Editor's Note

Common Law Repelling Super Injunctions, Limiting Anonymity and Banning Trial by Stealth

Introduction

"We live in a country", Lord Neuberger M.R. has recently observed, "which is committed to the rule of law. Central to that commitment is that justice is done in public—that what goes on in court and what the courts decide is open to scrutiny" (*Open Justice Unbound?* Judicial Studies Board Annual Lecture, March 2011). That the Master of the Rolls should make open justice the subject of his lecture on an important occasion is an indication of how serious and topical this has become. The principle of open justice has come under pressure from three directions. First, an increasing demand for super injunctions, which are orders restraining the publication of certain information and also permanently restraining the existence of the proceedings. Secondly, parties to legal proceedings have sought to keep their identities out of public view by requesting that their identity be kept anonymous when the proceedings are reported. Lastly, the Government has sought to extend the closed material procedure and the use of special advocates beyond proceedings in which they are mandated by statute. In a number of recent decisions the court has resisted this onslaught on the principle of publicity and has reasserted the common law's commitment to maintaining the transparency of legal process. The commitment to open justice is further elaborated in the Master of the Rolls' *Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice*, May 20, 2011 (MR Report 2011).

Super injunctions

There has been public concern about super injunctions following a number of high profile cases (see A. Zuckerman, "Super Injunctions—Curiosity-Suppressant Orders Undermine the Rule of Law" (2010) 29 C.J.Q. 131). A super injunction directs a person to refrain from publishing certain information, and furthermore to refrain from publishing or communicating to anyone the existence of the order, its contents or the fact that the proceedings took place. A novel variant of such injunctions is the hyper-injunction, which prohibits an individual from disclosing the fact of the proceedings or discussing the proceedings with a Member of Parliament, lest the MP uses parliamentary privilege to divulge the information (MR Report 2011, 6.9). The purpose of such order is to ensure that the public gets no whiff of the proceedings lest peoples' curiosity is excited by the forbidden publication to the point where it must be satisfied by means foul or fair.

The standard situation in which such orders were made was as follows. An applicant fearing publication of private and confidential information by the media applies to court, without notice to any respondent, for an order restraining

publication and also forbidding those served with the order to disclose its existence. The order might be made against named or unnamed respondents. The person served with the order would be entitled to apply to court for its discharge or variation. But if no such application is made, the proceedings will never come to light. If the respondent does challenge the order and it is maintained, again the proceedings will remain hidden from public view.

However desirable the protection of private and confidential information may be, it can hardly justify a legal process that is totally concealed from public view. The legal process does not deal only with the rights and duties of the immediate parties. It also develops and disseminates the law. Judicial process shapes and publicises legal standards and is therefore the lifeblood of the rule of law. For this reason secret process is inimical to the rule of law. Lord Neuberger M.R. stressed this point when he said that we "live in a country which is committed to the rule of law. Central to that commitment is that justice is done in public—that what goes on in court and what the courts decide is open to scrutiny." (Lord Neuberger's above-mentioned lecture. See also MR Report 2011, 1.21.).

In the same speech Lord Neuberger stressed that the court must ensure that open justice does not yield to other interests any more than strictly necessary to secure the achievement of the proper administration of justice. This approach had already been articulated in *Ntuli v Donald* [2010] EWCA Civ 1276; [2011] 1 W.L.R. 294. In that case the applicant sought to restrain publication of his private sexual activities. Maurice Kay L.J. explained the court's task in deciding such an application (at [52]):

> "[the claimant] is entitled to expect that the court will adopt procedures which ensure that any ultimate vindication of his Article 8 case is not undermined by the way in which the court has processed the interim applications and the trial itself. On the other hand, the principle of open justice requires that any restrictions are the least that can be imposed consistent with the protection to which [the claimant] is entitled."

The Court of Appeal held that the applicant was entitled to an injunction restraining publication of intimate details. At the same time, however, it decided that the protection of the applicant's right to privacy did not require derogation from open justice over and above the suppression of the applicant's intimate details. As a result, the applicant's identity was not anonymised and the court's judgment was made public.

In explaining its approach to derogation from publicity the Court of Appeal referred to *Attorney General v Leveller Magazine Ltd* [1979] A.C. 440 HL at 450, where Lord Diplock said of the principle of publicity that

> "since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceeding are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice …"

It is notable that Lord Diplock did not envisage entire derogation from the principle of publicity. What he had in mind was partial derogation, such as is commonplace in without notice applications for freezing injunctions or search orders, where

secrecy is necessary to ensure that the respondent does not take precipitate action to dispose of assets or destroy disclosable evidence. In such situations secrecy is only maintained pending notification of the order, not for ever after.

The Court of Appeal did not expressly say that there can never be complete derogation from the publicity principle, as some of the earlier super injunctions sought to achieve. In his lecture mentioned above, Lord Neuberger said that "open justice must … yield no more than strictly necessary to secure the achievement of the proper administration of justice". Since, as he was also at pains to emphasise, publicity is at the heart of the administration of justice, it may be concluded that justice can never permit total secrecy, where every aspect of the proceedings is out of public view. It is therefore safe to conclude that total and permanent derogation from publicity is not permissible since it is at odds with the very nature of justice, especially in a democratic society. This does not mean that private and confidential information will not receive adequate protection since the court can still forbid publication of information. As we shall presently see, the court has been developing means of protecting information while at the same time allowing the public to learn of the orders that the court has made and of the judicial reasoning. This has been done by refining the rules on granting anonymity.

Party anonymity

As we have seen, a central feature of the administration of justice is that the court administers justice in the open. This implies that the entire process is public and visible, including the identity of the parties. A person who takes or defends legal proceedings cannot at the same time insist that the trial be heard behind closed doors so that his private affairs are not made public. Those who wish to keep their disputes out of the public eye must settle or use arbitration, because by their very nature legal proceedings are public. Tugendhat J. gave expression to this principle when he stated in *Gray v UVW* [2010] EWHC 2367 (QB), that "an order for anonymity and reporting restrictions cannot be made simply because the parties consent: parties cannot waive the rights of the public". This principle has now been endorsed by the Court of Appeal in *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42; [2011] 2 All E.R. 324 at [12], which will be discussed later.

There has however, been a "recent efflorescence of anonymity orders", as Lord Rodger pointed out in *Guardian News & Media Ltd, Re* [2010] UKSC 1; [2010] 2 All E.R. 799 at [22]. Anonymity was commonplace in proceedings involving children and in divorce proceedings. But, as Lord Rodger observed in the same case, the restrictions on identifying parties in divorce proceedings were made for the prevention of injury to public morals and not for the protection of the parties' privacy. Since the incorporation of the European Convention on Human Rights, anonymity orders have also been justified on grounds of protecting parties from threats to life, safety or personal welfare.

Under ECHR art.8 persons are entitled to protection of their private and family life. This includes protection of reputation (*Guardian News* at [39]). Clearly, information that emerges during legal proceedings may have a bearing on the reputation of a party, or indeed of a witness. A finding that a party lied or that he or she had behaved in a dishonest, dishonourable or otherwise reprehensible manner may well have an adverse effect on their reputation in the community. It does not,

however, follow that whenever there is a risk that such information may emerge in the proceedings the party has a right to have his or her identity protected. If this were so, a very substantial proportion of civil proceedings would have to be anonymised, with the effect that the public would be denied full view of the legal process. All that a party is entitled to claim is that the court should consider the harm that publicity of the proceedings may do his or her reputation as part of the protection to which he or she is entitled under ECHR art.8. Such a claim must then be considered against the countervailing art.10 right to free expression and against the principle of publicity which is a fundamental component of justice in a democratic society (*Guardian News* at [47]).

The approach that the court should take to this balancing of competing convention rights was set out by Lord Rodger in *Guardian News*. He explained that where the publication of the proceedings "concerns a question 'of general interest', art 10(2) scarcely leaves any room for restrictions on freedom of expression" (at [51]). The application of this approach to the case in question is instructive.

The applicants had been designated by HM Treasury under the Terrorism (United Nations Measures) Order 2006 (SI 2006/2657) on the basis that the Treasury had reasonable grounds for suspecting that they were, or might be, persons who facilitated the commission of acts of terrorism. Some of the applicants were also designated under that Order and under the Al Qa'ida and Taliban (United Nations Measures) Order 2006 (SI 2006/2952). As a result, their assets were frozen, and they applied to have the orders discharged.

One of the applicants contended that publication of his name would cause serious damage to his reputation in circumstances in which he had not been charged with, or convicted of, any criminal offence and so had no opportunity to challenge the substance of the allegations against him. Lord Rodger proceeded from the assumption that the applicants' private and family life was entitled to protection. At the same time, however, the publication of a report of the proceedings, including a report identifying the applicants, was a matter of general public interest. Consequently, Lord Rodger explained, the question for the court was whether there was sufficient general public interest in publishing a report of the proceedings which identifies the applicants to justify any resulting curtailment of their right and his family's right to respect for their private and family life (at [52]).

The applicants accepted that it was in the public interest that the court's judgment and the reasoning behind it should be available for public inspection. But they argued that the suppression of their identity would in no way impede public understanding and appreciation of the court's decision. Lord Rodger would have none of it; he said that "the public has a legitimate interest in not being kept in the dark about who are challenging" the particular orders made in this case (at [68]). He went on (at [69]):

> "By lifting the anonymity order … the court allows members of the public to receive relevant information about him [one of the applicants] which they can then use to make connections between items of information in the public domain which otherwise appear to be unrelated. In this way the true position is revealed and the public can make an informed judgment. There may well, of course, be no similar revelations in the case of M [another applicant]. But,

> assuming that is so, this would, in itself, be important, since it would contribute to showing how the freezing order system affects different people in different situations—a point to be considered in any debate on the merits of the system. At present, the courts are denying the public information which is relevant to that debate, even though the whole freezing order system has been created and operated in their name."

Lord Rodger concluded the discussion of this aspect with the following passage:

> "[73] Although it has effects on the individual's private life, the purpose of a freezing order is public: it is to prevent the individual concerned from transferring funds to people who have nothing to do with his family life. So this is not a situation where the press are wanting to publish a story about some aspect of an individual's private life, whether trivial or significant. Rather, they are being prevented from publishing a complete account of an important public matter involving this particular individual, for fear of the incidental effect that it would have on M's private and family life."

The Supreme Court's decision in *Guardian News* reasserted the primacy of the principle that court adjudication is performed in full public view, that the publicity imperative encompasses not just the issues and the abstract legal reasoning but the entire factual aspects of the case including, crucially, the parties' identities. Publicity may in some circumstances yield to fundamental rights, but any derogation from publicity must be justified and must be no more than strictly necessary to protect such rights. Importantly, where the publication concerns a question of general interest, little room is left for protecting the right to private and family life under ECHR art.8. However, the Supreme Court seemed to allow that the position might be different "where the press are wanting to publish a story about some aspect of an individual's private life, whether trivial or significant", from the situation where the media was seeking to publish "a complete account of an important public matter" (at [73]).

The former situation came up for consideration in *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42, where the applicant sought an injunction against publication of intimate details of his sex life. It was accepted that he was entitled to an injunction restraining the dissemination of his private peccadilloes. The only matter for consideration before Tugendhat J. and the Court of Appeal was the extent to which the reporting of the proceedings or of his identity should be restricted.

The Court of Appeal took this opportunity to set out guidelines to be followed in applications for restriction on publication in cases such as the present one (now endorsed by MR Report 2011). The court must first be satisfied that the circumstances of the case are sufficiently strong to justify encroaching on the principle of open justice by restricting the extent to which the proceedings can be reported. Put differently, the court must be satisfied that the applicant has a sufficiently strong case on the merits (presumably in accordance with the standard set out in *Cream Holdings Ltd v Banerjee* [2004] UKHL 44; [2004] 4 All E.R. 617). If this test is satisfied then the court must ensure "that the restrictions on publication are fashioned so as to satisfy the need for the encroachment in a way

which minimises the extent of any restrictions" (at [22]). Having set out these general principles, the Court of Appeal laid down the following guidelines (at [21]):

> "(1) The general rule is that the names of the parties to an action are included in orders and judgments of the court.
>
> (2) There is no general exception for cases where private matters are in issue.
>
> (3) An order for anonymity or any other order restraining the publication of the normally reportable details of a case is a derogation from the principle of open justice and an interference with the Article 10 rights of the public at large.
>
> (4) Accordingly, where the court is asked to make any such order, it should only do so after closely scrutinising the application, and considering whether a degree of restraint on publication is necessary, and, if it is, whether there is any less restrictive or more acceptable alternative than that which is sought.
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> (5) Where the court is asked to restrain the publication of the names of the parties and/or the subject matter of the claim, on the ground that such restraint is necessary under Article 8, the question is whether there is sufficient general, public interest in publishing a report of the proceedings which identifies a party and/or the normally reportable details to justify any resulting curtailment of his right and his family's right to respect for their private and family life.
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> (6) On any such application, no special treatment should be accorded to public figures or celebrities: in principle, they are entitled to the same protection as others, no more and no less.
>
> (7) An order for anonymity or for reporting restrictions should not be made simply because the parties consent: parties cannot waive the rights of the public.
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> (8) An anonymity order or any other order restraining publication made by a Judge at an interlocutory stage of an injunction application does not last for the duration of the proceedings but must be reviewed at the return date.
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> (9) Whether or not an anonymity order or an order restraining publication of normally reportable details is made, then, at least where a judgment is or would normally be given, a publicly available judgment should normally be given, and a copy of the consequential court order should also be publicly available, although some editing of the judgment or order may be necessary.
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> (10) Notice of any hearing should be given to the defendant unless there is a good reason not to do so, in which case the court should be told of the absence of notice and the reason for it, and should be satisfied that the reason is a good one."

In setting out these guidelines the court has reasserted the fundamental principle of open proceedings including the publicity of the parties' identities. It is a now clearly a matter for the court, not the parties, whether anonymity should be granted to a party. Parties cannot, as the Master of the Rolls put it, waive the rights of the public.

An anonymity order or any other order restraining publication made without notice must not last for the duration of the proceedings but must be reviewed at the return date. But what if no respondent proposes to challenge the order? This can happen if no respondent is willing to run the risk of costs liability. The Court of Appeal was quite clear that a return date must be set (whether the order is made against named or unnamed respondents) and that a review must be held at such hearing, whether or not any respondent wishes to challenge the order. The importance of a return date was also stressed in *Goldsmith v BCD* [2011] EWHC 674 (QB); (2011) 108(14) L.S.G. 20. Tugendhat J. went out of his way to point out that the inclusion of a return date need not always involve claimants in substantial unnecessary legal costs. He said (at [60]):

> "In the normal way a return date was an oral hearing attended by counsel, which was a costly matter. However, where the only relief sought at the return date was agreed with all parties concerned, or where it was an extension of time for service of the claim form, or an extension of an anonymity order, or some other ancillary provision, that could generally be done on paper."

Not only does a return date ensure that the court will revisit any restriction on publicity following a without notice order but also that the applicant's undertaking, upon obtaining such order, to issue proceedings will be fulfilled. Failure to fulfil the undertaking to issue proceedings is a serious matter which could have serious consequences, as Tugendhat J. explained in *Goldsmith v BCD*.

The options available to a court faced with an application for an injunction to restrain publication of private information were closely examined in *JIH*, both by the Court of Appeal and by Tugendhat J. in the lower court. A court seeking to minimise derogation from the publicity principle in such cases is faced with a choice between two courses of action. It could permit the identity of the applicant to be revealed but at the same time withhold from public reporting any information likely to breach privacy. Alternatively, the court could grant anonymity to the applicant but allow the underlying facts to feature in the reporting of the proceedings. The Court of Appeal in *JIH* was of the view that in the circumstances of this particular case it was preferable to grant anonymity to the claimant but allow the substance of the offending allegations to appear in the public judgment. It considered that the public interest would be better served by publication of the fact that the court has granted an injunction to an anonymous sportsman in the circumstances described in the judgment, than by being told that it has granted an injunction to an identified person to restrain publication of unspecified information of an allegedly private nature.

Finally, Lord Neuberger M.R. expressed the hope that public concern over secret justice would be allayed if from now on judgments and orders disclosed as much as possible about the case. He said (at [35]) that:

> "the media will be generally better able to discover, and report on, what the courts are doing if they can publish (a) details of the type of case (for instance, as in this case, a sexual liaison between an unidentified well known sportsman, in an apparently monogamous relationship, and a third party) rather than (b) the name of the individual who is seeking to protect an unspecified aspect of his or her alleged private life by means of an injunction."

The Court of Appeal decision in *JIH* made it quite clear that henceforth some form of publicity will be maintained even where some protection of private or confidential information is necessary. Normally, a public judgment will be given, although some editing of the judgment or order may be necessary. The practice was outlined by Tugendhat J. in *Goldsmith* (at [54]):

> "In order to assist media third parties in this regard, and for the benefit of those members of the public who are concerned about anonymised injunctions, there have been changes in practice. During the last year judges have generally adopted the practice of recording their reasons for granting an injunction that might affect the media in the form of written reserved judgments (like this one) which are made available on the internet at websites including *www.bailii.org*. In the past that information was not always provided to third parties unless they requested it."

We have therefore come a long way from the position where the court could grant a super injunction and permanently keep the proceedings and the order out of public view. All legal proceedings must now be transparent, though the court can still offer protection to private and confidential information, as it did in the above-mentioned cases, and others that followed (such as *MNB v News Group Newspapers Ltd* [2011] EWHC 528 (QB) and *XJA v News Group Newspaper Ltd* [2010] EWHC 3174 (QB)). Now, however, the protection for privacy, confidentiality and other important interests must be minimal, and the court's reasons must be available to public scrutiny.

Whether the court can provide effective protection for private information regarding persons in the public view is, however, an entirely different matter. As recent events have shown, it is doubtful whether there is any point in granting an injunction restraining publication of material which is readily available on the internet, on electronic social networks, and in newspapers published in neighbouring countries.

Trial by stealth, closed material procedure—the Al Rawi case

Given the importance that the common law has attached over the centuries to the transparency of legal proceedings, one would have thought that trial by stealth was something that would not be tolerated in this country. Yet in *Al Rawi v Security Service* [2010] EWCA Civ 482; [2010] 3 W.L.R. 1069, the Government urged the court to adopt just such a procedure.

The claimants, who had been detained in Guantanamo Bay, sued the Crown in respect of false imprisonment, trespass to the person, conspiracy to injure, torture and breach of contract. The Government argued that since the disclosure of much of the relevant evidence would be harmful to the public interest, a closed pre-trial

and trial procedure should be adopted. The proposal was that some of the defence allegations and evidence should not be disclosed to the claimants or to their lawyers, but only to special advocates. A special advocate is a lawyer cleared by the Government to see closed material, and appointed by the Attorney General in a case where closed material is involved.

In addition to the national security grounds, the Government supported the closed procedure application on grounds of economy. It argued since there was a large amount of material for which PPI claims would be made their determination would involve great cost and delay, which could be avoided by a closed procedure. The trial judge decided that as a matter of principle it was open to the court to order a closed material procedure in relation to a civil claim for damages, but the Court of Appeal would have none of it.

The closed material procedure derogates not just from publicity but, much more fundamentally, from the right to be heard. The right to be heard is a basic requirement of natural justice and, of course, is an essential precondition to fair trial. As a minimum requirement of procedural fairness, any person affected by a judicial decision must have an opportunity to be heard before the decision is made. This means an opportunity to meet the allegations made against such person, which the person can do only if he or she is fully informed of the allegations.

Lord Denning said, in *Kanda v Malaya* [1962] A.C. 322 PC (Fed. Malay States) at 337:

> "If the right to be heard is to be a real right which is worth anything it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them."

In *O'Reilly v Mackman* [1983] 2 A.C. 237 HL at 276, Lord Diplock said:

> "the requirement that a person … should be given a fair opportunity of hearing what is alleged against him and of presenting his own case, is so fundamental to any civilised legal system that it is to be presumed that Parliament intended that a failure to observe it should render null and void any decision reached in breach of this requirement."

Not only must litigants be informed of the case and evidence against them so that they may respond, they must also be told of the reasons for the eventual decision so that they may challenge it where it is ill founded. As Lord Phillips M.R. explained, "justice will not be done if it is not apparent to the parties why one has won and the other has lost" (*English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605; [2002] 1 W.L.R. 2409 at [16]). To that we may add the principle of publicity, already discussed: justice must be apparent to all and not just to the parties involved. English law holds that it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" (*R. v Sussex Justices Ex p. McCarthy* [1924] 1 K.B. 256 at 259. See also *Scott v Scott* [1913] A.C. 417 HL at 477). For this reason s.67 of the Supreme Court Act 1981 reads:

> "Business in the High Court shall be heard and disposed of in open court except in so far as it may, under this or any other Act, under rules of court or in accordance with the practice of the court, be dealt with in chambers."

As we have already seen, there are compelling reasons for the publicity of legal proceedings. Exposing the judicial process to the public gaze constitutes an important safeguard against bias, unfairness and incompetence. Lord Diplock observed (in *Attorney General v Leveller Magazine Ltd* [1979] A.C. 440 at 450) that if

> "the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice."

Public scrutiny of legal process is all the more important in a case such as *Al Rawi*, where the Government stands accused of serious misconduct and abuse of human rights. Dismissing a claim of this nature by secretive and opaque process is hardly likely to reassure the public of the Government's probity, as the Master of the Rolls noted in *Al Rawi*:

> "[56] While considering practical considerations, it is helpful to stand back and consider not merely whether justice is being done, but whether justice is being seen to be done. If the court was to conclude after a hearing, much of which had been in closed session, attended by the defendants, but not the claimants or the public, that for reasons, some of which were to be found in a closed judgment that was available to the defendants, but not the claimants or the public, that the claims should be dismissed, there is a substantial risk that the defendants would not be vindicated and that justice would not be seen to have been done. The outcome would be likely to be a pyrrhic victory for the defendants, whose reputation would be damaged by such a process, but the damage to the reputation of the court would in all probability be even greater."

Closed material procedure incompatible with the right to be heard

One of the central features of closed material procedure is that one of the parties is not informed of at least some of the allegations or of the evidence presented by the opponent. In this case the Government sought to screen from the claimant parts of its defence and much of the evidence in its support. While no such procedure has been recognised at common law, it has been created by statute in some areas (e.g. Schedule to the Prevention of Terrorism Act 2005, which deals with control orders, and Sch.7 to the Counter-Terrorism Act 2008, which is concerned with financial restriction proceedings). The issue in *Al Rawi* was whether the court should permit such procedure in a civil claim.

The Court of Appeal reiterated the fundamental principle that a trial is conducted on the basis that each party and his or her lawyer sees and hears all the evidence and all the argument seen and heard by the court. Lord Neuberger M.R. drew attention to *R. v Davis* [2008] UKHL 36; [2008] 1 A.C. 1128, where Lord Bingham

explained that the right to be confronted by one's accusers was enshrined in the constitutions of various common law jurisdictions, and stressed that "it is not enough if counsel sees the accusers if they are unknown to and unseen by the defendant" (at [34]). On this point Lord Neuberger M.R. stated:

> "[30] In our view, the principle that a litigant should be able to see and hear all the evidence which is seen and heard by a court determining his case is so fundamental, so embedded in the common law, that, in the absence of parliamentary authority, no judge should override it, at any rate in relation to an ordinary civil claim, unless (perhaps) all parties to the claim agree otherwise. At least so far as the common law is concerned, we would accept the submission that this principle represents an irreducible minimum requirement of an ordinary civil trial. Unlike principles such as open justice, or the right to disclosure of relevant documents, a litigant's right to know the case against him and to know the reasons why he has lost or won is fundamental to the notion of a fair trial."

The Court of Appeal found added support for its conclusion in the CPR. It drew attention to various provisions of the CPR which are incompatible with a closed material procedure. CPR 16.5 requires a defendant to state which allegations he or she admits and denies, his or her reasons, and any alternative case he or she wishes to advance; CPR 32 requires the service of witness statements containing the evidence of any witnesses who are to give evidence, and CPR 31 mandates disclosure and inspection of documents. It also invoked the overriding objective, which requires the court to ensure "that the parties are on an equal footing". It concluded its examination of the rules by stating (in *Al Rawi*, at [11])

> "firmly and unambiguously that it is not open to a court in England and Wales, in the absence of statutory power to do so or (arguably) agreement between the parties … to order a closed material procedure in relation to the trial of an ordinary civil claim, such as a claim for damages for tort or breach of statutory duty."

It is of course true that the procedure dictated by the CPR is incompatible with a closed procedure. But this is merely a reflection of the fact that the rules are legislative manifestations of the principles of natural justice. Were it otherwise, the rules would lack both legal and moral validity. The defendant's duty to inform the claimant of his or her case is no different from the claimant's obligation to inform the defendant of his or her demand and of its evidential foundation. Just as it would offend natural justice to hold a defendant liable in respect of an undisclosed claim and undisclosed evidence, so it is unimaginable that a claim could be dismissed in the absence of full notification of the defence and its evidential basis.

The limitations of public interest immunity

One of the aims of the Government's closed procedure application was to deny the claimant sight of certain documentary evidence for which they we going to claim public interest immunity (PII). The Court of Appeal was right to observe

that while the court had discretion in ordering disclosure the discretion has to "be exercised so as to ensure the trial process is fair" (at [19]). What is fair in the context of disclosure was spelt out by Lord Salmon in *Science Research Council v Nasse* [1980] A.C. 1028 HL at 1071, where he said that if the court

> "is satisfied that it is necessary to order certain documents to be disclosed and inspected in order fairly to dispose of the proceedings, then … the law requires that such an order should be made."

The modern approach to PII claims was developed in *Conway v Rimmer* [1968] A.C. 910 HL. It is now settled that a minister who considers that disclosure would be injurious to the public interest must make a PII claim, which the court determines. In doing so the court must weigh, on the one side, the injury that will be done to the public interest by disclosure of the material in question, and, on the other side, the harm that would be done to administration of justice if disclosure is refused. In this last regard, the court must consider the likely effect that the absence of the evidence in question might have on the court's ability to ascertain the truth about the facts in issue. Closely connected to this factor is the effect that withholding of the evidence would have on the ability of the party seeking disclosure to prove his or her case.

Since any potential harm to the public interest or to the administration of justice is case-specific, the court is called upon to conduct a case-sensitive balancing exercise. However, no balancing process of this kind can be conducted without a guiding principle. The court must know in advance what to do where it has concluded that the disclosure would cause substantial harm to the public interest and also that without disclosure of the material in question it could not determine the truth about the facts in issue. Bearing in mind that doing justice in the case before the court is also very much in the public interest it seems that there can only be one correct answer: disclosure must be ordered where it is necessary in order to enable the court to determine the truth, or at the very least where it is necessary to enable the party in question to prove his or her case.

The reason why this is the only acceptable principle to be applied in the balancing exercise is that the opposite answer would commit a court that has concluded that the disclosure would harm the public interest to say that it would refuse to order disclosure even though it cannot fairly determine the issues in dispute without the requested evidence. This would commit the court to delivering a judgment for which the court cannot vouchsafe, which is known to be, as it were, unsafe and unsatisfactory. Lord Salmon's dictum in *Science Research Council v Nasse*, already mentioned, must therefore be the correct position: where the court

> "is satisfied that it is necessary to order certain documents to be disclosed and inspected in order fairly to dispose of the proceedings, then … the law requires that such an order should be made."

It might be objected that there must be a level of harm to which the public should not be exposed, not even in the interests of justice. This is undoubtedly true, but the duty to avoid public harm in such situations falls on the executive not on the court. As Lord Hoffmann pointed out in *Secretary of State for the Home Dept v MB*; *Secretary of State for the Home Dept v AF* [2007] UKHL 46; [2008] 1 A.C.

440 at [51], if the court has concluded that the interests of administration of justice outweigh the public interest, the Government is free to concede the issue to which the information relates and thereby maintain the secrecy of the information and protect the public interest. What the court must not do, absent express statutory provision, is to hold that the documents are needed in the interests of justice but then refuse to order their disclosure.

Statutory exceptions to disclosure have been made in para.4 of the Schedule to the Prevention of Terrorism Act 2005. The rules made under this statute may make provision for proceedings to be conducted "in the absence of any person, including a relevant party to the proceedings and his legal representative". CPR 76 was introduced to govern such proceedings. Significantly for our purpose, the overriding objective of dealing with cases justly has been expressly "modified" in CPR 76.2 to ensure that the public interest does not yield to the need to do justice in a particular case. Similarly, the overriding objective is "modified" in CPR 79.2 to facilitate a closed material procedure under the Counter-Terrorism Act 2008 and Terrorist Asset-Freezing etc. Act 2010. It follows that if the court acceded to the Government's application for a closed material procedure in *Al Rawi*, it would have had to suspend the overriding objective as a matter of discretion. It is therefore not surprising that the court refused to go down this route.

However, towards the end of its judgment the court expressed a view that seems at odds with the general tenure of its judgment. It stated:

> "[68] We are conscious that in some cases, where evidence which is relevant, or even vital, to the interests of one of the parties (often the Crown, but sometimes not), limiting the procedure to the classic PII exercise can lead to unfairness, and can even result in what may appear to most people to be the wrong outcome, because the exercise will often result in important evidence being withheld. However, as explained by Lord Woolf in *Ex p Wiley* [1994] 3 All ER 420 at 447, [1995] 1 AC 274 at 306–307, even where a PII claim is upheld in respect of material, the effect can often be mitigated by summarising its relevant effect, producing relevant extracts, or even producing it 'on a restricted basis'. More generally, the evidential rules of exclusion, for instance in relation to material which attracts legal professional privilege or 'without prejudice' privilege, will often be to increase the risk of a 'wrong' outcome. But that is a risk inherent in any legal system with rules, and indeed it is inevitable in any system with human involvement. The risk of a 'wrong' outcome can be said to be increased if a party is prevented from relying on oral or documentary evidence for failing to comply with court orders or rules, or if a party cannot take a point because it was not raised in his statement of case, or even because it did not occur to his legal advisers."

The effect of legal professional privilege, of the without prejudice rule, or the privilege against self-incrimination on fair trial is fundamentally different from the potential effect of withholding evidence on grounds of public interest. The rules excluding material protected by legal professional privilege, by the without

prejudice rule and by the privilege against self-incrimination are themselves dictates of the common law conception of fair trial. The same cannot be said, however, of the principle permitting the exclusion of evidence on grounds of public interest.

Litigation privilege is justified on the grounds that each party is entitled to a private and secure zone in which to prepare for the proceedings. Advice privilege is justified on the grounds that persons are entitled to a secure zone in which to consult lawyers free of fear that what they tell their lawyers may later be used to their disadvantage. More significant in the present context is the fact that legal professional privilege does not confer immunity from disclosure of documents that exist independently of the client-lawyer relationship; nor does it prevent an opponent from compelling the client to tell the court all he or she knows, including the facts disclosed to the lawyer (as distinguished from client-lawyer communications).

As for without prejudice communications, these are communications known to both parties which the parties have accepted in advance could not be used in evidence. It would therefore go against the parties' own accord for one party to turn round and try to adduce in evidence such communications. For good measure, we may mention here the privilege against self-incrimination too. This is essentially a testimonial privilege that entitles its possessor to refrain from answering questions in legal process, the answers to which would tend to incriminate him or her. The privilege does not offer immunity from disclosing documents that exist independently of any testimonial obligation (the police may seize any evidence of crime, even by force if necessary).

Contrary to the Court of Appeal's implication, none of these bars to evidential use have any adverse impact on fair trial because they only prevent use of evidence that, if admitted, would itself render the trial unfair. It would be unfair to allow reliance on what a client told his or her lawyer in confidence as evidence of an admission against interest. It would be unfair to allow in evidence without prejudice statements when the parties have made the statements on the assumption that they would not be so used. And, finally, the common law considers it unfair to force a person to incriminate himself or herself.

The same cannot be said of a PII claim. PII claims are made in relation to material that is relevant to the determination of the true facts. It does not attract protection from disclosure on grounds of fairness since, *ex hypothesi*, it is necessary for the fair determination of the issues (otherwise it would not be disclosable). Denying evidential use of such material would prevent the court from carrying out a fair determination of the issues. The same cannot be said of a refusal to force a lawyer to disclose what he or she was told by his or her client in confidence, for example.

A simple hypothetical example will illustrate this last point. The Government decides to sue Al Rawi in respect of various torts committed by him during his captivity. The Government's evidence concerns closely guarded security operations which are vital to public safety. It therefore applies for the claim to be heard under closed material procedure. It asks the court for permission to withhold from the defendant the full particulars of claim, to withhold from him the evidence in support of its allegations, to exclude him from the trial and, finally, to serve him with the final order but withhold from him the court's reasoning to the extent that it deals with the closed material. Put differently, the Government seeks a process by which

the defendant can be held liable without knowing for what exactly and why. Such procedure runs counter to every common law principle of due process. Plainly, the same cannot be said of a claimant who refuses to divulge communications protected by legal professional privilege or by the without prejudice rule.

The answer to the Government's application in this hypothetical situation would be that if it wishes to protect the information in question it is at liberty to do so by refraining from bringing the claim, as Lord Hoffmann explained the Government's options in *MB*; *AF* at [51]. True, the defendant may escape the consequences of his tortious acts, but this would be a lesser evil by far than trial by stealth, which would bring the administration of justice into disrepute.

The right to know the court's reasons

The right to be heard was not the only right which would have been compromised by a closed procedure. The Government also sought to deny the claimant knowledge of the reasons for the court's eventual judgment to the extent that it was based on closed material and, of course, applied for the proceedings to be held in secret. These deviations from the normal process were also rejected. The Court of Appeal stressed that it was a fundamental principle that a party to litigation should know the reasons why he or she won or lost, so that a judge's decision would be liable to be set aside if it was founded on insufficient reasons.

The right of a party to know the reasons for the court's judgment was also considered in *R. (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65; [2010] 4 All E.R. 91. Here, too, the Court of Appeal held that a litigant was entitled to know what findings the court made in a case in which he was a party, and especially in the case of a litigant who credibly claimed to have been seriously mistreated, and where the court's findings concerned the United Kingdom's participation in his mistreatment.

Publicity

By its application for closed proceedings, the Government was seeking to shroud the entire process from public view. As noted earlier, publicity of legal proceedings is vital to the maintenance of a well-functioning administration of justice in a democratic society. CPR 39.2(1) provides that "the general rule is that a hearing is to be in public". Similarly, CPR 32.2 states the general rule that evidence is to be given orally at trial, or, if not at trial, in writing. CPR 32.4 and 32.5 provide that witness statements should be served on the other parties. At the same time, CPR 39.2(3) sets out the exceptions, which include "matters relating to national security" and "confidential information … and publicity would damage that confidentiality". However, the Court of Appeal in *Al Rawi* noted that there were no comparable exceptions in relation to the CPR provisions dealing with statements of case, disclosure, inspection of witness statements, let alone to evidence and argument in court, which had to be heard in the presence of all the parties. The Court of Appeal therefore concluded that the notion of a closed material procedure was incompatible not only with principle but also with the entire CPR structure.

While the Court of Appeal observed that "a private hearing in an individual case, with all litigants and their legal representatives present, cannot be said to involve a denial of justice in that case" (at [41]), it reiterated the general principle that the public interest required trials to be conducted in public, as is mandated by statute and by CPR 39.

As noted, CPR 39 lists a number of exceptions to publicity of court proceedings, and there are further statutory exceptions. For instance, private hearings and judgments are required by statute in some family and Court of Protection proceedings (see *Independent News and Media Ltd v A* [2010] EWCA Civ 343; [2010] 1 W.L.R. 2262). Thus, for instance, it has been the practice for a long time to deny publicity where the proceedings concern the interests of children or other vulnerable parties. However, the Court of Appeal in *Al Rawi* was of the view that the Government could not derive support for its closed procedure application from the practice of protecting vulnerable persons. Unlike proceedings concerning vulnerable persons, the present proceedings were normal adversarial proceedings involving claims for damages in tort and breach of statutory duty by a number of claimants against a number of defendants. The fact that the defendants are emanations of the Crown did not alter the nature of the proceedings to justify placing them on the same footing as childcare proceedings, for example. The court had this to say:

> "[38] We would respectfully echo Lord Bingham's approval of, and reliance on, two observations of Lord Shaw of Dunfermline in *Scott (orse Morgan) v Scott* [1913] AC 417 at 477–478 and 485, [1911–13] All ER Rep 1 at 30 and 35, cited in *R v Davis* [2008] 3 All ER 461 at [28], [2008] 1 AC 1128. Lord Shaw said that '[t]here is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure, and at the instance of the judges themselves', and that '[t]he policy of widening the area of secrecy is always a serious one; but this is for Parliament, and those to whom the subject has been consigned by Parliament, to consider'. Those observations were made by Lord Shaw in relation to hearings held in private, and cited by Lord Bingham in relation to concealing from a party (but not from his legal advisers) the identity of witnesses giving evidence in public. They surely apply with even greater force to the suggestion that the common law should permit ordinary civil claims not merely to be conducted in private, but in the absence of a party and his legal advisers. As Lord Brown of Eaton-under-Heywood ringingly observed in *R v Davis* [2008] 3 All ER 461 at [66], [2008] 1 AC 1128, 'It is the integrity of the judicial process that is at stake here. This must be safeguarded and vindicated whatever the cost'."

Notably, the Court of Appeal went out of its way to stress that it thought that the Civil Procedure Rule Committee does not have the authority to derogate from the principle of publicity and create the kind of closed procedure proposed by the Crown in this case (at [37]).

A claim to leave out of the public judgment security-sensitive information was considered by the Court of Appeal in *R. (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs*. The Court of Appeal reiterated its commitment to the principle of publicity, which meant that all parts of a judgment should be publicly available, unless there was a very powerful reason to the contrary. It stressed that the principles of freedom of expression and of democratic accountability under the rule of law were integral to the principle of open justice. Nevertheless, it found that, but for the fact that the information had already been made public in the United States, the value in releasing the contents of certain paragraphs would have been insufficient to justify running the risk to national security certified by the Secretary of State. Where a judgment has been given, the Court of Appeal stressed, there was a significant public interest in the whole judgment being published and it was undesirable that the executive should be seen to dictate to the judiciary what could and could not go into an open judgment of the court.

Conclusion

In a series of decisions the judiciary has shored up the integrity of the common law's conception of justice. Central to this conception is that parties are entitled to know the allegations they have to meet and the evidence presented by the opponent, and they are entitled to know the reasons for the court's eventual decision. Furthermore, justice under English law is done in full public view.

It has now been clearly established that while derogation from the principle of publicity may be made for the protection of fundamental rights, such as the right to private and family life or to personal welfare, such derogation must be no greater than strictly necessary to secure the protection of such rights or to achievement of ends of the administration of justice. As the Court of Appeal made clear in *JIH*, whether the court restricts publicity of the identity of a party or whether it restricts publicity of some private, confidential or other information that requires protection, the fact that proceedings have taken place and the underlying court reasoning in support of its judgment must be made public. One of the ways of protecting the right to private and family life or to personal welfare is by maintaining the anonymity of a party. However, this too is a significant derogation from the common law's open justice principle and has been closely circumscribed in the Supreme Court's decision in *Guardian News*, and the Court of Appeal's decision in *JIH*.

The most serious attempt to subvert the common law procedure was made in *Al Rawi*, where the Government sought to persuade the court to adopt a closed material procedure under which the claimant would not be informed of some (presumably central) parts of the defence allegations, would not be allowed to see the evidence adduced by the Government in support of such allegations, and would not be permitted to see the court's eventual judgment to the extent that it dealt with such allegations and evidence. In effect, the Government was asking the court to allow trial by stealth at common law.

It is true that such form of trial was introduced by statute in relation to terrorist activity, but it would be hugely significant if the court had discretion to order such procedure in ordinary civil proceedings. It is much to the judiciary's credit that it

has refused to allow this travesty of justice to infect the common law. To realise just how bizarre the application was we need only postulate a reversal of roles whereby the Government is the claimant rather than the defendant. It is plainly abhorrent to any sense of justice to hold a defendant liable without being informed of the claimant's allegation, without being permitted to hear the claimant's evidence and without being given reasons for the eventual court decision. There may well be historical examples of such process, but none of which a civilised society would boast about,

The matter is now before the Supreme Court, which one hopes will also resist the application. For, quite apart from the fact that the closed material procedure infringes every principle of due process, such dispute resolution process would be largely self- defeating. For dismissing the claimants' action by stealth would lack legitimacy, would not restore confidence in the probity of the security services and would therefore command little public respect.

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