or person. This standard may be particularly relevant where “the Court recognises that the originator of the impugned measure is better placed to assess the appropriate means to advance the legitimate aim espoused. This has occurred in cases involving implementation of the legislature’s or executive’s political, social or economic policies but the principle is not confined to such cases.”[[58]](#footnote-58)
2. Which of the two standards should be employed by a court will be determined by a number of factors. Ribeiro PJ explained how this choice should be made:

“106. In principle, the choice of the standard for the Court’s intervention depends on the extent of the appropriate margin of discretion, determined by factors which affect the proportionality analysis in the circumstances of the particular case. In cases calling for a wide margin of discretion, the ‘manifest’ threshold may well be apposite, whereas cases admitting of a narrow or no margin of discretion are more appropriately analysed on the basis of ‘reasonable necessity’. Which standard or threshold to choose therefore depends on the appropriate width of the margin.”[[59]](#footnote-59)

1. Ribeiro PJ also noted that it is relevant when conducting the proportionality analysis to have regard to the significance of the particular right affected by the interference and the extent of interference with it. This led him to say:

“108. … While there would be no point in attempting to construct a formal hierarchy of constitutional rights, a sliding scale has been recognised in which the cogency of the justification required for interfering with a particular right will be proportionate to the perceived importance of that right and the extent of the interference.

109. The specific right invoked may have a low significance and the lower the significance, the broader the margin of discretion is likely to be.”[[60]](#footnote-60)

1. Also relevant are the content and features of the impugned measure, the identity and constitutional role of its originator and any special competence possessed by such a person. These factors may cause the court to accord the decision-maker’s views a wide margin of discretion. But:

“115. If assessment of the proportionality of the measure calls for the application of purely legal principles and an assessment which the Court is the expert to make, the primary decision-maker having no special competence or expertise, it is likely that the margin of discretion will have little role to play and that the Court will simply adopt a standard of reasonable necessity.”[[61]](#footnote-61)

1. Although he referred to these two standards as though they were different standards, separate from each other, Ribeiro PJ was at pains to emphasise that the difference between them is one of degree. They both operate on the same reasonableness spectrum and really only “indicate positions on a continuous spectrum rather than wholly independent concepts.”[[62]](#footnote-62) The location of the “manifestly without reasonable foundation” standard in this spectrum of reasonableness depends, he said, on many factors “relating principally to the significance and degree of interference with the right; the identity of the decision-maker; and the nature and features of the encroaching measure relevant to setting the margin of discretion.”[[63]](#footnote-63)
2. Ribeiro PJ went on to add to the proportionality analysis a fourth step in the enquiry to be conducted by the court. He said:

“135. A fourth step should be added. In line with a substantial body of authority, where an encroaching measure has passed the three-step test, the analysis should incorporate a fourth step asking whether a reasonable balance has been struck between the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the individual, asking in particular whether pursuit of the societal interest results in an unacceptably harsh burden on the individual.”[[64]](#footnote-64)

1. The fourth step has become part of the jurisprudence of the United Kingdom. In setting out how it has been described in case law from that jurisdiction Ribeiro PJ said:

“67. A four-step approach appears now to be generally accepted in the United Kingdom. As Lord Reed JSC puts it in the *Bank Mellat v Her Majesty’s Treasury (No 2)* case: ‘… the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.’ And as Baroness Hale of Richmond DPSC states in *R (Lord Carlile of Berriew) v Secretary of State for the Home Department*, the fourth question ‘can be encapsulated as ‘do the ends justify the means’?’”[[65]](#footnote-65)

1. Although adopting this fourth step Ribeiro PJ recognized that:

“… in the great majority of cases, its application would not invalidate a restriction which has satisfied the requirements of the first three stages of the inquiry. … But one may exceptionally be faced with a law whose content is such that its application produces extremely unbalanced and unfair results, oppressively imposing excessive burdens on the individuals affected.”[[66]](#footnote-66)

1. Mr Bruce did not address us on this fourth step should we be against him on the third step. Of course, if we are with him on the third step then consideration of the fourth step falls away.
2. We shall firstly address the question of whether the *ex parte* procedure in section 61(4) is a fair procedure since it excludes the defendant from having any role in it, or even from knowing of its existence.
3. We are not persuaded that it does create unfairness simply by virtue of its one-sidedness. The judge can still look to the interests of a defendant and ensure that they are protected just as he does in the third class of public interest immunity case that was described by the English Court of Appeal in *R v Davis*[[67]](#footnote-67). This is the class of case relating to material where the public interest would be injured even by disclosure that an *ex parte* application is to be made. The Court of Appeal described such cases as highly exceptional because they were contrary to the general principle of open justice in criminal trials.
4. In England the problems associated with *ex parte* hearings were the subject of discussion by the House of Lords in *R v H*[[68]](#footnote-68)*.* The approach of the courts to claims of public interest immunity was commented on by Lord Bingham of Cornhill who, in giving the opinion of the Appellate Committee, said[[69]](#footnote-69):

“In such circumstances some derogation from the golden rule of full disclosure may be justified but such derogation must always be the minimum derogation necessary to protect the public interest in question and must never imperil the overall fairness of the trial.”

1. Whether this process, which is an exceptional process, renders a defendant’s trial as unfair cannot be answered without regard being had to the role of the prosecutor. In his judgment in *R v H*, Lord Bingham discussed how the fairness of a trial was to be achieved. At page 146E-F he said:

“… the achievement of fairness in a trial on indictment rests above all on the correct and conscientious performance of their roles by judge, prosecuting counsel, defending counsel and jury.”

1. He went on to discuss the role of prosecuting counsel and said at page 146G that:

“The duty of prosecuting counsel … is not to obtain a conviction at all costs but to act as a minister of justice.”

Lord Bingham referred to his discussion of the role of the prosecutor in *Randall v The Queen*[[70]](#footnote-70) where he had commended the following statement by Rand J in the Supreme Court of Canada in *Boucher v The Queen*[[71]](#footnote-71):

“It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.”

1. The important contribution that the prosecutor makes to the fairness of the trial in the context of disclosure was the subject of comment by Lord Rodger of Earlsferry in *McDonald (John) v H.M. Advocate*[[72]](#footnote-72). He said:

“The success of our adversarial system of trial depends on both sides duly performing their respective roles. Of course, a prosecutor must always act as a ‘minister of justice’ and this means that, when carrying out his duty of prosecuting, the prosecutor must do his best to ensure that the accused receives a fair trial. So the prosecutor must be alert to examine and re-examine the Crown case in the light of known and emerging lines of defence and must disclose any disclosable material of which he is aware or becomes aware while carrying out that duty. Disclosure is simply one aspect of the overall duty to prosecute the case fairly.”

1. We are satisfied that so long as the prosecutor conscientiously performs the role of a minister of justice and at all times remains vigilant in protecting the fairness of the trial, the *ex parte* procedure and the constraints on the powers of the judge should not, by themselves alone, lead to an unfair procedure.
2. But, in conducting the proportionality analysis, it is not just fairness to the defendant with which we are concerned but also frequency of occurrence. This is because this form of *ex parte* procedure is so contrary to the principle of open justice that it must be regarded as a truly exceptional procedure. It cannot become a regular occurrence in our trials. We are concerned, therefore, at the possibility of section 61(4)(b) hearings occurring more frequently than the third category of *Davis* public interest immunity hearings presently occur. We share the concern of the English courts that by reason of their total exclusion of a defendant from these *ex parte* hearings they should be regarded as a highly exceptional hearing whose number should be kept to a minimum. However, if the legitimacy of covert surveillance evidence is proven by means of the authorization, then ‍the statement in writing or affirmation that has been relied on to justify the issue of the authorization will continue to be disclosable material by application of the common law test.
3. Documents created by law enforcement for the purpose of obtaining various kinds of warrants often find their way into disclosable unused material. When this happens they may have to be redacted if they contain information which, by the time of trial, still remains sensitive. In that situation a claim of public interest immunity is made and the procedure and legal principles for determining such a claim are well established in our law. But where the redactions have been made in order to conceal the fact that telephone interception has taken place, as happened in the present case, such a procedure will be inappropriate. The obvious solution is for no reference to be made to information obtained from telephone interception. Once reference is made to telephone interception and a redaction is made to the disclosable document then the judge has to be informed that a public interest immunity claim will not be made but that the redacted parts of the document remain undisclosable for other reasons. It is difficult to see how, within the constraints imposed by section ‍61, this can sensibly be done. This does not seem to be a problem that has been catered for in the legislation and is something that may have to be addressed by those responsible for the ICSO.
4. We note that in England use has been made of the device of a “special advocate” where it has been adjudged necessary to have an independent person who could advance before the court arguments in support of the interests of a defendant. Such a person is made aware of the disclosable material but cannot inform the defendant of it. Use of such a special advocate has taken place without statutory backing. We are not aware of such a device having been employed in Hong Kong. However, we do think that where the judge feels it would be desirable for the purposes of assisting him and for maintaining the fairness of the proceedings then recourse could be had to it.
5. We turn next to the question of whether this regime prevents a defendant from receiving a fair trial. Nowhere does the ICSO require a defendant’s trial to continue in circumstances where the judge concludes that, by virtue of the limited powers available to him, he cannot ensure that the defendant will have a fair trial. The constraints imposed upon the judge are necessary if secrecy is to be maintained. If those constraints prevent a fair trial then the judge so rules and orders a stay of the proceedings. The price to be paid for maintaining secrecy is a price paid by the prosecution which, by tying the judge’s hands, exposes itself to the risk that its prosecution may be stayed.
6. As we have said earlier in this judgment, it is not contended that the narrower statutory test for disclosure by itself, prevents a defendant from receiving a fair trial.
7. This brings us to the final element of the disclosure regime of which complaint is made and that is whether the section 61(4) regime, in transferring from the prosecutor to the investigator responsibility for the application of the disclosure test, is reasonably necessary, and is, therefore, a proportionate response, to the legitimate aim ‍of maintaining secrecy of telephone interception.
8. We note that the prosecutor is not excluded completely from the process. He will become involved should the department conclude it possesses information that is caught by the disclosure test. Nor is there anything in the ICSO which would prevent the department from seeking legal advice on this issue, for which purpose it would have to disclose the information that continues to exist. In these circumstances we find it difficult to see what essential benefit is to be gained from transferring the disclosure duty from the prosecution to the department, without which the secrecy of the telephone interception would be undermined or imperilled.
9. One way of testing the respondent’s argument that this regime is necessary is to examine what has been done in the RIPA on which the ICSO has been modelled.
10. There is nothing in RIPA which actually transfers the disclosure duty from the prosecution to the investigator. Section 15(2) of RIPA requires that the number of persons to whom intercepted material is disclosed and the extent to which any such material is disclosed “is limited to the minimum that is necessary for the authorised purposes.” Subsection (4) sets out what is “necessary for the authorized purposes” and includes the situation where:

“(d) it is necessary to ensure that a person conducting a criminal prosecution has the information he needs to determine what is required of him by his duty to secure the fairness of the prosecution.”

1. These provisions must be read with section 17(1) which contains a prohibition similar to section 61(3) of the ICSO and, in so far as it also encompasses a prohibition on disclosure, similar to section 61(2) of the ICSO. But section 17(1) is expressly made subject to section 18 and section 18 states in subsection (7):

“(7) Nothing in section 17(1) shall prohibit any such disclosure of any information that continues to be available for disclosure as is confined to—

(a) a disclosure to a person conducting a criminal prosecution for the purpose only of enabling that person to determine what is required of him by his duty to secure the fairness of the prosecution.”

1. How these provisions are intended to operate in practice is set out in the Attorney-General’s Guidelines for Prosecutors as follows:

“ If protected information is disclosed to a prosecutor, as permitted by section 18(7)(a), the first step that should be taken by the prosecutor is to review any information regarding an interception that remains extant at the time that he or she has conduct of the case. In reviewing it, the prosecutor should seek to identify any information whose existence, if no action was taken by the Crown, might result in unfairness. Experience suggests that the most likely example of such potential unfairness is where the evidence in the case is such that the jury may draw an inference which intercept shows to be wrong, and to leave this uncorrected will result in the defence being disadvantaged.

6. If in the view of the prosecutor to take no action would render the proceedings unfair, the prosecutor should, first consulting with the relevant prosecution agency, take such steps as are available to him or her to secure the fairness of the proceedings provided these steps do not contravene section 18(10). In the example given above, such steps could include:

(i) putting the prosecution case in such a way that the misleading inference is not drawn by the jury;

(ii) not relying upon the evidence which makes the information relevant;

(iii) discontinuing that part of the prosecution case in relation to which the protected information is relevant, by amending a charge or count on the indictment or offering no evidence on such a charge or count; or

(iv) making an admission of fact.”

1. The Crown Prosecution Service Disclosure Manual has a chapter entitled “Dealing with Intercept Product”. It states as follows:

“… The raw product (post, voice or email data) may or may not ‍any longer exist at the prosecution stage, as the intercepted material and any related communications data is required to be destroyed as soon as there are no longer any grounds for retaining it as necessary for any of the authorised purposes. The prosecutor should identify what material the relevant agency holds; for example raw product, a copy of the product, monitors notes, notes created concerning the content, applications and authorisations etc. and examine it in accordance with this guidance.

Section 15 of RIPA and Part 6 of the ICC Code set out the obligations placed on the intercepting agencies in relation to the handling, destruction and copying of the product. Intercepted material should not be retained against a remote possibility that it might be relevant to future proceedings. The normal expectation is that the intercepted material will be destroyed in accordance with the safeguards in section 15. It is however important that material is retained if it has the capacity to undermine a potential future prosecution or assist the defence.

Each intercepting agency will interpret the obligations under section 15 in a different way, depending on their own statutory functions, and will have their own internal handling arrangements. Prosecutors should comply with the agreed handling arrangements of the relevant agency.

Prosecutors must keep secret matters related to warranted interception (s19 of RIPA). It is a criminal offence to make an ‍unauthorised disclosure of material relating to warranted interception, as may failing to comply with the requirements of section 15, or the internal handling arrangements of interception agencies.

The ICC Code clearly envisages that much of the product will have been destroyed before revelation to the prosecutor becomes an issue. However, it is stressed that this will depend on the handling arrangements of the interception agency. Material, be it raw product, copies, etc will therefore only be available if a conscious decision has been made to retain it for an authorised purpose, i.e. the same purpose for which the warrant was issued (National security/ prevention or detection of crime) *or retention was deemed necessary for prosecutorial review of all available material*.

*Material (product, copies, documents and/ information) resulting from an interception warrant which exists and which could affect the fairness of the trial will be brought to the attention of the prosecutor in accordance with internal referral criteria for the prosecution agency and/or Division. This process is known as a ‘Preston briefing’*.

*The prosecutor should ascertain from the police (or other investigator and/or relevant third party, where applicable) whether ‘Preston’ material exists.* This material should then be handled in accordance with guidance issued ….” (Emphasis added.)

1. It is our view that when sections 15, 17 and 18(7) are read together it is clear that an obligation is imposed upon the investigator to inform a prosecutor of information that continues to be available but only for the limited purpose “of enabling that person (i.e. the prosecutor) to determine what is required of him by his duty to secure the fairness of the prosecution”.
2. Disclosure is an aspect of a fair trial and, as we have seen, the prosecution is a key player in ensuring that a defendant receives a fair trial. This is recognised by RIPA and there is nothing in RIPA, or in the United Kingdom’s administrative material that we have quoted in the preceding paragraphs, to suggest that the law enforcement agency can withhold material from the prosecution because it considers that material to be non-disclosable. There is no suggestion that the investigator performs an initial filtering process in respect of the information that continues to be ‍available and that he can choose not to disclose it to the prosecutor if he, the investigator, is of the view that the prosecutor does not need this information to enable him “to determine what is required of him by his duty to secure the fairness of the prosecution.”
3. By restricting the purpose for which disclosure is made to the prosecution, the principle of equality of arms is preserved as the prosecutor can make no evidential use of it or any tactical adversarial use of it. The purpose of disclosure to the prosecutor is to enable him, in his role as prosecutor, to decide what he, as prosecutor, must do in order to fulfil “his duty to secure the fairness of the prosecution”. It is important to emphasize that what the prosecutor is fulfilling is something as high as “a duty” and it is a duty personal to him. He may rely on others to assist him in discharging it but ultimately it is *his* duty for the performance of which *he* is held responsible.
4. The fact that the United Kingdom has not seen the need to limit the role of the prosecutor in the way that the ICSO does, seems to us to be a very powerful indicator that such a provision is not in fact necessary for the purpose of maintaining the secrecy of the interception.
5. It is also worth bearing in mind that section 18(7) of RIPA flowed from the practice that developed from Preston briefings which themselves were prompted by what Lord Mustill said in *Preston*. What Lord Mustill said bears repetition. Lord Mustill’s comments were in response to a proposition by the Attorney General that “since nothing which might be disclosed to prosecuting counsel and through him to the defendants could in the light of section 9 be put in evidence before the jury there was no need to override the interests of secrecy by any further disclosure.”[[73]](#footnote-73) Lord Mustill’s first response to this proposition was that disclosure of inadmissible information can lead by a train of inquiry to information which may be admissible, or helpful to the defence in some other way. He then continued:

“Secondly, the Attorney-General’s proposition overlooks the essential function of the investigating and prosecuting authority which it must perform alongside its more obvious tasks of discovering, marshalling and presenting the evidence against the accused, namely to ensure that the prosecution of a suspected offender is conducted fairly. One aspect of this duty is to consider whether amongst the material to which the authority alone is privy there is material which suggests that the suspicions are unfounded, or that apparently damaging evidence should be viewed in a more favourable light. Upon such consideration the authority should decide whether the prosecution should proceed at all, and if so in what way it should be presented. Counsel for the prosecution plays an indispensable part in this function, and his role as arbiter between the adversarial interests of the prosecution and the broader dictates of justice cannot be effectively performed unless he knows everything material that there is to know. The Attorney-General’s advice seems to ignore this entirely. Moreover the logic of the advice has disturbing implications in the present context. The question of admissibility arises, if at all, through section 9. Assuming that this has the meaning for which the prosecutor contends, the products of an intercept are made inadmissible because the interests of state demand that the whole business should be kept secret. If the Attorney-General is right it must follow that even if the contents of the intercept would clearly demonstrate to prosecuting counsel that the accused person is innocent he must be kept in ignorance of it, and in the interests of secrecy left to press unwittingly for an unjust conviction. My Lords, this is raison d’etat indeed, and I would not hold it to be the law of England unless compelled to do so. I find no such compulsion in the Attorney-General’s advice, for even if it gave a sound reason for refusing disclosure to the defence (which for the reason stated I believe it does not) the logic cannot be transferred to the supply of material, admissible or otherwise, to prosecuting counsel. If this, too, is to be withheld, a justification must be found elsewhere.” [[74]](#footnote-74)

1. This eloquent statement by Lord Mustill on the importance of the prosecutor to the fairness of the trial process lends further emphasis to the crucial and unique role that the prosecutor plays in what is otherwise an adversarial process.
2. It is important to appreciate just how different are the roles of investigator and prosecutor. In the investigative stage of the criminal justice process the courts and the prosecutor play a support role to the law enforcement agencies in order to facilitate their investigations. The prosecutor provides legal advice and the courts will become involved in adjudicating upon applications for search warrants, ICSO authorizations or production or other orders.
3. Throughout their performance of their different roles, investigator and prosecutor, remain, crucially, separate from each other. But it is not just that they are separate from each other that distinguishes the Hong Kong/English common law relationship of investigator and prosecutor, but also that in the performance of their duties they act independently of each other. The prosecutor may advise, suggest and request an investigator to conduct his investigation in a particular way but he can never require, demand or dictate that he do so. In respect of the ICAC that operational independence is actually entrenched in Article 57 of the Basic Law.
4. But once a person is charged with an offence the support roles are reversed. The forensic process is dominant and the law enforcement agency plays a supporting role to the prosecutor. In carrying out his prosecution duties the prosecutor’s independence of action is also constitutionally guaranteed. Article 63 of the Basic Law provides:

“The Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions free from any inference.”

1. This brings us to the context in which a prosecution plays out. That context is, of course, the adversarial process of the courtroom.
2. We have seen how much human rights law has developed around the rights of the accused in an endeavour to make more equal this adversarial contest between the prosecutor, who possesses all the resources of the state to support him, and the defendant who, more often than not, has only the limited resources of a legal aid organization available to him. Examples of this are the development of the concept of equality of arms, the disclosure duty imposed on the prosecution and the importance given to the concept of open justice.
3. But no matter how many rights we give to a defendant we cannot hope to achieve a completely equal contest. Nor does the law require perfection in attaining the goal of a fair trial. In *HKSAR v Lee Ming Tee & Anor*[[75]](#footnote-75) Ribeiro PJ, in giving a judgment with which the other members of the court agreed, described the position as follows:

“ In the first place, it is only in very unusual circumstances that a court can properly be satisfied that a fair trial is ‘impossible’. The ‘fairness’ achievable is judged in practical and not absolute terms. As Brennan J pointed out in *Jago v District Court of New South Wales* (1989) 168 CLR 23 at p.49:

If it be said that judicial measures cannot always secure perfect justice to an accused, we should ask whether the ideal of perfect justice has not sounded in rhetoric rather than in law and whether the legal right of an accused, truly stated, is a right to a trial as fair as the courts can make it. Were it otherwise, trials would be prevented and convictions would be set aside when circumstances outside judicial control impair absolute fairness.

More importantly, the court’s primary endeavour is to ensure that a fair trial takes place, employing the law’s available resources, and not to abort it on the ground that fairness cannot be attained, save as a last resort. To quote Brennan J again:

A power to ensure a fair trial is not a power to stop a trial before it starts. It is a power to mould the procedures of the trial to avoid or minimise prejudice to either party. (*Jago v District Court of New South Wales* (1989) 168 CLR 23 at p.46)”

1. The need to ensure that the trial proceeds is because there are other interests at stake. The criminal trial is more than just a contest between state and defendant and more than just a process in which the only interest at stake is that of the defendant. In his now celebrated statement in *AG’s Reference (No 3 of 1999)*[[76]](#footnote-76) Lord Steyn described the forensic stage of the criminal justice process as involving a triangulation of interests. He said at page 118E-F:

“… The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public. …”

1. Once we accept that there are limitations on what we can achieve but that the interests of justice require us to, nevertheless, do all in the court’s power to ensure a trial takes place, the issue becomes one of examining what can be done, in the words of Brennan J in the *Jago* case, “to mould the procedures of the trial to avoid or minimize prejudice to either party.”[[77]](#footnote-77)
2. We strive to protect the interests of the defendant by having his trial take place in public; by providing him with legal representation at the trial level; by providing him with procedural and evidential rights; by ensuring that the trial is presided over by an impartial judicial officer and by imposing on the prosecutor duties which transform his role from simply being an advocate for a party to being a minister of justice.
3. Inevitably, the more we dilute any of these matters the more we put at risk the fairness of the trial. It is in this context that the importance of the role of the prosecutor must be appreciated. Lord Mustill in *Preston* described the role of the prosecutor as being an “arbiter between the adversarial interests of the prosecution and the broader dictates of justice”[[78]](#footnote-78) and went on to say that this minister of justice aspect of his role “cannot be effectively performed unless he knows everything material that there is to know.”[[79]](#footnote-79)
4. Consequently, we are very wary of in any way limiting the prosecutor in performing his role as a minister of justice in a process which, precisely because it is one sided, demands more, not less, from him in respect of this aspect of his role. He, not the investigator, is best equipped to know how he will present his case, to appreciate what weaknesses exist in his case and to anticipate how a defence counsel might be able to advance his client’s defence in response to the prosecution case.
5. This emphasis on the importance of prosecuting counsel as a minister of justice resonates with the judgment of Sir Anthony Mason NPJ in *Lee Ming Tee* who resisted any attempt to dilute the prosecution duty. It is difficult to imagine, given the strength of Sir Anthony Mason NPJ’s comments, that he could ever have contemplated transferring this duty from a person on whom the law imposes a role of minister of justice to an officer of the law enhancement agency who has a vested interest in the success of the prosecution.
6. In deciding this issue we have had regard to the two standards discussed by Ribeiro PJ to be applied in the course of performing the proportionality analysis. We accept that in drafting legislation governments commonly have regard to what has been enacted by other parliaments or legislative bodies and that even when they model their legislation on what has been done elsewhere they do not necessarily copy everything from the foreign legislation. Governments inevitably review the range of options open to them and choose the one that they feel is, for one reason or another, most appropriate for them.
7. We accept that in respect of the ICSO the government chose a different path from the United Kingdom on the issue of disclosure. The government, again for one reason or another, may have thought that was a more desirable path to take. But we are not concerned with what is desirable but rather with what is necessary.
8. In deciding what is necessary we do not see that there is any particular margin of discretion relevant to this issue. We appreciate the concern of the respondent and we understand its argument that anything less than the regime created will undermine and imperil the legitimate aim that section 61 seeks to achieve. But we are not persuaded by this argument. We apply the reasonable necessity test and in doing so we conclude that the intruding measure of transferring the disclosure duty from the prosecution to the investigator is more than is necessary. We are satisfied that retaining the common law position whereby the duty is imposed upon the prosecution is “a significantly less intrusive and equally effective measure” in achieving the legitimate aim of maintaining secrecy of telephone interception.
9. In due course we shall hear the parties on what order we should make in response to this ruling. One option might be to give a remedial interpretation of section 61(4). In *Keen Lloyd Holdings Ltd v Commissioner of Customs and Excise*[[80]](#footnote-80) the Court of Appeal said that a court that finds itself in the position of declaring a legislative provision unconstitutional “should consider whether the legislative provision in question can become Basic Law–compliant by remedial interpretation before holding that it is constitutionality invalid.” At paragraph 97 of its judgment it summarized the relevant legal principles as follows:

“(a) Subject to the limitations in (c) and (d) below, the court can exercise the power of remedial interpretation to depart from the unambiguous meaning of the legislative provision in order to give a Basic Law-compliant effect to the same;

(b) In adopting a remedial interpretation, the court can interpret language in a statutory provision restrictively or expansively. It can also read in words which change the meaning of the provision;

(c) However, the court cannot adopt a meaning inconsistent with a fundamental feature of the legislative scheme or its essential principles. Whether an element in the statutory provision constitutes a fundamental feature or essential principle must be determined with regard to its place in the overall scheme of the legislation;

(d) Remedial interpretation does not empower the courts to make decisions for which they are not equipped such as choosing between various options which requires legislative deliberation or adopting a meaning which has important practical repercussions which the court is in no position to evaluate.”

1. We believe that the following remedial interpretation would not be inconsistent with these principles:

“… any information obtained pursuant to a relevant prescribed authorization and continuing to be available to the department concerned *shall be provided to the prosecution so that it may consider whether the information* might reasonably be considered capable of undermining the case for the prosecution against the defence or of assisting the case for the defence. Where, *in respect of such information that is disclosed to it, the prosecution is of the view that it might reasonably be considered capable of undermining the case for the prosecution against the defence or of assisting the case for the defence* it shall then disclose the information to the judge in an ex parte hearing that is held in private.”

1. The italicised words are read in to ensure that the prosecution is provided with any extant information and that it is the prosecution who then decides whether that information passes the disclosure test.
2. At this stage we do no more than raise this possible remedial interpretation for the consideration of the parties as we shall not be making any order until the parties have been given an opportunity to be heard on this matter.
3. It was also argued under this ground of appeal that the judge erred in requiring the defence to explain to him the relevance of the redacted material before determining whether it was disclosable.[[81]](#footnote-81) In the circumstances in which the judge found himself we see nothing wrong in his decision.
4. True it is that the documents were disclosable as they were clearly relevant documents under the common law disclosure test, being the underlying documents containing the factual justification for the granting of the authorizations. But that does not mean that all of their contents were disclosable. Only parts of each document were redacted and the rest of the document contained sufficient information to justify the issue of the covert surveillance authorizations. Furthermore, there was nothing on the face of the documents which showed that they had a relevance beyond providing the evidential basis for the granting of the application for an authorization to conduct covert surveillance. Nor was there any reason to believe that the redacted parts would call into question the propriety of the application, the sufficiency of the evidence to support it or the legality of the decision to grant it.
5. In this situation the defence request had all the hallmarks of a fishing expedition of the kind that has long been regarded as inimical to the interests of justice. In the case of *R v Guney*[[82]](#footnote-82) Lord Justice Judge said:

“In practice, as Lord Taylor C.J. underlined in *Turner* [1995] 2 Cr.App.R. 94, a justified claim that material in the possession of the prosecution is relevant in the sense explained in the authorities must be distinguished from a forensically manufactured opportunity for a general trawl through the prosecution papers, with the risk that the burden imposed on the prosecution will defeat the interests of justice by causing a discontinuance of the case where it otherwise should proceed. …”

1. In *R v H*[[83]](#footnote-83) Lord Bingham offered the following guidance on the approach to be taken to disclosure:

“35. If material does not weaken the prosecution case or strengthen that of the defendant, there is no requirement to disclose it. For this purpose the parties’ respective cases should not be restrictively analysed. But they must be carefully analysed, to ascertain the specific facts the prosecution seek to establish and the specific grounds on which the charges are resisted. The trial process is not well served if the defence are permitted to make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good.”

1. The redactions in the present case clearly peaked the curiosity of the defence counsel and caused them to embark on an exercise of exploratory disclosure in the wholly speculative hope that something favourable to their clients might be discovered. The judge, quite properly, refused to allow this to take place.

**E.4 The impact of the constitutional challenge on the convictions**

1. Before leaving this ground of appeal we have to address the question of whether our ruling in respect of the constitutionality of section 61(4) has any impact on the applicants’ convictions. The ruling is particularly relevant to the 1st applicant’s second ground of appeal and the section 61(4) part of the 2nd applicant’s second ground of appeal. We are satisfied it does not. We say that because on the facts of the present case it is clear that by the *ex parte* hearing on 5 November 2014 the ICAC had disclosed the redacted material to the prosecution and the prosecution had applied to it the statutory disclosure test.[[84]](#footnote-84) Independently of the ICAC, the prosecution had reached the view that none of the material was covered by the test and, therefore, none of it was disclosable.
2. It follows, therefore, that, despite our ruling on section 61(4), the grounds of appeal that are the 1st applicant’s first and second grounds of appeal and the 2nd applicant’s second ground of appeal, must fail.

**E.5 Executive authorizations**

1. The 2nd applicant’s first ground of appeal complains that the executive authorizations were issued pursuant to an unconstitutional provision as such an infringement of the right to privacy should only have been sanctioned by a judicial officer or someone capable of acting judicially. As we have said at paragraph 176 of this judgment this argument engages Article 30. There is no doubt that executive authorizations amount to an interference with, or restriction of, that right. The next question that needs to be addressed is whether the right that is engaged is an absolute right.[[85]](#footnote-85) The right to privacy is not an absolute right and so, in principle, it is lawful for government to legislate in a way which interferes with, or encroaches on, the right.
2. The question raised by this ground of appeal is whether the use of executive authorizations is necessary for the purpose to be achieved or whether it is a disproportionate response. The argument of the applicants is that applications for authorizations to conduct covert surveillance must be authorized by a judicial officer or a person capable of acting judicially and that officers working within the same law enforcement agency that is applying for the authorization are not capable of acting judicially.
3. In support of this argument Mr Bruce relies on the Canadian Supreme Court case of *Hunter v Southam Inc*[[86]](#footnote-86) which concerned search warrants. In the area of search warrants our Court of Appeal has approved the approach espoused in *Hunter v Southam Inc* in its judgment in the *Keen Lloyd* case.
4. There is no doubt that in an ideal word judicial authorization is a very desirable check on the use by the executive of important powers that impact in a substantial way on the rights of the citizen. No one would disagree with the valuable role that a respected judiciary can play as a gatekeeper of these powers. Any judicial officer will bring not just actual independence of mind and impartiality of decision making to the gatekeeper role but, also of great importance, a perception by the public that these qualities stand between the power of the state and the rights of the citizen. Such perception is strengthened when the judicial officer is of the rank of High Court judge.
5. The principle in *Hunter v Southam* *Inc* has been expressly followed by our Court of Appeal in the *Keen Lloyd* case*.* At pages 1396-1399 the court discussed the judicial gatekeeping role and said:

“***B3. The judicial gatekeeping role:***

71. Before we concentrate on the constitutional challenge against s.21(1)(a) of the IEO (which authorises warrantless search), we shall first examine the safeguards against executive abuse provided by the requirement of a judicial warrant as prior authorisation for searches. The vetting of an application for a warrant by a judicial officer provides important safeguards against arbitrary interference with the right of privacy guaranteed by art.14 of the HKBOR and art.29 of the Basic Law.

72. The significance of having prior scrutiny of the justification for the interference with the rights of a private citizen (whether in terms of common law rights of property or the human rights of privacy) by an impartial authority has been explained by Dickson J in *Hunter v Southam Inc* (1984) 14 CCC (3d) 97, 109. In the same vein, Stock V-P made similar observations in [*Philip KH Wong v Commissioner of Independent Commission Against Corruption* *(No 2)* [2009] 5 HKLRD 379](https://login.westlawasia.com/maf/app/document?src=doc&maintain-toc-node=true&linktype=ref&&context=&crumb-action=replace&docguid=IB1623E7FAA3A4296916C4DA38CA8937E) at [47]-[49]. We respectfully reiterate these observations as a sound reminder of the approach which should be adopted by every law enforcement officer in an application for a warrant and every judicial officer in the consideration of such application:

[47] The starting principle is the inviolability of private premises from arbitrary intrusion. The right to security of one’s home and of the place in which one works is a right historically protected by the common law and now widely recognised in constitutional and other human rights instruments. It is therefore incumbent on every magistrate or judge to whom an application to permit such an intrusion is made to remind himself of the seriousness of the act which he is asked to authorizse and not to permit the apparent simplicity of the procedure or the frequency with which it is invoked to devalue its significance. The duty upon him has been described as ‘a high duty … to protect individual citizens from arbitrary infringements of their liberties, as well as a responsibility to facilitate the conviction of the guilty in the interests of the whole of society.’

[48] The fulfilment of this duty means that the task must be approached judicially; in other words, the judicial officer must apply his mind to the individual circumstances of the case and exercise his own judgment. He must act within the boundaries of his powers as prescribed by the statute pursuant to which the application is made and, if an intrusion is, within those boundaries, justified by the facts ascertained by him, he should ensure that the intrusion authorised goes no further than is reasonably necessary for the permissible objective and that the parameters of the authorisation are sufficiently clear on the face of the warrant, so that the person executing the warrant and the person upon whom it is served knows what is and what is not permitted.

…

73. These observations highlight the importance of careful scrutiny of an application by a judicial officer, the need to approach the application judicially with an independent mind balancing the conflicting interests and the duty on the part of an applicant to place all material information before the judicial officer. …

74. The importance of the judicial gatekeeping role in the context of search warrant was highlighted by Lord Hoffmann in [*Attorney-General of Jamaica v Williams* [1998] AC 351](https://login.westlawasia.com/maf/app/document?src=doc&maintain-toc-node=true&linktype=ref&&context=&crumb-action=replace&docguid=I69C003E0E42711DA8FC2A0F0355337E9), 358F-G, Chan CJHC (as he then was) in *Apple Daily Ltd v Commissioner of Independent Commission Against Corruption* [[2000] 1 HKLRD 595](https://login.westlawasia.com/maf/app/document?src=doc&maintain-toc-node=true&linktype=ref&&context=&crumb-action=replace&docguid=IAB041522EDF54EE6A8BF379E5F8021C0), 600A-B and Li CJ in *P v Commissioner of Independent Commission Against Corruption* [(2007) 10 HKCFAR 293](https://login.westlawasia.com/maf/app/document?src=doc&maintain-toc-node=true&linktype=ref&&context=&crumb-action=replace&docguid=ID5F05F59A24644E2AAA4CF23A6C0243F), 300J-301B. In *Attorney-General of Jamaica v Williams* [[1998] AC 351](https://login.westlawasia.com/maf/app/document?src=doc&maintain-toc-node=true&linktype=ref&&context=&crumb-action=replace&docguid=I69C003E0E42711DA8FC2A0F0355337E9), Lord Hoffmann said:

The purpose of the requirement that a warrant be issued by a justice is to interpose the protection of a judicial decision between the citizen and the power of the state. If the legislature has decided in the public interest that in particular circumstances it is right to authorise a policeman or other executive officer of the state to enter upon a person’s premises, search his belongings and seize his goods, the function of the justice is to satisfy himself that the prescribed circumstances exist. This is a duty of high constitutional importance. The law relies upon the independent scrutiny of the judiciary to protect the citizen against the excesses which would inevitably flow from allowing an executive officer to decide for himself whether the conditions under which he is permitted to enter upon private property have been met.”

1. In this case the Court of Appeal was dealing with a statutory provision which allowed a warrantless search of premises and was called upon to determine the constitutionality of this provision. It again found assistance in the comments of Dickson J in *Hunter v Southam Inc*. At page 1394 [64]-1399 [75] it said:

“… However, we respectfully find the following *dicta* of Dickson J in *Hunter v Southam Inc*, *supra*, 109 to be enlightening in the application of our proportionality test as discussed above:

[The purpose of the constitutional protection under s.8] …is to protect individuals from unjustified State intrusions upon their privacy. That purpose requires a means *preventing* unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place. This, in my view, can only be accomplished by a system of *prior authorisation*, not one of subsequent validation.

65. Having said so, Dickson J recognised that there could be exceptions to the requirement of prior authorisation:

I recognise that it may not be reasonable in every instance to insist on prior authorisation in order to validate governmental intrusions upon individuals’ expectations of privacy. Nevertheless, where it is feasible to obtain prior authorisation, I would hold that such authorisation is a pre-condition for a valid search and seizure.

66. We are in broad agreement with this sentiment though in the context of art.14 of the HKBOR and art.29 of the Basic Law, we would not exclude the possibility of justifications for exception other than infeasibility of obtaining prior authorisation in meeting our proportionality test. But each justification has to be tested against the well-established criteria in our proportionality test.

67. Dickson J further discussed the process of prior authorisation at p.110:

The purpose of a requirement of prior authorisation is to provide an opportunity, before the event, for the conflicting interests of the State and the individual to be assessed, so that the individual’s right to privacy will be breached only where the appropriate standard has been met, and the interests of the State are thus demonstrably superior. For such an authorisation procedure to be meaningful it is necessary for the person authorising the search to be able to assess the evidence as to whether that standard has been met, in an entirely neutral and impartial manner.

68. He was further of the view that the person giving the authorisation might not need to be a judicial officer:

While it may be wise, in view of the sensitivity of the task, to assign the decision whether an authorisation should be issued to a judicial officer, I agree … that this is not a necessary pre-condition for safeguarding the right enshrined in s.8. The person performing this function need not be a judge, but he must at a minimum be capable of acting judicially.

69. Strasbourg jurisprudence is to the same effect. … It is pertinent for our purposes to note that in assessing proportionality, the European Court also placed emphasis on examining whether there were adequate and effective safeguards against abuse, see *Camenzind v Switzerland*, *supra*, at [45]:

… The Court will assess … whether the aforementioned proportionality principle has been adhered to. As regards the latter point, the Court must first ensure that the relevant legislation and practice afford individuals ‘adequate and effective safeguards against abuse’; notwithstanding the margin of appreciation which the Court recognises the Contracting States have in this sphere, it must be particularly vigilant where, as in the present case, the authorities are empowered under national law to order and effect searches without a judicial warrant. If individuals are to be protected from arbitrary interference by the authorities with the rights guaranteed under Article 8, a legal framework and very strict limits on such powers are called for …

70. Notwithstanding the difference in the wordings of art.8 of the European Convention from art.14 of the HKBOR, we are of the view that this is the proper approach to be adopted for considering whether a statutory power of search is consistent with the HKBOR and art.29 of the Basic Law in light of the Hong Kong jurisprudence discussed earlier.

…

75. As mentioned earlier, we appreciate there could be justifications for not subjecting a search to the requirement of prior judicial authorisation. However, in the overall assessment of proportionality, the court must examine whether the justification is cogent enough and whether other safeguards are in place to protect a citizen from abuse or excess of executive action in the name of investigation. An obvious case for exception is a situation where it would not be reasonably practicable to obtain a warrant in light of the risk of destruction or loss of the relevant evidence or materials. …”

1. The answer of the respondent to this ground of appeal is that:

(i) European Human rights law, which is to be preferred to Canadian Charter of Rights and Freedoms law, does not mandate judicial authorization. It recommends it and in its absence would want there to be in place some form of judicial supervision of the executive authorization process;

(ii) the authorizing officer is a senior officer within the ICAC and is a person “capable of acting judicially”;

(iii) in any event there is justification for having executive authorizations; and

(iv) the ICSO provides for safeguards against abuse in the form of the Commissioner.

1. As attractive as it is to simply follow European human rights law we cannot ignore the fact that the judgment of Dickson J in *Hunter Southam Inc* has been specifically approved and followed by our Court of Appeal. Some further analysis is, therefore, necessary.
2. *Hunter v Southam Inc* can be distinguished on the basis that it concerned a search power provision, a power that by its nature involves a far greater intrusion of privacy. Nevertheless, we accept the importance that a judicial officer plays in his gatekeeper role and the fact that a judicial officer is not involved in the authorization process is a relevant factor in the proportionality analysis.
3. However, the lack of judicial involvement in the authorization process is not determinative of the issue. We say that because it is clear that if the law allows warrantless search then it must allow for searches to be authorized by persons other than judicial officers. In *Hunter v Southam Inc*, Dickson J said at page 653:

“I recognise that it may not be reasonable in every instance to insist on prior authorisation in order to validate governmental intrusions upon individual’s expectations of privacy. Nevertheless, where it is feasible to obtain prior authorization, I would hold that such authorisation is a pre-condition for a valid search and seizure.”

1. This passage was quoted with approval by our Court of Appeal in the *Keen Lloyd* case.[[87]](#footnote-87) Furthermore, we note the ICSO itself allows for any prescribed authorisation to be issued by the head of a department in an emergency situation. Consequently, it not so much a question of whether it is legally permissible but whether it is justifiable.
2. We turn now to the justification that even though the officer of the department granting the authorization is not a judicial officer he is, nevertheless, a person capable of acting judicially.
3. This raises the question of what it means to be “capable of acting judicially”. The argument of the applicants is that the issuing authority is not just a person incapable of acting judicially, but he is actually a person with a positive conflict of interest. What is being argued is that this is, in effect, a situation of where the poacher is made the gamekeeper without being required to give up his poaching activities.
4. In *Hunter v Southam Inc* Dickson ‍J said that for a prior authorization mechanism to be meaningful it is necessary for the person granting the authorization “to be able to assess the evidence as to whether that standard has been met, in an entirely neutral and impartial manner.”[[88]](#footnote-88) When addressing whether it was permissible for a person within an investigatory body to authorize subordinates to exercise search powers Dickson ‍J said:

“In my view, investing the Commission or its members with significant investigatory functions has the result of vitiating the ability of a member of the Commission to act in a judicial capacity when authorizing a search or seizure under s. 10(3). This is not, of course, a matter of impugning the honesty or good faith of the Commission or its members. It is rather a conclusion that the administrative nature of the Commission’s investigatory duties (with its quite proper reference points in considerations of public policy and effective enforcement of the Act) ill-accords with the neutrality and detachment necessary to assess whether the evidence reveals that the point has been reached where the interests of the individual must constitutionally give way to those of the state. A ‍member of the R.T.P.C. passing on the appropriateness of a proposed search under the *Combines Investigation Act* is caught by the maxim *nemo judex in sua causa*. He simply cannot be the impartial arbiter necessary to grant an effective authorization.”[[89]](#footnote-89)

1. The authorizing officer is designated under section 7 of the ICSO by the head of a department and must not be “below a rank equivalent to that of senior superintendent of police”. The Code of Practice, issued pursuant to section 63 of the ICSO by the Secretary for Security, stipulates that in relation to the ICAC only “an officer of its Operations Department at or above the rank of Principal Investigator”[[90]](#footnote-90) may be so designated. In respect of such persons the Code of Practice further provides:

“34. For executive authorizations, in no case should-

(a) the authorizing officer be directly involved in the investigation of the case covered by the application for authorization;

(b) the applying officer be the same person as the authorizing officer; or

(c) the authorizing officer be involved in formulating the application.”

1. Clearly this provision is designed to bring both independence and impartiality to the issuing process. The Code also provides the following guidance to authorizing officers on how they should carry out their duties:

“**Determination of Application for Executive Authorization by the Authorizing Officer**

68. Authorizing officer should take a critical approach when considering applications, including whether the application is fully justified and whether the duration sought is reasonable. He should not approve an application as a matter of course or consider the application solely in light of his knowledge of the case in question. Where necessary, he should seek clarification and explanation from the applicant before he comes to any determination. In such case, he shall record the additional information in writing, if it is not provided in written form. After considering the application, the authorizing officer shall deliver in writing his determination (**COP-10** or **COP-11** at **Annex**).

69. In considering an application, an authorizing officer must be satisfied that the conditions for issuing the authorization set out in section 3 of the Ordinance (see paragraphs 35 to 43 above) are all met. The particular intrusiveness of the operation because of the nature of the information that may be obtained (such as journalistic material), the identity of the subject (such as lawyers or paralegals), etc. may be relevant (paragraph 65 above). In particular, special attention should be paid to the assessment of the likelihood that information which may be subject to LPP will be obtained. If LPP information is likely to be obtained through the proposed covert surveillance operation, an application for Type 1 authorization from a panel judge should be made (paragraph 29 above).”

1. The Code also ensures that there will be serious consequences for non-compliance with its provisions. Under the heading “Ensuring Compliance” it states:

“184. Officers who fail to comply with the provisions of the Ordinance, the provisions of this Code or the terms and conditions of the authorization or device retrieval warrant concerned would be subject to disciplinary action or, depending on the case, the common law offence of misconduct in public office, in addition to continuing to be subject to the full range of existing law. Each department should therefore ensure that officers who may be involved in the application for, or determination of and execution of matters covered by the Ordinance are fully briefed on the various requirements. Refresher briefings should be arranged as and when this Code is updated or after an important review by the Commissioner or the reviewing officer that may be of general reference value. All non-compliance, whether it is or is not due to the fault of the department (or any of its officers), and the remedial measures, should be reported to the Commissioner. The departments should take into account any views that the Commissioner may have on the appropriate disciplinary action before taking any disciplinary action against an offending officer.”

1. In assessing the role of the authorizing officer in determining an executive authorization we take into account the provisions of the Code of Practice. This is a public document issued by the Secretary for Security pursuant to an explicit provision contained in the ICSO. Under human rights case law it is accepted as being legitimate to have regard to such “law”.[[91]](#footnote-91)
2. The question of whether an officer of the department that is applying for the authorization could be regarded as a person capable of acting judicially in the grant of the authorization, was the subject of discussion by Dickson J in *Hunter v Southam Inc*.
3. In *Hunter v Southam Inc* the legislation under challenge empowered the Director of Investigation and Research of the Combines Investigation Branch to search premises and seize from them evidence relevant to matters into which he was inquiring. But this power could only be exercised if the Director could produce a certificate from a member of the Restrictive Trade Practices Commission (RTPC) which can be granted to him on an *ex parte* application. The question arose of whether a member of the RTPC was a person capable of acting judicially.
4. The Alberta Court of Appeal had concluded “that the Act was not entirely successful in separating the role of the director as investigator and prosecutor from that of the commission as adjudicator.”[[92]](#footnote-92) Put simply, there was not sufficient separation between the applicant for the power and the person granting it. Dickson J adopted a similar analysis and after examining the duties and powers of the RTPC under the legislation he said:

“ In my view, investing the commission or its members with significant investigatory functions has the result of vitiating the ability of a member of the commission to act in a judicial capacity when authorizing a search or seizure under s. 10(3). This is not, of course, a matter of impugning the honesty or good faith of the commission or its members. It is rather a conclusion that the administrative nature of the commission’s investigatory duties (with its quite proper reference points in considerations of public policy and effective enforcement of the Act) ill-accords with the neutrality and detachment necessary to assess whether the evidence reveals that the point has been reached where the interests of the individual must constitutionally give way to those of the State. A member of the R.T.P.C. passing on the appropriateness of a proposed search under the *Combines Investigation Act* is caught by the maxim *nemo judex in sua causa.* He simply cannot be the impartial arbiter necessary to grant an effective authorization.”[[93]](#footnote-93)

1. This analytical approach commends itself to us in deciding the question we have to answer. We are satisfied that when regard is had to the various provisions of the Code of Practice to which we have referred it can be said that the authorising officer is capable of bringing a degree of independence to his role but we do not believe that this, by itself, is sufficient to enable it to be said that he is a person capable of acting judicially. He is an officer of the Operations Department of the ICAC and is, therefore, a colleague of the officer applying for the authorization. He is, by training and inclination, an investigator. His daily work involves him in performing all the usual investigation tasks of an investigator in the Operations Department. One day he is granting an authorization but the next day, or even the same day, he, or officers acting under his command, could be applying for an authorization. Furthermore, he is only a Principal Investigator which is several ranks below the head of the Operations Department. In the words of Dickson J he does not possess the “neutrality and detachment necessary to assess whether the evidence reveals that the point has been reached where the interests of the individual must constitutionally give way to those of the State.”[[94]](#footnote-94)
2. We now turn to the matters on which Mr Perry relies in order to justify the use of executive authorizations.
3. On 2 August 2006, the proposer of the Interception of Communications and Surveillance Bill, the Secretary for Security, said of executive authorizations[[95]](#footnote-95):

“As Type 2 surveillance is *less intrusive*, it would suffice for law enforcement officers to be the authorizing authority and this would *maintain efficiency in operations*.”

1. The “less intrusive” justification was elaborated upon in an information paper provided by the Security Bureau to the Legislative Council Panel on Security. It is dated 7 February 2006 and is entitled “Proposed Legislative Framework on Interception of Communications and Covert Surveillance”. It states:

“18. As for the **authorization authority**, we propose that all interception of communications should be authorised by judges. As for covert surveillance, there is a wide spectrum of such operations with varying degrees of intrusiveness. As in many other jurisdictions, it is necessary to balance the need to protect law and order and public security on the one hand, and the need for safeguarding the privacy of individuals on the other. More stringent conditions and safeguards should apply to more intrusive activities.

19. We therefore propose a two-tier authorization system for covert surveillance, under which authorization for ‘more intrusive’ operations would be made by judges, and ‘less intrusive’ operations by designated authorizing officers within LEAs. Surveillance that does not infringe on the reasonably expected privacy of individuals would not require authorization.

20. Whether a covert surveillance operation is ‘more intrusive’ or ‘less intrusive’ depends mainly on two criteria: whether surveillance devices are used and whether the surveillance is carried out by a party participating in the relevant communications. In general, operations involving the use of devices are considered more intrusive. On the other hand, when the use of devices involves a party participating in the relevant communications, the operation is considered less intrusive because that party’s presence is known to the other parties and that party may in any case relate the discussion to others afterwards.”

1. We have not been provided with any material elaborating on the justification of operational efficiency but, in our view, that is largely a matter of common sense.
2. Participant monitoring is very much the covert surveillance tool of undercover operations. Undercover operations are themselves very fluid in their nature and not always readily controlled, no matter how much planning may go into them. Their, at times, opportunistic nature can be inconsistent with the delay involved in obtaining a judge’s authorization. The need for a more speedy avenue for obtaining an authorization is no doubt also the reason why the statement in writing is an unsworn document.
3. We are persuaded that justification exists for the use of executive authorizations and unsworn statements in writing.
4. The supervisory function of the Commissioner is primarily set out in the ICSO. Under section 40(a), the function of the Commissioner is:

“… to oversee the compliance by departments and their officers with the relevant requirements.”

1. This general function includes conducting “such reviews as he considers necessary on compliance by departments and their officers with the relevant requirements.”[[96]](#footnote-96) On completion of his review the Commissioner must notify the head of any department of his findings[[97]](#footnote-97) and upon being so notified the head of the department must submit a report to the Commissioner “with details of any measures taken by the department (including any disciplinary action taken in respect of any officer) to address any issues identified in the findings”[[98]](#footnote-98). As is apparent from the already quoted paragraph in the Code of Practice[[99]](#footnote-99) the Commissioner is expected, so it seems, to recommend what disciplinary action should be taken.
2. Under section 51 of the ICSO, the Commissioner may make recommendations to the Secretary for Security on revisions to the Code of Practice to “better carry out the objects” of the ICSO. He may similarly, under section 52, make recommendations to departments to change their arrangements “to better carry out the objects” of the ICSO.
3. For the purpose of performing his functions the Commissioner is given power to require public officers to answer questions and to provide any information or document within the public officer’s possession or control.[[100]](#footnote-100) These safeguards are considerable.
4. We are persuaded that there is justification for non-judicial officers to issue authorizations for covert surveillance and that there are safeguards in place to prevent abuse of this power by departments. However, deciding whether the justification and the safeguards lead to a conclusion that executive authorizations are reasonably necessary cannot be done without regard being had to what it is the executive authorization permits law enforcement to do in infringing the right of privacy.
5. Type 2 surveillance is defined as follows:

“‘Type 2 surveillance’ (第2類監察), subject to subsections (3) and (4), means any covert surveillance that—

(a) is carried out with the use of a listening device or an optical surveillance device by any person for the purpose of listening to, monitoring or recording words spoken or activity carried out by any other person, if the person using the device—

(i) is a person by whom the other person intends, or should reasonably expect, the words or activity to be heard or seen; or

(ii) listens to, monitors or records the words or activity with the consent, express or implied, of a person described in subparagraph (i); or

(b) is carried out with the use of an optical surveillance device or a tracking device, if the use of the device does not involve—

(i) entry onto any premises without permission; or

(ii) interference with the interior of any conveyance or object, or electronic interference with the device, without permission.”

1. Under this definition there can be no trespass to private premises or property. The intrusiveness is kept to a minimum and is nothing like the level of intrusiveness of a search warrant. A search warrant, accompanied by a seizure power, permits a trespass onto the private premises of another, a search of the personal property in those premises and the seizure of an individual’s private property from those premises. In terms of the intrusiveness into a person’s privacy the closest covert surveillance equivalent is the entry onto a private premises in order to install a surveillance device within those premises so as to be able to capture images of persons and their activities within the premises or words spoken in the premises. This form of covert surveillance is Type 1 surveillance and must be authorised by a judge.
2. The nature of the covert surveillance in the present case is known as participant monitoring or participant surveillance, that is, the recording of a conversation by a person who is a party to it, and it is typical of what can be authorized for Type 2 surveillance and is, perhaps, the most common form of it. In such a situation the persons who are present know that what they say could be related to others by any one of their number. They have an expectation of privacy and may believe that their conversation is confidential but they also know they have no control over what may happen to their words as a result of the subsequent conduct of those who are a party to the conversation.
3. In *HKSAR v Muhammad Riaz Khan*[[101]](#footnote-101) the Court of Final Appeal put such a breach of the right of privacy in context when it quoted with approval what had been said in that case by the Court of Appeal. Bokhary PJ, in giving a judgment with which the other members of the court agreed, said at page 240 [12]:

“12. Finally, the Court of Appeal said:

‘Further, the evidence of the conversation in the hotel room meeting could as well have been given by … the undercover agent, in the absence of the recording. The production of the recording simply ensured that evidence of that conversation was given in the most reliable and accurate form. Not to have admitted it in evidence would, as said in *Wong Kwok Hung*, have required the best evidence to be ignored. That in itself would have derogated from the fairness of the trial.’”

1. There are three features of participant monitoring which are important to remember. The first is that there is nothing unlawful in one of the participants to the recorded conversation testifying to what was said by anyone present. No authorization for covert surveillance is needed to enable a participant to a conversation to give testimonial evidence as to what was said in the conversation. The only reason an authorization is needed is because the participant is employing electronic technology to obtain a recording of the conversation without the knowledge of the other participants to it. In this way the ICSO gives effect to the distinction drawn by La ‍Forest ‍J in the *Duarte* case, which Cheung and Tang JJA quoted with approval in their judgments in *Lam Hon Kwok* *Popy*.[[102]](#footnote-102)
2. Thus the intrusion into the privacy of another is not in revealing the content of the conversation but in the covert recording of it.
3. The third feature of participant monitoring is that, as a consequence of the first two features, the law enforcement agency is not gaining access to evidence it could not otherwise gain. Rather, it is doing no more than gaining what hopefully will be a complete and accurate record of the conversation instead of having to rely on the memory of its witness who is participating in it.
4. The cumulative effect of all these features is to place this form of covert surveillance at the very lowest level of intrusiveness of privacy. That there can be different levels of intrusiveness of privacy we are in no doubt at all and in our view participant monitoring demonstrates precisely that.
5. Given that this proportionality analysis involves taking into account the operational efficiency of departments who are responsible for public safety and security we are of the view that we should employ the “manifestly without reasonable foundation” standard. In doing so we allow a sufficiently wide margin of discretion to the government on the operational efficiency aspect of its justification for the impugned measure. However, this is not done just to cater to the needs of our law enforcement agencies. We bear in minds the words of Lord Steyn in the *Attorney Generals Reference (No 3 of 1999)* case quoted earlier in this judgment.[[103]](#footnote-103) Where he said that “the purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property.” There is, consequently, a much broader interest at stake it; an interest which is a truly public interest as it involves the whole of Hong Kong.
6. In according a sufficiently wide margin of discretion to the government we bear in mind the words of Ribeiro PJ in the *Hysan Development* case at paragraph 186:

“The specific right involved may have a low significance and the lower the significance, the broader the margin of discretion is likely to be.”

1. When the justification for the measure is taken together with the after-the-event judicial supervision safeguards that are in place and regard is also had to the fact that the executive authorization only permits low levels of intrusiveness into the privacy rights of others, we are of the view that the measure of executive authorization is one that cannot be said to be manifestly without reasonable foundation. The use of executive authorizations for Type 2 surveillance is, therefore, constitutional.

**E.6 Entrapment**

1. We now turn to the 2nd applicant’s third ground of appeal.
2. We do not see any merit in respect of any of the arguments advanced by the 2nd applicant in support of his third ground of appeal. This was never a case of entrapment. Nothing was done by the ICAC officers to encourage the applicants to commit a crime. The applicants needed persons from whom they could solicit a bribe. The ICAC did no more than provide those persons.
3. Crucial to the success of the undercover operation was the ability of the ICAC to convince the applicants that they could speak openly. Unless they believed that they could trust those present and that those present would be receptive to their overtires then the undercover operation could not possibly be successful. That this involved the ICAC officers in deceitful conduct goes with saying. Did they trick the applicants into believing they would pay a bribe? Of course they did! Did they take advantage of the applicant’s trust in their informant? Of course they did! That is what happens in undercover operations and to pretend otherwise is simply unrealistic.
4. In support of his argument Mr Bruce relied on the judgment of Pincus JA in *O’Neill* where he said at page 547:

“The appellant was deliberately tricked into surrendering her right to silence at the instance of law enforcement personnel by an implicit misrepresentation that Lally sought her confidence as a friend, not a police agent.”

1. We do not find this case relevant to the situation of the applicants. In *O’Neill* the appellant had confided in Lally of her *past* attempt to kill her husband. Lally reported this to the police who then concealed a recording device on her and sent her back to the appellant in order to get her to repeat her confession so it could be recorded. It is in respect of this factual situation that Pincus JA made the comment quoted above.
2. The same can be said for the decision of the South Australian Supreme Court in *Smith Turner and Altintas*. This was also an investigation of a past offence and the approach of the trial judge, Perry J, in ruling that it would be unfair to use a tape recording of inculpatory statements obtained by an agent provocateur, is quite reminiscent of *Lam Tat Ming*. At page 335 of the report he said:

“ In those circumstances, particularly having regard to the fact that police interrogation of Turner would necessarily have carried with it an obligation to caution, it seemed to me to be unfair to use the tape-recorded evidence against Turner, and it is for that reason that I ruled accordingly.

In exercising my discretion, I also took into account the unsatisfactory nature of the quality of the tape-recordings.

It must be understood that there will be occasions when the taping in a clandestine fashion of conversations between a suspect and another person, whether a friend or family member who has his or her confidence, will be admissible even in the absence of a caution. Different considerations apply, for example, where statements are volunteered and not elicited. *Musico* is a case in point*. Different considerations also apply to situations where the person making the recording is an agent provocateur engaged in a transaction with the suspect which is itself the criminal conduct which becomes the subject of a charge.*

Furthermore, it must be accepted that even where an investigation has reached the accusatory stage, the absence of a caution does not necessarily mean that evidence will be excluded. Each case depends upon its own facts.” (Emphasis added.)

1. The law for Hong Kong, in any event, is contained in the Court of Final Appeal’s decision in *Lam Tat Ming*. The *O’Neill* case, like *Lam Tat Ming*, involved an attempt by law enforcement to obtain a confession to a *past* offence. Li CJ, in giving a judgment with which the other members of the court agreed, explained in just such a situation what undercover agents could and could not do in this situation when the right of silence is engaged.
2. But Li CJ emphasised that there was a distinction between undercover officers being employed as part of an investigation of past offences, especially where they were dealing with a person or persons in respect of whom there was reason to believe, and perhaps grounds to arrest, were involved in those past offences, and ongoing offences.
3. There is no merit in this aspect of the 2nd applicant’s third ground of appeal.
4. The other aspect is that the ICAC should have terminated the undercover operation once they had evidence to arrest the applicants. This is an argument which this court has rejected on two prior occasions; once before the judgment in *Lam Tat Ming* and once after it.
5. In *HKSAR v Okey Afunwa Enukwe & Anor*[[104]](#footnote-104) there was a relatively long police undercover operation into drug trafficking. During the operation the police undercover officer had numerous contacts with both applicants. Power VP in giving the judgment of the court said:

“23. The 13th Ground submits that the judge wrongly ruled that ‘the police failure to arrest the defendant during the first transaction and continuous encouragement is within the Common Law principle’. This ground suggests that there was impropriety upon the part of the police in their allowing the matter to develop as far as it did. We reject that without hesitation. This was an undercover operation. The police were seeking to obtain as much evidence as they could as to the source of the drugs and as to the activities of the persons involved in the drug transactions. It was entirely legitimate for them to continue their investigation in the way in which they did and to arrest the applicants at the time when they did. There is nothing in the suggestion that the police should have truncated their investigation and made arrests immediately after the first offence. They were dealing with persons who were clearly intent upon pursuing a course of drug trafficking and they were entitled to continue their investigations in an endeavour to uncover the full extent of the illicit operation.”

1. We see nothing in *Lam Tat Ming* that is contrary to what Power VP said of the right of law enforcement, when investigating *on-going criminal activity* to “continue their investigations in an endeavour to uncover the full extent of the illicit operation.”
2. The second case is *HKSAR v Ng Yau Kau & Anor*[[105]](#footnote-105). This case also involved a police undercover operation into drug trafficking which resulted in the applicants being jointly charged with two counts of trafficking in a dangerous drug. It was argued that when it came to sentence the judge “did not give sufficient weight … to the fact that the applicants should have been arrested after the first transaction, thus preventing the offence the subject of the 2nd count from occurring.” McMahon J, in giving the Reasons for Judgment of the court said at paragraph 12:

“… we are perfectly satisfied that the police were under no obligation to arrest the applicants after the first transaction.  It is quite obvious that the purpose of undercover operations such as that in the present case is, amongst other things, to discover the scope of the supply operation and the identity and role of those involved.  To bring such an operation to a premature conclusion by arresting suspects at the point of time of a firstoffence would negate the undoubted value of such operations.”

1. We agree entirely with what is said in both these cases. For the sake of completeness we should also make it clear that we do not think that an undercover operation into ongoing criminal activity is transformed into an investigation of past crimes simply because a stage may have been reached where sufficient evidence has been acquired to enable prosecution of certain acts that have occurred in the course of the undercover operation. There is no merit in this ground of appeal.

**F. The five questions raised by the court**

1. In the course of discussing the grounds of appeal we have answered questions 1 and 2. We have nothing to add to the information provided to us by counsel in respect of question 3.
2. In respect of question 4 we have upheld the constitutionality of section 61 other than for the part of section 61(4) which provides for an initial application of the statutory disclosure test by the law enforcement agency. We have also demonstrated that, ultimately, the prosecution did apply the disclosure test and did reach its own independent view that none of the redacted material fell within it.
3. That being so, even on the version of section 61(4) which we have reformulated, there was no right of the judge to inspect the material and, consequently, there is no right for this court to inspect it.
4. In respect of question 5 it is clear that the fact that the acts of covert surveillance, being infringements of the applicants’ right of privacy, were conducted in accordance with the law was a matter that needed to be proven. This can be done by producing the authorizations into evidence and exhibiting them at trial or simply by the parties making their grant the subject of an admitted fact. In this latter situation there is no need to exhibit the authorizations if the fact of their grant is admitted. If the fact of their grant cannot be admitted then the ICAC officers who applied for them and to whom they were issued would have to be called. The statements in writing or affirmations should be included in the unused material.
5. The applications with supporting documents will usually not be relevant unless there is some challenge to the legitimacy of the authorization process. In the present case there was no unfairness flowing from whether or not the documents were exhibited; the complaint of unfairness was confined to the non-disclosure of the redacted parts. For the reasons set out in this judgment we have found that this non-disclosure did not impact adversely upon the applicants’ right to a fair trial.

**G. Disposition**

1. Because we have found merit in part of the applicants’ arguments in respect of section 61(4) we grant them leave to appeal their convictions but, for the reasons set out in this judgment, we dismiss their appeals.

|  |  |  |
| --- | --- | --- |
| (Andrew Macrae) | (Ian McWalters) | (Jeremy Poon) |
| Vice-President | Justice of Appeal | Justice of Appeal |

26 September 2017

Mr Martin Hui SC, Ag DPP and Ms Audrey Parwani Ag SPP, of the Department of Justice, for the respondent

The 1st applicant acting in person

Mr Phillip Ross, instructed by King & Co, assigned by DLA, for the

2ndapplicant

14 and 15 August 2018

Mr David Perry QC, Mr Martin Hui SC, DDPP, Ms Audrey Parwani SPP and Ms Karen Ng PP, of the Department of Justice, for the respondent

Mr Richard Donald, instructed by Ho, Tse, Wai & Partners, assigned by

DLA, for the 1st applicant

Mr Andrew Bruce SC and Mr Phillip Ross, instructed by King & Co,

assigned by DLA, for the 2nd applicant

1. See Part D below. [↑](#footnote-ref-1)
2. Appeal Bundle, page 1122K. [↑](#footnote-ref-2)
3. Appeal Bundle, page 1126 I-K. [↑](#footnote-ref-3)
4. Appeal Bundle, pages 1304-1305. [↑](#footnote-ref-4)
5. Appeal Bundle, page 1142 S-T. [↑](#footnote-ref-5)
6. (2003) 6 HKCFAR 336 [↑](#footnote-ref-6)
7. Appeal Bundle, page 1182 D-F. [↑](#footnote-ref-7)
8. Appeal Bundle, page 1184 G-S. [↑](#footnote-ref-8)
9. Appeal Bundle, page 59 P-R. [↑](#footnote-ref-9)
10. Appeal Bundle, page 60 B-I. [↑](#footnote-ref-10)
11. Appeal Bundle, page 62E. [↑](#footnote-ref-11)
12. Appeal Bundle, page 63 I-S. [↑](#footnote-ref-12)
13. Appeal Bundle, page 65 E-F. [↑](#footnote-ref-13)
14. Appeal Bundle, page 66 J-T. [↑](#footnote-ref-14)
15. Reasons for Verdict, at [145], Appeal Bundle, page 68. [↑](#footnote-ref-15)
16. Appeal Bundle, page 74 Q-S. [↑](#footnote-ref-16)
17. Appeal Bundle, page 75T-76C. [↑](#footnote-ref-17)
18. Appeal Bundle, page 77 B-C. [↑](#footnote-ref-18)
19. Appeal Bundle, page 77 N-O. [↑](#footnote-ref-19)
20. Appeal Bundle, page 78 C-D. [↑](#footnote-ref-20)
21. (2012) 15 HKCFAR 232 [↑](#footnote-ref-21)
22. Reasons for Verdict, at [303], Appeal Bundle, page 101. [↑](#footnote-ref-22)
23. Reasons for Verdict, at [307], Appeal Bundle, page 102. [↑](#footnote-ref-23)
24. Part II of the HKBORO bears the heading “The Hong Kong Bill of Rights” and is composed of 23 articles containing various rights. [↑](#footnote-ref-24)
25. HCMA 432/2009, unreported, 6 May 2010. [↑](#footnote-ref-25)
26. The equivalent article under the International Covenant on Civil and Political Rights (“ICCPR”) is Article 17. [↑](#footnote-ref-26)
27. CACC 528/2004, unreported, 21 July 2006. [↑](#footnote-ref-27)
28. [1990] 1 SCR 30 at [48] [↑](#footnote-ref-28)
29. In this case Tang JA (as he then was) also approved of the distinction drawn by La Forest J in *R v Duarte*. [↑](#footnote-ref-29)
30. Paragraph 39 of the written submissions of the 2nd applicant. [↑](#footnote-ref-30)
31. (1978) 2 EHRR 214. Mr Bruce also relied on the decision of *Huvig v France* (1990) 12 EHRR 528 which contained a comment which emphasised the value of involving in the decision making process an investigating judge, who is an independent judicial authority. [↑](#footnote-ref-31)
32. Commissioner on Interception of Communications and Surveillance Annual Report 2010 to the Chief Executive (2011) paragraph 9.2. [↑](#footnote-ref-32)
33. (2000) 30 EHRR 441 [↑](#footnote-ref-33)
34. (1990) DCR (4th) 473 [↑](#footnote-ref-34)
35. (1994) 75 A Crim R 327 [↑](#footnote-ref-35)
36. [1995] 81 A Crim R 458 [↑](#footnote-ref-36)
37. (2011) 52 EHRR 4 [↑](#footnote-ref-37)
38. Ibid, at [151]. [↑](#footnote-ref-38)
39. [1994] 2 AC 130 [↑](#footnote-ref-39)
40. [2005] EWCA Crim 887 [↑](#footnote-ref-40)
41. Appeal Bundle, pages 1224, 1240, 1262. [↑](#footnote-ref-41)
42. [2003] 1 Cr. App. R 30 494, 507. [↑](#footnote-ref-42)
43. (2000) 3 HKCFAR 168 [↑](#footnote-ref-43)
44. (2012) 15 HKCFAR 232 [↑](#footnote-ref-44)
45. *HKSAR v Lee Ming Tee & Anor* (2003) 6 HKCFAR 336 at 389G-H. [↑](#footnote-ref-45)
46. [2001] 1 WLR 2425 at 2438-2439 [39]-[40] [↑](#footnote-ref-46)
47. [2005] HRLR 26, 948 at 962-963 [33] [↑](#footnote-ref-47)
48. (2011) 52 EHRR 4, 207 at 263-264 [184]. [↑](#footnote-ref-48)
49. (2016) 19 HKCFAR 372 [↑](#footnote-ref-49)
50. (2015) 18 HKCFAR 467, [22]. [↑](#footnote-ref-50)
51. (2014) 17 HKCFAR 179 at 183 [7] [↑](#footnote-ref-51)
52. See Part E.5 paragraphs 243-286 below. [↑](#footnote-ref-52)
53. See *R v Davis* [1993] 1 WLR 613. [↑](#footnote-ref-53)
54. *Official Receiver v Zhi Charles* (2015) 18 HKCFAR 467, [23]. [↑](#footnote-ref-54)
55. (2016) 19 HKCFAR 372, at 410, [83]. [↑](#footnote-ref-55)
56. Ibid, at 424, [136]. [↑](#footnote-ref-56)
57. Ibid, at 414, [99]. [↑](#footnote-ref-57)
58. Ibid, at 424-425, [139]. [↑](#footnote-ref-58)
59. Ibid, at 417, [106]. [↑](#footnote-ref-59)
60. Ibid, at 417, [108] to 418, [109]. [↑](#footnote-ref-60)
61. Ibid, at 419, [115]. [↑](#footnote-ref-61)
62. Ibid, at 421, [122]. [↑](#footnote-ref-62)
63. Ibid, at 425, [140]. [↑](#footnote-ref-63)
64. Ibid, at 424, [135]. [↑](#footnote-ref-64)
65. Ibid, at 404, [67]. [↑](#footnote-ref-65)
66. Ibid, at 406, [73]. [↑](#footnote-ref-66)
67. [1993] 1 WLR 613 [↑](#footnote-ref-67)
68. [2004] 2 AC 134 [↑](#footnote-ref-68)
69. Ibid, at 148E-F. [↑](#footnote-ref-69)
70. [2002] 1 WLR 2237 at 2241G – 2242A. [↑](#footnote-ref-70)
71. [1955] SCR 16 at 23-24. [↑](#footnote-ref-71)
72. [2009] HRLR 3 at page 73, [60]. [↑](#footnote-ref-72)
73. *R v Preston* [1994] 2 AC 130 at 163F-G. [↑](#footnote-ref-73)
74. Ibid, at 164B-F. [↑](#footnote-ref-74)
75. (2001) 4 HKCFAR 133 at 150D-H. [↑](#footnote-ref-75)
76. [2001] 2 AC 91 [↑](#footnote-ref-76)
77. (2001) 4 HKCFAR 133 at 151H [↑](#footnote-ref-77)
78. [1994] 2 AC 130 at 164C [↑](#footnote-ref-78)
79. Ibid, 164D. [↑](#footnote-ref-79)
80. [2016] 2 HKLRD 1372 at 1404 [95]. [↑](#footnote-ref-80)
81. See paragraphs 81-82 of this judgment. [↑](#footnote-ref-81)
82. [1998] 2 Cr App R 242 at 257E [↑](#footnote-ref-82)
83. [2004] 2 AC 134 at 154-155 [35]. [↑](#footnote-ref-83)
84. See paragraphs 21-23 of this judgment. [↑](#footnote-ref-84)
85. See the quotation from *Official Receiver v Zhi Charles* at paragraph 174 of this judgment. [↑](#footnote-ref-85)
86. (1984) 11 DLR (4th) 641 [↑](#footnote-ref-86)
87. *Keen Lloyd Holdings Ltd v Commissioner of Customs and Excise* [2016] 2 HKLRD 1372 at paragraphs 66 and 75 which are quoted at paragraph 248 of this judgment. [↑](#footnote-ref-87)
88. 11 DLR (4th) 641 at page 654 [↑](#footnote-ref-88)
89. *Hunter v Southam Inc* [1984] 2 SCR 145, 164. [↑](#footnote-ref-89)
90. Code of Practice, paragraph 33(b)(iv). [↑](#footnote-ref-90)
91. See *Kennedy v United Kingdom* (2011) 52 EHRR 4 [↑](#footnote-ref-91)
92. *Hunter v Southam Inc* (1984) 11 DLR (4th) 641, 655. [↑](#footnote-ref-92)
93. *Hunter v Southam Inc* (1984) 11 DLR (4th) 641, 656. [↑](#footnote-ref-93)
94. *Hunter v Southam Inc* (1984) 11 DLR (4th) 641, 655. [↑](#footnote-ref-94)
95. Official Record of Proceedings of the Legislative Council, 2 August 2006, page 10101. [↑](#footnote-ref-95)
96. Section 41(1) of the ICSO [↑](#footnote-ref-96)
97. Section 42(1) of the ICSO [↑](#footnote-ref-97)
98. Section 42(2) of the ICSO. [↑](#footnote-ref-98)
99. See paragraph 184 of the Code of Practice quoted at paragraph 259 of this judgment. [↑](#footnote-ref-99)
100. Section 53(1)(a) of the ICSO [↑](#footnote-ref-100)
101. (2012) 15 HKCFAR 232 [↑](#footnote-ref-101)
102. See paragraph 63 of this judgment. [↑](#footnote-ref-102)
103. See paragraph 223 of this judgment. [↑](#footnote-ref-103)
104. CACC 339/1997, unreported, 25 August 1998. [↑](#footnote-ref-104)
105. CACC 374/2007, unreported, 12 June 2008. [↑](#footnote-ref-105)