Editor's Note

Closed Material Procedure — Denial of Natural Justice

Claims; Closed material; Disclosure; Inherent jurisdiction; National security; Natural justice; Open justice; Public interest; Public interest immunity

Al Rawi v The Security Service [2011] UKSC 34

The Supreme Court has pronounced its decision on the appeal from *Al Rawi v The Security Service* [2010] EWCA Civ 482; [2010] 3 W.L.R. 1069 (discussed in A. Zuckerman, "Common Law Repelling Super Injunctions, Limiting Anonymity and Banning Trial by Stealth" (2011) 30 C.J.Q. 223).

The claimants, who had been detained in Guantanamo Bay, sued the security service in respect of false imprisonment, trespass to the person, conspiracy to injure, torture and breach of contract. The appeal to the Court of Appeal and now to the Supreme Court concerned the following preliminary issue.

> "Could it be lawful and proper for a court to order that a 'closed material procedure' (as defined below) be adopted in a civil claim for damages?
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> Definition of 'closed material procedure'
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> A 'closed material procedure' means a procedure in which
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> (a) a party is permitted to
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> (i) comply with his obligations for disclosure of documents, and
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> (ii) rely on pleadings and/or written evidence and/or oral evidence without disclosing such material to other parties if and to the extent that disclosure to them would be contrary to the public interest (such withheld material being known as 'closed material'), and
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> (b) disclosure of such closed material is made to special advocates and, where appropriate, the court; and
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> (c) the court must ensure that such closed material is not disclosed to any other parties or to any other person, save where it is satisfied that such disclosure would not be contrary to the public interest.
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> For the purposes of this definition, disclosure is contrary to the public interest if it is made contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest."

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.

The Court of Appeal held that it was not open to a court (in the absence of statutory power to do so or, perhaps, agreement between the parties) to order a closed material procedure in relation to the trial of an ordinary civil claim. Following that decision the Government settled the claim so that the issue became hypothetical. Nonetheless, the Supreme Court entertained the appeal because the point of principle raised was of general public importance (Lord Clarke at [124]).

A nine-judge panel of the Supreme Court dismissed the Government's appeal by a majority of eight to one. However, while only one Justice would have allowed the appeal, there was some disagreement amongst the other members of the panel, and some of the views expressed give cause for concern about the law's commitment to maintaining intact fundamental principles of justice.

The principled approach

The Court of Appeal found that a secret procedure in which a party is not informed of the opponent's allegations, is not allowed to see the evidence advanced by the opponent and challenge it, and is not shown the judgment to the extent that it deals with the protected information, was contrary to fundamental common law principles. This principled approach was endorsed by four Supreme Court judges: Lord Hope, Lord Brown, Lord Kerr and Lord Dyson, who provided the fullest articulation of the approach.

Common law process is founded on a number of principles, which Lord Dyson took as the starting point. The first is open justice. He drew on Lord Shaw's celebrated dictum in *Scott v Scott* [1913] A.C. 417 HL at 476, that a hearing in camera constituted "a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties, and an attack upon the very foundations of public and private security."

The second principle is universal: trials must meet the minimum requirements of natural justice. Namely, a party must have a right to know the case against him and the evidence on which it is based; he is entitled to an opportunity to respond to the opponent's allegations and evidence and to cross-examine the opponent's witnesses; finally, he is entitled to be informed of the court's judgment and the reasons for it. Lord Dyson drew attention to *Kanda v Government of Malaya* [1962] A.C. 322 PC (Fed. Malay States) at where the Privy Council stated:

> "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."

It is not surprising, therefore, that Lord Dyson concluded that "a closed material procedure involves a departure from both the open justice and the natural justice principles" (at [14]). He rejected the Government's argument that the court could use its inherent jurisdiction to control its own procedure in order to order a closed material procedure when this was necessary in the interest of national security and justice (at [22]):

> "… the court cannot exercise its power to regulate its own procedures in such a way as will deny parties their fundamental common law right to participate in the proceedings in accordance with the common law principles of natural justice and open justice. … the court must exercise the power to regulate its procedure in a way which respects these two important principles which are integral to the common law right to a fair trial."

The Government argued that a closed material procedure in this kind of case was not only in the interest of national security but also in the interests of justice. It pointed out that it was duty bound to claim public interest immunity (PII) in respect of documents and information the disclosure of which was likely to be harmful to national security. If the court accepted the PII claim, the claimant could well be deprived of the entire evidential support for his claim, which in turn would leave the court with no choice but to strike out the claim. A more just solution in such a case, the Government argued, would be to hold a closed material procedure where the evidence would be available to the court and to special advocates.

This argument proved too much for, as Lord Dyson was quick to observe, if the closed material procedure was the cure to the potential injustice inherent in PII claims, then it would have to be followed in most cases in preference to PII. The Government did not go so far, it limited itself to seeking an acknowledgment that, in principle, the court had power to adopt a closed material procedure in exceptional cases where it was *necessary* in the interests of justice. Rejecting this more limited suggestion Lord Dyson explained it is one thing to say that the open justice principle may be abrogated if justice cannot otherwise be achieved, but it is quite a different matter to say that the court may sanction a departure from the natural justice principle (including the right to be present at and participate in the whole or part of a trial) (at [27]).

A similar plea for derogation from the principles of natural justice was made in *R. v Davis (Iain)* [2008] UKHL 36; [2008] 1 A.C. 1128, where the question was whether in a criminal trial witnesses for the prosecution could testify under conditions of anonymity where owing to intimidation the witnesses were unwilling to testify otherwise. The House of Lords overturned the Court of Appeal's decision that the court could allow witness anonymity in the exercise of its power to control its process. Lord Bingham stated that the court had no power to adopt such procedure because it undermined the centuries old common law right to be confronted by one's accusers; it was not enough, he stressed, if counsel sees the accusers if they remain unknown and unseen by the defendant (Davis [2008] UKHL 36 at [35]). He went on to say that procedure suggested by the Crown "hampered the conduct of the defence in a manner and to an extent which was unlawful and rendered the trial unfair" (id, [35]).

Crucial to the Government's case was the suggestion that the defects of the closed material procedure (in terms of denying a party knowledge of the opponent's arguments and evidence, an opportunity to challenge them and sight of the court's judgment) could be remedied by the involvement of special advocates. Lord Dyson accepted that while in some cases special advocates could mitigate these defects, in many others they would be hampered by being unable to take instructions from the party. More serious still, the judge would be unable to determine if and to what extent the special advocate's task has been hampered.

Lord Dyson drew attention to the report of the Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights (16th Report): *Annual Renewal of Control Orders Legislation* 2010 (TSO, 2010), HL Paper 64, HC 395, where it expressed grave concern about the inadequacy of the special advocate system. Lord Brown added at [83]:

> "One need not take so extreme a view as that expressed by the Joint Committee on Human Rights last year … to recognise the grave inroads into our fundamental principles of open justice and fair trials that are made by closed procedures."

The limitation on the special advocate's ability to assist the client was discussed by Martin Chamberlain (himself a special advocate) in "Special Advocates and Procedural Fairness in Closed Proceedings" (2009) 28 C.J.Q. 314..

The rejection of the special advocate process in civil cases was further articulated by Lord Kerr who said of the Government's case (at [93]):

> "The central fallacy of the argument, however, lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead. It is precisely because of this that the right to know the case that one's opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial. However astute and assiduous the judge, the proposed procedure hands over to one party considerable control over the production of relevant material and the manner in which it is to be presented. The peril that such a procedure presents to the fair trial of contentious litigation is both obvious and undeniable."

While accepting that nobody can predict how the law will develop in the future, Lord Dyson agreed with the Court of Appeal (at [69]) that the issues of principle raised by the closed material procedure were

> "so fundamental that a closed material procedure should only be introduced in ordinary civil litigation (including judicial review) if Parliament sees fit to do so."

Lord Hope, too, was of the view that the case should be decided as a matter of general principle, rather than on a narrower ground, favoured by some members of the panel, as we shall presently see. The line must be drawn, he said "between procedural choices which are regulatory only and procedural choices that affect the very substance of the notion of a fair trial" (at [72]). And he warned against the usurpation of fundamental rights that proceeds little by little under the cover of rules of procedure, concluding that this "is not the time to weaken the law's defences" (at [73]).

Lord Kerr, who agreed with Lord Dyson's approach, said that to accede to the Government's argument:

> "would not be a development of the common law… It would be, at a stroke, the deliberate forfeiture of a fundamental right which… has been established for more than three centuries"(at [92])

Lord Brown, too, agreed with Lord Dyson's fundamental approach. He said (at [78]) that:

> "in so far as the real issue before us is whether Parliament alone could provide for so fundamental an inroad into the principle of open justice as is proposed here — whether, in other words, such a step is beyond the permissible development of the common law — I am in Lord Dyson's camp."

He went on (at [83]) to spell out that a closed procedure in the present case:

> "would mean that claims concerning allegations of complicity, torture and the like by UK Intelligence Services abroad would be heard in proceedings from which the claimants were excluded, with secret defences they could not see, secret evidence they could not challenge, and secret judgments withheld from them and from the public for all time."

The adoption of such a procedure, he concluded, would certainly not be a development of the common law (at [87]).

The narrow approach

Four Supreme Court judges (Lord Hope, Lord Brown, Lord Kerr and Lord Dyson) dismissed the appeal on the grounds that as a matter of principle the closed material procedure was incompatible with the common law procedure governing ordinary civil actions. As we shall presently see, Lady Hale, Lord Mance, and Lord Clarke considered that in some circumstances closed material procedure might be open to the court to employ. However, all the members of the panel agreed that it was not open to the court to order a wholesale replacement of the PII procedure with closed material procedure, as urged by the Government.

Lord Clarke explained that the adoption of such procedure could not have obviated the need for a PII exercise (at [152]). Before any closed material procedure could be ordered it would be necessary for the Government to identify what documents were relevant and in principle disclosable under CPR 31. It would be necessary for the minister to decide which of those documents should not be disclosed in the public interest. A detailed review of the documents would have to be carried out whether the procedure adopted was the PII procedure or the proposed closed procedure. In any event it would be necessary for the relevant documents to be identified and the balance struck. There could be no justification, all the judges therefore agreed, for dispensing the Government from the duty to indicate which materials were properly subject to a PII claim and which were not.

The only member of the panel who decided the case for this reason alone and refrained from expressing any other view about the availability of closed material procedure in civil cases was Lord Phillips. "What was proposed", Lord Phillips said, referring to the Government's application, "was an alternative to the manner in which public interest immunity ('PII') is dealt with under the conventional process of discovery" (at [190]). "The proposed scheme, as set out in the

preliminary issue, was a procedure which was intended to replace the conventional exercise" (at [191]). "The common law develops incrementally. The change envisaged by the preliminary issue would be fundamental" (at [192]). "This reasoning would have sufficed to enable the Court of Appeal to give a negative answer to the preliminary issue, and I consider that it would have been more satisfactory had the Court taken this course" (at [193]).

The Court of Appeal's view, shared by Lord Hope, Lord Brown, Lord Kerr and Lord Dyson in the Supreme Court, was that the closed material procedure proposed by the Government could not be legitimately used for the determination of a civil action because it involved a fundamental derogation from the common law principles of procedural justice. On this general point Lord Phillips said (at [106]):

> "Whether the general principles applied by the Court of Appeal would necessarily preclude the use of a different closed material procedure, not as a substitute for the conventional PII exercise, but to mitigate the injustice that can occur when relevant evidence is excluded from disclosure because of PII, is a question that should be left open until it actually arises …"

In doing so Lord Phillips sought to avoid taking a position with regard to the different views expressed by members of the *Al Rawi* panel about possible uses of the closed material procedure to which we now need to turn.

Closed material procedure and the PII dimension

The PII balancing process

Much attention was devoted by the Supreme Court to whether and how the conventional PII procedure may be mitigated by some use of a closed material procedure, short of wholesale replacement of the PII exercise with a closed material procedure.

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 it is for the court to determine. To this end the court must weigh, on the one side, the injury that would be done to the public interest by the disclosure of the material in question, and, on the other side, the harm that would be done to administration of justice if disclosure were 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 and, indeed, on the ability of the party seeking disclosure to prove its case.

A balancing process of this kind calls for a guiding principle which determines in advance what the court must do when the balance comes down on one side or the other. It is clear what the court must do where it has concluded that the harm that would be done to the administration of justice by withholding the material in question would be greater than the harm that disclosure would do to the public interest: disclosure must be ordered (see, for example, *Secretary of State for the Home Department v MB* [2007] UKHL 46; [2008] A.C. 440 at [51]). It is equally

clear what should be done in the diametrically opposite case. Where the court has concluded that the harm to the public interest would be greater than the harm to the administration of justice, it must not allow disclosure.

What is commonly understood, or assumed, by saying that the interests of the administration of justice outweigh the public interest, or vice versa, is that the harm to the interest that gives way would not be sufficiently great to justify risking harm to the interest. *Conway v Rimmer* itself is a good example, for the House of Lords ruled that while the possibility of harm to the public interest was remote, the reports were of vital importance to the determination of the action. At the other end, the court may conclude that withholding the material in question would not hamper the court in fairly determining the issues. Indeed, the court may take measures to satisfy both interests. For example by permitting some use of the evidence in question, such as by allowing a redacted version of a document or a summary to be produced instead. These are not, however, hard choice situations because they do not call for serious sacrifice of one or the other interest.

Hard choice cases

Remarkably, there is far less clarity as to what the court should do when it has concluded that the disclosure would cause substantial harm to the public interest and, at the same time, has also concluded that without disclosure of the material in question it could not fairly determine the issues in dispute (ie determine the truth). In these situations the court is confronted with a hard choice: it must either permit the withholding of the evidence and deliver a judgment which is known to be unsafe and unsatisfactory, or alternatively it must order disclosure notwithstanding the harm that it would do, say, to national security.

Authority concerning the principle to be followed in the hard choice situations is thin. In *Conway v Rimmer* [1968] A.C. 910 at 940, Lord Reid said:

> "There are many cases where the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private, can be allowed to prevail over it."

But, as we have seen, that was not a hard choice case and the court did not have to face the prospect of giving a judgment which was known to be ill-founded. There are dicta pointing the other way. In *Science Research Council v Nasse* [1980] A.C. 1028 HL at 1071, Lord Salmon 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." Though, again, this was not a hard choice situation.

Clearer guidance is provided by *R. v H* [2004] UKHL 3; [2004] 1 All E.R. 1269; [2004] 2 A.C. 134, a criminal case, where the accused was charged with conspiracy to supply a Class A drug following a covert police investigation. The accused sought disclosure of material relating to the investigation. The prosecution made a PII application. The House of Lords held that the golden rule was that full disclosure of any material held by the prosecution which weakened its case or strengthened that of the defendants should be disclosed to the defence. It held that in circumstances where the material could not be disclosed to the defence without the risk of serious prejudice to an important public interest, some derogation from

the golden rule could be justified, but such derogation was always to be the minimum necessary to protect the public interest in question and should never be allowed to imperil the overall fairness of the trial. In other words, when it came to a hard choice, the court would not allow compromising the right of an accused to defend himself. A similar line was taken in *R. v Davis (Iain)* [2008] UKHL 36, mentioned earlier, where it was held that the need to protect witnesses from intimidation could not justify denying the accused the right to confront the witnesses for the prosecution.

There has in recent years been only one hard choice case where the court came down in favour of suppressing evidence despite the fact that it thereby condemned the claimant to losing: *Carnduff v Rock* [2001] EWCA Civ 680; [2001] 1 W.L.R. 1786, which figured in some of the judgments in *Al Rawi* and therefore deserves attention. The claimant, who was a police informer, brought an action against the police alleging that it had contracted to pay him for information that led to the apprehension of criminals. The police responded that there was no concluded contract because it was incomplete and because there was no intention to create legal obligations. Furthermore, and most importantly for our purpose, the police applied for the action to be struck out on the grounds that it was contrary to public policy as it would necessitate disclosure of police operational information.

By a majority, the Court of Appeal struck out the action as being contrary to the public interest. Laws and Jonathan Parker L.JJ. held that there was an overriding public interest in not requiring the police to make disclosure of material when this may harm the public interest. Laws L.J. went so far as to say that "the very bringing of such a claim as this makes injustice" (*Carnduff* [2001] EWCA Civ 680 at [37]).

The majority's reasoning in *Carnduff* is open to doubt. Waller LJ, dissenting, was of the view that the court should not strike out the action but should ascertain in due course through the usual PII procedure what evidence should be disclosed and whether there was a way to enable the issues to be adjudicated fairly. Laws L.J. rejected this suggestion, saying:

> "… once any such issue [concerning disclosure] were raised, it is to my mind inevitable that the court's duty would be to hold that the public interest in withholding the evidence about it outweighed the countervailing public interest in having the claim litigated on the available relevant evidence. In reality such a position could only be avoided if the police made comprehensive admissions which absolved the court from the duty to enter into any of these issues. But a case which can only be justly tried if one side holds up its hands cannot, in truth, be justly tried at all."

While Laws L.J. considered it unjust to place the police in a position where it had to pay up or alternatively risk harm to the public interest, he failed to explain why it was not equally unjust to try a claimant's action without the available evidence. He gave no reason why it was not equally objectionable to force the claimant to concede because he could not get disclosure.

It is possible that Laws LJ thought that in striking out the claim the court was avoiding having to try it. For he said that since the claim "cannot be litigated consistently with the public interest … there is a plain jurisdiction to strike out the claim as embarrassing or abusive, under CPR 3.4" (at [33]). The problem with this

explanation is that it amounts to saying that a claim brought in good faith and which on the face of it was arguable nevertheless amounted to abuse of process; and for no better reason than that the police were going to make a PII claim.

It might be suggested that once the court has decided that the material was not disclosable, the evidential basis of the claim disappeared so as to make it appropriate to strike out under CPR 3.4(2)(a) on the grounds that "the statement of case discloses no reasonable grounds for bringing or defending the claim". Unlike striking out for abuse of process under CPR 3.4(2)(b) or for non compliance under CPR 3.4(2)(c), striking out under CPR 3.4(2)(a) is the outcome of an assessment of the merits of the claim (see examples in CPR 3A PD 1.4). In this regard the CPR 3.4(2)(a) procedure is closely connected with the summary judgment jurisdiction under CPR 24, according to which the court may give summary judgment if it considers that the claimant has no real prospect of succeeding. Judgment under both rules is given because the court has concluded that the claim cannot be made out either due to defect in the pleadings or to the absence of evidential support. However, striking out on grounds of lack of evidential support was not open to the court since the claimant was presumably prepared to testify to the material facts and his evidence was not manifestly unbelievable.

The difficulty with the striking out option was also manifest in the judgment of Jonathan Parker L.J. who, having reached the conclusion that there was an overriding public interest in not requiring the police to disclose the information in question, went on to say:

> "It seems to me to follow that if a fair trial of the issues in the case would necessarily involve the disclosure by the authorities of information or material which is sensitive or confidential and the disclosure of which is not in the public interest, and if that in turn means that it would be contrary to the public interest that the trial should take place, then the case should not be allowed to proceed. As soon as it becomes apparent that that is the position, then in my judgment it is open to the court, in the exercise of its inherent jurisdiction, to strike the action out."

But if "fair trial would necessarily involve the disclosure" of the materials in question, then by striking out the claim the court has surely denied the claimant a fair trial. The notion that by striking out the court somehow avoids the hard choice of having to inflict an injustice on one party or the other is unsustainable.

It is difficult to avoid the conclusion that the *Carnduff* decision provides weak support for the proposition that in a hard choice case the court may sanction non-disclosure on grounds of public interest even if it means that the affected party is thereby deprived of a fair trial of his claim or defence. The result of the case is better explicable by the fact, acknowledged by all the members of the court, that it was highly unlikely that the claimant would have been able to make out his extraordinary claim even if the case had gone forward and by the whiff of impropriety that it carried.

The flaw in the minority's treatment of the hard choice question

Lord Mance, in whose judgment Lady Hale concurred, agreed that there was no basis for the complete substitution of the conventional PII exercise with a closed material procedure and for that reason held that the appeal should be dismissed. He thought however, that it was worth investigating other possible uses of such a procedure.

He cited *Carnduff v Rock* as lending support to the proposition that if a successful PII claim makes an issue untriable, "the court will simply refuse to adjudicate upon the case" (*Al Rawi* [2011] UKSC 34 at [108]). But no such course is open; the court cannot refuse to adjudicate (except when a claim is unjustitiable, a possibility to which Lord Brown alluded). The claimant in *Al Rawi* had a properly arguable case without the documents, otherwise, as Lord Mance noted, his case would be struck out (at [116]). Lord Mance went on to say that

> "in some circumstances … the court is faced not with a binary choice, between trial with or without the material for which PII has been claimed, but with a trinary choice: the third possibility is no trial at all—whoever happens to be the claimant then has no access to the court at all."

Yet, no one, not even the Government, suggested that the court might eventually dismiss the claim as abuse of process; that it would have been open to the court at some future point "to simply refuse to adjudicate upon" Al Rawi's case or any other similar claim. This is not surprising, because to have done so would have amounted to leaving anyone caught in the realm of a successful PII application with no remedy, with no court protection; an outlaw in effect. Since no member of the panel contemplated the possibility that at the end of the PII exercise the court might go down the *Carnduff v Rock* route and hold that Al Rawi's claim was an abuse of process, it is hard to see what role that case could play in the court's reasoning.

The plain fact is that the third possibility is more a myth than reality. Yet it became the engine for the proposal that Lord Mance put forward.

> "112. If the court never has jurisdiction … to order a closed material procedure, that means that, even where a court concluded that a claimant must be denied access to material and the case must otherwise be struck out as untriable, it would be impossible for the court to order, with the consent of the claimant, a closed material procedure. There would be no way in which the material could be put before a judge, with the claimant's interests being represented to the best extent possible by a special advocate. I would be surprised if the court's inherent jurisdiction (in the strict sense) were inhibited to this extent."

Lord Mance went on to explain why he rejected the wider use of closed material procedure proposed by Lord Clarke and concluded with this proposal (at [120]):

> "the only exception that I would presently accept is where, after a conventional PII exercise, the judge concludes that there should be no disclosure, and that the case is as a result untriable. Then I think that the court could adopt some form of closed material procedure, if the claimant consented, in order to avoid denying the claimant any form of access to the court."

Lord Dyson rejected Lord Mance's proposal saying:

> "50. It is true that, if a closed material procedure were introduced, it might not be necessary to strike out a claim such as *Carnduff*. Looked at in isolation, that would be a good thing. But the problem cannot be looked at so narrowly and in any event it seems that cases such as *Carnduff* are a rarity. They do not pose a problem on a scale which provides any justification (let alone any compelling justification) for making a fundamental change to the way in which litigation is conducted in our jurisdiction with all the attendant uncertainties and difficulties that I have mentioned."

Carnduff is a rarity not because the court sanctioned the withholding of the information, but because the claim smacked of impropriety. One instinctively feels that there is something morally wrong with the kind of arrangement alleged by the claimant; something in which a court of law should not involve itself. In that sense, the claim had more in common with an action founded on an illegal contract than with any other civil claim. This cannot be said of Al Rawi's claim or indeed of virtually any other claim. It is difficult to find any other decision since *Conway v Rimmer* in 1968 where the court has sanctioned non-disclosure notwithstanding that it was thereby depriving one party of their opportunity to establish their case.

PII cannot override justice

The House of Lords decision in *Conway v Rimmer* brought about a fundamental change in the law's approach to the balance between public interest and the administration of justice. Prior to that decision the public interest was protected by Crown privilege. Claims for withholding disclosure, especially on grounds of national security, were accepted by the court at face value. The watershed of this policy was *Duncan v Cammell Laird & Co Ltd (Discovery)* [1942] 1 All E.R. 587 HL. Ninety-nine men lost their lives during submergence trials on a submarine which was being constructed during the war. Claims were brought on behalf of the dead men and discovery was sought of documents concerning design and construction work. The Government produced a certificate stating that disclosure would be against the public interest. The House of Lords held that documents otherwise relevant and discoverable did not have to be produced if, owing to their actual contents, or the class of documents to which they belong, the public interest requires that they should be withheld. Moreover, it held that an objection to the production of documents duly taken by the Government should be treated by the court as conclusive.

In that way Crown privilege freed the court from any responsibility for the 99 men who perished in the accident. Thereafter, government departments claimed immunity with little discrimination and with the inevitable result that its practices became immune to court scrutiny and litigants would be sent away with no redress.

In its 1968 decision in *Conway v Rimmer*, the House of Lords put an end to the executive's right to be the final arbiter of public interest and held that PII was not a privilege of the Crown. It was for the court not the executive to decide whether and to what extent the public interest demanded that information should be withheld from disclosure in legal process. When deciding PII claims, the House of Lords held, the court must weigh the harm to the public interest against the harm to the administration of justice, in what is known as the balancing exercise.

However, it took time before the implications of court responsibility for balancing the competing interests were fully appreciated. For a while protection from disclosure continued to be granted as a matter of course in some areas. For example, it remained the case that documents relating to the investigation of complaints against the police were immune from production regardless of the effect on the court's ability to determine the truth. This surviving class of blanket immunity was killed off by *R. v Chief Constable of the West Midlands Ex p. Wiley* [1994] 3 All E.R. 420 HL. Today there are virtually no areas of public interest which are out of the balancing exercise's reach.

Today the court shoulders the responsibility for the consequence of the balancing exercise. It is the court's responsibility if a person is denied a remedy to which he is otherwise entitled, or is convicted of an offence he did not commit, as a result of being denied access to material evidence that is necessary for fairly determining the issue in the case. As a result, the balancing exercise has brought into the open important questions of morality and justice which had previously been hidden from view. It is inconceivable that a present day court will tell 99 families of deceased workers and servicemen that it cannot try their case because the disclosure of the evidence is against the public interest. The reason why *Carnduff* has no parallel is that it goes against the judicial grain to deny a litigant what is due to him or her under the law.

Lady Hale and Lord Mance's proposal was motivated by the desire to offer claimants who face a successful PII claim some chance of obtaining redress, albeit procedurally inferior. But, as the four Supreme Court Justices who rejected the idea pointed out, the effect was likely to weaken the court's commitment to protecting rights. They noted that if a jurisdiction to use closed material procedure in civil case were recognised, its use would be bound to increase over time: the thin end of the wedge argument.

These Justices are right in their prognosis because the availability of a closed material procedure at the choice of the claimant would weaken judicial sense of responsibility for outcomes. Judges confronted with a hard choice case would be able to reason that by sanctioning non-disclosure they have discharged their duty to the public, and it is now up to the claimant to ask for closed material procedure if he wanted adjudication on the basis of all the available evidence. Even if closed material procedure were available only by the agreement of both parties, Lord Dyson noted, it would create possibilities for pressure to be brought on reluctant claimants. The pressure will be far greater where the claimant is effectively left with no other choice. It goes without saying that the erosion of judicial responsibility in hard choice cases would suffer even further if Lord Clarke's suggestion for more extensive use of closed material procedure were accepted.

It might be said that surely there must be occasions where the harm to national security would be so widespread and so great that no well-governed system could allow it to take place just for the sake of doing justice to an individual. Surely, it might be suggested, it was right that the court in *Duncan v Cammell Laird* should not order disclosure of the secret blueprints of a backfiring submarine, when to do so would weaken the war effort. This must of course be accepted, but what does not follow, and cannot be accepted, is that it is necessary to leave 99 families without redress.

This brings us back to the question of whether it is acceptable to place the Government in a position where it has to pay even though it may not be liable or, alternatively, disclose and risk harm to the public interest. As we have seen, Lord Mance proposed to allow claimants who have lost the PII argument to opt for a closed material procedure as a means of avoiding sure defeat. He was not, however, prepared to allow this choice to the Government if it brought a claim but could not prove it without access to material which public interest would not permit to be disclosed (*Al Rawi* [2011] UKSC 34 at [117]).

Lord Mance's reason for denying the same choice to a claimant Government was that the Government can choose not to sue and thereby avoid the hard choice. This presupposes that feeling compelled to forgo a legitimate claim is somehow less serious, less objectionable, than feeling compelled to forgo a legitimate defence. The distinction is, however, without foundation. As a matter of general principle all persons are free to choose whether to litigate and what to litigate. No one is obliged to litigate. A person whose right has been infringed by another is perfectly free to refrain from bringing legal proceedings to enforce the right. This is equally true of a defendant against whom an unfounded claim has been made. The defendant is fully entitled to refrain from defending and suffer a default judgment that obliges him to pay what is not owed.

It has become acceptable in criminal cases that if the court rules that documents for which a PII claim has been made are necessary for the defence case, the prosecution must either disclose them or abandon the prosecution (*R. v H* [2004] 2 A.C. 134). The consequence of abandoning a well-founded prosecution which allows a dangerous criminal to go free may well be more injurious to the public interest than an otherwise unwarranted money payment. It is therefore difficult to understand why it is considered intolerable that the Government should not be put in a position where it must either pay or forgo a legitimate defence.

The outcome of the *Al Rawi* case is instructive in this respect. Following the Court of Appeal's decision, the Government decided to settle the claim rather than undertake a PII procedure, which would have required the appropriate minister to review the material and make a reasoned application for immunity. The official explanation for the Government's decision was that the PII exercise would be very expensive due to the large number of documents. It seems therefore that the court cannot spare the Government hard choices; in this case of either paying an unfounded claim or risking even higher costs in successfully defending the claim. The argument that the law should not place the Government in the position of either paying or risking harm to the public interest has therefore little traction.

Conclusion

The fact that the appeal was heard by 9 out of the 12 Justices of the Supreme Court is indicative of the importance of the principle at stake. The Justices were united on one point: that the court had no common law jurisdiction to replace the PII procedure with closed material procedure as suggested by the Government. To have done so would have infringed every basic principle of justice: the right to be informed of the opponent's allegations and evidence, the right to an effective opportunity to challenge them, the right to know the reasons for the court's decision, and the principle that trials are held in public.

However, only four Supreme Court Justices fully endorsed the Court Appeal decision that the court had no jurisdiction to order closed material procedure in civil cases. Their principled view was straightforward: at common law the court has no jurisdiction to order closed material procedure that involves departure from both the open justice and the natural justice principles. A further two Justices accepted that while the court may not order a closed material procedure, it may allow it at the choice of the claimant, where a claimant would prefer to have the case heard in this way rather than face being struck out because the court had accepted the Government's PII claim. Of the remaining three, one Justice was in favour of more extensive use of closed material procedure, and would have allowed the appeal. One Justice refused to express any view on whether there might be circumstances in which closed material procedure could be authorised at common law. Sadly, Lord Rodger, the 9th Justice, died before he was able to give a reasoned judgment beyond indicating that he would dismiss the appeal.

Parliament has enacted closed material procedure in relation to terrorist activities. Furthermore, statutory provision for a closed material procedure was made in the employment tribunal (considered by the Supreme Court in *Tariq v Home Office* [2011] UKSC 35; [2011] 3 W.L.R. 322, which is discussed in M.Chamberlain's commentary on *Al Rawi* in this issue). Parliament may of course introduce such procedure for all civil cases, but it seems unlikely. In this respect it is worth reverting to *R. v Davis (Iain)* [2008] UKHL 36, where the House of Lords held that it was not open to the court to deny an accused person the right to confront witnesses for the prosecution who were otherwise afraid to testify. Lord Brown pointed out that there was a difference between the situation that confronted the court in *Davis* and the present case. In *Davis* it was envisaged that Parliament would legislate to introduce a closed procedure (as it turned out correctly) whereas here it was highly doubtful whether Parliament would legislate. There is, indeed, good reason to doubt that Parliament would legislate a closed material procedure for ordinary civil cases. One has only to spell out, as Lord Brown did (at [83]), what such procedure would mean to realise how unlikely such legislation is:

> "A closed procedure in the present context would mean that claims concerning allegations of complicity, torture and the like by UK Intelligence Services abroad would be heard in proceedings from which the claimants were excluded, with secret defences they could not see, secret evidence they could not challenge, and secret judgments withheld from them and from the public for all time."

Precisely because the "rule of law and the administration of justice concern more, much more, than just the interests of the parties to litigation" (Lord Brown at [84]), one hopes that Parliament will not legitimise a Kafkaesque procedure in civil cases generally.

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