Neutral Citation Number: [2006] EWCA Crim 04

Case No: 200506175 D5

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CENTRAL CRIMINAL COURT
THE HON. SIR MICHAEL ASTILL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13th January 2006

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION
THE HON. MR JUSTICE OPENSHAW
and
THE RT HON. SIR PAUL KENNEDY

- -

Between :

R
- v -
The Crown Court at the Central Criminal Court Ex parte A
Times Newspapers Ltd
Guardian Newspapers Ltd
British Broadcasting Corporation

- -
- -

Mr Patrick O'Connor QC and Mr H. Mullan for A
Mr David Waters QC, Mr M. Heywood and Mr D. Atkinson for the Crown
Mr Keir Starmer QC and Mr A. Hudson for the Times Newspapers Limited, Guardian Newspapers Limited and the British Broadcasting Corporation

Hearing date: 16th December 2005

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Judgment

PRESIDENT OF THE QUEEN'S BENCH DIVISION:

1. SA is charged on an indictment alleging that between 1 January 2003 and 30 March 2004, he and six others were parties to a conspiracy to cause explosions in the United Kingdom. The other six defendants were arrested on 30 March 2004. A was arrested on 8 February 2005 on an inbound flight from Pakistan to London Heathrow. Prior to his arrest, he was detained in Pakistan for about ten months. He was charged on 12 February 2005, and sent for trial on 14 February.

2. Thereafter the defendant's solicitor read out a statement on his behalf alleging that throughout his detention he was "tortured mentally and physically and subjected to interrogation by British, American and Pakistani intelligence authorities". A number of newspaper reports of his appearance and some or all of the statement issued on his behalf were published on 14th and 15th February in the Evening Standard, the Independent, the Mirror, the Daily Express, the Times and the Sun.

3. On 22 February it was reported in the Times that A had appeared at the Central Criminal Court by video link and that he was remanded in custody until 27 May 2005.

4. On 30 June a defence case statement was served, together with an outline skeleton argument. These raised a number of issues which will form the basis of an application that the trial against A should be stayed as an abuse of process. They include whether United Kingdom officials were party to his unlawful detention or torture, whether they forced or procured his return from Pakistan, and whether they were guilty of "entrapment". If the case proceeds the further question whether the interviews between A and the police on his return to this country should be excluded under s 76 or 78 of the Police and Criminal Evidence Act 1984.

5. The trial is due to start on 9 January 2006. It will by then be not far short of two years since the arrest of the six other defendants, and nearly a year after A's arrest. If humanly possible the trial date must be maintained: hence the urgent hearing of this application on Friday, 16 December 2005.

6. This hearing concerns an order dated 28 November 2005 made by Sir Michael Astill, the nominated trial judge, sitting as a Deputy High Court judge at the Central Criminal Court. At the end of a hearing in camera he ordered:

> "… for reasons of national security and the avoidance of harm to the due administration of justice, this court will sit in camera for those parts of the trial and the pre-trial process during which there is any evidence given or any reference made to evidence, information or argument which relates to the material disclosed by the prosecution by a notice dated …"

7. The reasons for the judge's ruling are stark. He was satisfied that the material shown to him revealed that:

> "… general publication of the relevant parts of it could give rise to a substantial risk to national security. Additionally it could obstruct the identification of, and cause the Crown to be deterred from prosecuting in this and other cases, those who it is in the public interest should be tried. … The importance of the principle of open justice and the special function of the media are acknowledged, but the grave risk to national security at the present time from potential acts of terrorism and the likely obstruction both to the identification of perpetrators and to the bringing to justice those who are identified are so real that an exceptional course is justified. Departure from the principle must be the minimum necessary to achieve the objective."

8. The application by the Crown concerned:

> "… evidence relating to, or any reference to, the events touching or concerning his [the defendant's] treatment out of this jurisdiction, from the commencement of the investigation to the time of his arrest on 8 February 2005, to be given in camera. It is not intended that any order should prohibit publication of, or public access to, any part of the trial or pre-trial process in which only his account of his treatment is given in evidence."

9. The judge's ruling is much narrower than the written submissions before us might have suggested. It does not prohibit the defendant at trial from giving or calling any admissible evidence he may wish about events in this country, following his arrest. The defendant will also be able to give any admissible evidence relating to his treatment abroad. In short, his personal evidence in its entirety, including any allegations he may choose to make about his treatment here and abroad, will be given in open court. It can then be reported. There is this further consideration. The evidence covered by the in camera order will indeed be given in camera. It will not however be secret. It will not be hidden from the defendant himself. He will hear it: so will his legal advisers: so, indeed, will the co-defendants, and so, too, will the jury. This reflects the simple fact that he is indeed the defendant, and presumed in law to be innocent, and it is the defendant, no-one else, who will face the consequences if he is convicted at the end of the trial. A complete record of all the evidence will be made, and in due course will be available for consideration, if necessary, in this Court.

10. It is also worth highlighting the circumstances in which the material covered by the judge's order came into existence. Dealing with it very briefly, following the assertions made by the appellant's solicitor after the committal, and in the light of the defence case statement, the authorities in this country made efforts to discover, so far as they could, whether there was, indeed, any material which might enable the

appellant to advance arguments against the admissibility of evidence obtained in this country, or indeed to support any application that his future trial might amount to an abuse of process. In short, the order against which this appeal is now brought relates to material which the prosecution wishes to disclose to the defendant.

11. The judge recorded that if the application by the prosecution failed, there was a serious possibility that the Crown might "decide that having regard to the substantial risks to national security which could arise if the evidence is given in open court", it would not pursue the allegations against A, and that others who might be involved in terrorist activities would not be identified and prosecuted. It is salutary to remind ourselves of the circumstances in which it became appropriate for the Crown to apply that a very limited part of the case should be heard in camera, and that if it were not, the consequence of the Crown's efforts to investigate the allegations made on the defendant's behalf could realistically culminate in the discontinuance of the prosecution case against him. That is not consistent with the interests of justice.

12. This is an application for leave to appeal the judge's order. If granted the application would proceed as an appeal. The hearing before us raised two distinct issues, the first a point of general importance, involved an analysis of the nature and proper method of conducting the application and any subsequent appeal, and the second directly related to the particular facts of this case. Mr Patrick O'Connor QC, counsel for the defendant at trial, and Mr Keir Starmer QC, representing the Times and the Guardian newspapers and the British Broadcasting Corporation, appeared in support of the application.

13. We heard argument on the point of general importance in open court. Having heard it, we decided that the application, and any appeal, should proceed without a hearing. We have reduced our reasons to writing, and our judgment may be reported.

<u>The proceedings before Sir Michael Astill</u>

14. The proceedings began with an application by the Crown under Rule 16.10 of the Criminal Procedure Rules 2005 that part of the forthcoming trial should be held in camera. Rule 16.10(1) provides that:

> "Where a prosecutor … intends to apply for an order that all or part of a trial be held in camera for reasons of national security or for the protection of the identity of a witness or any other person, he shall … serve a notice in writing to that effect on the Crown Court officer and the … defendant …"

15. The notice in the present case reads:

> "TAKE NOTICE that the Crown intends to apply in this case … for an order that part of the trial and pre-trial process take

> place *in camera*, under the provisions of Rule 16.10 of the Criminal Procedure Rules.
>
> The part of the trial process in respect of which application will be made is all those parts of the trial and pre-trial process in which any evidence is given relating to, or any reference is made to, any matter disclosed or raised in response to A's case relating to all matters concerning events from the time of his surrender to overseas authorities until the time of his arrest by the Metropolitan Police Anti-Terrorist Branch in February 2005.
>
> This notice is given pursuant to Rule 16.10(1) of the Criminal Procedure Rules."

16. Mr O'Connor submitted that the notice was flawed. It failed expressly to identify which of the considerations in Rule 16.10 was engaged. It therefore contravened the principles to be derived from Ex parte Guardian Newspapers [1999] 1 WLR 2130, where, in criminal proceedings, the defendants purported to serve a notice under Rule 24A(1) of the Crown Court Rules 1982 (the precursor of Rule 16.10) of an intention to apply for a hearing in camera of their application that the trial be stopped as an abuse of process. We need not begin to attempt a comprehensive description of the defects which characterised the application. Significantly, although nothing appeared in the notices, the appellants were told that the single ground for the application related to national security, but later discovered that the reasons for the judge's order had ranged much more widely, and they were not given any opportunity to address him on the relevant principles. In the course of his judgment, Brooke LJ observed that the words in the rule 24A meant what they said. They meant:

> "A notice that the relevant party intends to apply for an order that the relevant part of the trial process … be held in camera for reasons of national security or for the protection of identity of a witness. This was not done. We appreciate that there may be rare cases where it might invalidate the very purpose of the application to specify which of the two grounds was being relied on and in such a case it would be proper for the party to use the language of the rule without being more specific."

17. The possible relevance of this argument to the present application is readily explained. Mr O'Connor suggested that the consequence of what he identified as the defective notice is that the apparent prohibition against an oral hearing in Rule 67.2 of the Criminal Procedure Rules 2005 could not survive a flawed original notice of application. He pointed out that the present notice did not specify which of the relevant features, national security or the protection of witnesses was to be argued before the judge. Mr David Waters QC, on behalf of the Crown, relied on the words of the notice itself. No-one could have been in any doubt that Rule 16.10 (1) in its entirety was engaged. In fact, he told us that notice was also given orally, three days before the hearing. His skeleton argument, distributed before the hearing, again fully

explained the basis for the application. At the hearing itself, Mr O'Connor made observations about the terms of the notice without taking any formal objection.

18. Our conclusion can be expressed very briefly. The purpose of the notice under Rule 16.10(1) is to enable those affected to be given a proper opportunity to consider how best to deal with it. In our judgment this notice, set in the context of the other available material, was sufficient for the purposes of Rule 16.10. No one can have been in any doubt that both limbs of Rule 16.10 (1) were engaged. If further particulars were needed, or if there were any continuing ambiguity, the issue could and should have been addressed at the hearing below. The application before the judge proceeded in accordance with the notice. The application, and appeal with which we are now concerned arises under Rule 67.2: otherwise there is no application to be considered, and no appeal process has been undertaken.

19. During the proceedings before Sir Michael Astill the defendant, and some of the representatives of the media, were given the opportunity not only to be present, but to be heard and advance any relevant evidence and argument against the in camera hearing. Full skeleton arguments and oral submissions were deployed before the judge. They were properly considered. He gave his decision in open court, explaining the reasons for it.

20. Mr Starmer suggested that it was a pre-requisite to any fair hearing before the judge that the representatives of the media should have been provided with all the material, or at the very least a summary of the material shown to the judge, before he made his order. Equally, he complained that they should have been provided with an unredacted copy of the document summarising the Crown's submission in support of the order for this appeal to be decided without a hearing. Although we understand the submission, in our judgment it was a little unrealistic. When an application for an in camera hearing is being made, it is self-evident that if it is to be justified on the grounds of national security, or the protection of the identity of witnesses, some at least of that material is almost certainly bound to be highly sensitive, and cannot be made available for dissemination. The judge must examine the material and decide whether or not the application is justified. If counsel representing media interests are put into possession of the same material as the judge before he makes his decision, the purpose of an in camera hearing would be defeated. The effectiveness of the order would be dissipated before it came into existence. We take the same view about the disclosure to Mr Starmer in redacted form of the Crown's submissions before us. The same practical considerations apply to the more familiar application for public interest immunity. If the desired confidentiality is broken in advance of the hearing, there is no confidentiality to be preserved. In deference to Mr Starmer's submission we considered whether there was anything in the material which was not disclosed prior to the hearing which ought to have been disclosed. There was none.

<u>The application</u>

21. The application is made under s 159 of the Criminal Justice Act 1988. Sir Michael Astill's order restricted the access of the public to part of the trial on indictment, and to proceedings ancillary to the trial. It did not restrict reporting of the public elements of the trial. S 159(1)(b) of the Criminal Justice Act 1988 provides that "a person aggrieved may appeal to the Court of Appeal, if that Court grants leave, against the order". The application for leave to appeal has been referred directly to the full court by the Registrar. Under s 159(3) we are empowered to give such directions as appear appropriate and to "give directions as to persons who are to be parties to the appeal, or who may be parties to it if they wish." S 159(4) begins with important words, "Subject to Rules of Court made by virtue of subsection (6) below", and then continues, "any party to an appeal may give evidence before the Court of Appeal orally or in writing." S 159(6) makes specific provision for the creation of Rules of Court in relation to the "special provision as to the practice and procedure to be followed in relation to hearings in camera and appeals from orders for such hearings." The subsection further provides that the rules may direct that s (4) should not have effect, and indeed in due course, Rule 67.2 (9) made such a direction.

22. We have decided that leave to appeal should be given not only to Mr Starmer's clients, but also to the defendant. The starting point is that every infringement of the principle of open justice is significant. We emphasise that does not mean that it will always be appropriate for leave to appeal to be given when a judge has decided that the whole or part of a trial should take place in camera. If so, the requirement for leave to appeal would be otiose. Moreover, as we have explained, orders for in camera hearings are more likely to be of concern to the media rather than the defendant. He will be present during any in camera hearings, together with his legal advisers. So, in the normal course, the difficulties for the media, responsible for properly informing the public, will be more striking than any potential problems for the defendant. That said, this is a case where the issues raised are of particular sensitivity, involving as they do, the trial of allegations of a major terrorist conspiracy, and, on the basis of the statement issued on his behalf, that A was a victim of torture, currently itself a general issue of public concern and importance. Our conclusion in the particular circumstances was that we should ourselves consider and examine whether the in camera order was justified.

23. A himself asserts that he is "aggrieved" by the order. So do Mr Starmer's clients. The media have a clear interest. They represent and inform the public who cannot be present in court personally. Mr Starmer's clients fall within the description "aggrieved" within s 159(1) of the 1988 Act. Bearing in mind that the evidence encompassed within the order includes reference to matters which may assist A, it seems a little surprising for it to be asserted that he is "aggrieved". We cannot avoid contemplating the reaction if the consequence for an order that the entire trial should take place in open court carried with it a prohibition against any attempt by him to deploy the material covered by the in camera order. That said, having reflected on the particular circumstances drawn to our attention by Mr O'Connor, we concluded that A's interest is sufficient. This therefore is now an appeal by the defendant and Mr Starmer's clients. They are referred to hereafter as 'the appellants'.

<u>Rule 67.2 of the Criminal Procedure Rules 2005</u>

24. We are not at this stage considering the appeal against the in camera ruling: we are simply considering the form which the appeal should take. The broad issue to be addressed is whether the appeal should be determined without a hearing. The appellants submit that this would be wrong in principle. At the very least, there is, or must be a discretion in the court to permit an oral hearing in open court. Any provision which suggests otherwise is flawed, and contravenes common law principles, and the rights encapsulated in Article 6 of the European Convention on Human Rights. In doing so, we are fully aware of the nature and importance of the criminal trial which will begin on 9th January. However if we lack jurisdiction to order an open court hearing of this appeal, the seriousness of the issues raised in the connected criminal trial will not create it. As this issue could have had no bearing on the merits or otherwise of the appeal, and arose quite distinctly from it, we agreed that the argument should be conducted in open court.

25. As already noted, this appeal is not concerned with an order restricting the reporting of proceedings, at any rate in the sense that the judge imposed any restriction on the reporting of material given in open court. What he ordered was that parts of the trial and pre-trial process should take place in camera. This was not an order made under s 4 or 11 of the Contempt of Court Act 1981, nor indeed made under s 58(7) or (8) of the Criminal Procedure and Investigations Act 1996. S 159 of the 1988 Act plainly distinguishes between orders which restrict the reporting of proceedings, and orders which restrict public access to those proceedings. Accordingly the order made by Sir Michael Astill is subject to the appeal process provided by Rule 67.2 of the Criminal Procedure Rules 2005, and is not governed by Rule 67.1. Nor indeed is it some kind of hybrid appeal under both rules. The issues are different. It is, of course, possible that orders may be made both restricting the reporting of proceedings and restricting public access to them. If so, there would be distinct orders, subject to distinct processes of appeal.

26. Rule 67.2 and Rule 67.1 replace in identical terms Rule 16B and Rule 16A of the Criminal Appeal Rules 1968, as inserted by the Criminal Appeal (Amendment) Rules 1989. These rules were held not to be ultra vires in Ex parte Guardian Newspapers Ltd, The Times, 26th October 1993. The present provisions are in identical terms. The relevant statutory instrument was laid before Parliament after the Human Rights Act 1998 came into force.

27. Rule 67.2 of the Criminal Procedure Rules 2005 lays down the appropriate procedure. It provides:

> "Appeal against order restricting public access to proceedings
>
> (1) This rule applies to proceedings in which a prosecutor or a defendant has served a notice under rule 16.10(1) of his intention to apply for an order that all or part of a trial be held in camera for reasons of national security or for the protection of a witness or any other person …

> (3) Subject to paragraph (4) a notice served on the Registrar under paragraph (2) within 7 days of the display of the notice under rule 16.10(2) and where such an order is made at the trial, the notice shall be treated as the application for leave to appeal against the order.
>
> (4) Where an order is made at the trial, a person aggrieved who has not served a notice under paragraph (2) may apply for leave to appeal against the order by serving notice in the form set out in the Practice Direction on the Registrar within 24 hours after the making of the order …
>
> (6) An application for leave to appeal shall be determined by a judge of the court, or the court as the case may be, without a hearing.
>
> (7) Where leave to appeal is granted, the appeal shall be determined without a hearing."

28. Notwithstanding that the appeal "shall" be determined without a hearing, in Ex parte Guardian Newspapers Ltd, The Times, 26th October 1993, the Divisional Court held that written submissions from an appellant or applicant would be permitted. We have received written submissions both from Mr O'Connor, extending in total to well over 40 pages of typescript, together with a chronology, and further written submissions well over 20 pages in length from Mr Starmer. We also received detailed written submissions from the Crown. We did not "hear" oral submissions by either side on the merits of the appeal.

29. Rule 67.2 should be contrasted with Rule 67.1. This provides that an application for leave to appeal against an order restricting reporting of proceedings "may be determined without a hearing", and that an application for an extension of time "shall be determined without a hearing, unless the court or a judge of the court, as the case may be, directs otherwise." In short, in marked contrast to the language of Rule 67.2, a discretionary jurisdiction is expressly conferred on the court considering applications to which Rule 67.1 applies.

30. The logic behind Rule 67.2 is plain. The court is considering an appeal against an order that public access to the whole or part of the trial shall be restricted. An open court hearing would normally involve disclosure to all parties of the material deployed before the judge. We have already examined and rejected Mr Starmer's contention relating to disclosure of material prior to the making of the order, on the basis that it would be deprived of its usefulness. The same considerations apply to pre-appeal disclosure of the same material. If, of course, the Court of Appeal were to conclude that the judge's order was wrongly made, then if the material were deployed at trial, it would be heard in open court, and the restrictions imposed by the judge's order would not apply. The material would be available for publication.

31. The submissions begin with the proposition that the word "shall" in R 67.2(6) and (7) ought to be read to mean "may" rather than "must". Even discounting the terms of Rule 67.1, on any basis of ordinary construction this would be an abuse of language. "Shall" is not a synonym for "may". Nevertheless it is argued that this reading is required for Rule 67.2 to comply with the entitlement under Article 6(1) of the European Convention of Human Rights to a fair and public hearing, a principle which has been held to encompass the right to an oral hearing (R (Hammond)) v Secretary of State for the Home Department [2005] UK HL 69.)

32. The principle of open justice, whether in the Court of Appeal, or at the court of trial, is so fundamental that supporting citation of authority is not required. The principle resonating throughout the common law is that, unless the circumstances are highly exceptional, justice must be administered in public. The principle is echoed and repeated in Article 6 of the European Convention on Human Rights. The judge was well aware of these principles, and expressly reminded himself of them. Nevertheless, even this fundamental principle is subject to a number of recognised exceptions at common law. Similarly, Article 6 of the Convention provides that the press and public may be excluded from all or part of the trial in the interests of "… national security in a democratic society, … or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice". These are the interests engaged in the decision currently under examination. Again, Article 10, which proclaims the right to "freedom of expression", allows that it may be "subject to such formalities, conditions, restrictions … as are prescribed by law and are necessary in a democratic society, in the interests of national security … or public safety …". Again these are perfectly familiar exceptions.

33. We must address the very recent decision of the House of Lords in R (Hammond) v Secretary of State for the Home Department [2005] UK HL 69. This case involved a determination by a High Court Judge of the punitive term of imprisonment to be served following a conviction and the imposition of a sentence of life imprisonment for murder. More particularly, it addressed the transitional processes governing the arrangements for prisoners whose punitive term had not been notified to them by 18th December 2003, an integral part of the trial. The relevant statutory provision, paragraph 11(1) of Schedule 22 of the Criminal Justice Act 2003 reads:

> "An application …is to be determined by a single judge of the High Court without an oral hearing."

34. Lord Bingham of Cornhill analysed the Convention jurisprudence and concluded that it "would appear to support the … contention that an oral hearing should, where fairness requires it, be held before a minimum term is set for an existing prisoner such as the respondent …". He continued that it was "plain beyond argument that the imposition of sentence at first instance is part of a criminal trial and ought in any ordinary case to take place in public at a hearing at which the defendant is present and represented and able to participate. … In those cases where fairness does require an oral hearing, however, … it seems to me that paragraph 11(1), in precluding the possibility of an oral hearing at first instance, is incompatible with the Convention."

He therefore agreed with the Divisional Court that, as it stood, paragraph 11(1) was incompatible with the Convention. Effectively, that represented the decision in the House of Lords. It was then accepted or, as we assess it, conceded on behalf of the Secretary of State, that in order to comply with the requirement of "fairness", paragraph 11(1) should be read subject to an implied condition that the judge making the determination had a discretion to order an oral hearing in cases where such an oral hearing was required to enable the prisoner's rights under Article 6(1) to be fulfilled. We were urged to adopt a similar construction. If not, Rule 67.2 was to be treated as if it was incompatible with Article 6, and as it was dependent on delegated rather than primary legislation, an order striking it down would be appropriate.

35. Hammond was concerned with the sentencing process, that is, the process by which a citizen is deprived of his liberty, and the process which decides the length of time for which he will continue to be deprived of it. Ekbatani v Sweden 13 EHRR 504 was also concerned with the process of criminal justice. The defendant was convicted of threatening a civil servant. His appeal was dealt with without a hearing in the Court of Appeal. The Court confirmed the decision at what can conveniently be described as first instance. Although the European Court confirmed that provided there had been a public hearing at first instance, it had, on previous occasions accepted that the absence of a public hearing before a second or third instance tribunal might be justified, it went on to conclude that as the Court of Appeal had to make what was described as a "full assessment of the question of the applicant's guilt or innocence" its re-examination of the conviction ought to have comprised a full rehearing.

36. Mr Starmer suggested that the present appeal amounted to a full hearing of the issues before the judge. Ekbatani demonstrated that we were similarly bound to provide, at the very least, for an oral hearing rather than a determination on the papers. He relied on R v Beck ex parte The Daily Telegraph [1992] 94 CAR 376, Ex parte The Telegraph Plc [1993] 1 WLR 980 and Ex p. Telegraph Group Plc [2001] 1 WLR 1983, all cases involving s 4(2) of the Contempt of Court Act 1981, to support his submission that under s 159 of the 1988 Act the function of the Court of Appeal is not limited to a review of the discretion exercised by the judge, with the well-known limitations on interference with it, but requires this Court to review all the material and form an independent judgment of the merits, or otherwise, of the proposed order. Leave to appeal having been given, we agree, and that is what we have done. However, it does not follow from the fact that the process in which we are now engaged is a re-hearing that we must automatically be vested, or vest ourselves, with a discretion to order an oral hearing.

37. Ekbatani was directly concerned with the principles of open justice as an element of fair process in the context of a criminal conviction. Hammond required that the same principle of fairness should not be excluded from the sentencing process. In truth, these cases provide practical illustrations of the workings of what we have already described as the fundamental principle of open justice. The present appeal, however, is concerned with the process which should govern the exceptional cases which fall outside the principle, and which, provided of course that they do, should not be subject to it. The order made by the judge reflected his analysis of the needs of national security, and the potential prejudice to them and the interests of justice that

would be caused by an open court hearing. We have, of course, considered by way of rehearing whether the in-camera order was appropriate, but when deciding whether the process before us is fair, the starting point is the trial judge's conclusion that part of the trial should indeed take place in camera. If his decision was right, then we cannot discern a reasoned justification for concluding that the language of Rule 67.2 (7) requires us to interpret the word "shall" as providing the court with a discretion to decide whether the present appeal should or may be held "orally". If, and to the extent that it was wrong, the in-camera order will cease to have effect. Accordingly, the absence of a discretion in this matter is not incompatible with the European Convention, and this Court cannot ignore the express requirement that the determination of the appeal shall take place without a hearing.

The Appeal

38. After we had adjourned to consider the relevant material, it was drawn to our attention that the ex parte hearings before the judge, were, with his knowledge, recorded, not by a shorthand writer, but by a mechanical tape recording. This arrangement was made for obvious security reasons, including the protection of any shorthand writer from inappropriate pressure, or, if the material somehow became public, from any allegation of wrong doing. At the conclusion of the hearings, the tapes were removed from the recording machinery, and placed in marked envelopes and retained within the precincts of the court. When notice of the present appeal was given, transcripts based on the tape recording were prepared by security-cleared employees of the relevant intelligence agency. For Mr O'Connor, it was a matter of understandable sensitivity that any material drawn to our attention should be prepared or checked independently. As we appreciated during our pre-reading, the transcripts were not absolutely complete. They were, however, perfectly intelligible and, on the face of it, the omissions and infelicities in the text were explicable on the basis that difficulties can arise, for perfectly understandable reasons, if transcripts are being urgently prepared from a tape recording. What was not made known to us, however, was that the transcripts prepared for the purposes of the application for leave had not been independently verified or checked. On subsequent investigation, we ascertained that the judge had not been told how, in the event of an application, it was proposed that the transcripts should be prepared. When the facts were discovered, immediate arrangements were made for the transcripts to be submitted to the judge. In the course of a further short hearing before us, Mr O'Connor was informed of these arrangements. Since then, Sir Michael Astill has examined the transcripts. Allowing for the omissions and infelicities already noted, they fairly represent what happened at the hearings before him. Nothing of importance is omitted, and nothing has been added. This was a sufficient check of the integrity of the transcripts.

39. For the future, there should be no misunderstanding. We understand the reasons why the ex parte proceedings were tape recorded, and indeed why transcription could not, in the available time, be arranged by someone independent of the intelligence agencies, who was himself or herself security cleared to the appropriate level. In urgent cases, and certainly as soon as it becomes known that an application for leave to appeal will be made, the trial judge should be informed, and invited to check the

transcripts against his recollection and his notes before they are submitted to this court. Thereafter, the court should be fully informed of what has happened.

40. We have reflected on the written submissions on behalf of the appellants and the Crown. We need comment only on Mr O'Connor's most troublesome submission, that the argument for an in-camera hearing was irrational and patently absurd. Paragraph 4 of the statements supplied in support of the application attempted to explain how national security would be endangered if the application were not to be granted and the trial were to proceed. He asserted that there is no rational connection between disclosure and the danger envisaged, and that an irrational connection would not suffice. He also pointed out that the in-camera issue emerged late, but the reasons have been explained. In the end, what mattered to the judge, and what matters to us, is whether the order was appropriate. The structure of the order was indeed unusual, and Mr O'Connor submitted that it was so unusual that it called into question the whole alleged risk to national security. In effect, he asked rhetorically, can there really be a risk to national security which can be guarded against by prohibiting general disclosure to the public, but permitting disclosure to an alleged terrorist, his co-accused, the legal advisers and jurors? That must represent an irrational response.

41. The argument is attractively presented, but it is nonetheless logically flawed. It is an imperative of the administration of criminal justice that, subject to exceptions which do not apply here, such as deliberate non-attendance, or unruly behaviour, the defendant is entitled to be present to hear the evidence presented to the jury, for and against him, throughout the trial. The grounds for an in-camera hearing of part or the whole of the hearing on the basis of the threat to national security and the interests of justice (which we use compendiously, to cover the entire range of exceptions to the fundamental principle) are well established. Nevertheless, they always yield to the imperative that the defendant is entitled to be present throughout the trial. Carried to its logical conclusion, Mr O'Connor's submission would mean that in cases falling within the recognised exceptions, the prosecution would be faced with two choices. Either to prosecute, and put all the material within the public domain, or offer no evidence against the defendant. That cannot be right. Simply because the order made by the judge was subject to the inevitable limitations created by the entitlement of the defendant and his legal advisers to be present throughout the trial, and to provide the defence with material which may be of possible assistance to him, it does not follow that the order for an in-camera hearing was flawed or irrational.

42. Having examined the material, in our judgment, the substantial risk of prejudice to national security and to the administration of justice without an order for an in-camera hearing to the extent ordered by the judge is unequivocally established. The in-camera order will enable A to be provided with material which may assist in the preparation of his defence, while simultaneously ensuring that the prosecution is not forced to discontinue the prosecution. In short, the trial will proceed fairly to both sides, so far as practicable diminishing the risks to national security. We agree with the decision of the judge and the reasons he gave for it. We do not propose to repeat those reasons using different language.

43. This appeal is dismissed. So as to ensure that the trial could proceed on 9 January, the parties were notified of the decision on 3 January 2006, and that the reasons would be handed down at the beginning of the new term.