Neutral Citation Number: [2012] EWCA Civ 420

Case No: C1/2011/1019

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEENS BENCH DIVISION
ADMINISTRATIVE COURT
Sullivan LJ and Silber J
CO/7737 and 7272/10

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/04/2012

Before:
THE MASTER OF THE ROLLS
LORD JUSTICE HOOPER
and
LORD JUSTICE TOULSON

- -

Between:

THE QUEEN ON THE APPLICATION OF GUARDIAN NEWS AND MEDIA LIMITED	**Appellant**
- and -	
CITY OF WESTMINSTER MAGISTRATES' COURT	**Respondents**
-and-	
THE GOVERNMENT OF THE UNITED STATES OF AMERICA	**Interested Party**
-and-	
ARTICLE 19	**Intervener in the Appeal**

- -
- -

Gavin Millar QC and Adam Wolanski (instructed by **Reynolds Porter Chamberlain LLP**) for the **Appellant**
David Perry QC and Melanie Cumberland (instructed by **the CPS**) for the **Interested Party**
Heather Rogers QC and Ben Silverstone (instructed by **Leigh Day and Co Solicitors)** for the **Intervener in the Appeal**

Hearing date: 7 February 2012

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Approved Judgment

Lord Justice Toulson:

Introduction

1. Open justice. The words express a principle at the heart of our system of justice and vital to the rule of law. The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed? It is an age old question. Quis custodiet ipsos custodes - who will guard the guards themselves? In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse. Jeremy Bentham said in a well known passage quoted by Lord Shaw of Dunfermline in *Scott v Scott* [1913] AC 407, 477:

> "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial."

2. This is a constitutional principle which has been recognised by the common law since the fall of the Stuart dynasty, as Lord Shaw explained. It is not only the individual judge who is open to scrutiny but the process of justice. In a valuable report by the Law Commission of New Zealand on Access to Court Records, 2006, Report 93, the Commission summarised the principle at paragraph 2.2:

> "Open justice is a fundamental tenet of New Zealand's justice system. It requires, as a general rule, that the courts must conduct their business publicly unless this would result in injustice. Open justice is an important safeguard against judicial bias, unfairness and incompetence, ensuring that judges are accountable in the performance of their judicial duties. It maintains public confidence in the impartial administration of justice by ensuring that judicial hearings are subject to public scrutiny, and that "Justice should not only be done, but should manifestly and undoubtedly be seen to be done"."

3. The Commission quoted, at paragraph 2.11, the following passage from the judgment of the President of the Court of Appeal, Woodhouse P, in *Broadcasting Corporation of New Zealand v Attorney General* [1982] 1 NZ LR 120, 122:

> "…the principle of public access to the Courts is an essential element in our system. Nor are the reasons in the slightest degree difficult to find. The Judges speak and act on behalf of the community. They necessarily exercise great power in order to discharge heavy responsibilities. The fact that they do it under the eyes of their fellow citizens means that they must provide daily and public assurance that so far as they can manage it what they do is done efficiently if possible, with human understanding it may be hoped, but certainly by a fair and balanced application of the law to the facts as they really appear to be. Nor is it simply a matter of providing just answers for individual cases, important though that always will

> be. It is a matter as well of maintaining a system of justice which requires that the judiciary will be seen day by day attempting to grapple in the same even fashion with the whole generality of cases. To the extent that public confidence is then given in return so may the process may be regarded as fulfilling its purposes."

4. There are exceptions to the principle of open justice but, as Viscount Haldane explained in *Scott v Scott*, they have to be justified by some even more important principle. The most common example occurs where the circumstances are such that openness would put at risk the achievement of justice which is the very purpose of the proceedings.

5. While the broad principle and its objective are unquestionable, its practical application may need reconsideration from time to time to take account of changes in the way that society and the courts work. Unsurprisingly there may be differences of view about such matters.

6. In this case the question has arisen whether a District Judge, who made two extradition orders on the application of the US Government, had power to allow the Guardian Newspaper to inspect and take copies of affidavits or witness statements, written arguments and correspondence, which were supplied to the judge for the purposes of the extradition hearings. They were not read out in open court but they were referred to during the course of the hearings. The judge, DJ Tubbs, refused the Guardian's application. She found that she had no power to allow it to do so for reasons which she set out in a careful judgment. The Administrative Court (Sullivan LJ and Silber J) agreed with her in an equally careful judgment delivered by Silber J. The Guardian appeals against the refusal of its applications with leave of the court. The court has allowed Article 19, a not for profit organisation which campaigns globally for free expression, to intervene in support of the Guardian's appeal by way of written submissions.

Facts

7. Extradition proceedings were brought by the US Government under the Extradition Act 2003 against two individuals alleged to have been involved in the bribery of Nigerian officials by Kellogg Brown and Root (KBR), a subsidiary of the well known US company Halliburton.

8. The two people were Geoffrey Tesler, a London based solicitor, and Wojciech Chodan, a former executive of MW Kellogg, a company associated with KBR. Both men are British citizens.

9. The Tesler extradition application was heard over five days between November 2009 and January 2010. The Chodan application was heard on 22 February 2010. The hearings were conducted in open court throughout. The US Government was represented by David Perry QC and the defendants were similarly represented by leading counsel. The District Judge gave judgment in the Tesler case on 25 March 2010 and in the Chodan case on 20 April 2010. Both defendants were ordered to be extradited.

10. Prior to the delivery of the District Judge's judgments, the Guardian wrote to the court asking to be provided with copies of various documents which had been referred to in the course of the extradition hearings. In summary the documents were:

> 1. The opening notes and skeleton arguments submitted on behalf of the US Government and the skeleton arguments submitted on behalf of the defendants.
>
> 2. Affidavits submitted by William Stuckwisch, the US senior trial attorney responsible for the conduct of the prosecutions.
>
> 3. Other affidavits or witness statements submitted by prosecutors for the US Department of Justice.
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> 4. Correspondence between the Serious Fraud Office (SFO) and the US Department of Justice discussing which agency should prosecute the case.
>
> 5. Correspondence between solicitors acting for MW Kellogg and counsel for Mr Tesler on the subject of whether MW Kellogg was being prosecuted by the SFO and an accompanying witness statement from the solicitor acting for Mr Tesler, which had been handed up to the judge at the hearing on 28 January 2010.

11. The judge gave a judgment on 20 April 2010 ruling against the Guardian. She acknowledged the importance of the principle of open justice. She emphasised that the public and press had not been excluded from any part of the proceedings. She stated that all the issues relied upon by any of the parties had been fully set out in oral submissions in open court by senior counsel – in one case over a period of four days and in the other case over a whole day. Every member of the public and the press in attendance heard the clear and able expositions of all the issues in great detail. Copies of her written judgments setting out her reasons for ordering extradition were available to any member of the public or press requesting them. After considering the case law and the Criminal Procedure Rules she held that "this Court does not have the power to direct the provision of the documents requested". She concluded by referring to problems which would arise if she were wrong in her view of the law:

> "Practical problems would arise if the view was taken that the decision I have just outlined is wrong in principle and that members of the press and the public may require as of right to be provided with written copies of documents and exhibits relied upon in the open court proceedings. There are a very large and growing number of extradition cases, many with a high public profile, passing through this Court in a very tight timetable required by the Extradition Act. To whom would any "direction" for the provision of the material be directed? In this case the applicants wish to see affidavits and files of correspondence some of which are provided by the Government, some of which are provided by the defence. In

> these cases alone the requested documents run to hundreds of pages. The Court itself is provided the papers by the parties in extradition proceedings. Those documents are not usually retained by the Court at the conclusion of the hearing but are forwarded to the Secretary of State, the High Court or returned to the parties as appropriate. The Court has very limited Court staff time and photocopying facilities. The practical problems in producing copies of voluminous correspondence in sufficient time for contemporaneous reporting of the case for any member of the press or the contemporaneous understanding of any member of the public, who required them as of right, whether or not they had attended the Court hearing, would be immense and lead to inevitable delays and public expense.
>
> Open justice requires that criminal proceedings are conducted in open Court with access to the public and the press who may see, hear and report on those proceedings and subject them to proper public scrutiny. That course has been followed in both these cases. I am not granting the application."

The application for judicial review

12. In its application for judicial review of the District Judge's decision, the Guardian argued that she was wrong to hold that she had no power to allow its application. It submitted that at common law a Magistrates Court has power to regulate its own procedure, relying on *Attorney General v Leveller Magazine* [1979] AC 440, and it submitted that the general common law principle of open justice was now bolstered by the introduction of article 10 of the European Convention through the Human Rights Act 1998.

13. On the facts of the present case, the Guardian submitted that it was wrong for it to be denied the documentation sought. In particular,

    (a) it had a serious journalistic purpose in seeking production of the documents, because the case raised issues of public interest;

    (b) allowing it to see the documents would not frustrate or render impracticable the administration of justice; and

    (c) allowing it to see the documents would not interfere with any rights of the parties to the case or of third parties.

14. The Guardian has long had an interest in investigating stories of bribery and corruption of public officials. It argued that the public interest issues in this case included the following:

    (a) What were the two British citizens alleged to have done when participating in the scheme to bribe foreign officials/politicians in Nigeria?

(b) Was the scheme run through London because the UK then had weak laws against overseas corruption?

(c) Why was the US Government, rather that the SFO, seeking to prosecute the two British citizens? Had the SFO taken a back seat so as to allow the US Government to extradite and prosecute them?

(d) Has the UK, by the 2003 Bilateral Extradition Treaty with the USA, made it too easy for the US Government to extradite British citizens, even when the offences alleged were mostly committed in countries other than the USA?

15. In its evidence in support of its claim for judicial review, the Guardian referred to the fact that for reasons of efficiency, and in order to save time and costs, judges increasingly receive and read written material which in previous years would have been given orally in open court. This makes it more difficult for journalists to follow the details unless one of the parties chooses to provide the press with copies of the documents. Rob Evans, the Guardian journalist who principally covered the case, said in his witness statement:

> "17. We were unable to attend for all five days as we had other commitments and other stories to report. Given the financial constraints on national newspapers, it is normal for reporters to attend only parts of trials. I believe that reporters should not be penalised if they are not able to attend every day of a trial. Rather than putting obstacles in front of reporters, the justice system, which is supposed to be open for all to see, should assist the media by providing key documents to them once they have been aired in court….
>
> 18. Given that Counsel did not refer in detail to the content of documents that were the subject of their submissions, it was simply not possible to understand the full case against Mr Chodan or Mr Tesler from hearing the submissions without access to the documents. The approach adopted by Counsel was, I understand, for the parties' and court's convenience and to make the hearing more efficient. It was possible to do so as copies of the correspondence and documents had been made available to the court and the court was familiar with their contents but without access to these documents my understanding of the proceedings has been hampered."

Decision of the Administrative Court

16. The court gave six reasons for dismissing the Guardian's claim.

17. First, it was settled law as established *in R v Waterfield* [1975] 1WLR 711 and *R v Crook* (1991) 93 Cr App R (S) that the principle of open justice in criminal proceedings did not extend to a right for the public or the press to inspect documents or other exhibits placed before the court.

18. Second, no case had been cited which undermined or qualified the reasoning in *Waterfield*.

19. Third, those responsible for the Criminal Procedure Rules 2010 must have been aware of *Waterfield* and *Crook* but took no steps to reverse or qualify them. It was to be inferred that they intended the law to remain as laid down in those cases.

20. Fourth, by contrast with the Civil Procedure Rules, there were no provisions in the Criminal Procedure Rules 2010 giving any right of inspection of written evidence.

21. Fifth, the Freedom of Information Act 2000 could not be used to obtain the documents sought by the Guardian. That Act contained a number of checks and balances, and no good reason had been shown why such checks and balances should be overridden by the common law and/or article 10.

22. Sixth, reference to the inherent jurisdiction of the court did not assist, especially since section 32(1) of the Freedom of Information Act expressly exempts a public authority from any obligation to produce a document placed in the custody of a court for the purposes of proceedings in a particular cause or matter.

Criminal Procedure Rules

23. Section 69 of the Courts Act 2003 makes provision for rules of court "governing the practice and procedure to be followed in the criminal courts" to be made by a committee known as the Criminal Procedure Rule Committee.

24. Part 5 of the Criminal Procure Rules 2011 includes provisions about the supply of information or documents from records or case materials kept by a court. Rule 5.7 applies where the request comes from a party. Under that rule the appropriate court officer must supply to an applicant party a copy of any document served by or on that party, and, with the court's permission, may also supply copies of other documents retained by the court.

25. Rule 5.8 deals with supply of information about a case to the public. It provides:

> "1. This rule applies where a member of the public, including a reporter, wants information about a case from the court officer.
>
> 2. Such person must –
>
> (a) apply to the court officer;
>
> (b) specify the information requested; and
>
> (c) pay any fee prescribed."

26. Rule 5.8(6) sets out information which the court officer is required to supply, but that information is confined to basic details such as the date of any hearing, the alleged offence, the court's decision and the identities of the prosecutor, the defendant, their representatives and whoever made the decision.

27. Rule 5.8(7) provides:

> "If the court so directs, the court officer will –
>
> (a) supply to the applicant, by word of mouth, other information about the case; or
>
> (b) allow the applicant to inspect or copy a document, or part of a document, containing information about the case."

28. Where a request is made under rule 5.8(7), it must be made in writing and it must explain for what purpose the information is required.

29. The Criminal Procedure Rules 2010, which were in force at the time of the District Judge's decision, had no provisions equivalent to rules 5.7 and 5.8 of the 2011 Rules.

The Guardian's appeal

30. Gavin Millar QC began with the uncontentious statement that a District Judge hearing an application for an extradition order under the Extradition Act is a court of law. Section 77 of the Act provides that at the extradition hearing the judge has the same powers (as nearly as may be) as a Magistrates Court would have if the proceedings were the summary trial of an information against the person whose extradition is requested.

31. Mr Millar submitted next that every court of law has a wide inherent power to control the conduct of its proceedings: *Attorney General v Leveller Magazine* [1979] AC 440. In that case magistrates allowed a witness to conceal his identity from the general public on national security grounds and to write his name on a piece of paper shown to the court, the defendants and the parties' representatives. The House of Lords rejected an argument that this procedure offended against the principle of open justice. As to the general principle, Lord Diplock said at p 450:

> "The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this."

32. However, the House of Lords recognised that danger to national security could be a lawful reason for a court to hear evidence in private, and that it was equally permissible for the court to avoid the need to sit in private by allowing the witness to

give evidence in public but conceal his identity. By parallel reasoning, Mr Millar submitted that in the present case the District Judge could have required the skeleton arguments, the witness statements and the correspondence to be read in open court, and must therefore have had inherent power to achieve the same effect by the alternative route of allowing the press to inspect and copy the material.

33. Similar questions have arisen in the civil courts. Lord Scarman, a thinker ahead of his time, said in *Harman v Home Office* [1983] 1 AC 280, 316:

> "Reasonable expedition is, of course, a duty of the judge. But he is also concerned to ensure that justice not only is done but is seen to be done in his court. And this is the fundamental reason for the rule of the common law, recognised by this House in *Scott v Scott* [1913] AC 417, that trials are to be conducted in public. Lord Shaw of Dunfermline referred with approval, at p 477, to the view of Jeremy Bentham that public trial is needed as a spur to judicial virtue. Whether or not judicial virtue needs such a spur, there is also another important public interest involved in justice done openly, namely, that the evidence and argument should be publicly known, so that society may judge for itself the quality of justice administered in its name, and whether the law requires modification. When public policy in the administration of justice is considered, public knowledge of the evidence and arguments of the parties is certainly as important as expedition: and, if the price of expedition is to be the silent reading by the judge before or at trial of relevant documents, it is arguable that expedition will not always be consistent with justice being seen to be done.
>
> …Justice is done in public so that it may be discussed and criticised in public. Moreover, trials will sometimes expose matters of public interest worthy of discussion other than the judicial task of doing justice between the parties in the particular case."

34. Lord Bingham CJ took matters further in *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [1999] 4 All ER 498, 511-512:

> "Since the date when Lord Scarman expressed doubt in *Home Office v Harman* as to whether expedition would always be consistent with open justice, the practices of counsel preparing skeleton arguments, chronologies and reading guides, and judges pre-reading documents (including witness statements) out of court, have become much more common. These methods of saving time in court are now not merely permitted, but are positively required, by practice directions. The result is that a case may be heard in such a way that even an intelligent and well-informed member of the public, present throughout every hearing in open court, would be unable to obtain a full understanding of the documentary evidence and the arguments on which the case was to be decided.

> In such circumstances there may be some degree of unreality in the proposition that the material documents in the case have (in practice as well as in theory) passed into the public domain. That is a matter which gives rise to concern…
>
> As the court's practice develops it will be necessary to give appropriate weight to both efficiency and openness of justice, with Lord Scarman's warning in mind. Public access to documents referred to in open court (but not in fact read aloud and comprehensively in open court) may be necessary, with suitable safeguards, to avoid too wide a gap between what has in theory, and what has in practice, passed into the public domain."

35. In *GIO Personal Investment Services Limited v Liverpool and London Steamship P & I Association Limited* [1999] 1 WLR 984 a non-party applied to inspect written submissions and documents forming part of the evidence, including witness statements which had been referred to in open court but not read out. The application was refused at first instance. The Court of Appeal allowed an appeal in respect of the written submissions but not the evidence. As to the evidence, Potter LJ (with whose judgment the other members of the court agreed) said that historically there had been no right, and that there was currently no provision, which enabled a member of the public to see, examine or copy a document on the basis that it had been referred to in court or read by the judge. He added that he did not consider that any recent development in court procedures justified the court in contemplating such an exercise under its inherent jurisdiction. On the other hand, he considered the arguments for such an exercise in respect of the written submissions of counsel to be a good deal stronger. He said at p 996:

> "If, as in the instant case, an opening speech is dispensed with in favour of a written opening (or a skeleton argument treated as such) which is not read out, or even summarised, in open court before the calling of the evidence, it seems to me impossible to avoid the conclusion that an important part of the judicial process, namely the instruction of the judge in the issues of the case, has in fact taken place in the privacy of his room and not in open court. In such a case I have no doubt that, on an application from a member of the press or public in the course of the trial, it is within the inherent jurisdiction of the court to require that there be made available to such applicant a copy of the written opening or skeleton argument submitted to the judge."

36. The criminal courts have also recognised that they have a power at common law, founded on the principle of open justice, to allow a request by a non-party for disclosure of skeleton arguments read by the court in order to understand the case and to save time: *R v Howell* [2003] EWCA Crim 486. In that case Judge LJ said at para 197:

> "Subject to questions arising in connection with written submissions on PII applications, or any other express

> justification for non-disclosure on the basis that the written submissions would not properly have been deployed in open court, we have concluded that the principle of open justice leads inexorably to the conclusion that written skeleton arguments, or those parts of the skeleton arguments adopted by counsel and treated by the court as forming part of his oral submissions, should be disclosed if and when a request to do so is received."

37. Turning to the authorities on which the Administrative Court placed particular reliance, Mr Millar submitted that the Guardian's appeal was not foreclosed by the decisions in *Waterfield* and *Crook*. In *Waterfield* the defendant was convicted of importing pornographic films and magazines. One of his grounds of appeal was that the proceedings were a nullity because the press and public had been excluded from the court room during the showing of the films. Dismissing the appeal, Lawton LJ said at p 714:

> "When evidence is given orally, all in court hear what is said. When evidence is produced it may or may not be read out. …The members of the public in court have no right to claim to be allowed to look at the exhibits."

38. He added at p 715:

> "As judges have differed as to how judicial discretion should be exercised in this class of case it may be helpful if we give some guidance…It seems to us that, normally when a film is being shown to a jury and the judge, in the exercise of his discretion, decides that it should be done in a closed court room or in a cinema, he should allow representatives of the press to be present. No harm can be done by doing so: some good may result."

39. Mr Millar submitted that the circumstances and the issue in that case were quite different from the present and that it does not answer the question whether the court has a common law power to permit journalists to see evidence considered at an extradition hearing and referred to in open court. He also observed that the court appeared to treat the question what the press should be allowed to see as a discretionary matter.

40. In *Crook* the court dismissed two appeals by a journalist against orders made by a trial judge to exclude the press and public from the court while he considered, in one case, an issue concerning the conduct of a juror and, in the other case, an issue about where the jury should be seated. In the course of its judgment the court observed that although there might be some cases where it was appropriate to allow the press to remain in court while other members of the general public were excluded, as had been suggested in *Waterfield*, it would not be generally right to make such a distinction. There was no further discussion of questions of principle.

Article 10

41. Mr Millar relied strongly on article 10 and recent Strasbourg decisions. Article 10.1 provides:

> "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers…"

42. Article 10.2 permits restrictions to protect other legitimate interests. The Strasbourg Court's approach has developed through a line of cases. In *Leander v Sweden* (1987) 9 EHRR 433 the applicant was refused employment at a naval museum after a negative security vetting. He demanded to know the information on which the decision was taken. On his request being refused, he complained that the refusal of his request was a violation of his rights under article 10. The court rejected his complaint. It said at para 74:

> "The Court observes that the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those in the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual. "

43. That principle has been followed in other cases, for example, *Gaskin v United Kingdom* (1990) 12 EHRR 36, where the applicant complained of ill-treatment while he was in the care of a local authority and living with foster parents. He sought access to his case records held by the local authority but his request was denied. Applying the *Leander* principle, the court held that the refusal did not involve a violation of article 10.

44. In *Atkinson* (1990) 67 DR 244 two freelance journalists working at the Central Criminal Court complained of a decision by the court to hold a private sentencing hearing on a drug dealer who had been convicted after a trial in open court. Relying on *Leander* and *Gaskin*, the UK argued that article 10 had no application. The Commission ruled that the application was inadmissible but on a different basis. After referring to *Leander* and *Gaskin* it said:

> "The Commission considers however that the general principles stated by the Court may not apply with the same force in the context of court proceedings…
>
> In order that the media may perform their function of imparting information there is a need that they should be accurately informed.
>
> Assuming that the decision of the court to hold part of the proceedings in camera constituted an interference with the

> applicants' right to receive and impart information as guaranteed by article 10 para 1 of the Convention, the Commission must consider whether this interference was prescribed by law and whether it was necessary in a democratic society for one or more of the purposes set out in article 10 para 2 of the Convention."

45. The Commission found that, having regard to the margin of appreciation, the interest of the media in reporting the proceedings was outweighed by other considerations.

46. In *Grupo Interpres SA v Spain*, Application No 32849/96, 7 April 1997, the applicant sold information about people's assets to third parties. He complained that the refusal of the Spanish courts to allow him access to the courts' archives in order to obtain such information violated his rights under article 10. His application was ruled inadmissible. The Commission reiterated that article 10 "is intended basically to prohibit a Government from restricting a person from receiving information that others may wish or may be willing to impart to him". It also observed that "the sale of commercial information, which was the applicant company's object, was not concerned with informing public opinion, which is the purpose of the provision in question".

47. *Matky v Czech Republic*, Application No 19101/03, 10 July 2006, concerned attempts by members of an environmental group to obtain original project documents lodged with a government department. They wanted to compare the plans with revised plans which were currently the subject of an environmental assessment. The Ministry refused access to the documents. The group applied to the court, relying on article 10, but the court declared its application inadmissible. In its reasons the court stated:

> "It notes that the circumstances in the present case are to be clearly distinguished from those in cases relating to restrictions upon the freedom of the Press in which it has on many occasions recognised the existence of a right for the public to receive information…The Court considers that article 10 of the Convention should not be interpreted as guaranteeing the absolute right to have access to all the technical details relating to the construction of a power station as, unlike information concerning its environmental impact, such data should not be of general public interest."

48. In *Tarsasag v Hungary* (2011) 53 EHRR3 a Hungarian MP lodged a complaint with the Hungarian Constitutional Court for a review of parts of the Hungarian Criminal Code. The Hungarian Civil Liberties Union asked the court for access to the complaint. The court refused to disclose it. The court subsequently dismissed the MP's complaint, which it summarised in its published decision. The applicant complained that the decision of the court refusing access to the full complaint was an interference with its rights under article 10.

49. It appears from the Strasbourg Court's judgment, para 18, that the Hungarian Government did not contest that there had been an inference with the applicants' rights under article 10, but relied for its defence on article 10.2. The Court found that there had been a violation of article 10. It said:

> "26. The court has consistently recognised that the public has a right to receive information of general interest. Its case law in this field has been developed in relation to press freedom which serves to impart information and ideas on such matters. In this connection, the most careful scrutiny on the part of the Court is called for when the measures taken by the national authority are capable of discouraging the participation of the press, one of society's "watchdogs", in the public debate on matters of legitimate public concern, even measures which merely make access to information more cumbersome.
>
> 27. In view of the interest protected by article 10, the law cannot allow arbitrary restrictions which may become a form of indirect censorship should the authorities create obstacles to the gathering of information. For example, the latter activity is an essential preparatory step in journalism and is an inherent, protected part of press freedom. The function of the press includes the creation of forums for public debate. However, the realisation of this function is not limited to the media or professional journalists. In the present case, the preparation of the forum of public debate was conducted by a non-governmental organisation. The purpose of the applicant's activities can therefore be said to have been an essential element of informed public debate. …
>
> 28. …the Court finds that the applicant was involved in the legitimate gathering of information on a matter of public importance. It observes that the authorities interfered in the preparatory stage of this process by creating an administrative obstacle. The Constitutional Court's monopoly of information thus amounted to a form of censorship. Furthermore, given that the applicant's intention was to impart to the public the information gathered from the constitutional complaint in question, and thereby to contribute to the public debate concerning legislation on drug-related offences, its right to impart information was clearly impaired."

50. At para 35 the court referred to the principle in *Leander* but added:

> "Nevertheless, the Court has recently advanced towards a broader interpretation of the notion of "freedom to receive information" and thereby towards the recognition of a right of access to information."

51. A footnote to that paragraph referred to *Matky*. The court continued at para 36:

> "…moreover, the state's obligations in matters of freedom of the press include the elimination of barriers to the exercise of press functions where, in issues of public interest, such barriers exist solely because of an information monopoly held by the authorities. The Court notes at this juncture that the information sought by the applicant in the present case was ready and available and it did not require the collection of any data by the Government. Therefore, the court considers that the State had an obligation not to impede the flow of information sought by the applicant."

52. In *Kennedi v Hungary,* Application No 31475/05, 26 August 2009, the applicant was a historian specialising in study of the functioning of secret services under totalitarian regimes. He sought access to documents held by the Hungarian Ministry of the Interior. After refusal of his request he brought an action against the Ministry in the Budapest Regional Court, which found in his favour, but the Ministry continued to prevaricate. Eventually he made an application to the Strasbourg Court complaining of a violation of article 10. The court noted at para 43 that the Hungarian Government had accepted that there had been an interference with his right to freedom of expression. It added:

> "The Court emphasises that access to original documentary sources for legitimate historical research was an essential element in the exercise of the applicant's right to freedom of expression (see Tarsasag v Hungary)."

53. In *Independent News and Media Limited v A* [2010] EWCA Civ 343 [2010] 1 WLR 2262, paras 39-44, this court observed that the Strasbourg jurisprudence had developed since *Leander*, so that article 10 seems to have acquired a wider scope; and that, where the media are involved and genuine public interest is raised, at least in some circumstances the general principle laid down in *Leander* may not apply.

Other countries

54. Heather Rogers QC and Ben Silverstone in their written submissions on behalf of Article 19 provided the court with a helpful and interesting survey of the approach which has been taken by courts in other common law countries. Many of them have constitutional texts which are relevant, but the judgments also reflect the courts' views about the requirements of open justice.

55. In Canada there is now relevant provision in the Charter of Rights and Freedoms but in *R v Canadian Broadcasting Corporation* 2010 ONCA 726 Sharpe JA, giving the judgment of the Court of Appeal for Ontario, said at para 28:

> "Even before the Charter, access to exhibits that were used to make a judicial determination, even ones introduced in the course of pre-trial proceedings and not at trial, was a well-recognised aspect of the open court principle."

She cited the judgment of Dickson J for the majority of the Supreme Court in *Attorney General of Nova Scotia v MacIntyre* [1982] 1 SCR 175.

56. In that case an investigative journalist was denied access to search warrants and supporting material filed in a criminal court. The ground of refusal was that the material was not available for inspection by the general public. The Supreme Court held that the public should be entitled to inspect such documents. After referring to the decisions of the House of Lords in *Scott v Scott* and *MacPherson v MacPherson* [1936] AC 177, Dickson J said p 185-7:

> "It is, of course, true that *Scott v Scott* and *MacPherson v MacPherson* were cases in which proceedings had reached the stage of trial whereas the issuance of a search warrant takes place at the pre-trial investigative stage. The cases mentioned, however, and many others which could be cited, establish the broad principle of "openness" in judicial proceedings, whatever their nature, and in the exercise of judicial powers. The same policy considerations upon which is predicated our reluctance to inhibit accessibility at the trial stage are still present and should be addressed at the pre-trial stage…
>
> At every stage the rule should be one of public accessibility and concomitant judicial accountability…
>
> In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these is the protection of the innocent."

57. In *Rogers v Television New Zealand Limited* [2007] NZSC 91 the Supreme Court of New Zealand considered the application of the open justice principle in a case about a police videotape of an interview with a suspect who was subsequently acquitted of murder. In the interview Mr Rogers admitted killing the victim and re-enacted the way in which he had done so, but the interview was ruled inadmissible at his trial because of the circumstances in which it had been conducted. The television company was given a copy of the videotape by the police officer in charge of the case and proposed to broadcast it. Mr Rogers obtained an injunction against the television company to prevent its broadcast, but the injunction was set aside by the Court of Appeal. The Supreme Court, by a majority of three to two, upheld the decision of the Court of Appeal.

58. Because there were serious questions over the propriety of the way in which the television company had received the videotape, the majority approached the matter as if the television company was seeking access to the videotape from the court as a document which formed part of the court records.

59. Mr Rogers' case was that his rights had been breached by the way in which the police had obtained his confession and that the material, which had for that reason been excluded from consideration by the jury, should not be shown to the public at large. The majority considered that the appellant's rights had been sufficiently protected by the exclusion of the evidence from the trial, but that open justice militated in favour of the television company now being able to broadcast it. Tipping J said:

"71. The public have a legitimate interest in being informed about the whole course of the investigation and the trials in relation to the death of Ms Sheffield. Two people have been charged and ultimately neither has been found guilty. The Court of Appeal differed from the High Court over whether the videotape should be admitted in evidence. The conduct of the police in setting up the reconstruction in circumstances which led to its being declared inadmissible is also a justified subject of public scrutiny, as is whether the Court of Appeal was correct in reversing the High Court.

72. It was said in argument that the public did not need to see the videotape when they already had the judgments of Cooper J and the Court of Appeal explaining their differing conclusions as to whether the videotape should be admitted. I do not consider that that argument carries much weight. In the first place the showing of the videotape is what is important for a visual medium like a television. In the second I do not consider that legitimate public debate about the admissibility ruling and the circumstances of the case generally can take place effectively without the public being fully informed by access to the video itself. I say that because the public are entitled to be satisfied that the courts have, in their judgments, fairly portrayed the substance of what Mr Rogers said and did during the videotaped reconstruction. The public are also entitled to assess for themselves whether the law generally and its application to this case strike the right balance between vindicating breaches of the Bill of Rights Act and the effective prosecution of crime. I am not expressing any view about that issue myself. I am simply pointing out that this is a matter of legitimate public interest and unless the videotape is released the public will be less than fully informed. Only if the case for withholding the material in question is of sufficient strength should the public have to consider the matter on a less than fully informed basis.

…

74. One final point should be mentioned. The courts must be careful in cases such as the present lest, by denying access to their records, they give the impression they are seeking to prevent public scrutiny of their processes and what has happened in a particular case. Any public perception that the courts were adopting a defensive attitude by limiting or preventing access to

> court records would tend to undermine confidence in the judicial system. There will of course be cases when a sufficient reason for withholding information is made out. If that is so, the public will or should understand why access has been denied. But unless the case for denial is clear, individual interests must give way to the public interest in maintaining confidence in the administration of justice through the principle of openness."

60. McGrath J said:

> "122. The media was, of course, able to fully report everything that happened at Mr Rogers' trial. The unusual feature of the preset case, however, is that the video tape of the reconstruction of events at Mangonui, part of which TVNZ wishes to broadcast, did not form part of the evidence at the trial. This is because the Court of Appeal decided that there was a breach of Mr Rogers' protected rights and that the interests of justice required that the tape not be shown to the jury. This raises the question whether the requirements of open justice, in relation to scrutiny of judicial processes and also police actions in this case, will not be satisfied unless the videotape is made available, in effect, for public broadcasting.
>
> …
>
> 136. In the end, in the circumstances of this difficult case, I have reached the conclusion, when balancing the conflicts of interest, that the side of open justice carries the greatest weight. Preservation of public confidence in the legal system is directly relevant, because of the circumstances and outcomes of the trials of the two accused persons. There is a real risk of damage to public faith in the criminal justice system if the circumstances that led the Court of Appeal to refuse to admit the evidence are not fully transparent. It is a less than satisfactory response to reason that the end is achieved because the courts' own descriptions of the events that are depicted in the videotape are full and complete. Open justice strongly supports allowing the media access to primary sources of relevant information rather than having to receive it filtered according to what the courts see as relevant. On the other side of the scales, Mr Rogers' rights have been breached but also vindicated during the criminal justice process. At this stage they have mush less weight."

61. In his judgment to the same effect, Blanchard J at para 55 expressly concurred with the words of William Young P in the Court of Appeal:

> "I agree that the underlying issues can be debated without the videotape being shown on national television. But experience shows that arguments are usually more easily understood where they are contextualised. An esoteric argument about the way the New Zealand Bill of Rights Act is applied by the Courts becomes far more accessible to the public if the implications can be assessed by reference to the concrete facts of a particular case. In that context, to prohibit the proposed broadcast of the videotape of the confession and reconstruction would necessarily have the tendency to limit legitimate public discussion on questions of genuine public interest."

62. In *Independent Newspapers v Minister for Intelligence Services* [2008] ZACC 6, the Constitutional Court of South Africa considered an application by the press to compel disclosure of parts of the record of court proceedings in a claim brought unsuccessfully by the former head of the National Intelligence Agency arising from his suspension and dismissal. The Minister objected to disclosure on national security grounds. The judgment of the majority was delivered by Moseneke DCJ. He referred to open justice as a fundamental principle of the constitution, and said, at para 41:

> "From the right to open justice flows the media's right to gain access to, observe and report on, the administration of justice and the right to have access to papers and written arguments which are an integral part of court proceedings subject to such limitations as may be warranted on a case-by-case basis in order to ensure a fair trial."

63. At para 43, he described "the default position" as "one of openness", but he considered it an over-narrow formulation to say that "the default position may only be disturbed in exceptional circumstances". Whether there was sufficient reason to depart from the default position required a balancing exercise.

64. Sachs J in a judgment concurring with the general approach of the majority, but partially disagreeing with the decision, agreed at para 161 with the Deputy Chief Justice that technical concepts such as onus of proof should not loom large in the balancing enquiry. He continued:

> "On the contrary, in fact-specific matters such as these, undue technicism, whether on questions of procedure or evidence, would be more likely to distort the achievement of constitutional justice than to enhance it. Similarly, it seems clear that, whereas in most cases involving proportionality, the courts will act as an outside eye in assessing the constitutionality of the way in which power has been exercised, in cases such as the present the courts will have to do the balancing themselves. Check-lists will not be helpful. As in all proportionality exercises, the factual matrix will be all-important, and the court concerned will itself have to make an

> order based on its enquiry into the specific way in which constitutionally-protected interests interact with each other, and particularly with the intensity of their engagement."

65. In the USA the Federal Courts have recognised a presumption favouring access to "judicial documents" at common law. In *US v Amodeo* 71 F 3d 1044 (1995) the Court of Appeals, 2nd Circuit, considered an application for disclosure of a sealed report filed with the District Court in connection with a corruption investigation into a union. The court (Winter, Calabresi and Cabranes, CJJ) noted that the courts had given various descriptions of the weight to be given to the presumption of access. It observed:

> "The difficulty in defining the weight to be given the presumption of access flows from the purpose underlining the presumption and the broad variety of documents deemed to be judicial. The presumption of access is based on the need for federal courts, although independent – indeed, particularly because they are independent – to have a measure of accountability and for the public to have confidence in the administration of justice. Federal courts exercise powers under Article III that impact upon virtually all citizens…Monitoring both provides judges with critical views of their work and deters arbitrary judicial behaviour…Such monitoring is not possible without access to testimony and documents that are used in the performance of Article III functions."

66. The court commented that many statements and documents generated in federal litigation actually have little or no bearing on the exercise of judicial power because "the temptation to leave no stone unturned in the search for evidence material to a judicial proceeding turns up a vast amount of not only irrelevant but also unreliable material". Unlimited access to every item turned up in the course of litigation could cause serious harm to innocent people. The court concluded that the weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of judicial power and the resultant value of such information to those monitoring the federal courts.

67. The decision of the US District Court for the District of Massachusetts *In The Matter Of The Extradition Of Anthony Philip Romeo*, No-0808RC, May 1, 1987, shows how the present case would be resolved by a US court. The Canadian Government applied for the extradition of Mr Romeo, who was a US citizen. It also asked the court to withhold the affidavits detailing the evidence against Mr Romeo, which were admitted into evidence at the extradition hearing, from disclosure to the public, on the ground that disclosure would prejudice his right to a fair trial because of potential jury exposure to the details of the case against him. The US Department of Justice opposed the request for non-disclosure. The court referred in its ruling to the particular public interest in proceedings for the extradition of American citizens to foreign countries to face trial there. The extradition hearing and the documentary evidence admitted at the hearing were the most important part of the process. The court held that the presumption of openness should apply unless the Canadian Government presented evidence to satisfy it that non-disclosure was essential to preserve Mr Romeo's right to a fair trial.

Counter-arguments

68. On behalf of the US Government, Mr Perry submitted that the courts below were right in their reasoning and conclusions. His arguments were these:

1. The open justice principle is ordinarily satisfied if:

   (a) proceedings are held in public; and

   (b) fair, accurate and contemporaneous media reporting of the proceedings is not prevented by any action of the court.

2. The *Tesler* and *Chodan* extradition hearings satisfied those requirements.

3. The court had no inherent jurisdiction empowering it to allow the Guardian's request.

4. The true position at common law was as stated in *Waterfield*.

5. The observations of Judge LJ in *Howell* were limited to the provision of skeleton arguments in the Court of Appeal in circumstances where the words written were treated as if they had been deployed in open court. The case had no wider significance.

6. In written submissions on behalf of the US Government it was argued that a power to allow the Guardian's application was now conferred by rule 5.8 of the Criminal Procedure Rules 2011. Those rules had not been in force at the relevant time but they made the Guardian's appeal academic. In his oral submissions Mr Perry took a different position. He submitted that rule 5.8 was to be narrowly construed and would not include the Guardian's request.

7. The Administrative Court was right to take into account the existence of the exemption in section 32 of the Freedom of Information Act. It was significant that Parliament had expressly exempted public authorities, which would include a court, from any obligation under the Act to produce a document placed in the custody of the court for the purposes of proceedings in a particular cause or matter.

8. Article 10 was not engaged in this case. The *Leander* principle applied, and the later cases relied on by the Guardian did not support its case. In *Tarsasag* all that was sought was access to the complaint which had been made to the court. In the present case the nature

of the extradition application was plain and the Guardian's request was for access to a much wider range of documents than in *Tarsasag*. Further, in *Tarsasag* the applicability of article 10 had not been a contested issue. The question in that case was whether the Government had a defence under article 10.2. In *A v Independent News and Media* the issue was whether the press should be allowed to be present at a court hearing. In the present case the extradition hearings had been held in open court.

9. The District Judge's comments about the problems which would arise if her view of the law was wrong were important practical considerations.

10. In any event, the appeal ought to be dismissed on the facts. The extradition hearings had been full and lengthy. The issue had not been whether the US Government had produced sufficient evidence to justify putting the defendants on trial. The scheme under the Extradition Act 2003 prohibits an inquiry by the court considering extradition into the sufficiency of the evidence to be relied upon at trial. The issues in the extradition hearings were confined to whether the US Government had satisfied the formal requirements of Part 2 of the Act. The judge had delivered clear and full judgments explaining why the requirements were satisfied. Since it appeared from the Guardian's evidence that its correspondents had not attended the full hearings it was unsurprising if they found themselves unable fully to follow the arguments, but that was not through any want of open justice. If the Guardian regarded the cases as raising matters of great importance, it would be reasonable to expect it to have committed more resources to following it.

Conclusions

69. The open justice principle is a constitutional principle to be found not in a written text but in the common law. It is for the courts to determine its requirements, subject to any statutory provision. It follows that the courts have an inherent jurisdiction to determine how the principle should be applied.

70. Broadly speaking, the requirements of open justice apply to all tribunals exercising the judicial power of the state. The fact that Magistrates Courts were created by an Act of Parliament is neither here nor there. So for that matter was the Supreme Court, but the Supreme Court does not require statutory authority to determine how the principle of open justice should apply to its procedures.

71. The decisions of the courts in *Scott v Scott*, *GIO Personal Investments Services Limited v Liverpool and London Steamship P & I Association Limited* and *Howell* are

illustrations of the jurisdiction of the courts to determine what open justice requires. For this purpose it is irrelevant how broadly or narrowly the last two cases should be interpreted. The significant point is that the decisions of the court in those cases, about disclosure of skeleton arguments to non-parties, were an exercise of the courts' power to determine whether such disclosure was required by the open justice principle.

72. The exclusion of court documents from the provisions of the Freedom of Information Act is in my view both unsurprising and irrelevant. Under the Act the Information Commissioner is made responsible for taking decisions about whether a public body should be ordered to produce a document to a party requesting it. The Information Commissioner's decision is subject to appeal to a tribunal, whose decision is then subject to judicial review by the courts. It would be odd indeed if the question whether a court should allow access to a document lodged with the court should be determined in such a roundabout way.

73. More fundamentally, although the sovereignty of Parliament means that the responsibility of the courts for determining the scope of the open justice principle may be affected by an Act of Parliament, Parliament should not be taken to have legislated so as to limit or control the way in which the court decides such a question unless the language of the statute makes it plain beyond possible doubt that this was Parliament's intention.

74. It would be quite wrong in my judgment to infer from the exclusion of court documents from the Freedom of Information Act that Parliament thereby intended to preclude the court from permitting a non-party to have access to such documents if the court considered such access to be proper under the open justice principle. The Administrative Court's observation that no good reason had been shown why the checks and balances contained in the Act should be overridden by the common law was in my respectful view to approach the matter from the wrong direction. The question, rather, was whether the Act demonstrated unequivocally an intention to preclude the courts from determining in a particular case how the open justice principle should be applied.

75. Similarly, I do not consider that the provisions of the Criminal Procedure Rules are relevant to the central issue. The fact that the rules now lay down a procedure by which a person wanting access to documents of the kind sought by the Guardian should make his application is entirely consistent with the court having an underlying power to allow such an application. The power exists at common law; the rules set out a process.

76. I turn to the critical question of the merits of the Guardian's application. The application is for access to documents which were placed before the District Judge and referred to in the course of the extradition hearings. The practice of introducing documents for the judge's consideration in that way, without reading them fully in open court, has become commonplace in civil and, to a lesser extent, in criminal proceedings. The Guardian has a serious journalistic purpose in seeking access to the documents. It wants to be able to refer to them for the purpose of stimulating informed debate about the way in which the justice system deals with suspected international corruption and the system for extradition of British subjects to the USA.

77. Unless some strong contrary argument can be made out, the courts should assist rather than impede such an exercise. The reasons are not difficult to state. The way in which the justice system addresses international corruption and the operation of the Extradition Act are matters of public interest about which it is right that the public should be informed. The public is more likely to be engaged by an article which focuses on the facts of a particular case than by a more general or abstract discussion.

78. Are there strong countervailing arguments? The four main counter-arguments are that the open justice principle is satisfied if the proceedings are held in public and reporting of the proceedings is permitted; that to allow the Guardian's application would be to go further than the courts have considered necessary in the past; that in the present case the issues raised in the extradition proceedings were ventilated very fully in open court, and there is no need for the press to have access to the documents which they seek for the purpose of reporting the proceedings; and that to allow the application would create a precedent which would give rise to serious practical problems.

79. The first objection is based on too narrow a view of the purpose of the open justice principle. The purpose is not simply to deter impropriety or sloppiness by the judge hearing the case. It is wider. It is to enable the public to understand and scrutinise the justice system of which the courts are the administrators.

80. The second objection is correct but not of itself decisive. The practice of the courts is not frozen. In *Waterfield*, on which the courts below placed considerable weight, the issue was quite different. It was whether the exclusion of the press from the viewing of a pornographic film rendered the criminal proceedings a nullity. I do not regard the observations of the court in that case, thirty-five years ago, as determining how the present case should be resolved.

81. In *GIO Personal Investment Services Limited v Liverpool and London Steamship P & I Association Limited* an insurance company sought access to documents in a case which did not directly concern it, because it was facing a claim giving rise to similar issues. Both claims were brought under reinsurance contracts placed at about the same time through the same chain of brokers. In both cases the re-insurers purported to avoid for non-disclosure. The applicants wanted sight of the evidence filed in the first action in the hope that it would strengthen their position in the second action. Issues about informing the public regarding matters of general public interest did not arise.

82. I do not regard the third objection as a strong objection on the facts of this case. The Guardian put forward credible evidence that it was hampered in its ability to report as fully as it would have wished by not having access to the documents which it was seeking. That being so, the court should be cautious about making what would really be an editorial judgment about the adequacy of the material already available to the paper for its journalistic purpose.

83. The courts have recognised that the practice of receiving evidence without it being read in open court potentially has the side effect of making the proceedings less intelligible to the press and the public. This calls for counter measures. In *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* Lord Bingham referred to the need to give appropriate weight both to efficiency and to openness of justice as the

court's practice develops. He observed that public access to documents referred to in open court might be necessary. In my view the time has come for the courts to acknowledge that in some cases it is indeed necessary. It is true that there are possible alternative measures. A court may require a document to be read in open court, but it is not desirable that a court should have to take this course simply to achieve the purpose of open justice. A court may also declare that a document is to be treated as if read in open court, but that is merely a formal device for the exercise of a power to allow access to the document. I do not see why the use of such a formula should be required. It may have the advantage of ensuring that other parties have an opportunity to comment, but that can equally be achieved if, in a case such as the present, the applicant is required to notify the parties to the litigation of the application.

84. I am not impressed by the fourth objection, based on the practical problems which it is said would arise if the Guardian's application were to succeed. Rule 5.8 of the Criminal Procedure Rules 2011 provides a sensible and practical procedure where a member of the public, including a reporter, wants to obtain information about a case or to inspect or copy a document. The applicant may be required to pay an appropriate fee; it must specify what it wants; and it must explain for what purpose the information is required.

85. In a case where documents have been placed before a judge and referred to in the course of proceedings, in my judgment the default position should be that access should be permitted on the open justice principle; and where access is sought for a proper journalistic purpose, the case for allowing it will be particularly strong. However, there may be countervailing reasons. In company with the US Court of Appeals, 2nd Circuit, and the Constitutional Court of South Africa, I do not think that it is sensible or practical to look for a standard formula for determining how strong the grounds of opposition need to be in order to outweigh the merits of the application. The court has to carry out a proportionality exercise which will be fact-specific. Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the material in advancing that purpose and, conversely, any risk of harm which access to the documents may cause to the legitimate interests of others.

86. The Law Commission of New Zealand listed in its report on Access to Court Records, at paragraphs 2.62 and 2.63, a number of countervailing risks which it suggested should or might lead to access being refused. While it is often helpful for a report by a law commission to consider a range of examples, what matter for present purposes are the general principle and its application to this case. It is, however, right to observe that we are not presently concerned with a case involving a child or vulnerable adult. The Law Commission of New Zealand gave particular consideration to such cases and said at paragraph 2.37:

> "There seem to be good reasons for non-disclosure to the public of sensitive, personal information in family law and mental health and disability cases. In both instances, the need to protect personal information from painful and humiliating disclosure may found an exception to the open justice principle. The rationale for protecting such information, especially relating to vulnerable people like children, battered spouses, the

> mentally disabled, or the elderly and infirm, where there seems no obvious public-interest reason in publicity, still holds."

87. In this case the Guardian has put forward good reasons for having access to the documents which it seeks. There has been no suggestion that this would give rise to any risk of harm to any other party, nor would it place any great burden on the court. Accordingly, its application should be allowed.

88. I base my decision on the common law principle of open justice. In reaching it I am fortified by the common theme of the judgments in other common law countries to which I have referred. Collectively they are strong persuasive authority. The courts are used to citation of Strasbourg decisions in abundance, but citation of decisions of senior courts in other common law jurisdictions is now less common. I regret the imbalance. The development of the common law did not come to an end on the passing of the Human Rights Act. It is in vigorous health and flourishing in many parts of the world which share a common legal tradition. This case provides a good example of the benefit which can be gained from knowledge of the development of the common law elsewhere.

89. The Strasbourg jurisprudence may be seen as leading in the same direction, but it is not entirely clear cut because this is not a case in which the court can be said to have had a monopoly of information (as it did in *Tarsasag* and *Kennedi*), so as to justify regarding the court's refusal of access as tantamount to censorship. There is significance in the question whether the refusal of access to the Guardian amounted to covert censorship, because there is force in the argument that article 10 is essentially a protection of freedom of speech and not freedom of information (*Leander*), although in exceptional cases infringement of the latter may be regarded as a covert form of infringement of the former. Some of the observations by the Strasbourg court may be said to support the reasoning behind my decision, but I base the decision on the common law and not on article 10.

90. Although I disagree with the reasoning of the courts below, I recognise that this decision breaks new ground in the application of the principle of open justice, although not, as I believe, in relation to the nature of the principle itself.

91. For those reasons I would allow this appeal and direct that the Guardian should be allowed access to the documents which it seeks.

Lord Justice Hooper:

92. I agree with the judgment of Toulson LJ and only wish to add a few points.

93. Whilst accepting entirely Toulson LJ's arguments that the Guardian succeeds on the basis of the common law, I would be minded, if I needed to do so, to decide that the Criminal Procedure Rules as now drafted give a court the necessary power to make an order of the kind sought by the appellant.

94. The Rules have, since the hearing before the DJ, been amended to include a new Part V, which makes provision in Rule 5.8 for the "Supply to the public, including reporters, of information about a case".

95. Crim PR 5.8(7) provides:

> "If the court so directs, the court officer will—
>
> (a) supply to the applicant, by word of mouth, other information about the case; or
>
> (b) allow the applicant to inspect or copy a document, or part of a document, containing information about the case."

96. Following the Rule there is an italicised Note which reads:

> "The supply of information about a case is affected by—
>
> (a) Articles 6, 8 and 10 of the European Convention on Human Rights, and the court's duty to have regard to the importance of—
>
> (i) dealing with criminal cases in public, and
>
> (ii) allowing a public hearing to be reported to the public;
>
> (b) the Rehabilitation of Offenders Act 1974;
>
> (c) section 18 of the Criminal Procedure and Investigations Act 1996;
>
> (d) the Sexual Offences (Protected Material) Act 1997;
>
> (e) the Data Protection Act 1998;
>
> (f) section 20 of the Access to Justice Act 1999; and
>
> (g) reporting restrictions, rules about which are contained in Part 16 (Reporting, etc. restrictions)."

97. Any power to release material to third parties would be subject to restrictions such as PII and the Article 8 rights of witnesses, victims and defendants. In this case, as the last sentence of paragraph 12 of the judgment of the Divisional Court makes clear, it was not claimed by the US that release of any document would breach any right of confidence or be damaging.

98. It seems to me that Crim PR 5.8(7) is a necessary corollary of Part 3 of the Rules which, with other Rules, gives very wide powers and duties to manage cases from start to finish. I take some examples: the power to dispense with a public hearing when making decisions at the pre-trial stage, the power to entertain submissions by email and telephone and the duty to run cases efficiently so that the huge costs associated with public hearings are reduced. The corollary must be that the Rules should ensure that the exercise of these powers and duties does not imperil the principle of open justice. Crim PR 5.8(7) does that. I note in passing that, notwithstanding what was said for example in *Gio Personal Investment Services Ltd.*

v Liverpool and London Steamship Protection and Indemnity Association Ltd. and Others [1999] 1 W.L.R. 984 by Potter LJ at 995, there has been no suggestion that the rules in the CPR which deal with disclosure to third parties are *ultra vires*. As Lord Woolf, MR said in *Barings Plc v. Coopers & Lybrand* [2000] 1 WLR 2353:

> "43. As a matter of basic principle the starting point should be that practices adopted by the courts and parties to ensure the efficient resolution of litigation should not be allowed to adversely affect the ability of the public to know what is happening in the course of the proceedings."

99. I note also that there is often post-trial third party inspection of much of the material relied upon by the prosecution in criminal trials. The modern policy is to be found in "Publicity and the Criminal Justice System Protocol for working together: Chief Police Officers, Chief Crown Prosecutors and the Media"[1] which provides:

> "2. Media Access to Prosecution Materials
>
> The aim of the CPS is to ensure that the principle of open justice is maintained - that justice is done and seen to be done - while at the same time balancing the rights of defendants to a fair trial with any likely consequences for victims or their families and witnesses occasioned by the release of prosecution material to the media.
>
> Prosecution material which has been relied upon by the Crown in court and which *should* normally be released to the media, includes:
>
> Maps/photographs (including custody photos of defendants)/diagrams and other documents produced in court;
>
> Videos showing scenes of crime as recorded by police after the event;
>
> Videos of property seized (e.g. weapons, clothing as shown to jury in court, drug hauls or stolen goods);
>
> Sections of transcripts of interviews/statements as read out (and therefore reportable, subject to any orders) in court;
>
> Videos or photographs showing reconstructions of the crime;
>
> CCTV footage of the defendant, subject to any copyright issues.
>
> Prosecution material which may be released after consideration by the Crown Prosecution Service in consultation with the police and relevant victims, witnesses and family members includes:

[1] http://www.cps.gov.uk/publications/agencies/mediaprotocol.html#a02

> CCTV footage or photographs showing the defendant and victim, or the victim alone, that has been viewed by jury and public in court, subject to any copyright issues;
>
> Video and audio tapes of police interviews with defendants, victims and witnesses;
>
> Victim and witness statements.
>
> Where a guilty plea is accepted and the case does not proceed to trial, then all the foregoing principles apply. But to ensure that only material informing the decision of the court is published, material released to the media must reflect the prosecution case and must have been read out, or shown in open court, or placed before the sentencing judge." (Emphasis added)

100. Whether the defence has an unfettered right to release documents served on it by the prosecution during the proceedings and vice versa is a more difficult topic. The Criminal Procedure and Investigations Act 1996 in sections 17 and 18 makes special provision for the confidentiality of unused material served on the defendant by the prosecution. Section 17(3) allows the defence to use or disclose unused material only to the extent that it has been displayed to the public in court or to the extent that it has been communicated to the public in court. As far as material relied upon by the prosecution as part of its case and not covered by the Sexual Offences (Protected Material) Act 1997 is concerned, the defence do not in practice give any undertaking about its use and nor do the prosecution give any undertaking in relation to material received from the defence. As to whether there are any implied restrictions on the use of such material, see *Mahon and another v Rahn and others* [1998] Q.B. 424 and *Taylor and another v Serious Fraud Office and others* both in the Court of Appeal and in the House of Lords [1999] 2 A.C. 177, where Lord Hoffmann (with whose speech the other members of the Judicial Committee agreed) said at page 212:

> "I do not propose to express a view on the further points which arose in *Mahon v. Rahn* [1998] Q.B. 424, namely whether the [implied] undertaking applies also to used materials and whether it survives the publication of the statement in open court"

101. I turn to another topic.

102. During the course of the hearing we asked whether the decision of the Court of Appeal, [2011] EWCA Civ 1188, holding that it had jurisdiction to entertain an appeal from the decision of the Divisional Court in this case has any impact on the powers of the Criminal Procedure Rule Committee.

103. Sections 68 and 69 of the Courts Act 2003 provide:

> 68. In this Part "criminal court" means—
>
> (a) the criminal division of the Court of Appeal;

> (b) when dealing with any criminal cause or matter—
>
> (i) the Crown Court;
>
> (ii) a magistrates' court.
>
> 69. (1) There are to be rules of court (to be called "Criminal Procedure Rules") governing the practice and procedure to be followed in the criminal courts.
>
> (2) Criminal Procedure Rules are to be made by a committee known as the Criminal Procedure Rule Committee.
>
> (3) The power to make Criminal Procedure Rules includes power to make different provision for different cases or different areas, including different provision—
>
> (a) for a specified court or description of courts, or
>
> (b) for specified descriptions of proceedings or a specified jurisdiction.
>
> (4) Any power to make . . . Criminal Procedure Rules is to be exercised with a view to securing that—
>
> (a) the criminal justice system is accessible, fair and efficient, and
>
> (b) the rules are both simple and simply expressed.

104. As sections 68 and 69 make clear, the rule making power of the Committee is limited to making rules in relation to the Crown Court and the magistrates' court when they are dealing with "any criminal cause or matter".

105. The Court of Appeal held that it had jurisdiction to entertain an appeal notwithstanding section 18(1) of the Senior Courts Act 1981 which provides that no appeal shall lie to the Court of Appeal in relation to the types of case therein specified, which include "(a) except as provided by the Administration of Justice Act 1960, from any judgment of the High Court in any criminal cause or matter" (emphasis added). The Court held that the Guardian's application was "wholly collateral to the extradition proceedings".

106. Mr Perry, rightly in my view, said that the words "any criminal cause or matter" must have a different meaning in section 68 of the Courts Act 2003 than they do in section 18(1) of the Senior Courts Act 1981. To give the words "any criminal cause or matter" in section 68 a narrow meaning would lead to the undesirable result that issues such as those dealt with in Part 5 of the Crim PR (and in other parts of the Rules) would have to be the subject of rule-making by some other body. That cannot have been the intention of Parliament. See also section 66 of the Courts Act 2003, the recently inserted subsection (1A) of section 8 of the Senior Courts Act 1981 (both of which make provision for the powers of certain judges) and section 16(5) of the Prosecution of Offences Act 1985.

107. I turn to one final topic.

108. Mr Perry submitted that the words "a document ... containing information about the case" in Rule 5.8 (7)(b) should be interpreted narrowly so as not to include written statements made by witnesses or exhibits. I do not agree.

The Master of the Rolls:

109. I agree that this appeal should be allowed for the reasons given by Toulson LJ, to which there is nothing I can add.

110. As to the three points made by Hooper LJ:

i. I would leave open the question whether, if the court would not otherwise have power to make the order sought by the appellant, it would have such power by virtue of Rule 5.8. Not only is it unnecessary to decide the point, but it was not argued before us, unsurprisingly as the rule was not in existence at the time the District Judge made her order.

ii. I agree with what is said in para 106 that 'criminal cause or matter' in section 68(b) of the Courts Act 2003 does not necessarily have the same meaning as the identical expression in section 18(1) of the Senior Courts Act 1981, and that, if the expression in the 1981 Act has the meaning ascribed to it in the earlier decision in this case, [2011] EWCA Civ 1188, then it has a different meaning in the 2003 Act. In particular, it would be inappropriate for the expression to be accorded a narrow meaning in the 2003 Act.

iii. I also agree that 'a document ….containing information about the case' in Rule 5.8(7)(b) includes written statements made by witnesses, and any exhibits: to exclude them would involve giving the words an artificially and inappropriately narrow meaning.