

Sheku Bayoh Public Inquiry

Conduct and Procedure Hearing - 12 and 13 June 2025

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THE SHEKU BAYOH INQUIRY

LIST OF AUTHORITIES FOR THE SOLICITOR GENERAL FOR SCOTLAND

ON THE MATTER OF APPARENT BIAS AND FAIRNESS

NOTE: this list excludes authorities referred to in the SPF Submission.

1. *R v Lord Saville of Newdigate & Others* [2000] 1 WLR 1855
2. *Helow v Advocate General for Scotland* 2009 S.C. (H.L.) 1
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4. *Black v Scott Lithgow* 1990 SC 322
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6. *R (Cabinet Office) v Chair of the UK Covid-19 Inquiry* [2024] KB 319
7. Lord Scott, “Procedures at Inquiries – the Duty to be Fair.” (1995) 111 LQR 596
8. De Smith, *Judicial Review*, 9th edition, § 12-034
9. Beer, *Public Inquiries*, §§ 3.5 & 3.7; 5.177-5.189; 5.186(iii)(2); 5.188(5); 9.10-9.18; 11.16(7)

the principal sum which the defender is prepared to pay in settlement of the pursuer's claim. The expenses are, as MacLaren on *Expenses* puts it at p. 4, merely incidental to the cause, which is why the rule has always been that the award of expenses is at the discretion of the judge before whom the cause has been heard.

Parties were agreed that it is not necessary to remit the case back to the Lord Ordinary, since the Lord Ordinary has explained the basis on which he would have proceeded had he been satisfied that it was open to him to modify the expenses in this case. He has told us that, in his opinion, the appropriate course would be to make an award of expenses on the ordinary sheriff court scale but without sanction for the employment of counsel. We shall pronounce an interlocutor to that effect.

THE COURT awarded the pursuer expenses on the ordinary sheriff court scale but without sanction for the employment of counsel.

Drummond & Co., W.S. — Brodies W.S. — Simpson & Marwick, W.S.

BLACK v. SCOTT LITHGOW LTD.

No. 32.
March 28, 1990.

FIRST DIVISION.
Sheriff at Greenock.

MRS ANN TRAINER or BLACK and OTHERS, Pursuers (Appellants). —
Grant-Hutchison.

SCOTT LITHGOW LTD., Defenders (Respondents). — *Cullen.*

Practice — Sheriff court — Sheriff presiding at previous fatal accident inquiry — Same sheriff holding proof in civil action for damages arising from same death — Sheriff issuing interlocutor altering date of proof to date when proof likely to be heard by another sheriff — Proof nevertheless being heard by himself — Whether sheriff had, in effect, overturned his own previous interlocutor — Whether sheriff had power to do so — Whether sheriff erred in law in proceeding to hear proof — Whether universal rule that sheriff who had presided over fatal accident inquiry disqualified from hearing subsequent proof in civil action arising from same accident — Whether sheriff disqualified in particular circumstances of case — Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 (cap. 14), sec. 6 (1).¹

Sec. 6 (1) of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 enacts that: "At the conclusion of the evidence and any submissions thereon, or as soon as possible thereafter, the Sheriff shall make a determination setting out the following circumstances of the death so far as they have been established to his satisfaction—(a) where and when the death and any accident resulting in the death took place; (b) the cause or causes of such death and any accident resulting in the death; (c) the reasonable precautions, if any, whereby the death and any accident resulting in the death might have been avoided; (d) the defects, if any, in any system of working which contributed to the death or any accident resulting in the death; and (e) any other facts which are relevant to the circumstances of the death."

A man was killed in an accident in August 1983 and a fatal accident inquiry was held at Greenock Sheriff Court in connection therewith. On 9th July 1984 the sheriff ruled that the evidence justified no more than a formal

¹ Sec. 6 (1) of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 is as set out in the rubric.—*Ed.*

determination as the deceased had fallen from the deck of an oil rig in circumstances which had not been proved and that there was no foundation for recommendations for precautions to prevent similar deaths in the future. In September 1986, the widow and two children of the deceased raised an action for damages and the case appeared before the same sheriff who had heard the fatal accident inquiry who allowed parties of proof before answer and appointed certain dates as dates for the proof. The pursuers wrote to the sheriff clerk to point out that that sheriff had dealt with the fatal accident inquiry and that throughout the inquiry they had attempted to persuade him to issue a determination indicating fault on the defenders' part and that the sheriff had issued a determination in which he had obviously applied his mind to the merits of the case and it was therefore improper for him to sit in judgment at proof. Accordingly, they lodged a motion to fix an alternative diet of proof and, on 6th March 1987, that sheriff granted the motion to alter the date of the diet to 2nd June 1986 when the other resident sheriff might be likely to be taking civil business. In the event, however, that sheriff himself had had to hear the proof and the pursuers moved that he disqualify himself from hearing it. This he refused to do and, on viewing the evidence, assoltized the defenders from the crave of the initial writ. The pursuers thereafter appealed to the Court of Session.

Held (1) that, the interlocutor of 6th March 1987, although it dealt only with the date when the proof was to commence, had nothing in it about which sheriff was to take the proof and there was no mention in it of any decision by the sheriff that he was disqualified from doing so; (2) that, by granting the pursuers' motion to fix a new diet of proof, the sheriff had not decided that he was disqualified and thus barred himself by his own decision from taking the proof for the most that could be said was that he was willing to accommodate the pursuers by altering the diet to another date when he was unlikely to be available; (3) that that however did not preclude him from taking the proof himself on that date if circumstances made this necessary, nor did it prevent the issue from being raised again on the morning of the proof; (4) that there was no universal rule that a sheriff who had presided over a fatal accident inquiry was disqualified from hearing a proof in any civil action arising out of the same accident; (5) that there was nothing in the sheriff's conduct at the fatal accident inquiry or in his determination which indicated any actual bias on his part and no reasonable man with a proper understanding of the judicial function and of the issues involved would suspect the sheriff of being other than impartial in his approach to the proof; and (6) that the sheriff had been right to take the view that he was not obliged to disqualify himself from hearing the proof; and appeal *refused*.

MRS ANN TRAINER or BLACK, Sandra Black and Mrs Kathleen Black or Appleby, the widow and children respectively of the late Alexander Black, raised an action of damages against Scott Lithgow Ltd. in Greenock Sheriff Court in respect of the death of Alexander Black, who had died on 30th August 1983 while in the employment of the defenders as a plant labourer. He had been working on board an oil rig known as Sea Explorer 2001 which had been moored at the tail of the bank in the Firth of Clyde while in the course of construction. At some time during the night-shift between 4 a.m. and 7.30 a.m. he fell from the deck of the rig into the sea where he died by drowning. A diet of proof was set originally for starting on 27th May 1987. However, on 6th March 1987, on the pursuers' motion, the sheriff (J. I. Smith) discharged the diet of proof and fixed a new diet to commence on 2nd June 1987. That sheriff had presided at a fatal accident inquiry arising out of the same accident and had, on 9th July 1984, ruled that the evidence justified no more than a formal determination as the deceased fell in circumstances which had not been proved and that there was no foundation for recommendations for precautions to prevent similar deaths in future. On 2nd June 1987, the cause called before the sheriff (J. I. Smith) who refused the motion by the pursuers to disqualify himself from hearing the proof. After hearing the evidence in the cause,

on 18th December 1987, the sheriff granted decree of *absolvitor*. The pursuers thereafter appealed to the Court of Session.

The interlocutor pronounced on 6th March 1987 was in the following terms:—
“The sheriff having heard procurators on the pursuers’ motion to discharge the diet of proof fixed grants the same and of new appoints the proof before answer to proceed upon the second June 1987 at the hour of ten thirty o’clock forenoon and continuing days. Grants to the defenders leave to appeal.”

The cause called before the First Division, comprising the Lord President (Hope), Lord Wylie and Lord Allanbridge for a hearing thereon on 28th February 1990. *Eo die*, their Lordships made *avizandum*.

At advising, on 28th March 1990;—

LORD PRESIDENT (Hope).—The appellants in this appeal are the pursuers in an action of reparation which was raised in the sheriff court at Greenock. They are the widow and two children of the late Alexander Black, who died on 30th August 1983 while in the employment of the defenders as a plant labourer. He was working on board an oil rig known as Sea Explorer 2001 which was moored at the tail of the bank in the Firth of Clyde while in the course of construction. At some time during the nightshift between 4 a.m. and 7.30 a.m. he fell from the deck of the rig into the sea where he died by drowning. The pursuers claimed damages on the ground that his death was caused by the fault of the defenders, but on 18th December 1987 after a proof the sheriff granted decree of *absolvitor*.

The appeal was originally taken on three grounds, one of which challenged several of the sheriff’s findings-in-fact as being unsound in the light of the evidence. But at the outset of the hearing counsel for the pursuers abandoned this ground of appeal. In the result there is no longer any suggestion that the sheriff’s decision on the merits of the action was contrary to the evidence or that it is otherwise open to criticism. The sole issue which remains is whether the sheriff erred in law in proceeding to hear the proof, the pursuers having contended that he was disqualified from doing so because he had presided at a fatal accident inquiry in respect of the same accident in 1984.

This issue is now focused in the two remaining grounds of appeal. The first ground, which is of a technical nature, alleges that the sheriff, by deciding to hear the proof in the present action, in effect overturned an interlocutor which had been pronounced by himself on 6th March 1987. The second is directed to the substantial point which is at issue in this case, which is whether the sheriff was in fact disqualified from holding the proof. It is not necessary to examine the facts of the accident in any detail in order to understand these contentions, but it is necessary to set out briefly the history of what happened thereafter up to the moment when the proof began on 2nd June 1987.

The deceased’s death was one to which sec. 1 (1) (a) of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 applied, because it resulted from an accident while the deceased was in the course of his employment. In due course a fatal accident inquiry took place in the sheriff court at Greenock. The sheriff was Sheriff J. Irvine Smith, one of the two sheriffs resident in that court. Evidence was led in May, and on 9th July 1984 the sheriff issued his determination. He made various findings as to where and when the death took place and the cause of death, including one that the cause of the death was drowning as a result of the deceased falling from the deck of the rig through an anchor cable opening. His determination ended with the following paragraph: “9. It is not proved what caused the deceased so to fall, or what precisely he was doing at the time of his

fall that brought him into a position where he could fall through the said anchor cable opening." In the note which follows he explained that the evidence adduced at the inquiry, in his view, did not justify more than a formal determination. The agent for the relatives canvassed in submission and in evidence matters suggestive of fault on the part of various parties, but as the evidence turned out at the end of the day he did not consider that any such findings would have been possible. He concluded his note by saying that since it was clear that the deceased fell when he did in circumstances which had not been proved, he was unable to hold that any of the matters raised in the course of the evidence could be invoked as a foundation for recommendations for precautions which might prevent a similar death in the future.

The next event which is relevant for present purposes was the raising of the present action in September 1986. The sums sued for were substantial and the pursuers would have been justified in raising their action in the Court of Session. Nevertheless they decided, as they were entitled to do, to raise it in the sheriff court at Greenock. On 16th September 1986 the cause appeared before Sheriff Smith who allowed it to table, appointed defences to be lodged, and continued the cause to the adjustment roll of 17th October 1986. There were two continuations in the adjustment roll, and on 6th February 1987 Sheriff Smith closed the record, allowed parties a proof before answer, and assigned Wednesday 27th May 1987 and two following days as a diet for the proof. On 12th February 1987 the pursuers' agents wrote to the sheriff clerk pointing out that Sheriff Smith had dealt with the fatal accident inquiry. They said that it was unusual in that throughout the inquiry they had attempted to persuade the sheriff to issue a determination indicating fault on the part of the employers, and that the sheriff had issued a detailed determination in which he had obviously applied his mind to the merits of the case. They asked that in view of this background it should be considered improper for him to sit in judgment at the proof. This informal approach was followed by the lodging of a motion for the pursuers which was in these terms: "The pursuers respectfully crave the court to discharge the diet of proof before answer fixed for 27th, 28th and 29th May 1987, and to fix an alternative diet."

The motion, which was opposed by the defenders, was heard by Sheriff Smith on 6th March 1987 when he pronounced the following interlocutor: [His Lordship quoted same as set out at p. 324 *supra* and continued thereafter].

It should be noted that neither the motion nor the interlocutor contained any reference to the fact that the sheriff was disqualified from hearing the proof. There is no doubt, however, that the purpose of discharging the diet fixed for 27th May and appointing a new diet to commence on 2nd June was to make it possible for the proof to be heard by the other sheriff resident in Greenock, Sheriff Sir Stephen Young. He was expected to be dealing with civil business in that week while Sheriff Smith was expected to be dealing with criminal business and thus unable to take a civil proof. The sheriff has provided the following explanation of his decision in the note appended to the interlocutor which he issued after proof granting decree of absolvitor in favour of the defenders: "I may add that this proof was originally set down before myself. The pursuers lodged a motion that I should not hear it because I had heard the fatal accident inquiry in 1984. I did not consider that having done so disqualified me from hearing an action of damages based on allegations of negligence, but since another court was available here the

motion was granted, and the case was put down before my colleague, Sir Stephen Young." In the event it was not possible for the work of the court to be allocated this way, because on the morning of 2nd June Sir Stephen Young was still engaged in criminal business on a continued sheriff and jury trial. So the proof was returned to Sheriff Smith who was available to take it. Counsel for the pursuers then moved that the sheriff disqualify himself from hearing the case because he had heard evidence at the fatal accident inquiry. The sheriff refused the motion and he proceeded to take the case and ultimately to issue the decision which is now under appeal.

The pursuers have contended that the sheriff erred in law in holding on 2nd June 1987 that he had power in the absence of the consent of both parties to overturn his interlocutor of 6th March 1987 and hear the proof. Counsel submitted that the sheriff had in effect decided on 6th March 1987 that he should not hear the proof since this was the issue which was being argued in support of the motion that the diet fixed for 27th May should be discharged. The fact that he had allowed leave to appeal against his interlocutor showed that he was aware that he had taken a decision on a point of substance and that the alteration of the date was not merely a matter of administrative convenience. By deciding on 2nd June 1987 that he should hear the proof after all he acted in a way which was inconsistent with his own interlocutor, which he had no power to do.

In my opinion this argument does not stand up to examination. The interlocutor of 6th March 1987 dealt only with the date when the proof was to commence. It said nothing about which sheriff was to take the proof, and there is no mention in it of any decision by Sheriff Smith that he was disqualified from doing so. If he had decided to decline jurisdiction, I would have expected his decision to that effect to have been recorded in the interlocutor. This would have enabled the point to be reviewed on appeal and it would have made it clear once and for all that the proof would have to be taken by someone else. As it is, the terms of the interlocutor were obtempered to the letter, because the proof proceeded on the days which had been appointed for it. I am willing to accept that the issue which was debated on 6th March 1987 was whether the sheriff was disqualified despite the absence of any reference to this in the motion. The letter dated 12th February 1987 sets out sufficiently the background to the matter, and the sheriff has confirmed the point in his note. But I reject the pursuers' argument that, by granting the pursuers' motion, the sheriff decided that he was disqualified and thus barred himself by his own decision from taking the proof. It seems to me that the most that can be said is that he was willing to accommodate the pursuers by altering the diet to another date when he was unlikely to be available. No doubt this was a sensible course in the circumstances: see *Bradford v. McLeod* 1986 S.L.T. 244, *per* Lord Dunpark at p. 249. But it did not preclude him from taking the proof himself on that date if circumstances made this necessary, nor did it prevent the issue from being raised again on the morning of the proof — which is in fact what occurred.

I turn, therefore, to the merits of the question with which the sheriff was confronted on the morning of the proof. The pursuers' motion was that he should disqualify himself from hearing the case because he had heard evidence at the fatal accident inquiry. The sheriff refused the motion, but it was argued in this appeal that he should have granted it and declined to exercise jurisdiction in the case. The argument was presented in several ways, but it seems to me that in the

end of the day the points in issue can be reduced to two. The first is whether it should be asserted as a universal rule that a sheriff who has presided over a fatal accident inquiry is disqualified from hearing a proof in any civil action arising out of the same accident. The second is whether, assuming there is no such universal rule, Sheriff Smith was nevertheless disqualified in the particular circumstances of this case. The declinature was said to arise on the ground of interest, because of the risk of bias. It was argued that a sheriff who hears evidence in a fatal accident inquiry is liable to acquire a knowledge of the facts of the case which may not be repeated in evidence later at the proof, and that there is a risk that he may be predisposed to base his decision at the proof on knowledge which he has acquired in this way. That was the argument in support of the universal rule which we were asked to affirm. As for the particular circumstances of this case, it was said that Sheriff Smith heard a considerable amount of evidence at the inquiry, that it was more than a purely formal inquiry because issues were raised at it about the fault of various parties which were similar to those to be decided at the proof, that these facts were sufficient to raise in the mind of a reasonable man a suspicion of his impartiality, and that these suspicions were confirmed when, having listened to that argument on 6th March 1987, he granted the motion to alter the diet for the proof.

It is necessary to examine the relevant legislation in order to understand the significance of these arguments. Section 3 of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 makes provision for the holding by the sheriff of an inquiry under that Act into the circumstances of the death. Under the previous legislation a fatal accident inquiry was conducted by a sheriff and a jury of seven persons: Fatal Accidents Inquiry (Scotland) Act 1895, sec. 4 (5). The jury has now been dispensed with and instead of a verdict by jury provision is made by sec. 6 (1) of the Act for the making by the sheriff of a determination. That subsection is in the following terms: [His Lordship quoted sec. 6 (1) as set out *supra* and continued thereafter].

There is no power in this section to make a finding as to fault or to apportion blame between any persons who might have contributed to the accident. This is in contrast to sec. 4 (7) of the 1895 Act, which gave power to the jury to set out in its verdict the person or persons, if any, to whose fault or negligence the accident was attributable. It is plain that the function of the sheriff at a fatal accident inquiry is different from that which he is required to perform at a proof in a civil action to recover damages. His examination and analysis of the evidence is conducted with a view only to setting out in his determination the circumstances to which the subsection refers, in so far as this can be done to his satisfaction. He has before him no record or other written pleading, there is no claim of damages by anyone and there are no grounds of fault upon which his decision is required. The inquiry is normally held within a relatively short time after the accident — in this case the evidence was heard within about eight months after the death of the deceased. It provides the first opportunity to canvass matters relating to precautions which might have avoided the death or any defects in any system of working which contributed to it, at a stage when these issues have not been clearly focused by the parties to any future litigation which may arise. And it is not uncommon, as happened in the present case, to find questions being asked about possible precautions or defects which are not the subject of averment in the subsequent action of damages.

Two other points about the legislation may be made. The first is that the Act makes no provision to the effect that the sheriff who conducts a fatal accident inquiry is to be disabled from exercising his judicial functions in relation to any subsequent proceedings arising from the accident. On the contrary, sec. 1 (3) provides that the application for the holding of the inquiry is to be made to the sheriff with whose sheriffdom the circumstances of the death appear to be most closely connected. In the case of accidents in the course of employment this is likely to be the place where the employer conducts his business and is liable to be sued. Yet the Act contains no provision to deal with the obvious inconvenience which would result if the same sheriff could not hear both the fatal accident inquiry and a proof arising from the same accident. The second is that sec. 6 (3) of the Act provides that the determination of the sheriff shall not be admissible in evidence or be founded on in any judicial proceedings, of whatever nature, arising out of the death. This is a clear statement to the effect that the issues which may arise in subsequent proceedings are not to be regarded as having been predetermined by what the sheriff has held to have been established at the inquiry. Taking all these circumstances into account, it seems to me that there is no sound basis for thinking that a sheriff who has performed his statutory functions under sec. 6 of the 1976 Act would be unable to apply his mind afresh and with an unbiased mind to the issues raised in civil proceedings which might follow later relating to the same accident.

We were referred by the pursuers' counsel to *Free Church of Scotland v. McRae* (1905) 7 F. 686 and to *McCardle v. McCardle's J.F.* (1906) 8 F. 419 in which judges had declined jurisdiction on the ground that they had formerly acted as counsel in the case, but in my opinion no guidance can be derived from these cases for present purposes. He also referred to *Bahai v. Rashidian* [1985] 1 W.L.R. 1337, in which the question was raised whether a judge who had been highly critical of the conduct of the solicitor in the case and of his credibility when he gave evidence ought to have adjudicated on an application that the solicitor should be held jointly liable with his client for the other party's costs. He relied on a passage in the dissenting judgment of Parker L.J. at p. 1344H where he said that it was inevitable that there would be the appearance of bias and that in the circumstances he should not try this issue. But the majority were of the view that there was no reason why he should not do so. Balcombe L.J. said at p. 1346F that a judge properly exercising his judicial function cannot by that process be said to be biased. As he put it, bias is the antithesis of the proper exercise of a judicial function. I think that that comment, with which I respectfully agree, provides the complete answer to the argument in support of the universal rule. If the only basis for saying that the sheriff is disqualified from hearing the proof is that he has previously conducted a fatal accident inquiry into the same accident as that with which the proof is concerned, then it is no basis at all for a declinature. He was exercising a judicial function by conducting the inquiry, so in my opinion a reasonable man would have no proper basis for suspecting that he would be anything other than impartial when he came to conduct the proof in his judicial capacity.

The question then is whether there is anything in the particular circumstances of this case which provided grounds for suspecting the impartiality of the sheriff. The pursuers sought to rely on the *dictum* of Eve J. in *Law v. Chartered Institute of Patent Agents* [1919] 2 Ch. 276, at p. 290. That was a case in which the council

of the Institute were held to have acted as both accusers and judges when dealing with a complaint of professional misconduct. Eve J. stated the principle in these terms: "a person who has a judicial duty to perform is disqualified from performing it if he has a bias which renders him otherwise than an impartial judge, or if he has so conducted himself in relation to the matters to be investigated as to create in the mind of a reasonable man a suspicion that he may have such a bias". In an earlier passage at p. 289 he referred to: "circumstances so affecting a person acting in a judicial capacity as to be calculated to create in mind of a reasonable man a suspicion of that person's impartiality". We were referred to *Bradford v. McLeod* and *Tennant v. Houston* 1987 S.L.T. 317 in which that principle has been applied, the circumstances being such that it was held that justice in these cases was not seen to be done.

In my opinion, however, the pursuers' counsel was unable to point to anything in the sheriff's conduct of the fatal accident inquiry or the circumstances of the case which would justify a suspicion in the mind of a reasonable man as to the sheriff's impartiality. It is as well to bear in mind that for this purpose the likelihood of bias must be both direct and substantial: see *Gorman v. Wright* 1916 S.C. (J.) 44, *per* Lord Guthrie at p. 48. It was not contended that the sheriff had said or done anything at the fatal accident inquiry which lay outside the proper performance of his judicial duties in the hearing and assessment of the evidence. Even if there were merit in the suggestion that his determination would be likely in some way to preclude him from bringing a fresh mind to bear on the evidence relating to the same issues at the proof, which I cannot accept, it is clear from his determination that the sheriff was unable on the evidence led at the fatal accident inquiry to make any findings on matters from which negligence could be inferred. I agree with counsel for the defenders that the proper conclusion to draw from this fact is that the sheriff had not reached a concluded view on these matters, and that there was, therefore, nothing to preclude him from examining these issues again in an impartial manner at a later stage. I can find nothing in the sheriff's determination which indicates any actual bias on his part, and I do not think that a reasonable man with a proper understanding of the judicial function and of the issues involved would have suspected him of being other than impartial in his approach to the proof. As for the argument that his decision about the motion on 2nd March 1987 would have served to confirm such a suspicion, this argument falls because in my opinion there was no suspicion to confirm, but in any event I consider it to be unsound in the light of what the sheriff has told us about the reasons for his decision.

In my opinion the sheriff was right to take the view that he was not obliged to disqualify himself. It is not now contended that his decision was not in accordance with the evidence. In the circumstances I would refuse this appeal.

LORD WYLIE.—I agree with the opinion of your Lordship in the chair and feel there is nothing I can usefully add.

LORD ALLANBRIDGE.—For the reasons given by your Lordship in the chair, I agree that this appeal should be refused.

THE COURT *refused* the appeal.

Digby Brown & Co. — Shepherd & Wedderburn, W.S.

GIULIANI AND GAGGIO v ITALY

BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

Application No.23458/02

The President, Judge Costa; Judges Rozakis, Tulkens, Cabral Barreto, Zupančič, Vajić, Steiner, Gyulumyan, Jaeger, Björgvinsson, Ziemele, Berro-Lefèvre, Bianku, Tsotsoria, Kalaydjieva, Karakaş and Raimondi: March 24, 2011

(2012) 54 E.H.R.R. 10

☞ Deadly force; Demonstrations; Duty to undertake effective investigation; Italy; Police; Right to life

- H1 The applicants were the father, the mother and the sister of CG. On July 20, 2001, during an authorised demonstration in the context of the G8 summit in Genoa, violent clashes took place between anti-globalisation militants and law-enforcement officers. At around 17.00, under pressure from violent demonstrators, a group of about 50 *carabinieri* withdrew on foot, leaving two vehicles exposed. One of them, with three *carabinieri* inside, was surrounded and violently attacked by a group of demonstrators. One of the *carabinieri*, MP, who had been injured, drew his firearm and, after giving a warning, fired two shots. CG, who had been wearing a balaclava and playing an active part in the attack, was fatally wounded by a bullet which hit him in the face. Subsequently, in an attempt to escape, the driver of the jeep twice drove over CG's unconscious body. An investigation was immediately opened by the Italian authorities. Criminal proceedings were instituted against MP and the driver of the jeep for intentional homicide.
- H2 An autopsy, which was performed within 24 hours, concluded that CG's death had been caused by the shot and not by the attempts to drive the vehicle away. On July 23, 2001, the public prosecutor authorised the cremation of CG's body by his family. At the request of the public prosecutor, three expert reports were subsequently prepared. One of the reports, although deploring the fact that it had been impossible to examine the body, concluded that the bullet had been fired upwards by MP but had been deflected by a stone thrown at the vehicle by another demonstrator. On May 5, 2003, the investigating judge discontinued the proceedings, finding that the driver of the jeep could not be held responsible for the killing as, given the confusion prevailing around the vehicle, he had been unable to see CG. As to MP, the judge took the view that he had fired into the air without intent to kill and that he had in any event acted in self-defence in response to the violent attack on himself and his colleagues.
- H3 Relying upon art.2, the applicants complained that CG's death had been caused by excessive use of force, that there had been shortcomings in the domestic

legislative framework, that the organisation of the operations to maintain and restore public order had been defective and, finally, that there had been no effective investigation into CG's death. They further argued that the failure to render immediate assistance to CG after he had fallen, and the fact that a jeep had been driven over his body, had amounted to inhuman treatment in breach of art.3. They also complained under arts 6 and 13 that the investigation had been ineffective. Lastly, they alleged that the Italian Government had acted in breach of art.38 by failing to provide accurate information to the Court.

H4 Held:

- (1) by 13 votes to four, that there had been no violation of art.2 in its substantive aspect as regards the use of lethal force;
- (2) by 10 votes to seven, that there has been no violation of art.2 in its substantive aspect as regards the domestic legislative framework governing the use of lethal force or as regards the weapons issued to the law-enforcement agencies at the G8 summit in Genoa;
- (3) by 10 votes to seven, that there had been no violation of art.2 in its substantive aspect as regards the organisation and planning of the policing operations during the G8 summit in Genoa;
- (4) by 10 votes to seven, that there had been no violation of art.2 in its procedural aspect;
- (5) unanimously, that it was not necessary to examine the case under arts 3 and 6;
- (6) by 13 votes to four, that there has been no violation of art.13;
- (7) unanimously, that there had been no violation of art.38.

1. Right to life: deprivation of life; use of lethal force by state agents; substantive aspect; domestic legal framework (article 2)

- H5** (a) Article 2 covered both intentional killings and situations where a permitted use of force by state agents could result in an unintended deprivation of life. Any use of force by state agents had to be no more than absolutely necessary for the achievement of one or more of the permitted aims listed in art.2(2) and had to be strictly proportionate to the achievement of those aims. A use of force could be justified where it was based on an honest belief which was perceived to be valid at the time, but which subsequently turned out to be mistaken. When assessing whether the use of lethal force was legitimate, it was necessary to take into consideration not only the actions of the agents who had actually administered the force, but also all the surrounding circumstances, including the planning and control of the operation. It was primarily for the domestic courts to establish the facts on the basis of the evidence before them. In principle, if domestic proceedings had taken place, cogent elements were required to justify a departure from findings of fact made by the domestic courts. When there had been criminal proceedings in the domestic courts involving allegations of violation of arts 2 and 3, it was to be borne in mind that any domestic criminal liability was distinct from the responsibility of the state under the Convention for the acts of its organs, which was the sole object of scrutiny by the Court. [174]–[182]
- H6** (b) The video footage and photographs of the incident during which CG had lost his life showed that, in the context of a violent clash between law-enforcement

officers and demonstrators, a jeep with three *carabinieri* on board had been at least partially surrounded by demonstrators and had been the object of an unlawful and extremely violent attack. The jeep had not posed any threat to the demonstrators. At the time, the possibility that there might have been a lynching could not be excluded. [183]–[187]

- H7 (c) It was necessary to consider the events from the viewpoint of the victims of the attack at the time of the events. MP had been injured and panic-stricken, and had been lying in the rear of the jeep, from where he had not had a clear view of situation. In the circumstances, and given the extremely violent attack on the jeep, MP had acted in the honest belief that his own life, and that of his colleagues, had been in danger. In the circumstances, he had been entitled to use appropriate means to defend himself and the other occupants of the jeep. The photographic evidence and the testimonies of MP and some of the demonstrators showed that, before firing, MP had given a clear warning that he had been about to open fire. In that extremely tense situation, CG had picked up a fire extinguisher, apparently with the intention of throwing it at the occupants of the vehicle. His actions, and the fact that the majority of the demonstrators were continuing the assault, could reasonably have been interpreted by MP as an indication that the attack was not about diminish in intensity. As a result, MP's honest belief that his life was in danger could only have been strengthened. That constituted a justification for recourse to a potentially lethal means of defence such as the firing of shots. [188]–[191]
- H8 (d) It was not necessary to examine the well-foundedness of the theory, proposed by the experts for the prosecution and accepted by the investigating judge, according to which one of the bullets fired by MP had hit CG after being accidentally deflected by a stone thrown by one of the demonstrators. Given that MP had only been able to fire through the narrow space between the spare wheel and the roof of the jeep, the fact that a shot fired into that space had risked causing injury to one of the assailants or even killing one of them did not mean per se that the defensive action had been excessive. [192]–[193]
- H9 (e) In sum, the use of lethal force had been absolutely necessary in defence of individuals from unlawful violence within the meaning of art.2(2)(a) and there had been no violation of art.2 in its substantive aspect in that regard. It was not necessary to consider whether the use of force had also been justified under art.2(2)(c). [194]–[196]
- H10 (f) As to the alleged deficiencies in the domestic legislative framework, the state's duty under art.2(1) to safeguard the lives of those within its jurisdiction required the adoption of a legal and administrative framework which defined the limited circumstances in which law enforcement officials could use force and firearms. The framework in question had to secure a system of adequate and effective safeguards against arbitrariness and abuse of force and even against avoidable accidents. [208]–[210]
- H11 (g) The investigating judge had assessed the legitimacy of the use of force by MP in the light of the provisions setting out the grounds of justification of self-defence and legitimate use of weapons by a state agent. Those provisions were therefore to be regarded as constituting the relevant domestic legal framework. Although the formulation of the domestic provisions under consideration was not identical to those of art.2, they contained the elements required by the Court's case law. Any difference between the wording of the domestic provisions and that of

art.2 with regard to the requirement of “absolute necessity” could be overcome by interpretation by the domestic courts. Indeed, it was clear that the Italian courts interpreted the ground of justification of self-defence as authorising the use of lethal force only as a last resort. Accordingly, the difference in wording was not sufficient to conclude that no appropriate domestic legal framework existed. [211]–[215]

H12 (h) As to the applicants’ complaint about the weapons issued to the law enforcement agencies at the G8 summit, any discussion of whether law-enforcement agents should have been equipped with non-lethal means of crowd control was not relevant, as CG’s death had during a sudden and violent attack which had posed an imminent threat to the lives of three agents and law enforcement officers were clearly entitled to have lethal weapons at their disposal to counter such attacks. The applicants’ submission that some carabinieri had used non-regulation weapons was not relevant, as there appeared to be no connection with the death of CG. [216]–[217]

H13 (i) In conclusion, there had been no violation of art.2 in its substantive aspect with regard to the domestic legal framework governing the use of lethal force or by reason of the weapons issued to the law enforcement agencies. [218]

H14 (j) In certain circumstances, art.2 implied a positive obligation on the authorities to take preventive operational measures to protect an individual whose life was at risk from the criminal acts of another individual. However, a distinction had to be drawn between cases concerning the requirement of protection of individuals who were identifiable in advance as potential targets and cases involving an obligation to afford general protection to society. For the state’s responsibility to be engaged, it had to be established that the death had resulted from a failure on the part of the national authorities to do all that could reasonably have been expected of them to avoid a real and immediate risk to the life of an identified individual of which they had or ought to have had knowledge. [244]–[248]

H15 (k) The planning and control of a policing operation were to be taken into consideration in assessing whether the authorities had taken appropriate care to ensure that any risk to life was minimised. In order to prevent the arbitrary use of force, the domestic legal and administrative framework had to define the limited circumstances in which law enforcement officials could use force and firearms; in particular, law-enforcement agents had to be trained to assess whether there was an absolute necessity to use firearms. [249]–[250]

H16 (l) The Contracting States’ obligation to take reasonable measures to ensure the peaceful conduct of lawful demonstrations and the safety of all citizens was an obligation as to the measures to be taken, which included preventive security measures, and not an obligation of results. Whilst art.11 required the authorities to show a certain degree of tolerance towards peaceful gatherings, interferences with the right to freedom of assembly were in principle justified for the prevention of disorder or crime and for the protection of the rights and freedoms of others where demonstrators engaged in acts of violence. [251]

H17 (m) The present case did not concern the organisation of the public-order operations during the G8 as a whole but was rather confined to examining whether, in the organisation and planning of that event, failings had occurred which could be linked directly to the death of CG. There were no objective grounds for believing that, had the violent clashes which had preceded the incident during which CG had lost his life not occurred, MP would not have fired shots to defend himself against

the unlawful violence to which he was being subjected. The attack on the jeep had taken place at a time of relative calm when the detachment of carabinieri had taken up position on a lateral square in order to regroup and allow injured officers to board jeeps. It had not been possible to predict that an attack of such violence would take place in that precise location and in such circumstances. [252]–[254]

- H18 (n) All the personnel deployed to police the event had either belonged to specialised units or had received ad hoc training in maintaining order during mass gatherings. In view of the very large numbers of officers deployed, they could not all be required to have had lengthy experience and/or to have been trained over several months or years. A distinction was to be made between cases where the law-enforcement agencies were dealing with a specific target and those where they were engaged in the maintenance of order in the face of possible disturbances spread over an entire city. Only in the first category of cases could all the officers involved be expected to be highly specialised in dealing with the task assigned to them. Accordingly, no violation of art.2 could be found solely on the basis of the selection of officers who, like MP, were young and had been in service for a relatively short period of time. [255]–[256]
- H19 (o) With regard to the operational decisions taken by the law-enforcement agencies immediately before the attack on the jeep, at the relevant time nothing indicated that CG had been the potential target of a lethal act to any greater extent than others present at the scene, and the authorities had therefore not been under any obligation to provide him with personal protection. [257]
- H20 (p) In an emergency situation such as that prevailing at the time, it was conceivable that the law-enforcement agencies might have had to use logistical support vehicles to transport injured officers and it had not been unreasonable not to have required those vehicles to travel to hospital immediately as that would have meant crossing a part of the city where further disturbances could have broken out. There had been no reason to suppose that the demonstrators would have forced the *carabinieri* to withdraw rapidly, thereby leaving one of the jeeps isolated. The immediate cause of those events had been the violent and unlawful attack by the demonstrators and no operational decision previously taken could have taken account of that unforeseeable element. The fact that the communications system chosen had not allowed direct radio contact between the police officers and carabinieri did not mean that there had been no clear chain of command. MP had been subject to the orders and instructions of his superior officers, who had been present on the ground. In addition, the fact that MP had been injured and deemed unfit to remain on duty had not meant that his weapon should have been taken from him. The weapon was an appropriate means of personal defence by which to counter a possible violent attack, and was indeed used for that precise purpose. [258]–[260]
- H21 (q) As for the events following the fatal shooting, there was no evidence that the assistance afforded to CG had been inadequate or delayed or that the jeep had been driven over his body intentionally. In any case, as demonstrated by the autopsy report, the brain injuries sustained as a result of the shot fired by MP had been so severe that they resulted in death within a few minutes. [261]
- H22 (r) In conclusion, the Italian authorities had not failed in their obligation to do all that could reasonably be expected of them to provide the level of safeguards required during operations potentially involving the use of lethal force. There had

thus been no violation of art.2 on account of the organisation and planning of the policing operations at issue. [262]

2. Right to life: procedural obligations; effective investigation (article 2)

- H23 (a) Article 2 imposed a procedural obligation to carry out an effective investigation into every death resulting from the use of force. The investigation had to be thorough, impartial and rigorous and the authorities had to act with promptness and reasonable expedition. The investigation had to be effective, in the sense of being capable of leading to a determination of whether the force used had been justified and the identification and punishment of those responsible. When the investigation concerned alleged unlawful killing by state agents, it was necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. The authorities had to take whatever reasonable steps they could to secure evidence concerning the incident, including, where appropriate, an autopsy which provided a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Further, the relatives of the victim had to be involved to the extent necessary to safeguard their legitimate interests and there had to be a sufficient element of public scrutiny of the investigation. However, disclosure or publication of police reports and investigative materials which might involve sensitive issues with possible prejudicial effects to private individuals or other investigations was not an automatic requirement under art.2. Moreover, art.2 did not impose a duty on the investigating authorities to satisfy every request for a particular investigative measure made by a relative in the course of the investigation. [298]–[305]
- H24 (b) The findings that the use of lethal force by MP had been absolutely necessary for the purpose set out in art.2(2)(a) and that there had been no violation of the positive obligation to protect life on account of the organisation and planning of the policing operations had been reached on the basis of the information provided by the domestic investigation. It followed that the investigation had been sufficiently effective to enable it to be determined whether the use of lethal force had been justified and whether the organisation and planning of the policing operations had been compatible with the obligation to protect life. [307]–[309]
- H25 (c) In addition, several decisions taken by the organisers of the G8 and by the commanding officers of the law enforcement agencies present on the ground had been scrutinised in the course of other inquiries, including by a parliamentary commission. Further, the Genoa police department had been the subject of an administrative inspection and relevant body of the Ministry of the Interior had proposed taking disciplinary action against several police officers and the head of the department. [310]
- H26 (d) With regard to the issue of whether the applicants had been afforded access to the investigation to the extent necessary to safeguard their legitimate interests, although under Italian law the injured party could not apply to join the proceedings as a civil party until the preliminary hearing, and no such hearing had taken place in the present case, during the preliminary investigation injured parties could exercise the rights and powers expressly afforded to them by law. The applicants had had the opportunity to exercise those rights. Furthermore, they had been able to lodge an objection against the request to discontinue the proceedings and to indicate additional investigative measures which they wished to see carried out.

The fact that the investigating judge had refused those requests did not in itself amount to a violation of art.2, particularly since her decision on these points did not appear to have been arbitrary. [312]–[313]

H27 (e) With regard to the applicants' complaint that they had not had enough time to appoint an expert of their choosing ahead of the autopsy, art.2 did not require, as such, that the victim's relatives be afforded the possibility to appoint an expert of their choosing and secure the latter's attendance at the forensic examinations. [314]–[315]

H28 (f) As for the complaint about the autopsy report, the applicants had not provided evidence of any serious failings in the autopsy performed on CG. It was true that the forensic experts had omitted to extract and record a fragment of bullet which might have shed light on the trajectory of the fatal bullet. However, in light of the fact that the use of force would have been justified even if the bullet had not been deflected by another object, the metal fragment in question had not been crucial to the effectiveness of the investigation. Finally, the cremation of CG's body, which had made any further expert medical examinations impossible, had been authorised at the applicants' request. [316]–[319]

H29 (g) The procedural obligations arising out of art.2 did not require the holding of public hearings. Where the evidence gathered by the authorities was sufficient to rule out any criminal responsibility on the part of the state agent involved, the authorities could discontinue the proceedings at the preliminary investigation stage. The evidence gathered by the prosecuting authorities, and in particular the footage of the attack on the jeep, had led to the conclusion, beyond reasonable doubt, that MP had acted in self-defence. [320]

H30 (h) The prosecuting authorities had not accepted without question the version supplied by the law-enforcement officers implicated in the events; rather, they had questioned numerous witnesses and ordered several forensic examinations. The fact that the experts had not agreed on all aspects of the reconstruction of events did not per se make further investigations necessary, given that it was for the judge to assess the pertinence of the explanations given by the various experts and whether they were compatible with the existence of grounds of justification exempting the accused from criminal responsibility. [321]

H31 (i) As for the independence of the investigation, the fact that the armed force to which MP and the driver of the jeep belonged had been given the task of conducting certain checks had not affected the impartiality of the investigation, particularly in light of the technical and objective nature of those checks. The law-enforcement agencies had already been present at the scene and had thus been able to secure the area and search for and record any items of relevance to the investigation. Given the confusion after the shots had been fired, the authorities could not be criticised for not finding objects as small as the bullets fired by MP. The appointment of one of the experts, who had openly defended the view that MP had acted in self-defence, was a source of concern. Nevertheless, the expert in question had been one member of a team consisting of four experts; further, having been appointed by the prosecuting authorities, he had not acted as an impartial auxiliary of the investigating judge. In any case, the tests he had been required to carry out were of an essentially objective and technical nature. Accordingly, his participation was not capable, in itself, of compromising the impartiality of the investigation. In summary, it had not been established that the investigation had lacked impartiality and independence. [322]–[324]

- H32 (j) As regards the requirement of promptness of the investigation, CG had died on July 20, 2001 and the public prosecutor's office had closed the preliminary investigation, with a request for the case to be discontinued, approximately one year and four months later, in late 2002. On December 10, 2002 the applicants had objected to that request and the hearing before the Genoa investigating judge had taken place four months later, on April 17, 2003. The text of the decision discontinuing the proceedings had been deposited with the registry 23 days later, on May 5, 2003. In the circumstances, the investigation had been conducted with the requisite promptness and diligence. [325]
- H33 (k) Accordingly, there had been no violation of art.2 in its procedural aspect. [326]

3. Alleged violation of article 3

- H34 As for the applicants' allegation that the lack of immediate assistance to CG had contributed to his death and amounted to inhuman treatment, the facts complained of fell within the scope of the examination carried out under art.2. It could not be inferred from the law-enforcements officers' conduct that they had had the intention to inflict pain or suffering on CG. It was accordingly not necessary to examine the case under art.3. [329]–[330]

4. Alleged violations of articles 6 and 13

- H35 (a) The applicants' complaints that they had not had the benefit of an investigation that complied with the procedural requirements arising out of arts 6 and 13 was more appropriately to be examined in the light of the general obligation under art.13 to provide an effective remedy in respect of breaches of the Convention. [335]
- H36 (b) An effective domestic investigation complying with art.2 had been conducted into the circumstances of CG's death. Although they had not been able to apply to join the proceedings as civil parties, the applicants had been able to exercise the powers afforded to injured parties under the relevant domestic law. In any event, their lack of status as civil parties had resulted from the fact that the criminal judge had concluded that no offence punishable under domestic criminal law had been committed. Finally, the applicants had been able to bring a civil action for compensation either before or in parallel with the criminal proceedings. In such circumstances, they had had available to them effective remedies in respect of their complaint under art.2 and there had therefore been no violation of art.13. [337]–[339]

5. Duty to co-operate with the Court (article 38)

- H37 As for the applicant's claim that the Government had not co-operated sufficiently with the Court, although the information provided by the Government had not dealt exhaustively with every point raised by the applicants, the incomplete nature of that information had not prevented examination of the case. Accordingly, there had been no violation of art.38. [343]–[344]

H38 The following cases are referred to in the Court's judgment:

Aksoy v Turkey (1997) 23 E.H.R.R. 553

Andronicou v Cyprus (1998) 25 E.H.R.R. 491

- Assenov v Bulgaria* (1999) 28 E.H.R.R. 652
Avşar v Turkey (2003) 37 E.H.R.R. 53
Bönisch v Austria (1987) 9 E.H.R.R. 191
Brandstetter v Austria (1993) 15 E.H.R.R. 378
Bubbins v United Kingdom (2005) 41 E.H.R.R. 24
Edwards v United Kingdom (1993) 15 E.H.R.R. 417
Edwards v United Kingdom (2002) 35 E.H.R.R. 19
Ergi v Turkey (2001) 32 E.H.R.R. 18
Gül v Turkey (2002) 34 E.H.R.R. 28
Güleç v Turkey (1999) 28 E.H.R.R. 121
Ilaşcu v Moldova (2005) 40 E.H.R.R. 46
İlhan v Turkey (2002) 34 E.H.R.R. 36
Ireland v United Kingdom (1979–80) 2 E.H.R.R. 25
Jordan v United Kingdom (2003) 37 E.H.R.R. 2
K v United Kingdom (2009) 48 E.H.R.R. 29
Kaya v Turkey (1999) 28 E.H.R.R. 1
Klaas v Germany (1994) 18 E.H.R.R. 305
LCB v United Kingdom (1999) 27 E.H.R.R. 212
Makaratzis v Greece (2005) 41 E.H.R.R. 49
McCann v United Kingdom (1996) 21 E.H.R.R. 97
McKerr v United Kingdom (2002) 34 E.H.R.R. 20
Menson v United Kingdom (2003) 37 E.H.R.R. CD220
Nachova v Bulgaria (2006) 42 E.H.R.R. 43
Oğur v Turkey (2001) 31 E.H.R.R. 40
Öneryıldız v Turkey (2005) 41 E.H.R.R. 20
Opuz v Turkey (2010) 50 E.H.R.R. 28
Osman v United Kingdom (2000) 29 E.H.R.R. 245
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Solomou v Turkey (36832/97) June 24, 2008
Mastromatteo v Italy (37703/97) October 24, 2002

Scavuzzo-Hager v Switzerland (41773/98) February 7, 2006
Panayi v Turkey (45388/99) October 27, 2009
Barbu Anghelescu v Romania (46430/99) October 5, 2004
Perk v Turkey (50739/99) March 28, 2006
Bakan v Turkey (50939/99) June 12, 2007
Musayev v Russia (57941/00, 58699/00 & 60403/00) July 26, 2007
Zavoloka v Latvia (58447/00) July 7, 2009
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Sottani v Italy (26775/02) February 24, 2005
Abramiuc v Romania (37411/02) February 24, 2009
Mirilashvili v Russia (6293/04) December 11, 2008
Patyi v Hungary (5529/05) October 7, 2008
Maiorano v Italy (28634/06) December 15, 2009
Branko Tomašić v Croatia (46598/06) January 15, 2009

H39 The following domestic cases are referred to in the Court's judgment:

Catania (08204) Unreported April 13, 1987 Court of Cassation, First Section
PM and Vellino (02554) Unreported December 1, 1995 Court of Cassation, First Section
Tosani Unreported September 20, 1982 Court of Cassation

H40 The following case are referred to in the joint partly dissenting Opinion of Judges Rozakis, Tulkens, Zupančič, Gyulumyan, Ziemele, Kalaydjieva and Karakaş:

Akın v Turkey (30304/02) January 13, 2009

H41 The following cases are referred to in the joint partly dissenting Opinion of Judges Tulkens, Zupančič, Gyulumyan and Karakaş:

Akkum v Turkey (2006) 43 E.H.R.R. 26
Andronicou v Cyprus (1998) 25 E.H.R.R. 491
Toğcu v Turkey (27601/95) May 31, 2005
Solomou v Turkey (36832/97) June 24, 2008
Panayi v Turkey (45388/99) October 27, 2009
Bakan v Turkey (50939/99) June 12, 2007

THE FACTS

I. The circumstances of the case

- 11 The applicants were born in 1938, 1944 and 1972 respectively and live in Genoa and Milan. They are the father, mother and sister of Carlo Giuliani, who was shot and killed during the demonstrations on the fringes of the G8 summit in Genoa in July 2001.

A. The background to the G8 summit in Genoa and the events preceding the death of Carlo Giuliani

- 12 On July 19, 20 and 21, 2001 the G8 summit was held in Genoa. Numerous “anti-globalisation” demonstrations were staged in the city and substantial security measures were put in place by the Italian authorities. Under s.4(1) of Law 149 of June 8, 2000, the prefect of Genoa was authorised to deploy military personnel to ensure public safety in connection with the summit. In addition, the part of the city where the G8 were meeting (the historic centre) was designated as a “red zone” and cordoned off by means of a metal fence. As a result, only residents and persons working in the area were allowed access. Access to the port was prohibited and the airport was closed to traffic. The red zone was contained within a yellow zone, which in turn was surrounded by a white (normal) zone.
- 13 The service instructions of July 19, 2001 were issued by the officer in command of the law-enforcement agencies the day before Carlo Giuliani’s death. They sum up the priorities of the law-enforcement agencies as follows: establishing a line of defence within the red zone, with the task of repelling rapidly any attempt to break through; establishing a line of defence within the yellow zone to deal with any incidents, taking account of the position of the demonstrators in various locations and of actions perpetrated by more extremist elements; putting in place public-order measures on the streets concerned by the demonstrations, bearing in mind the risk of violence encouraged by the presence of crowds of people.
- 14 The parties agreed as to the fact that the service instructions of July 19, 2001 amended the plans hitherto established regarding the deployment of the available means and resources, in order to enable the law-enforcement agencies to counter effectively any attempt to enter the red zone by participants in the demonstration of the *Tute Bianche* (White overalls) which had been announced and authorised for the following day.
- 15 The applicants maintained that the service instructions of July 19 had given a detachment of *carabinieri* implicated in the death of Carlo Giuliani a dynamic role, whereas it had previously been supposed to remain in one location. The Government stated that the service instructions had been communicated orally to the officers on the ground.
- 16 A radio communications system had been put in place, with an operations control room located in the Genoa police headquarters, which was in radio contact with the officers on the ground. The *carabinieri* and police officers could not communicate directly amongst themselves by radio; they could only contact the control room.
- 17 On the morning of July 20 some groups of particularly aggressive demonstrators, wearing balaclavas and masks (the “Black Bloc”) sparked numerous incidents and clashes with law-enforcement officers. The *Tute Bianche* march was due to set off from the Carlini stadium. This was a demonstration involving several organisations: representatives of the “No Global” movement and of community centres, and young communists from the *Rifondazione comunista* party. While they believed in non-violent protest (civil disobedience), they had announced a strategic objective, namely to try to penetrate the red zone. On July 19, 2001 the head of the Genoa police authority had prohibited the *Tute Bianche* march from entering the red zone or the zone adjacent to it, and had deployed law-enforcement officers to halt the march at Piazza Verdi. Consequently, the demonstrators were able to march from

the Carlini stadium and all the way along Via Tolemaide to Piazza Verdi, that is to say, well beyond the junction of Via Tolemaide and Corso Torino where clashes occurred, as detailed below.

- 18 At around 13.30 the march set off and headed slowly westwards. Around Via Tolemaide there were signs of earlier disturbances. The march was headed by a contact group made up of politicians and a group of journalists carrying video recorders and cameras. The marchers slowed down and made a number of stops. In the vicinity of Via Tolemaide there were incidents involving persons wearing masks and balaclavas and law-enforcement officers. The march reached the railway tunnel at the junction with Corso Torino. Suddenly, tear gas was fired on the demonstrators by *carabinieri* under the command of Mr Mondelli. The *carabinieri* charged forward, making use of their batons. The march was pushed back eastwards as far as the junction with Via Invrea.
- 19 The demonstrators split up: some headed towards the seafront, while others sought refuge in Via Invrea and then in the area around Piazza Alimonda. Some demonstrators responded to the attack by throwing hard objects such as glass bottles or rubbish bins at the law-enforcement officers. Armoured vehicles belonging to the *carabinieri* drove up Via Casaregis and Via Invrea at high speed, knocking down the barriers erected by the demonstrators and forcing the demonstrators at the scene to leave. At 15.22 the control room ordered Mr Mondelli to move away and allow the marchers to pass.
- 20 Some of the demonstrators retaliated with violence and clashes took place with the law-enforcement agencies. At around 15.40 a group of demonstrators attacked an armoured *carabinieri* van and set it alight.

B. The death of Carlo Giuliani

- 21 At approximately 17.00 the presence of a group of demonstrators who appeared very aggressive was observed by the Sicilia battalion, consisting of around 50 *carabinieri* stationed close to Piazza Alimonda. Two Defender jeeps were parked nearby. Police officer Lauro ordered the *carabinieri* to charge the demonstrators. The *carabinieri* charged on foot, followed by the two jeeps. The demonstrators succeeded in pushing back the charge, and the *carabinieri* were forced to withdraw in disorderly fashion near Piazza Alimonda. Pictures taken from a helicopter at 17.23 show the demonstrators running along Via Caffa in pursuit of the law-enforcement officers.
- 22 In view of the withdrawal of the *carabinieri* the jeeps attempted to reverse away from the scene. One succeeded in moving off while the other found its exit blocked by an overturned refuse container. Suddenly, several demonstrators wielding stones, sticks and iron bars surrounded it. The two side windows at the rear and the rear window of the jeep were smashed. The demonstrators shouted insults and threats at the jeep's occupants and threw stones and a fire extinguisher at the vehicle.
- 23 There were three *carabinieri* on board the jeep: Filippo Cavataio (FC), who was driving, Mario Placanica (MP) and Dario Raffone (DR). MP, who was suffering from the effects of the tear-gas grenades he had thrown during the day, had been given permission by Captain Cappello, commander of a company of *carabinieri*, to get into the jeep in order to get away from the scene of the clashes. Crouched down in the back of the jeep, injured and panicking, he was protecting himself on one side with a riot shield (according to the statement of a demonstrator named

Predonzani). Shouting at the demonstrators to leave “or he would kill them”, MP drew his Beretta 9mm pistol, pointed it in the direction of the smashed rear window of the vehicle and, after some tens of seconds, fired two shots.

- 24 One of the shots struck Carlo Giuliani, a balaclava-clad demonstrator, in the face under the left eye. He had been close to the rear of the jeep and had just picked an empty fire extinguisher off the ground and raised it up. He fell to the ground near the left-side rear wheel of the vehicle.
- 25 Shortly afterwards, FC managed to restart the engine and in an attempt to move off, reversed, driving over Carlo Giuliani’s body in the process. He then engaged first gear and drove over the body a second time as he left the scene. The jeep then drove towards Piazza Tommaseo.
- 26 After “a few metres”, *carabinieri* Sergeant-Major Amatori got into the jeep and took over at the wheel, “as the driver was in a state of shock”. Another *carabiniere* named Rando also got in.
- 27 Police forces stationed on the other side of Piazza Alimonda intervened and dispersed the demonstrators. They were joined by some *carabinieri*. At 17.27 a police officer present at the scene called the control room to request an ambulance. A doctor who arrived at the scene subsequently pronounced Carlo Giuliani dead.
- 28 According to the Ministry of the Interior, it was impossible to indicate the exact number of *carabinieri* and police officers at the scene at the moment of Carlo Giuliani’s death; there had been approximately 50 *carabinieri*, some 150m from the jeep. In addition, 200m away, near Piazza Tommaseo, there had been a group of police officers.
- 29 Relying, inter alia, on witness evidence given by law-enforcement officers during a parallel set of proceedings (the “trial of the 25”),¹ the applicants stated in particular that, while on Piazza Alimonda, the *carabinieri* had been able to take off their gas masks, eat and rest. With the situation “calm”, Captain Cappello had ordered MP and DR to board one of the two jeeps. He considered the two *carabinieri* to be mentally exhausted and no longer physically fit for duty. Cappello also considered that MP should stop firing tear gas and took away his tear-gas gun and the pouch containing the tear-gas grenades.
- 30 Referring to the photographs taken shortly before the fatal shot, the applicants stressed that the weapon had been held at a downward angle from the horizontal. They also referred to the statements made by Lieutenant-Colonel Truglio,² who said that he had been ten metres or so from Piazza Alimonda and 30–40m away from the jeep. The *carabinieri* (around 100 of them) had been some tens of metres from the jeep. The police officers had been at the end of Via Caffa, towards Piazza Tommaseo. The applicants submitted that the photographs in the investigation file clearly showed some *carabinieri* not far from the jeep.

C. The investigation by the domestic authorities

1. The first steps in the investigation

- 31 A spent cartridge was found a few metres from Carlo Giuliani’s body. No bullet was found. A fire extinguisher and a bloodstained stone, among other objects, were found beside the body and were seized by the police. It emerges from the file that

¹ See [121]–[138] below

² See [43] below

the public prosecutor's office entrusted 36 investigative measures to the police. The jeep in which MP had been travelling, and also the weapon and equipment belonging to him, remained in the hands of the *carabinieri* and were subsequently seized under a court order. A spent cartridge was found inside the jeep.

- 32 During the night of July 20, 2001 the Genoa mobile police unit heard evidence from two police officers, Mr Martino and Mr Fiorillo. On July 21 Captain Cappello, who was in charge of the ECHO company, recounted the events of the previous day and gave the names of the *carabinieri* who had been in the jeep. He said that he had heard no shots, probably because of his radio earpiece, his helmet and his gas mask, which reduced his hearing.

2. Placing under investigation of MP and FC

- 33 On the night of July 20, 2001 MP and FC were identified and examined by the Genoa public prosecutor's office on suspicion of intentional homicide. The interviews took place at the headquarters of the Genoa *carabinieri*.

(a) MP's first statement

- 34 MP was an auxiliary *carabiniere* assigned to Battalion 12 (Sicilia), and one of the members of the ECHO company constituted for the purpose of the G8 summit. Together with four other companies from different regions of Italy, the company formed part of the CCIR, under the orders of Lieutenant-Colonel Truglio. The ECHO company was under the orders of Captain Cappello and his deputies Mirante and Zappia, and was directed and co-ordinated by Mr Lauro, a senior officer of the Rome police. Each of the five companies was divided into four detachments of 50 men. The overall commander of the companies was Colonel Leso.
- 35 MP, who was born on August 13, 1980 and began serving as a *carabiniere* on September 16, 2000, was 20 years and 11 months old at the material time. He was trained in the use of grenades and had been deployed to fire tear gas. He stated that during the public-order operations he had been supposed to move around on foot with his detachment. Having fired several tear-gas grenades, he had felt a burning in his eyes and face and had asked Captain Cappello for permission to board a jeep. Shortly afterwards another *carabiniere* (DR), who was injured, had joined him.
- 36 MP said that he had been very frightened because of everything he had seen being thrown that day, and was particularly afraid that the demonstrators would throw Molotov cocktails. He explained that he had grown more afraid after being injured in the leg by a metal object and in the head by a stone. He had become aware that the jeep was under attack because of the stones being thrown and had thought that "hundreds of demonstrators were surrounding the jeep", although he added that "at the time [he] fired the shots, no one was in sight". He said he had been "panic-stricken". At some point he realised that his hand was gripping his pistol; he thrust the hand carrying the weapon through the jeep's rear window and, after about a minute, fired two shots. He maintained that he had not noticed Carlo Giuliani behind the jeep either before or after firing.

(b) FC's statement

- 37 FC, the jeep's driver, was born on September 3, 1977 and had been serving as a *carabiniere* for 22 months. At the material time he was 23 years and 10 months old. He stated that he had been in an alleyway near Piazza Alimonda and had

attempted to reverse towards the square because the detachment was being pushed back by the demonstrators. However, he had found his path blocked by a refuse container and his engine had stalled. He had concentrated on trying to move the jeep out while his colleagues inside the vehicle were shouting. As a result, he had not heard the shots. Lastly, he stated:

“I did not notice anyone on the ground because I was wearing a mask, which partly blocked my view ... and also because it is hard to see properly out the side of the vehicle. I reversed and felt no resistance; actually, I felt the left wheel jolt and thought it must be a pile of rubbish, since the refuse container had been overturned. The only thought in my head was how to get out of that mess.”

(c) DR's statement

- 38 DR, who was born on January 25, 1982, had been performing military service since March 16, 2001. At the material time he was 19 years and six months old. He stated that he had been struck in the face and back by stones thrown by demonstrators and had started to bleed. He had tried to protect himself by covering his face, and MP for his part had tried to shield him with his body. At that point, he could no longer see anything, but he could hear the shouting and the sound of blows and objects entering the jeep. He heard MP shouting at their attackers to stop and leave, and then heard two shots.

(d) MP's second statement

- 39 On September 11, 2001 MP, during questioning by the public prosecutor, confirmed his statement of July 20, 2001, adding that he had shouted to the demonstrators: “Leave or I’ll kill you!”

3. Other statements taken during the investigation

(a) Statements by other carabinieri

- 40 Sergeant-Major Amatori, who was in the other jeep on Piazza Alimonda, said that he had noticed that the jeep in which MP was travelling had its path blocked by a refuse container and was surrounded by a large number of demonstrators, “certainly more than twenty”. The latter were throwing objects at the jeep. In particular, he saw one demonstrator throw a fire extinguisher at the rear window. He heard shots and saw Carlo Giuliani fall down. The jeep then drove twice over Carlo Giuliani’s body. Once the jeep had succeeded in leaving Piazza Alimonda, he went over to it and saw that the driver had got out and, visibly shaken, was asking for help. The sergeant-major took over the driving seat and, noticing that MP had a pistol in his hand, ordered him to replace the safety catch. He immediately thought that this was the weapon that had just fired the shots, but said nothing to MP, who was injured and whose head was bleeding. The driver told him that he had heard shots while he was manoeuvring the jeep. The sergeant-major was not given any explanation as to the circumstances surrounding the decision to shoot and did not ask any questions on the subject.
- 41 *Carabiniere* Rando had gone over to the jeep on foot. He said that he had seen that the pistol was drawn and asked MP if he had fired. MP said that he had, without specifying whether he had fired into the air or in the direction of a particular demonstrator. MP kept saying: “They wanted to kill me, I don’t want to die.”

42 On September 11, 2001 the public prosecutor heard evidence from Captain Cappello, commander of the ECHO company.³ Captain Cappello stated that he had given MP permission to board the jeep and had taken his tear-gas gun as MP was experiencing difficulties. He stated subsequently (at the “trial of the 25”, hearing of September 20, 2005) that MP had been physically unfit to continue on account of his mental state and nervous tension. Captain Cappello had then moved with his men—about 50 in number—towards the corner of Piazza Alimonda and Via Caffa. He was requested by police officer Lauro to proceed up Via Caffa in the direction of Via Tolemaide to assist the men engaged there in trying to push back the demonstrators. He said he had been puzzled by the request, given the number of men with him and their state of tiredness, but had nevertheless stationed them on Via Caffa. The *carabinieri* were forced back by the demonstrators coming from Via Tolemaide; they initially withdrew in an orderly manner, and then in disorderly fashion. Mr Cappello did not realise that, when the *carabinieri* withdrew, they were being followed by the two jeeps, as there was no “operational reason” for the vehicles to be there. The demonstrators dispersed only when the mobile police units stationed on the other side of Piazza Alimonda intervened. Only then did he observe a man wearing a balaclava lying on the ground, apparently seriously injured. Some of his men were wearing helmets equipped with video cameras which should make it possible to shed light on the sequence of events; the video recordings were handed over to Colonel Leso.

43 Lieutenant-Colonel Truglio, Captain Cappello’s superior officer, stated that he had stopped around 10m from Piazza Alimonda and 30–40m from the jeep, and had seen the jeep drive over a body lying on the ground.

(b) Statement by police officer Lauro

44 On December 21, 2001 Mr Lauro gave evidence to the public prosecutor. He stated that he had learnt of the change to the service instructions on the morning of July 20, 2001. At the hearing of April 26, 2005 during the “trial of the 25”, he stated that he had been informed on July 19, 2001 that no march was authorised for the following day. On July 20 he had still been unaware that an authorised march was due to take place. During the day he went to Piazza Tommaseo, where clashes were taking place with demonstrators. At 15.30, while the situation was calm, Lieutenant-Colonel Truglio and the two jeeps joined the contingent. Between 16.00 and 16.45 the contingent was involved in clashes on Corso Torino. It then arrived in the vicinity of Piazza Tommaseo and Piazza Alimonda. Lieutenant-Colonel Truglio and the two jeeps came back and the contingent was reorganised. Mr Lauro observed a group of demonstrators at the end of Via Caffa who had formed a barrier using wheeled refuse containers and were advancing towards the law-enforcement officers. He asked Captain Cappello whether his men were in a position to deal with the situation and the latter replied in the affirmative. Mr Lauro and the contingent therefore took up positions close to Via Caffa. He heard an order to withdraw and took part in the disorderly withdrawal of the contingent.

(c) Other statements made to the public prosecutor

45 Some demonstrators present at the time of the events also gave statements to the public prosecutor. Some of them said they had been very close to the jeep and

³ See [34] above

had themselves thrown stones and had struck the jeep with sticks and other objects. According to one demonstrator, MP had cried: “Bastards, I’m going to kill the lot of you!” Another noticed that the *carabiniere* inside the jeep had taken out his pistol; the demonstrator then shouted to his friends to watch out and moved away. Another demonstrator said that MP had been protecting himself on one side with a riot shield.

- 46 Some individuals who witnessed the events from the windows of their homes said they had seen a demonstrator pick up a fire extinguisher and raise it up. They had heard two shots and had seen the demonstrator fall to the ground.

4. Audiovisual material

- 47 The public prosecutor’s office ordered the law-enforcement agencies to hand over any audiovisual material which might help in reconstructing the events on Piazza Alimonda. Photographs had been taken and video recordings made by film crews, helicopter cameras and miniature video cameras in the helmets of some of the officers. Pictures taken by private individuals were also available.

5. The forensic examinations

(a) *The autopsy*

- 48 Within 24 hours the public prosecutor’s office ordered an autopsy to establish the cause of Carlo Giuliani’s death. On July 21, 2001 at 12.10 notice of the autopsy—specifying that the injured party could appoint an expert and a lawyer—was served on the first applicant, Carlo Giuliani’s father. At 15.15 Mr Canale and Mr Salvi, the experts appointed by the prosecuting authorities, were given their official brief and work commenced on the autopsy. The applicants did not send any representative or expert of their own.
- 49 The experts requested the public prosecutor’s office to give them 60 days to prepare their report. The request was granted. On July 23, 2001 the public prosecutor’s office authorised the cremation of Carlo Giuliani’s body in accordance with the family’s wishes.
- 50 The expert report was submitted on November 6, 2001. It found that Carlo Giuliani had been struck below the left eye by a bullet which had passed through the skull and exited through the rear of the skull on the left. The bullet’s trajectory had been as follows: it had been fired from a distance exceeding 50cm and had travelled from front to back, from right to left and in a downward direction. Carlo Giuliani had been 1.65m tall. The person firing the shot had been facing the victim and slightly to his right. According to the experts, the bullet injury to the head had resulted in death within a few minutes; the jeep’s being driven over the body had caused only insignificant minor injuries to the organs in the thorax and the abdomen.

(b) *The expert medical examinations carried out on MP and DR*

- 51 After leaving Piazza Alimonda the three *carabinieri* who had been in the jeep went to the casualty department of Genoa Hospital. MP complained of diffuse bruising to his right leg and an injury to the skull with open wounds; against the advice of the doctors, who wished to admit him, MP signed a discharge and left the hospital at around 21.30. He had an injury to the skull which, he said, had been caused by a blow to the head with a blunt instrument while he had been in the jeep.

- 52 DR presented with bruising and abrasions to the nose and the right cheekbone and bruises on the left shoulder and left foot. FC was suffering from a post-traumatic psychological disorder and was expected to recover within 15 days.
- 53 Medical examinations were carried out to establish the nature of the injuries and their connection with the attack on the jeep's occupants. The reports concluded that the injuries sustained by MP and DR had not been life-threatening. MP's head injuries could have been caused by a stone thrown at him, but it was not possible to determine the origin of his other injuries. The injury to DR's face could have been caused by a stone thrown at him and his shoulder injury by a blow from a wooden plank.

(c) The ballistics tests ordered by the public prosecutor's office

- (i) The first set of tests
- 54 On September 4, 2001 the public prosecutor's office instructed Mr Cantarella to establish whether the two spent cartridges found at the scene (one in the jeep and the other a few metres from Carlo Giuliani's body)⁴ had come from the same weapon, and specifically from MP's weapon. In his report of December 5, 2001 the expert concluded that there was a 90 per cent probability that the cartridge found in the jeep had come from MP's pistol, whereas there was only a 10 per cent probability that the cartridge found close to Carlo Giuliani's body had issued from the same weapon. In accordance with art.392 of the Code of Criminal Procedure (the CCP), these tests were carried out unilaterally, that is to say, without the injured party having an opportunity to participate.
- (ii) The second set of tests
- 55 The public prosecutor's office appointed a second expert, police inspector Manetto. The latter, in a report submitted on January 15, 2002, stated that there was a 60 per cent probability that the spent cartridge found near the victim's body had come from MP's weapon. He concluded that both the cartridges had come from MP's pistol, and estimated the distance between MP and Carlo Giuliani at the moment of impact at between 110 and 140cm. The tests were conducted unilaterally.
- (iii) The third set of tests
- 56 On February 12, 2002 the public prosecutor's office instructed a panel of experts (made up of Mr Balossino, Mr Benedetti, Mr Romanini and Mr Torre):

“[T]o reconstruct, even in virtual form, the actions of M.P. and Carlo Giuliani in the moments immediately before and after the bullet struck the victim's body.”

In particular, the experts were asked to:

“[E]stablish the distance between M.P. and Carlo Giuliani, their respective angles of vision and M.P.'s field of vision inside the jeep at the moment the shots were fired.”

⁴ See [31] above

It appears from the file that Mr Romanini had published an article in September 2001 in a specialist journal,⁵ in which he expressed the view, among other things, that MP's actions had constituted "a clear and wholly justified defensive reaction".

- 57 The representatives and experts appointed by the applicants attended the examinations by the panel of experts. The applicants' lawyer, Mr Vinci, stated that he did not wish to make an application for the immediate production of evidence. Article 392(1)(f) and (2) of the CCP allows the public prosecutor and the accused, among other things, to request the investigating judge to order a forensic examination where the latter concerns a person, object or place which is subject to unavoidable alteration or where, if ordered during the trial, the examination in question could entail suspension of the proceedings for a period exceeding 60 days. Under art.394 of the CCP the injured party may request the public prosecutor to apply for the immediate production of evidence. If the public prosecutor refuses the request, he or she must issue an order giving reasons and must serve it on the injured party.
- 58 An on-site inspection was conducted on April 20, 2002. Traces of the impact of a shot were found on the wall of a building on Piazza Alimonda, at a height of about 5m.
- 59 On June 10, 2002 the experts submitted their report. The experts stated at the outset that the fact that they had not had access to Carlo Giuliani's body (because it had been cremated) had been a major obstacle which had prevented them from producing an exhaustive report, as they had been unable to re-examine parts of the body and search for micro-traces. On the basis of the "little material available" the experts attempted to establish first of all what the impact of the bullet had been on Carlo Giuliani's body, setting out the following considerations.
- 60 The injuries to the skull had been very serious and had resulted in death "within a short space of time". The bullet had not exited whole from Carlo Giuliani's head; the report of the full body scan performed before the autopsy referred to a "subcutaneous fragment, probably metal" above the bones in the occipital region. This piece of opaque metal looked like a fragment of bullet casing. The appearance of the entry wound on the face did not lend itself to an unequivocal interpretation; its irregular shape was explained chiefly by the type of tissue in the part of the body struck by the bullet. However, one possible explanation was that the bullet had not hit Carlo Giuliani directly, but had encountered an intermediate object which could have distorted it and slowed it down before it reached the victim's body. That hypothesis would explain the small dimensions of the exit wound and the fact that the bullet had fragmented inside Carlo Giuliani's head.
- 61 The experts reported finding a small fragment of lead, probably from the bullet, which had come off Carlo Giuliani's balaclava when the latter was being handled; it was impossible to ascertain whether the fragment had come from the front, side or back of the balaclava. It bore traces of a substance which was not part of the bullet as such, but came from material used in the building industry. In addition, micro-fragments of lead were found on the front and back of the balaclava, apparently confirming the hypothesis that the bullet had lost part of its casing at the moment of impact. According to the experts, it was not possible to establish the nature of the "intermediate object" apparently hit by the bullet; however, they ruled out the possibility that it was the fire extinguisher which Carlo Giuliani had

⁵TAC Armi

been holding in his outstretched hand. The distance from which the shot had been fired had been in excess of 50–100cm.

- 62 In order to reconstruct the events on the basis of the “intermediate object theory”, the experts then had some test shots fired and conducted video and computer simulations. They concluded that it was not possible to establish the bullet’s trajectory as the latter had undoubtedly been altered as a result of the collision. On the basis of video footage showing a stone disintegrating in the air and of the shot that could be heard on the soundtrack, the experts concluded that the stone had shattered immediately after the shot had been fired. A computer simulation showed the bullet, fired upwards, hitting Carlo Giuliani after colliding with the stone in question, thrown at the jeep by another demonstrator. The experts estimated that the distance between Carlo Giuliani and the jeep had been approximately 1.75m and that MP had been able to see Carlo Giuliani at the moment the shot was fired.

6. The applicants’ investigations

- 63 The applicants submitted a statement made to their lawyer by JM, one of the demonstrators, on February 19, 2002. JM stated in particular that Carlo Giuliani had still been alive after the jeep had driven over his body. The applicants also produced a statement made by a *carabiniere* (VM), who reported a widespread practice among law-enforcement officers consisting in altering bullets of the kind used by MP in order to increase their capacity to expand and hence fragment.
- 64 Lastly, the applicants submitted two reports drawn up by experts they themselves had chosen. According to one of the experts, Mr Gentile, the bullet had already been in fragments when it struck the victim. The fact that it had fragmented could be explained by a manufacturing defect or by its having been manipulated to make it more likely to break up. In the expert’s view, however, these two scenarios occurred only rarely and were therefore less likely than the one advanced by the prosecuting authorities’ experts (namely that the bullet had collided with an intermediate object).
- 65 The other experts appointed by the applicants to reconstruct the events concluded that the stone had shattered on impact with the jeep rather than with the bullet fired by MP. In order to reconstruct the events on the basis of the audiovisual material, and especially of the photographs, it was necessary to establish the exact position of the photographer, and in particular his or her angle of vision, taking into account also the type of equipment used. In addition, it was necessary to establish the timing of the images and how they fitted in with the sound. The applicants’ experts criticised the method used by the prosecuting authorities’ experts, who had based their analysis on “video and computer simulations” and had not analysed the available images rigorously and in detail. The method used to perform the test shots was also criticised.
- 66 The applicants’ experts concluded that Carlo Giuliani had been about 3m away from the jeep when the shot was fired. While it was undeniable that the fatal bullet had been in fragments when it struck the victim, the possibility of its having collided with the stone which could be seen in the video should be ruled out. A stone would have distorted the bullet differently and left different marks on Carlo Giuliani’s body. Moreover, MP had not fired upwards.

D. The request to discontinue the proceedings and the applicants' objection

1. The request to discontinue the proceedings

67 On completion of the domestic investigation the Genoa public prosecutor decided to request that the case against MP and FC be discontinued. The public prosecutor noted first of all that far-reaching changes had been made to the organisation of the public-order operations on the night of July 19, 2001, and took the view that this partly explained the problems that had arisen on July 20. However, he did not detail the changes or the problems that had resulted.

68 The public prosecutor went on to observe that Mr Lauro's version of events and that of Captain Cappello differed on one specific point: whereas the former asserted that the decision to position law-enforcement personnel on Via Caffa in order to block the demonstrators had been taken by mutual agreement, the latter maintained that it had been a unilateral decision taken by Mr Lauro despite the risks entailed by the small size of the detachment and the fact that the men were tired.

69 The experts agreed on the following points: two shots had been fired from MP's pistol, the first of which had killed Carlo Giuliani; the bullet in question had not fragmented solely as a result of striking the victim; and the photograph of Carlo Giuliani holding the fire extinguisher had been taken when he was approximately 3m away from the jeep.

70 However, they differed on the following points:

- (a) according to the prosecuting authorities' experts, Carlo Giuliani had been 1.75m from the jeep when the bullet struck him (approximately three metres away according to the Giuliani family's experts);
- (b) according to the Giuliani family's experts, the shot had been fired before the stone could be seen on the video, contrary to the view of the prosecuting authorities' experts.

71 As the parties agreed that the bullet had fragmented before striking the victim, the public prosecutor concluded that they were also in agreement as to the causes of the bullet's fragmentation, and that the applicants subscribed to the "intermediate object theory". Other possible explanations for the fragmentation of the bullet advanced by the applicants—such as the manipulation of the bullet or a manufacturing defect—had been considered by the applicants themselves to be much less likely. They could not therefore be regarded as valid explanations in the public prosecutor's view.

72 The investigation had been lengthy, in particular owing to delays with some of the forensic reports, the "superficial nature" of the autopsy report and the errors committed by one of the experts, Mr Cantarella. However, it had addressed all the relevant issues in detail and led to the conclusion that the hypothesis of the bullet having been fired upwards and deflected by a stone was "the most convincing". Nevertheless, there was insufficient evidence in the file to determine whether MP had fired with the sole intention of dispersing the demonstrators or had knowingly run the risk of injuring or killing one or more of them. There were three possibilities, and "the matter [would] never be resolved with certainty". The possibilities were as follows:

- the shots had been designed to intimidate the demonstrators and it was therefore a case of causing death by negligence;

- MP had fired the shots in order to put a stop to the attack and had accepted the risk of killing someone; that would mean that it was a case of intentional homicide;
- MP had aimed at Carlo Giuliani; this would also be intentional homicide.

In the public prosecutor's view, the evidence in the file was such that the third possibility could be ruled out.

- 73 The public prosecutor further considered that the fact that the bullet had collided with the stone was not capable of severing the causal link between MP's actions and Carlo Giuliani's death. Given that the link remained, the question was whether MP had acted in self-defence.
- 74 It had been proven that the physical integrity of the jeep's occupants had been under threat and that MP had been "responding" in the face of danger. That response had to be examined in terms of both its necessity and its proportionality, "the latter aspect being the more delicate".
- 75 The public prosecutor took the view that MP had had no other option and could not have been expected to act differently, since "the jeep was surrounded by demonstrators [and] the physical aggression against the occupants was patent and virulent". MP had been justified in perceiving his life to be in danger. The pistol had been a tool capable of putting a stop to the attack, and MP could not be criticised for the equipment issued to him. He could not be expected to refrain from using his weapon and submit to an attack liable to endanger his physical integrity. These considerations justified a decision to discontinue the case.

2. The applicants' objection

- 76 On December 10, 2002 the applicants lodged an objection against the public prosecutor's request to discontinue the proceedings. They alleged that, since the prosecuting authorities themselves had acknowledged that the investigation had been flawed and raised questions which had not been answered with certainty, adversarial proceedings were essential in order to arrive at the truth. In their view, it was impossible to argue simultaneously that MP had fired into the air and that he had acted in self-defence, particularly since he had said that he could not see Carlo Giuliani when he had fired the shots.
- 77 The applicants further remarked that the intermediate object theory, which they disputed, had been put forward one year after the events and was based on pure supposition not backed up by objective evidence. There were other possible explanations.
- 78 The applicants also observed that, according to the evidence in the file, Carlo Giuliani had still been alive after the jeep had driven over his body. They stressed that the autopsy report, which found that no appreciable injuries had been caused by the jeep driving over the body, had been described by the public prosecutor as superficial; they also criticised the decision to entrust a number of investigative measures to the *carabinieri*.
- 79 It followed that MP and FC should have been committed for trial. In the alternative, the applicants requested that further investigative measures be undertaken, in particular:

- (a) that a forensic report be prepared aimed at establishing the causes and the time of Carlo Giuliani's death, in order to ascertain in particular whether he had still been alive when the jeep drove over his body, and afterwards;
- (b) that evidence be heard from the chief of police, Mr De Gennaro, and from *carabiniere* Zappia, to establish what instructions had been given regarding the wearing of weapons on the thigh;
- (c) that the person who had thrown the stone which allegedly deflected the bullet be identified and traced;
- (d) that further evidence be heard from the demonstrators who had come forward;
- (e) that evidence be heard from the *carabiniere* VM, who had reported the practice of cutting the tips of bullets⁶;
- (f) that forensic tests be carried out on the spent cartridges and on the weapons of all the police and *carabinieri* on Piazza Alimonda at the time of the events.

3. The hearing before the investigating judge

80 The hearing before the investigating judge took place on April 17, 2003. The applicants maintained their argument that the fatal bullet had not been deflected but had struck the victim directly. However, they conceded that there was no evidence that MP had altered the bullet to increase its impact; that was simply one theory.

81 The representative of the public prosecutor's office said he had the impression that:

“[C]ertain points which [he had] believed to be the subject of agreement were in fact not; on the contrary, there were divergences of opinion.”

He pointed out that the applicants' expert, Mr Gentile, had been in agreement as to the fact that the bullet had been damaged before striking Carlo Giuliani. Furthermore, Mr Gentile had acknowledged that one of the possible causes of the damage was a collision with some object or an intrinsic defect in the bullet, and that the second cause was less likely than the first.

E. The decision of the investigating judge

82 By an order lodged with the registry on May 5, 2003, the Genoa investigating judge granted the public prosecutor's request to discontinue the case.⁷

1. Establishment of the facts

83 The investigating judge referred to an anonymous account of the events posted by a French person on an anarchist website,⁸ which she considered to be credible given that it concurred with the audiovisual material and with the witness statements. The account in question described the situation on Piazza Alimonda and a charge by demonstrators against the *carabinieri*. The charge had been led by demonstrators throwing anything that came to hand, followed by others carrying containers and

⁶ See [63] above

⁷ Several extracts from the investigating judge's order are cited extensively at [94]–[116] of the Chamber judgment

⁸ See <http://www.anarchy99.net>

rubbish bins for use as mobile barricades. The atmosphere on the square was described as “frenetic”, with the law-enforcement agencies coming under attack from a crowd which was advancing, throwing missiles and immediately picking up new ones. The *carabinieri*, for their part, were firing tear gas, but a contingent was eventually forced to retreat towards Piazza Alimonda, where one of the two jeeps accompanying them found itself hemmed in and surrounded by demonstrators. The latter, brandishing iron bars and other objects, began hitting the jeep, and the rear window was soon smashed. The author of the account heard two shots and could see the hand of one of the two *carabinieri* inside the jeep, holding a firearm. When the jeep drove off and the noise died down, he saw a young man with serious head injuries lying on the ground. The author also described the anger of certain demonstrators on learning that a demonstrator had died.

84 The investigating judge observed that the description by the anonymous demonstrator tallied with the findings of the investigation, according to which, at around 17.00, a group of demonstrators had gathered in Via Caffà at the junction with Via Tolemaide, erecting barricades using rubbish bins, supermarket trolleys and other objects. From behind this barricade the group began throwing large numbers of stones and hard objects at a contingent of *carabinieri* who, having been stationed originally on Piazza Alimonda at the corner of Via Caffà, had begun to move forward in a bid to stop the demonstrators, whose numbers had increased in the meantime. Two jeeps, one of them driven by FC and with MP and DR on board, joined the contingent of *carabinieri*; however, the demonstrators charged violently, forcing the contingent to retreat. The jeeps reversed towards Piazza Alimonda, where one of them collided with a refuse container. In a matter of moments, the demonstrators surrounded the vehicle, hitting it using all available means and throwing stones. As the audiovisual material in the file showed, the jeep’s windows were smashed with stones, iron bars and sticks. The unrelenting nature of the demonstrators’ attack on the jeep was described as “impressive”. Some stones struck members of the *carabinieri* in the face and the head and one demonstrator, Mr Monai, thrust a long wooden beam through one of the windows, with the result that DR sustained bruises and grazing to his right shoulder.

85 One of the photographs showed MP kicking a fire extinguisher away; this was very probably the metal object which had caused severe bruising to his leg. Successive photographs showed a hand holding a weapon above the jeep’s spare wheel while a young man (Carlo Giuliani) reached down to the ground and picked up a fire extinguisher, in all likelihood with the intention of throwing it at the jeep’s rear window. At that moment two shots were fired from inside the jeep and the young man fell to the ground. The jeep drove over his body twice before managing to leave the scene.

86 All the available evidence, including MP’s statement of July 20, 2001,⁹ indicated that Carlo Giuliani’s death had been caused by one of the shots fired by MP. The investigating judge cited virtually the whole of that statement, in which MP spoke of his state of panic, the injuries he and DR had sustained and the fact that at the moment he pointed his pistol he had not seen anyone but had been aware of the presence of attackers because of the continuous barrage of stones. That version matched the statements made by DR and FC and those of other armed forces personnel and witnesses. In addition, the case file showed that MP had bruising

⁹ See [34]–[36] above

and injuries to his right leg, his arm and the top of his skull; DR had scratches on his face and bruising on his shoulder and foot, while FC had a post-traumatic disorder treatable within 15 days.¹⁰

2. The “intermediate object” theory

- 87 The investigating judge noted that the evidence in the file showed that the first bullet fired by MP had killed Carlo Giuliani. In exiting through the occipital bone in the skull the bullet had lost a fragment of its casing, as shown by the scan performed before the autopsy. This fact, combined with the characteristics of the entry and exit wounds, had led the prosecuting authorities’ experts to formulate the theory that the bullet had collided with an object before hitting Carlo Giuliani. The entry wound had been very irregular in shape and the exit wound had been small, as was the case when a bullet had lost momentum and/or fragmented.
- 88 The bullet in question was an encased 9mm parabellum, and therefore very powerful. This fact, together with the low resistance of the body tissue through which the bullet had travelled, served to confirm the theory advanced by the prosecuting authorities’ experts. Moreover, a “tiny fragment of lead”, compatible with the bullets issued to MP, had been found in the victim’s balaclava with particles of bone attached to it. This suggested that the bullet had lost part of its casing before hitting the bone.
- 89 The simulated shots had revealed that the intermediate object which caused the bullet to fragment could not have been either the fire extinguisher carried by the victim or one of the bones through which the bullet had passed; on the other hand, it could have been one of the numerous stones thrown at the jeep by demonstrators. This appeared to be confirmed by the video footage showing a stone disintegrating in the air at the same time as a shot was heard. The fact that the sound and the disintegration of the object occurred simultaneously made the applicants’ theory that the stone had smashed on impact with the roof of the jeep less convincing. Furthermore, the lead fragment in the victim’s balaclava had borne traces of building materials. Lastly, the test shots had shown that, when they were hit by a bullet, objects made up of building materials “exploded” in a similar manner to that seen in the video footage and caused damage to the cartridge casing. The tests performed showed that disintegration occurred differently when such objects were thrown against a vehicle (the dust was produced after rather than simultaneously with fragmentation, and in smaller quantities).
- 90 The second shot fired by MP had left a mark on the wall of the church on Piazza Alimonda (at a height of 5.3m). The first shot had hit Carlo Giuliani. The ballistics tests had been unable to establish the original trajectory of that bullet. However, the experts appointed by the public prosecutor’s office had taken into account the fact that the jeep was 1.96m high and that the stone seen on the video had been at a height of around 1.9m when the image was recorded. They had therefore fired some test shots, positioning the weapon around 1.3m from a stone suspended 1.9m above the ground: the bullet had been deflected downwards and hit the “collecting tray” (located 1.75m from the weapon) at heights of between 1.1 and 1.8m. These data tallied with the statements of certain demonstrators who had been eyewitnesses to the events, according to whom Carlo Giuliani had been about two metres from

¹⁰ See [51]–[53] above

the jeep when he was shot dead. The prosecuting authorities' experts had not had these statements available to them at the time they had carried out their work.

- 91 The foregoing considerations suggested that, as concluded by the prosecuting authorities' experts, the shot had been fired upwards, above Carlo Giuliani, who was 1.65m tall. The stone had disintegrated 1.9m above the ground.

3. MP's angle of vision

- 92 MP's angle of vision had probably been restricted by the jeep's spare wheel. However, it was difficult to be certain on that point as MP's face did not appear on any of the photographs in the file, whereas they clearly showed his hand holding the weapon. The pictures suggested, however, that he had been half-lying or crouching on the floor, as confirmed by MP's own statements and those of DR and the demonstrator Predonzani. That led to the conclusion that MP had been unable to see the persons close to the jeep's rear door below the spare wheel, and that he had fired the shots in an attempt to intimidate the demonstrators.

4. Legal characterisation of MP's actions

- 93 Having thus reconstructed the facts, the investigating judge addressed the legal characterisation of MP's actions. The prosecuting authorities had advanced two hypotheses in that regard¹¹: (a) that MP had fired as high in the air as possible with the sole aim of intimidating the jeep's assailants, in which case the charge should be one of causing death by negligence; (b) that MP had fired without aiming at anyone or anything, with the aim of halting the attack, in which case the charge should be one of intentional homicide on account of "reckless conduct", as he had accepted the risk that demonstrators might be hit.
- 94 The investigating judge took the view that the first hypothesis advanced by the public prosecutor was not correct. If MP had fired as high in the air as possible his actions would not have been punishable, by virtue of art.53 of the Criminal Code (the CC), and the causal link would in any case have been severed by an unforeseeable factor beyond his control, namely the bullet's collision with an intermediate object.
- 95 If, on the other hand, the second hypothesis advanced by the prosecuting authorities was accepted, it had to be established whether any grounds of justification existed (the legitimate use of weapons and/or self-defence, under arts 53 and 52 of the CC)¹² which would exempt MP from criminal responsibility and make his actions not punishable.

5. Whether MP made legitimate use of his weapon (article 53 of the CC)

- 96 The investigating judge first addressed the question whether the use of a weapon had been necessary. Under art.53 of the CC,¹³ state agents had wider powers than ordinary individuals in the context of self-defence; this ground of justification was not subject to the condition that the reaction was proportionate to the threat, but to the condition of "necessity". Even for state agents, the use of a weapon was a measure of last resort; however, state agents could not be held responsible for the

¹¹ See [72] above

¹² See [142]–[144] below

¹³ See [143] below

occurrence of a more serious event than that foreseen by them, as this risk was inherent in the use of firearms. In general terms, art.53 of the CC permitted the use of force where it was necessary to repel violence or thwart an attempt to resist official authority.

97 MP had found himself in a situation of extreme violence designed to disturb public order and targeting the *carabinieri*, whose safety was directly threatened. In that connection the investigating judge cited extracts from the testimonies of two of the jeep's assailants (Mr Predonzani and Mr Monai), noting once again the violence of the assault, and referred to the photographs in the file. The victim's conduct had not been an isolated act of aggression, but one phase in a violent attack on the jeep by several persons, who had been tilting it sideways and probably trying to open the rear door.

98 The evidence in the file ruled out the possibility that MP had deliberately targeted Carlo Giuliani; however, even assuming that this had been the case, in the particular circumstances of the case his conduct would have been justified under art.53 of the CC, as it was legitimate to fire in the direction of assailants in order to halt an attack while endeavouring to limit the damage, for instance by avoiding vital organs. In conclusion, the use of a firearm had been justified and had been likely not to cause serious harm, given that MP had "certainly fired upwards" and that the bullet had struck Carlo Giuliani only because it had been deflected in a manner that could not have been foreseen.

6. Whether MP acted in self-defence (article 52 of the CC)

99 The investigating judge next considered it necessary to determine whether MP had acted in self-defence, which was a "more stringent" test for exemption from responsibility. She took the view that MP had rightly perceived a threat to his physical integrity and that of his colleagues, and that the threat had persisted on account of the violent attack on the jeep by a crowd of assailants and not just by Carlo Giuliani. In order to be assessed in its proper context, MP's response had to be viewed in relation to that attack. The investigating judge rejected the hypothesis advanced by the victim's family that MP's head injuries had been caused by the internal lever of the flashing light on the jeep's roof rather than by stones thrown by demonstrators.

100 MP's response had been necessary in view of the number of assailants, the means used, the sustained nature of the violence, the injuries to the *carabinieri* in the jeep and the vehicle's difficulty in leaving the square because the engine had stalled. The response had been appropriate given the level of violence.

101 Had MP not taken out his weapon and fired two shots, the attack would have continued. If the fire extinguisher—which MP had already kicked away once—had landed in the jeep, it would have caused serious injury, or worse, to the occupants. As to the relationship of proportionality between the attack and the response, the Court of Cassation had held that the interests under threat had to be weighed against the means available to the accused, and that a plea of self-defence might be allowed even if the harm to the assailant was slightly greater than the threatened harm to the accused.¹⁴ Furthermore, the response had to be the only one possible in the circumstances, in the sense that other responses less damaging to the assailant

¹⁴ *Catania* (08204) Unreported April 13, 1987 Court of Cassation, First Section

would not suffice to counter the danger.¹⁵ Where a firearm was the only means of defence available to the person under attack, its use should be confined to displaying the person's resolve to make use of it, firing into the air or onto the ground or firing in the direction of the assailant but taking care not to hit vital organs, so as to inflict injury but not kill.¹⁶

- 102 In the instant case MP had had only one means of countering the attack: his firearm. He had made proportionate use of it, since before shooting he had called out to the demonstrators to leave, in an attempt to put a stop to their actions; he had then fired upwards and the bullet had hit the victim as the result of a tragic twist of fate. Had he wished to be sure of harming his assailants he would have fired through the side windows of the jeep, next to which numerous demonstrators had gathered. It followed that he had acted in self-defence. That being so, it was of little relevance whether MP had had a partial view of Carlo Giuliani (as the applicants' experts maintained and the prosecuting authorities' experts considered possible) or whether, as seemed more likely, he had not seen him and had fired as high in the air as his position would allow, accepting the risk that the shot might hit somebody.

7. The accusations against FC

- 103 The investigating judge also considered that the evidence in the file excluded any criminal responsibility on the part of FC, given that, as indicated by the forensic experts, Carlo Giuliani's death had undoubtedly been caused within minutes by the pistol shot. The jeep's driving over the victim's body had caused only bruising. In any event, owing to the confused situation around the jeep, FC had not been able to see Carlo Giuliani or observe that he had fallen to the ground.

8. Refusal of the applicants' requests for further investigation

- 104 The investigating judge refused all the applicants' requests for further investigative measures to be taken.¹⁷ The reasons for the refusal can be summarised as follows:

- (a) with regard to the request for a forensic report to be prepared aimed at establishing whether Carlo Giuliani had still been alive when the jeep drove over his body,¹⁸ the checks already carried out had been thorough; furthermore, the injured parties had been offered the opportunity of appointing an expert of their choosing to attend the autopsy, but had not availed themselves of that possibility. In addition, the victim's body had been cremated scarcely three days after his death, thereby rendering any subsequent examination impossible;
- (b) as to the request for Police Chief De Gennaro and *carabinieri* Second-Lieutenant Zappia to be examined on the subject of the lawfulness of the use of "thigh holsters" of the kind from which MP had drawn the weapon,¹⁹ it was clear that the directives issued with a view to the maintenance of public order could only be of a general nature and did not

¹⁵ *PM and Vellino* (02554) Unreported December 1, 1995 Court of Cassation, First Section

¹⁶ See *Tosani* Unreported September 20, 1982 Court of Cassation

¹⁷ See [79] above

¹⁸ See [79(a)] above

¹⁹ See [79(b)] above

include instructions applying to unforeseeable situations involving direct attacks on officers. Furthermore, the manner in which MP had been wearing the pistol was of no relevance in the present case given that he could legitimately make use of his weapon irrespective of where he was wearing it or where he drew it from;

- (c) any attempt to identify the person who had thrown the stone which deflected the bullet²⁰ was bound to fail, as it was not realistic to imagine that a demonstrator would have followed the trajectory of a stone after throwing it. In any event, it would be impossible to identify the person concerned and his or her statements would have no bearing on the technical findings in the judge's possession;
- (d) no purpose whatsoever would be served by further examining the demonstrators Monai and Predonzani concerning the conduct of the *carabinieri* inside the jeep, the number of demonstrators in the vicinity of the vehicle, the person inside the jeep who had actually seized the weapon, Carlo Giuliani's position or the number of the jeep's windows that were broken.²¹ Those witnesses had made statements very shortly after the events, while the latter were still fresh in their minds; the statements contained extremely precise details which were confirmed by the video footage and photographs in the file. Lastly, it was not relevant to establish how many of the jeep's windows had been broken as it was beyond dispute that some of the right-side windows and the rear window were smashed;
- (e) it was unnecessary to take evidence from Mr D'Auria, supposedly to confirm that no Molotov cocktails had been thrown on Piazza Alimonda, contrary to MP's assertion, or to determine how far away Mr D'Auria had been when he took the photograph which the prosecuting authorities' experts had used as a basis for the ballistics reconstruction. The photograph in question had been merely a starting point for determining Carlo Giuliani's position, which had been deduced from the position of the persons in relation to the fixed elements on the square. Furthermore, MP had never asserted that Molotov cocktails had been thrown on Piazza Alimonda; he had simply spoken of his fear that they might be;
- (f) with regard to the request to hear evidence from Sergeant-Major Primavera as to when the hatchback window of the jeep had been smashed, the photographs showed clearly that it had happened well before the shots were fired and that the latter had not been the cause of the smashed window; even if the witness whom the applicants wished to see called perceived the matter differently, this would not alter those findings;
- (g) the footage recorded on Piazza Alimonda by two *carabinieri* whose helmets were equipped with video cameras was already in the file;
- (h) there was nothing to be gained by hearing evidence from *carabiniere* VM concerning the practice of cutting the tips of bullets.²² It could only be assumed that this improper practice was not widespread; in any event, the findings of the ballistics reports, based on objective tests, were already available. There was nothing to indicate that MP had adopted the practice

²⁰ See [79(c)] above

²¹ See [79(d)] above

²² See [79(e)] above

in question in this case, given that the other bullets found in the magazine of his pistol had been perfectly normal;

- (i) it was beyond dispute that the damage to the jeep had been caused by the stones and other hard objects thrown at it; it was therefore unnecessary to order a technical inspection of the vehicle;
- (j) forensic tests on the spent cartridges seized, in order to establish which weapons they had come from,²³ would “serve no actual purpose”, as there was no doubt that the fatal bullet had been fired from MP’s weapon; this had been confirmed by MP’s statements and the findings of the forensic examinations.

9. The decision to delegate certain investigative steps to the carabinieri

- 105 The investigating judge dismissed the criticisms made by the applicants’ lawyers to the effect that it had been inappropriate to entrust several aspects of the investigation to the *carabinieri* and to hear evidence from a large number of witnesses in the presence of members of the *carabinieri*. The judge observed that the events on Piazza Alimonda had been reconstructed with the aid of the large volume of video and photographic material in the file and the statements of the participants themselves, and that all plausible scenarios had been considered.
- 106 In the light of all the above considerations the Genoa investigating judge decided that the proceedings should be discontinued.

F. The parliamentary inquiry

- 107 On August 2, 2001 the Speakers of the Senate and the Chamber of Deputies decided that an inquiry into the events which occurred during the G8 in Genoa should be carried out by the constitutional affairs committees of both houses of Parliament. To that end, a commission representing the different parliamentary groups was established, made up of 18 members of Parliament and the same number of senators (the Parliamentary Commission).
- 108 On August 8, 2001 the Parliamentary Commission heard evidence from the Commander General of the *carabinieri*. The latter stated, in particular, that 4,673 additional troops and 375 specialised *carabinieri* had been drafted in to Genoa to assist the 1,200 members of the provincial command. Only 27 per cent of the men present in Genoa had been auxiliary *carabinieri* performing military service (for public-order operations the figure was usually 70 per cent). Most of the auxiliary *carabinieri* had performed nine or 10 months’ service and had already been deployed in similar settings. Beginning in April 2001 all the personnel to be deployed in Genoa had received training in public-order operations and use of the standard equipment. Team exercises and seminars had been organised, the latter relating to the identification of potential threats and the layout of the city. All those deployed had protective helmets, riot shields, batons, gas masks and fire-resistant suits with protection for the most exposed parts of the body. Each *carabiniere* had a pistol and numerous tear-gas grenades had been issued to the detachments; there were also 100 armoured vehicles and 226 vehicles equipped with protective grilles,

²³ See [79(f)] above

in addition to the special vehicles (for instance, vehicles fitted with mobile barriers to reinforce the fixed barriers protecting the red zone).

- 109 According to a memorandum from the senior command of the *carabinieri*, an elite force of 928 men had undergone a programme of training in Velletri ahead of the G8 summit, covering both theory (the psychology of crowds and opposition groups, public-order techniques, handling emergencies) and practice (physical activity, use of resources, materials and equipment, final exercise with debriefing). The remaining troops had received three days' training in public-order techniques. 48 officers had taken part in an information seminar covering topics such as the layout of the city of Genoa.
- 110 On September 5, 2001 the Parliamentary Commission heard evidence from Mr Lauro, an officer of the Rome police who had taken part in the public-order operations in Genoa.²⁴
- 111 Mr Lauro stated that the *carabinieri* had been equipped with throat microphones, enabling them to communicate very rapidly with one another. When asked to explain why the law-enforcement officers stationed quite near to the jeep (15–20m away) had not intervened, Mr Lauro replied that the men had been on duty since the morning and had been involved in several clashes during the day. He added that he had not noticed at the time of the events that there was a group of *carabinieri* and police officers who could have intervened.
- 112 As to the function of the two jeeps, Mr Lauro explained that they had brought fresh supplies at around 16.00 and had left and then returned about an hour later to see if anyone was injured. Mr Lauro also said that he had called an ambulance for Carlo Giuliani as no doctor was present at the scene.
- 113 On September 20, 2001 the Parliamentary Commission submitted a report setting out the conclusions of the majority of its members following the inquiry. The document dealt with the organisation of the G8 in Genoa, the political context and protest movements surrounding the summit and similar events worldwide, and the numerous contacts which had taken place between representatives of the institutions and associations making up the Genoa Social Forum, with the aim of preventing public-order disturbances and making arrangements to receive the demonstrators. Despite that dialogue, the protest movement had not succeeded in isolating the violent elements, numbering "around 10,000"; within the latter, a distinction had to be made between the Black Bloc and "opportunistic" individuals who had concealed themselves in the crowd.
- 114 18,000 law-enforcement officers had taken part in the operation. There had been about 2,000 delegates and 4,750 accredited journalists; the number of demonstrators ran into the tens of thousands (100,000 had taken part in the final demonstration). Seminars on the co-ordination and training of the law-enforcement agencies (with contributions by trainers from the Los Angeles Police) had been held on April 24 and June 18 and 19, 2001. The agencies concerned had staged practical exercises, albeit after a deplorable delay. The administrative authorities had conducted research into non-lethal ammunition (including rubber bullets), in particular by means of study visits to foreign police forces. The authorities had been informed that Black Bloc demonstrators from anarchist circles in Italy and abroad were likely to travel to Genoa. After contacts with police forces in other countries, a decision had been taken to suspend application of the Schengen Agreements between July 13 and 21,

²⁴ See [34] above

2001. From July 14 onwards checks had been carried out at the Italian borders to allow certain demonstrators to enter the country and prevent violent elements from gaining access. In the meantime, by an order dated July 12, 2001, the Genoa *questore* had indicated the areas of the city where the summit and the demonstrations would take place and had given an analytical breakdown of the security measures in place in each area.

- 115 The parliamentary commission next examined the various violent incidents and clashes which had taken place between the law-enforcement agencies and demonstrators on July 19, 20 and 21, 2001 (in particular during a search conducted in a school, described by the commission as “perhaps the most notable example of organisational and operational failings”). With specific reference to the death of Carlo Giuliani, the commission observed that a *carabiniere* had fired the fatal shot while the victim had been preparing to throw a fire extinguisher in his direction; the *carabiniere* in question had previously sustained a blow to the head from another demonstrator. In view of the fact that a criminal investigation was in progress, the commission decided to focus its analysis on the “overall situation giving rise to the tragedy”, examining in particular the communications system between the contingents of law-enforcement personnel, their commanding officers and the control centres, in order to study the co-ordination arrangements between the different areas. The commission also noted that the “fundamental cause” of the loss of a life had been:

“[T]he mindless violence perpetrated by extremist groups which jeopardised the lives of the young people who became caught up in their criminal activities.”

- 116 In the commission’s view, the overall outcome of the G8 had been positive. While certain shortcomings had been identified in the co-ordination of the operations, it had to be borne in mind that the law-enforcement agencies had been confronted with between 6,000 and 9,000 violent individuals who had not been isolated by the peaceful demonstrators (the commission referred in that regard to the “double game” being played by the Genoa Social Forum). The parliamentary commission’s report concluded as follows:

“The commission ... reiterates that violence is not and must not be a tool for political action and that the rule of law is a fundamental value of democratic societies. At the same time it emphasises strongly the inviolability of the constitutional principles of freedom to express one’s thoughts and respect for the individual even – not to say especially – where he or she is detained following arrest, and also the need to ensure the safety of citizens and public order; if acts constituting a criminal or disciplinary offence are established, [the commission] would like to see the judicial authority and the administrative bodies concerned identify those responsible and punish their actions.”

- 117 The Government produced before the Court the verbatim records of the hearings at which the Parliamentary Commission had heard evidence from the Minister of the Interior, the Director General of the Public Safety Department and the Commander General of the Revenue Police.

- 118 On September 20, 2001 a group of parliamentarians called on the Government to explain why law-enforcement officers being deployed on public-order operations were equipped with live ammunition rather than rubber bullets. The parliamentarians

advocated the use of the latter, arguing that they had been used successfully on several occasions in other countries.

- 119 The government spokesman replied that the legislation made no provision for that option and that, moreover, it had not been proven that rubber bullets did not also cause very serious harm to the victim. Finally, he said that the possibility of introducing non-lethal weapons was currently being examined.
- 120 On June 22, 2006 the applicants applied to the Prime Minister's Office and to the Ministry of Defence for compensation in respect of the damage they had suffered as a result of the death of Carlo Giuliani. The Government explained that the application had been refused on the ground that it had been established in criminal proceedings that MP had acted in self-defence. For the same reason, no disciplinary proceedings were instituted against MP.

G. The decisions given in the "trial of the 25"

1. The first-instance judgment

- 121 On March 13, 2008 the Genoa District Court published its reasoning in the judgment adopted on December 14, 2007 following the trial of 25 demonstrators charged with a number of offences committed on July 20, 2001 (including criminal damage, theft, destroying property, looting and acts of violence against law-enforcement officers). During the trial, in which 144 hearings were held, the District Court, among other things, heard evidence from numerous witnesses and examined a wealth of audiovisual material.
- 122 The District Court held, *inter alia*, that the attack by *carabinieri* on the *Tute Bianche* marchers had been unlawful and arbitrary. The march had been authorised and the demonstrators had not committed any significant acts of violence against the *carabinieri*. The attack by the latter had been launched against hundreds of persons who were doing no harm, and no order to disperse had been given. The subsequent charge had also been unlawful and arbitrary. It had not been preceded by a warning to disperse, had not been ordered by the officer authorised to do so and had been unnecessary.
- 123 The methods deployed had also been unlawful. The *carabinieri* had fired tear-gas grenades at chest height, a large number of demonstrators had sustained injuries caused by non-regulation batons, and the armoured vehicles had knocked down the barricades and pursued members of the crowd along the pavement with the clear intention of causing harm.
- 124 The unlawful and arbitrary nature of the *carabinieri's* actions had justified the resistance shown by the demonstrators while tear gas was being used and during the attack on the march. Their resistance had also been warranted during the clashes which occurred in the side streets prior to 15.30, that is, up to the point at which the *carabinieri* had acted on the order to stop and allow the march to proceed. According to the court, the accused's actions had been a "necessary response" to the arbitrary actions of the law-enforcement officers for the purposes of art.4 of Legislative Decree 288 of 1944. Article 4 reads as follows:

"Articles 336, 337, 338, 339, 341, 342 and 343 of the Criminal Code [making punishable various acts of resistance against law-enforcement officers] shall

not apply where the State agent or person authorised to exercise public authority caused the offence contemplated in those Articles by overstepping the limits of his or her authority through arbitrary acts.”

- 125 The District Court decided to forward the file to the public prosecutor’s office on the ground that the statements made by Mr Mondelli and two other law-enforcement officers (to the effect that the attack had been necessary to counter the aggression shown by the demonstrators) did not match the facts.
- 126 After 15.30, although the demonstrators may still have felt a sense of abuse and injustice, their conduct had no longer been defensive but had been driven by a desire for revenge; it was therefore unjustified and punishable.
- 127 The charge ordered by police officer Lauro, which had triggered the events on Piazza Alimonda, had been neither unlawful nor arbitrary. As a result, the violent reaction by the demonstrators, which had led to the *carabinieri* being pursued and the jeep being attacked, could not be regarded as a defensive response.
- 128 The *carabinieri* in the jeep might well have feared that they would be subjected to an attempted lynching. The fact that the demonstrators surrounding them did not have Molotov cocktails and were therefore not in a position to set the vehicle on fire was a factor that could be appreciated with hindsight. The occupants of the jeep could not be blamed for having panicked.
- 129 Carlo Giuliani had probably been four metres from the jeep when he was shot down. MP had stated that he could only see what was happening inside the vehicle. When the shot was fired, he had been lying down with his feet pointing towards the rear door of the vehicle. He had pulled DR down on top of him and could not see his own hand; he was unable to say whether it had been inside or outside the jeep. In any event, he had fired upwards.
- 130 The District Court judgment mentions the statements made by the expert Marco Salvi, who performed the autopsy on Carlo Giuliani’s body. Mr Salvi stated in particular that the trajectory of the fatal bullet indicated a direct shot and that the metal fragment lodged in the victim’s body had been very difficult to find. The fragment, which had shown up on the scan,²⁵ “must have been very small”; the experts had tried to locate it by going through the brain tissue section by section, although the latter had been damaged and engorged with blood. The more the experts worked, the more damaged the tissue had become. Given that the fragment was not a bullet and was of no use for ballistics purposes, the experts had considered it to be a minor detail and had not pursued their search.

2. The appeal judgment

- 131 24 of the accused appealed against the first-instance judgment. In a judgment of October 9, 2009, deposited with the registry on December 23, 2009, the Genoa Court of Appeal partly upheld the convictions handed down by the District Court, increased some of the sentences and declared the prosecution of some of the offences time-barred.
- 132 Regarding the *carabinieri* attack on the *Tute Bianche* march, the Court of Appeal largely endorsed the view of the District Court. It observed that the *carabinieri* had encountered the march, which numbered around 10,000 persons, as a result of the route indicated to them by the control room. The front of the march, or

²⁵ See [60] above

“contact group”, had been made up of around 20 individuals, mostly members of Parliament, mayors, cultural figures and journalists. Behind them had been a series of Plexiglas protective devices, joined together; these were followed by the “head of the procession” made up of demonstrators equipped with helmets and shoulder and arm protectors. The march had not encountered the scenes of any clashes but had simply proceeded for about 2km without meeting any obstacle. The protective equipment showed that, although they were not carrying blunt instruments, the demonstrators had been prepared for possible clashes.

133 In these circumstances it was difficult to understand why officers Bruno and Mondelli had decided to launch an attack on the march. They had not received any orders to that effect; on the contrary, they had been requested to avoid crossing the marchers’ path. The news that an attack was in progress had been greeted with cries of disapproval in the control room.

134 The *carabinieri* had been summoned to intervene urgently in Marassi Prison, where law-enforcement officers were struggling to cope with an attack by the Black Bloc. Accordingly, when they encountered the march they had attempted to clear the junction and the tunnel through which they wished to pass. According to the witness testimony of one journalist, judged to be “neutral” and therefore credible, youths belonging to the Black Bloc arriving from the opposite direction to the marchers had thrown stones at the *carabinieri*; this had led to the order to fire tear gas, given by Mr Bruno. The Court of Appeal concluded that, although the charge by the *carabinieri* had been illegitimate, they had been called upon to intervene in a situation characterised by violence from the Black Bloc demonstrators, who had earlier ransacked other parts of the city, and by the fact that the junction they needed to cross was occupied by the crowd and the tunnel was blocked by barricades.

135 In the Court of Appeal’s view, the District Court had correctly found the following actions by the *carabinieri* to be illegitimate:

- (a) the firing of tear gas at chest height;
- (b) the failure to order the dispersal of the marchers, who were not causing a disturbance and who could only have entered the red zone much further on, at Piazza Verdi;
- (c) the attack on an authorised, peaceful march made up of unarmed demonstrators. While the Black Bloc had created serious disturbances elsewhere in the city, there was no proof that they were being “covered” by the marchers, that is, that they had hidden amongst them before or after committing acts of vandalism.

136 Furthermore, there had been arbitrary acts in the form of: the use of non-regulation batons (pieces of wood or iron wrapped in adhesive tape and a source of serious cuts and bleeding); the use of armoured vehicles to make “forays” amidst the demonstrators, pursuing some of them at high speed along the pavement (the Court of Appeal observed that the vehicles did not have sufficiently safe brakes and that one of them had pursued a demonstrator in zig-zag fashion, as if attempting to run him over); the infliction of excessive injury and the beating of demonstrators, journalists and an ambulance driver.

137 The illegitimate and arbitrary attack had produced a reaction from the demonstrators which was not punishable in view of the grounds of justification provided for in art.4 of Legislative Decree 288 of 1944. However, once the *carabinieri* had withdrawn and an armoured vehicle had broken down, the

demonstrators had no longer been in danger. Hence, the attack on the vehicle and its occupants had not constituted a defensive act, but an act of retaliation. From that point onwards the *Tute Bianche* had “reclaimed” their right of assembly and protest, and any further acts of violence and vandalism on their part, including the damage to the armoured vehicle, amounted to a criminal offence.

- 138 The Court of Appeal endorsed the District Court’s view that, despite their violent response, the marchers had not been guilty of the offence of criminal damage. The damage caused had been minor and had resulted from the use of objects (cars and refuse containers) as protection against the *carabinieri*. Unlike the Black Bloc, the *Tute Bianche* had not taken to the streets with the intention of damaging public or private property symbolising the system they opposed. The damage had been confined to the fairly small area in which the response had occurred and, by and large, had ceased with the withdrawal of the *carabinieri*. Although “disquieting”, the fact that the demonstrators in the front lines had worn protectors could not give rise to the assumption that they had intended to engage in acts of violence.

H. The audiovisual material produced by the parties

- 139 During the proceedings before the Court the parties submitted a large volume of audiovisual material. The CD-ROMs produced by the Government and the applicants on June 28 and July 9, 2010 respectively were viewed by the judges of the Grand Chamber on September 27, 2010.²⁶ These show several phases in the demonstrations that took place in Genoa on July 20, 2001 and contain images of the moments before and after the shot which killed Carlo Giuliani. They also show the violence perpetrated by the demonstrators (throwing of stones, charges on the law-enforcement agencies, acts of vandalism in the street and against police and *carabinieri* vehicles) and violence imputable to the authorities. Some of the footage shows police armoured vehicles pursuing demonstrators at high speed along the pavement and police officers beating a demonstrator lying on the ground. The applicants’ CD-ROM also contains extracts from Mr Lauro’s statement and from an interview with MP shown on television.

I. The administrative documents produced by the Government

- 140 The Government produced numerous administrative documents from the police authorities, the Ministry of the Interior and the Chamber of Deputies. The documents relevant to the present case noted the following:

- on February 6, 2001 the Public Safety Department of the Interior Ministry had sent out a circular to all *questori* reminding them, in particular, that the firing of tear gas should be considered a “measure of last resort for dealing with particularly serious situations which cannot be managed otherwise”;
- the Public Safety Department of the Interior Ministry had prepared “an information handbook for State police personnel” which contained guidelines on conduct at the Genoa G8;
- on July 17, 2001—hence, before the G8—the Minister of the Interior had addressed the Chamber of Deputies “on the public-order situation in Genoa”;

²⁶ See [9] above

- on July 23, 2001 the same Minister had addressed Parliament on the subject of the “serious incidents occurring in Genoa during the G8 summit”;
- on July 30 and 31, 2001 the Interior Ministry’s Public Safety Department had submitted reports on the conduct of the law-enforcement agencies during the search carried out on the night of July 21, 2001 in a school occupied by demonstrators, and in a police station where persons had been taken into custody. Disciplinary action had been proposed against several police officers and the Genoa *questore*;
- on August 6, 2001 the inter-regional police directorate had forwarded to the chief of police the findings of an administrative inspection carried out in the Genoa *questura*, which pointed to certain organisational problems during the G8 and analysed thirteen “potentially punishable incidents” imputable to the law-enforcement agencies emerging from the available audiovisual material; none of the incidents related to the use of force by MP.

141 The Government also produced a memorandum from the Public Safety Department of the Interior Ministry dated October 4, 2010, according to which some 18,000 law-enforcement officers had been deployed at the G8 in Genoa. In particular, the state had drafted in 14,102 “reinforcements” including 11,352 “police operators” (police officers, *carabinieri*, officers of the revenue and forestry police and prison officers) and 2,750 members of the armed forces. Of the 11,352 “police operators”, 128 belonged to the elite units, while 2,510 police officers and 1,980 *carabinieri* belonged to “mobile units” made up of personnel specially trained and equipped for public-order operations. The Public Safety Department indicated that, beginning in March 2001, it had put in place a training programme aimed specifically at personnel taking part in the G8, with a view to ensuring public-order management based on the principles of democracy and respect for fundamental rights (hence, participants in the training courses were reminded that the use of force was a measure of last resort). Advanced training seminars had also been organised which explored the dynamics of events such as the G8 summit.

II. Relevant domestic law and practice

A. “Grounds of justification”

142 The CC provides for situations which may exempt individuals from criminal responsibility and render not punishable conduct which amounts to an offence under the law. Possible grounds of justification include the legitimate use of weapons and self-defence.

1. Legitimate use of weapons

143 Article 53 of the CC provides that no sanctions may be imposed on:

“[A] State agent who uses or orders the use of weapons or any other means of physical force in the exercise of his or her official duties, where he or she is obliged to do so in order to repel an act of violence or thwart an attempt to resist official authority. In any case, he or she shall not be liable where such action is taken to prevent criminal acts entailing massacre, shipwreck, flooding,

aviation or railway disasters, intentional homicide, armed robbery or abduction ... The law provides for other cases in which the use of weapons or any other means of physical force is authorised.”

2. Self-defence

144 Article 52 of the CC provides that no sanctions may be imposed on

“[P]ersons who commit an offence when forced to do so by the need to defend their rights or the rights of others against a real danger of unjust attack, provided that the defensive response is proportionate to the attack.”

3. Negligent excess

145 Under art.55 of the CC, in cases, inter alia, of self-defence or legitimate use of weapons, where the person concerned has negligently overstepped the limits laid down by law or by the competent authority, or dictated by necessity, his or her actions are punishable as negligent conduct to the extent provided for by law.

B. Provisions governing public safety

146 Articles 18–24 of the Public Safety Code 773 of June 18, 1931 govern public gatherings and assemblies in public places or open to the public. Where such a gathering is liable to endanger public order or safety, or where offences are committed, the gathering may be dissolved. Before it is dissolved, the participants must be requested by the law-enforcement agencies to disperse. If the request is not complied with, the crowd must be given three formal warnings to disperse. If these are not complied with or cannot be issued because of revolt or opposition, the police officers or *carabinieri* order the gathering or assembly to be broken up by force. The order is carried out by the police and the armed forces under the command of their respective senior officers. Refusal to comply with the order to disperse is punishable by a term of imprisonment of between one month and one year and by a fine of between €30 and 413.

C. Rules governing the use of weapons

147 In February 2001 the Ministry of the Interior issued a directive to *questori* containing general provisions on the use of tear gas and batons. The use of such equipment must be ordered clearly and expressly by the head of the service after consultation with the *questore*. The personnel must be informed.

148 In addition, Presidential Decree 359 of October 5, 1991 lays down the “criteria for determining the weapons to be issued to the public safety authorities and the State police”. The decree contains a description of the various weapons issued as standard,²⁷ making a distinction between “personal weapons” and “collective weapons”. The personal weapons consist of a pistol which is allocated to the individual for the duration of his or her service.²⁸ He or she must keep the weapon,

²⁷ Presidential Decree 359 arts 10–32

²⁸ Presidential Decree 359 art 3(2)

ensure its upkeep, apply the safety measures provided for at all times and in all situations and participate in the firing exercises organised by the authorities.²⁹

- 149 Article 32 states that the authorities “may issue weapons with tranquilising agents (*proiettili narcotizzanti*)” and that in cases of necessity and urgency the Minister of the Interior may authorise police officers who have received ad hoc training to use weapons other than those issued as standard, provided that the weapons have been checked and do not exceed the offensive capacity of the standard-issue weapons.³⁰ The abovementioned decree further provides that the standard-issue weapons must be appropriate and proportionate to the requirements of protecting public order and public safety, preventing and dealing with crime and other institutional aims.³¹

D. The rights of injured parties during the preliminary investigation and following a request by the public prosecutor to discontinue the proceedings

- 150 Under art.79 of the CCP, the injured party may apply to join the proceedings as a civil party from the preliminary hearing onwards; the latter is the hearing at which the judge is called upon to decide whether the accused should be committed for trial. Before the preliminary hearing, or where no such hearing is held because the case is discontinued at an earlier stage, injured parties may exercise certain powers. The relevant provisions of the CCP provide:

“Article 90

Injured parties shall exercise the rights and powers expressly afforded to them by law and may furthermore, at any stage of the proceedings, submit pleadings and, except in cassation proceedings, request the inclusion of evidence. ...

Article 101

Injured parties may appoint a legal representative for the exercise of the rights and powers afforded to them ...

Article 359 § 1

Where the public prosecutor orders examinations ... or any other technical operation calling for a specific competence, he or she may appoint ... experts. The latter may not refuse to cooperate.

Article 360

1. Where the examinations referred to in Article 359 ... concern persons, objects or places in a state subject to alteration, the public prosecutor shall inform the accused, the injured party and the lawyers without delay of the date, time and place designated for the briefing of the experts and of the possibility of appointing experts.

...

3. Any lawyers or experts appointed shall have the right to attend the briefing of the experts, participate in the examinations, make observations and express reservations. ...

Article 392

1. In the course of the preliminary investigation, the public prosecutor and the accused may apply to the judge for the immediate production of evidence

...

²⁹ Presidential Decree 359 art 6(1)

³⁰ Presidential Decree 359 art 37

³¹ Presidential Decree art 1

2. The public prosecutor and the accused may also request a forensic examination where such examination, if ordered during the trial, could entail the suspension of the latter for more than 60 days ...

Article 394

1. Injured parties may request the public prosecutor to apply for the immediate production of evidence.

2. Should the public prosecutor refuse that request, he or she shall give reasons for the decision and serve it on the injured party.”

- 151 The public prosecutor does not have the power to discontinue the proceedings; he or she may simply request the investigating judge to do so. The injured party may object to that request. The relevant provisions of the CCP read as follows:

“Article 409

1. Except in cases where the objection referred to in Article 410 has been lodged, if the judge grants the request for the proceedings to be discontinued he or she shall make an order to that effect, giving reasons, and return the file to the public prosecutor’s office. ...

2. If the judge rejects the request [to discontinue the proceedings], he or she shall fix the date of the private hearing and shall inform the public prosecutor, the accused and the injured party accordingly. The procedure shall be conducted in accordance with Article 127. The documents shall be deposited with the registry up to the day of the hearing, and copies may be obtained by counsel.

...

4. After the hearing, if the judge considers additional investigative measures to be necessary, he or she shall issue an order to the public prosecutor detailing the measures and laying down a binding time-limit for their completion.

5. Where the circumstances described in paragraph 4 do not apply and the judge rejects the request to discontinue the proceedings, he or she shall issue an order instructing the public prosecutor to draw up the indictment within ten days. ...

6. An appeal against the decision to discontinue the proceedings shall lie to the Court of Cassation solely on the grounds of nullity provided for by Article 127 § 5 [in particular failure to comply with the procedural provisions concerning the holding of hearings in private]. ...

Article 410

1. When objecting to the request to discontinue the proceedings, the injured party shall request that the investigation be continued, indicating the purpose of further investigation and requesting the inclusion of the relevant evidence, failing which the objection shall be declared inadmissible.

2. Where the objection is declared inadmissible and the accusations are unfounded, the judge shall issue an order discontinuing the proceedings and shall return the file to the public prosecutor’s office.”

E. Burial and cremation

- 152 Article 116 of the implementing provisions of the CCP concerns investigations into deaths where there are grounds for suspecting that a crime has been committed. This article provides:

“Where it is suspected that a person died as the result of a crime, the public prosecutor shall verify the cause of death and, should he or she consider it necessary, shall order an autopsy in accordance with the procedure laid down in Article 369 of the Code or apply for the immediate production of evidence

...

... The burial may not take place without an order from the public prosecutor.”

- 153 Article 79 of Presidential Decree 285 of September 10, 1990 stipulates that cremation must be authorised by the judicial authority where death occurred suddenly or in suspicious circumstances.

III. Relevant international principles and documents

A. UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

- 154 The relevant parts of these principles (the UN Principles), which were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba) from August 27 to September 7, 1990, provide as follows:

“1. Governments and law enforcement agencies shall adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials. In developing such rules and regulations, Governments and law enforcement agencies shall keep the ethical issues associated with the use of force and firearms constantly under review.

2. Governments and law enforcement agencies should develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms. These should include the development of non-lethal incapacitating weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons. For the same purpose, it should also be possible for law enforcement officials to be equipped with self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind.

...

9. Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

10. In the circumstances provided for under principle 9, law enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed,

unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident.

11. Rules and regulations on the use of firearms by law enforcement officials should include guidelines that:

- (a) Specify the circumstances under which law enforcement officials are authorized to carry firearms and prescribe the types of firearms and ammunition permitted;
- (b) Ensure that firearms are used only in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm;
- (c) Prohibit the use of those firearms and ammunition that cause unwarranted injury or present an unwarranted risk;
- (d) Regulate the control, storage and issuing of firearms, including procedures for ensuring that law enforcement officials are accountable for the firearms and ammunition issued to them;
- (e) Provide for warnings to be given, if appropriate, when firearms are to be discharged;
- (f) Provide for a system of reporting whenever law enforcement officials use firearms in the performance of their duty.

...

18. Governments and law enforcement agencies shall ensure that all law enforcement officials are selected by proper screening procedures, have appropriate moral, psychological and physical qualities for the effective exercise of their functions and receive continuous and thorough professional training. Their continued fitness to perform these functions should be subject to periodic review.

19. Governments and law enforcement agencies shall ensure that all law enforcement officials are provided with training and are tested in accordance with appropriate proficiency standards in the use of force. Those law enforcement officials who are required to carry firearms should be authorized to do so only upon completion of special training in their use.

20. In the training of law enforcement officials, Governments and law enforcement agencies shall give special attention to issues of police ethics and human rights, especially in the investigative process, to alternatives to the use of force and firearms, including the peaceful settlement of conflicts, the understanding of crowd behaviour, and the methods of persuasion, negotiation and mediation, as well as to technical means, with a view to limiting the use of force and firearms. Law enforcement agencies should review their training programmes and operational procedures in the light of particular incidents.”

B. Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)

155 The CPT visited Italy in 2004. The relevant parts of its report, published on April 17, 2006, read as follows:

“14. As far back as 2001 the CPT began a dialogue with the Italian authorities concerning the events that took place in Naples (on 17 March 2001) and in

Genoa (from 20 to 22 July 2001). The Italian authorities have continued to inform the Committee of the action taken in response to the allegations of ill-treatment made against the law-enforcement agencies. In that context the authorities furnished a list during the visit of the judicial and disciplinary proceedings in progress.

The CPT wishes to be kept regularly informed of the progress of the above-mentioned proceedings. In addition, it wishes to receive detailed information on the measures taken by the Italian authorities to prevent the recurrence of similar episodes in the future (relating, for instance, to the management of large-scale public-order operations, training of supervisory and operational personnel and monitoring and inspection systems).

15. In the report on its visit in 2000, the CPT recommended that measures be taken as regards the training of law-enforcement officers, with more particular reference to incorporating human rights principles in practical training – both initial and ongoing – concerning the management of high-risk situations such as the arrest and questioning of suspects. In their response, the Italian authorities simply gave general replies concerning the ‘human rights’ component of the training provided to law-enforcement officers. The CPT wishes to receive more detailed – and updated – information on this subject.”

C. Documents produced by the UN Committee Against Torture (CAT)

- 156 The Government produced documents summarising the consideration by the CAT of reports submitted by states parties under art.19 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Part of the *Fourth Periodic Report* submitted by Italy deals with the “events of Genoa”.³² It is based mainly on certain passages from the report of the Parliamentary Commission.³³ The CAT considered Italy’s *Fourth Periodic Report* at its 762nd and 765th meetings, held on May 4 and 7, 2007, and adopted, at its 777th and 778th meetings, a document containing conclusions and recommendations. The relevant parts of the CAT report read as follows:

“Training

15. The Committee takes note with appreciation of the detailed information provided by the State party on training for its law enforcement officials, penitentiary staff, border guards and armed forces. However, the Committee regrets the lack of information on training on the employment of non-violent means, crowd control and the use of force and firearms. In addition, the Committee regrets that there is no available information on the impact of the training conducted for law enforcement officials and border guards, and how effective the training programmes have been in reducing incidents of torture and ill-treatment. (art. 10)

The State party should further develop and implement educational programmes to ensure that:

³² *Fourth Periodic Report* submitted by Italy (May 4, 2004), paras 365–395

³³ See [113]–[116] above

- a) All law enforcement officials, border guards and personnel working in the CPTs and CPTAs are fully aware of the provisions of the Convention, that breaches will not be tolerated and will be investigated, and that offenders will be prosecuted; and
- b) All law enforcement officers are adequately equipped and trained to employ non-violent means and only resort to the use of force and firearms when strictly necessary and proportionate. In this respect, the Italian authorities should conduct a thorough review of current policing practices, including the training and deployment of law enforcement officials in crowd control and the regulations on the use of force and firearms by law enforcement officials.

Furthermore, the Committee recommends that all relevant personnel receive specific training on how to identify signs of torture and ill-treatment and that the Istanbul Protocol of 1999 (Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) become an integral part of the training provided to physicians. In addition, the State party should develop and implement a methodology to assess the effectiveness and impact of its training/educational programmes on the reduction of cases of torture and ill-treatment.

...

Ill-treatment and excessive use of force

17. The Committee notes with concern continued allegations of excessive use of force and ill-treatment by law enforcement officials. In this respect, the Committee is particularly concerned at reports emerging of alleged excessive use of force and ill-treatment by law enforcement officials during the demonstrations in Naples (March 2001) in the context of the Third Global Forum, the G8 Summit in Genoa (July 2001) and in Val di Susa (December 2005). The Committee is also concerned that such incidents have reportedly occurred during football matches but it notes the recent adoption of Act no. 41/2007, entitled 'Urgent measures on the prevention and the repression of violence cases occurring during football matches'. (arts. 12, 13 and 16)

The Committee recommends that the State party should take effective measures to:

- (a) Send a clear and unambiguous message to all levels of the police force hierarchy and to prison staff that torture, violence and ill-treatment are unacceptable, including through the introduction of a code of conduct for all officials;
- (b) Certify that those who report assaults by law enforcement officials are protected from intimidation and possible reprisals for making such reports; and
- (c) Ensure that law enforcement officials only use force when strictly necessary and to the extent required for the performance of their duty.

Furthermore, the State party should report to the Committee on the progress of the judicial and disciplinary proceedings related to the above-mentioned incidents.

18. The Committee is concerned at reports that law enforcement officers did not carry identification badges during the demonstrations in connection with the 2001 G8 summit in Genoa which made it impossible to identify them in case of a complaint of torture or ill-treatment (arts. 12 and 13).

The State party should make sure that all law enforcement officials on duty be equipped with visible identification badges to ensure individual accountability and the protection against torture, inhuman or degrading treatment or punishment.

Prompt and impartial investigations

19. The Committee is concerned at the number of reports of ill-treatment by law enforcement agencies, the limited number of investigations carried out by the State party in such cases, and the very limited number of convictions in those cases which are investigated. The Committee notes with concern that the offence of torture, which as such does not exist in the Italian CC but rather is punishable under other provisions of the CC, might in some cases be subject to the statute of limitations. The Committee is of the view that acts of torture cannot be subject to any statute of limitations and it welcomes the statement made by the State party's delegation that it is considering a modification of the time limitations (arts. 1, 4, 12 and 16).

The Committee recommends that the State party should:

- (a) Strengthen its measures to ensure prompt, impartial and effective investigations into all allegations of torture and ill-treatment committed by law enforcement officials. In particular, such investigations should not be undertaken by or under the authority of the police, but by an independent body. In connection with prima facie cases of torture and ill-treatment, the suspect should as a rule be subject to suspension or reassignment during the process of investigation, especially if there is a risk that he or she might impede the investigation;
- (b) Try the perpetrators and impose appropriate sentences on those convicted in order to eliminate impunity for law enforcement personnel who are responsible for violations prohibited by the Convention; and
- (c) Review its rules and provisions on the statute of limitations and bring them fully in line with its obligations under the Convention so that acts of torture as well as attempts to commit torture and acts by any person which constitute complicity or participation in torture, can be investigated, prosecuted and punished without time limitations."

JUDGMENT

I. Alleged violation of article 2 of the Convention in its substantive aspect

157 The applicants complained that Carlo Giuliani had been killed by the law-enforcement agencies and that the authorities had not safeguarded his life. They relied on art.2 of the Convention, which provides:

- "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;

- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

A. Whether the use of lethal force was justified

158 The applicants submitted first of all that in the specific circumstances of the case the use of lethal force by MP had not been “absolutely necessary” in order to achieve the aims enumerated in the second paragraph of art.2 of the Convention. The Government contested that argument.

1. The parties’ submissions

(a) The applicants

159 The applicants pointed out that they had never subscribed to the “intermediate object theory”. According to their expert, Mr Gentile, the bullet had not fragmented on striking the victim’s body.³⁴ However, since the bullet was not available and neither the shape nor the dimensions of the “intermediate object” were known, it was impossible to formulate a scientific hypothesis as to the type of collision in which the bullet had been involved during its trajectory and to maintain that it had been deflected. Furthermore, the other experts appointed by the applicants had taken the view that the stone had shattered on impact with the jeep rather than because of the bullet fired by MP.³⁵

160 According to the applicants, the lives of the jeep’s occupants had not been in danger, as the vehicle in question had been a Defender jeep, a model which, even without armour, was sufficiently robust. Furthermore, the number of demonstrators visible on the images was no more than a dozen or so. The demonstrators had not had lethal weapons and had not surrounded the jeep; the audiovisual material showed that there had been no demonstrators to the left or in front of the vehicle. As proved by the photographs, there had been a riot shield on board the jeep. MP had been wearing a bullet-proof vest and had two helmets at his disposal. Finally, there had been other law-enforcement officers in the vicinity and there was no proof that the injuries of which MP and DR complained had been sustained during the events.

161 According to the autopsy report³⁶ and as could be deduced from MP’s own statements, the latter had fired downwards. When questioned on July 20, 2001 by representatives of the Genoa public prosecutor’s office, MP had stated that there had been nobody in his field of vision when he pointed his gun; he had been aware of stones being thrown and of the presence of assailants whom he could not see.³⁷ In those circumstances it was difficult to imagine how MP could have been acting in self-defence in response to the actions of Carlo Giuliani, whom he was unable to see. As neither Carlo Giuliani nor the other demonstrators had been armed, MP’s response could not be said to have been proportionate.

³⁴ See [64] above

³⁵ See [65] above

³⁶ See [50] above

³⁷ See [36] above

- 162 Moreover, MP's statements had been contradictory. On the first two occasions when he had been questioned (on July 20 and September 11, 2001),³⁸ he stated that he had not seen Carlo Giuliani and did not say that he had fired upwards (this, in the applicants' view, amounted to a tacit admission that he had fired at chest height). However, at the hearing of June 1, 2007 in the "trial of the 25", he stated that he had fired with his arm in the air; this was at odds with a photograph produced by the defence which showed him pointing the weapon at chest height, at a downward angle from the horizontal. Lastly, during a TV interview broadcast on November 15, 2007, MP stated that he had "tried to fire as high in the air as possible", that he had not aimed at Carlo Giuliani and that he had never been a good shot. He added that he had been sent to the G8 in Genoa as a replacement for a colleague who did not wish to go.
- 163 Finally, the applicants submitted that MP had not issued clear warnings of his intention to use his firearm and that some of the photographs taken during the events showed a riot shield being used as protection in place of one of the broken windows of the jeep.

(b) *The Government*

- 164 The Government argued that it was not the Court's task to call into question the findings of the investigation and the conclusions of the national judges. Accordingly, the reply—in the negative—to the question whether the domestic authorities had failed in their duty to protect the life of Carlo Giuliani was to be found in the request for the proceedings to be discontinued. In support of its assertions the Government referred to *Grams v Germany*³⁹ and to the partly dissenting opinion of Judges Thomassen and Zagrebelsky in *Ramsahai v Netherlands*,⁴⁰ and requested the Court to follow that approach.
- 165 There had been no intentional taking of life in the instant case, nor had there been any "excessive use of force". Furthermore, no causal link existed between the shot fired by MP and the death of Carlo Giuliani. Although the investigating judge, in her decision to discontinue the case, had applied arts 52 and 53 of the CC, she had not disregarded the exceptional and unforeseeable circumstance whereby the shot had been deflected following a collision with a stone, a circumstance which had been assessed from the standpoint of proportionality. The Government inferred from this that the decision to discontinue the proceedings had exonerated MP on the ground that the causal link between the shot and Carlo Giuliani's death had been broken by the collision between the bullet and the stone and the deflection of the shot's trajectory.
- 166 In the view of the investigating judge, MP had acted on his own initiative, in a state of panic and in a situation where he had valid reasons to believe that there was a serious and imminent threat to his own life or physical integrity. Furthermore, MP had not aimed at Carlo Giuliani or anyone else. He had fired upwards, in a direction that entailed no risk of striking someone. Carlo Giuliani's death had not been the intended and direct consequence of the use of force, and the force used had not been potentially lethal.⁴¹

³⁸ See [36] and [39] above

³⁹ *Grams v Germany* (33677/96) October 5, 1999

⁴⁰ *Ramsahai v Netherlands* (2006) 43 E H R R 39

⁴¹ The Government referred, in particular, to *Scavuzzo-Hager v Switzerland* (41773/98) February 7, 2006 at [58] and [60]; and *Stewart v United Kingdom* (1985) 7 E H R R CD453

- 167 Both parties' experts had agreed as to the fact that the bullet had already been in fragments when it hit the victim. The possibilities advanced by the applicants to explain why the bullet had fragmented—such as its having been manipulated in order to increase its capacity to fragment, or the presence of a manufacturing defect—had been considered by the applicants themselves to be “much less likely”,⁴² and could not provide a valid explanation. The fact that it had been impossible to identify the intermediate object was a detail not capable of having a decisive impact on the investigation's findings.
- 168 In the alternative, the Government submitted that the use of lethal force had been “absolutely necessary” and “proportionate”. It stressed the following elements in particular: the level and widespread nature of the violence which had marked the demonstrations; the force of the demonstrators' assault on the contingent of *carabinieri* immediately prior to the events in question and the peak of violence at that moment; the physical and mental state of the individual *carabinieri* concerned, especially MP; the extremely short duration of the events, from the assault on the vehicle until the fatal shot was fired; the fact that MP had fired only two shots and had directed them upwards; the likelihood that MP had been unable to see the victim when he fired the shot or, at most, could see him indistinctly on the edge of his field of vision; and the injuries sustained by MP and DR.
- 169 In the Government's submission, it had not been proven that the photograph showing the pistol protruding from the rear window of the jeep represented the position of the weapon at the moment the shots were fired. MP had drawn his weapon a few seconds at least before shooting, and only a fraction of a second was needed in order to move the hand by a few centimetres or alter the angle of fire by a few degrees. The photograph in question, therefore, did not provide proof that MP was responsible for the death of Carlo Giuliani and did not serve to refute the hypothesis of an unforeseeable accident.
- 170 It had been objectively impossible for the prosecuting authorities to establish MP's state of mind and his precise intentions, given his confusion and state of panic at the time of the events. MP's equipment had consisted of the uniform issued for public-order duties, two helmets fitted with a visor, a rucksack, six large tear-gas grenades, a gas-mask filter and a Beretta pistol and magazine. According to the Ministry of the Interior, it could not be established whether there had been a riot shield in the jeep.
- 171 MP had had no other option than to shoot, as the vehicle's position made escape impossible. Furthermore, the *carabinieri* in the jeep had been unable to summon help given their state of panic, the aggressive intentions of the demonstrators and the speed of events. In any case, there would have been no time for help to arrive, given the distance involved and the fact that the law-enforcement agencies needed to regroup and had themselves been engaged in a clash with the demonstrators. The Government referred to the audiovisual material produced before the Court, which in its view showed that if MP had not used his gun, the violent assault by some 70 demonstrators on the *carabinieri* vehicle would have ended in the death of one of the occupants.
- 172 The public prosecutor's request for the proceedings to be discontinued had been based on all these factors and on the *favor rei* principle: under Italian law, where there were doubts and it appeared impossible to prosecute the case in court, and a

⁴² See [64], [71] and [81] above

trial was not likely to add anything significant to the evidence, the proceedings had to be discontinued.

2. The Chamber judgment

- 173 The Chamber held that the use of force had not been disproportionate. This finding was based mainly on its acceptance of the investigating judge's reasoning in her decision to discontinue the proceedings, which the Chamber considered to have been based on a detailed analysis of the witness evidence and the available photographic and audiovisual material. The Chamber added that, before shooting, MP had held the weapon in his hand in such a way that it was visible from outside the jeep.⁴³

3. The Court's assessment

(a) General principles

- 174 The Court reiterates that art.2 ranks as one of the most fundamental provisions in the Convention, one which, in peace time, admits of no derogation under art.15. Together with art.3, it enshrines one of the basic values of the democratic societies making up the Council of Europe.⁴⁴
- 175 The exceptions delineated in para.2 indicate that art.2 extends to, but is not concerned exclusively with, intentional killing. The text of art.2, read as a whole, demonstrates that para.2 does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. The use of force, however, must be no more than "absolutely necessary" for the achievement of one of the purposes set out in subparas (a), (b) or (c).⁴⁵
- 176 The use of the term "absolutely necessary" indicates that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether state action is "necessary in a democratic society" under paras 2 of arts 8–11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in subparas 2(a), (b) and (c) of art.2. Furthermore, in keeping with the importance of this provision in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the state who actually administer the force but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination.⁴⁶
- 177 The circumstances in which deprivation of life may be justified must be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also require that art.2 be interpreted and applied so as to make its safeguards practical and effective.⁴⁷ In particular, the

⁴³ See [214]–[227] of the Chamber judgment

⁴⁴ See, among many other authorities, *Andronicou v Cyprus* (1998) 25 E H R R 491 at [171]; and *Solomou v Turkey* (36832/97) June 24, 2008 at [63]

⁴⁵ See *McCann v United Kingdom* (1996) 21 E H R R 97 at [148]; and *Solomou* (36832/97) June 24, 2008 at [64]

⁴⁶ See *McCann* (1996) 21 E H R R 97 at [147]–[150]; and *Andronicou* (1998) 25 E H R R 491 at [171]; see also *Ayşar v Turkey* (2003) 37 E H R R 53 at [391]; and *Musayev v Russia* (57941/00, 58699/00 and 60403/00) July 26, 2007 at [142]

⁴⁷ See *Solomou* (36832/97) June 24, 2008 at [63]

Court has held that the opening of fire should, whenever possible, be preceded by warning shots.⁴⁸

- 178 The use of force by agents of the state in pursuit of one of the aims delineated in para.2 of art.2 of the Convention may be justified under this provision where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the state and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others.⁴⁹
- 179 When called upon to examine whether the use of lethal force was legitimate, the Court, detached from the events at issue, cannot substitute its own assessment of the situation for that of an officer who was required to react in the heat of the moment to avert an honestly perceived danger to his life.⁵⁰
- 180 The Court must also be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case.⁵¹ As a general rule, where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and it is for the latter to establish the facts on the basis of the evidence before them.⁵² Though the Court is not bound by the findings of domestic courts and remains free to make its own appreciation in the light of all the material before it, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by the domestic courts.⁵³
- 181 To assess the factual evidence, the Court adopts the standard of proof "beyond reasonable doubt", but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this context, the conduct of the parties when evidence is being obtained may also be taken into account.⁵⁴ Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. The Court is also attentive to the seriousness that attaches to a ruling that a contracting state has violated fundamental rights.⁵⁵
- 182 The Court must be especially vigilant in cases where violations of arts 2 and 3 of the Convention are alleged.⁵⁶ When there have been criminal proceedings in the domestic courts concerning such allegations, it must be borne in mind that criminal law liability is distinct from the state's responsibility under the Convention. The Court's competence is confined to the latter. Responsibility under the Convention is based on its own provisions which are to be interpreted in the light of the object and purpose of the Convention, taking into account any relevant rules or principles

⁴⁸ See *Panayi v Turkey* (45388/99) October 27, 2009 at [62]; see also, in particular, para 10 of the UN Principles, at [154] above

⁴⁹ See *McCann* (1996) 21 E H R R 97 at [200]; and *Andronicou* (1998) 25 E H R R 491 at [192]

⁵⁰ See *Bubbins v United Kingdom* (2005) 41 E H R R 24 at [139]

⁵¹ See, e.g. *McKerr v United Kingdom* (2002) 34 E H R R 20

⁵² See, among many other authorities, *Edwards v United Kingdom* (1993) 15 E H R R 417 at [34]; and *Klaas v Germany* (1994) 18 E H R R 305 at [29]

⁵³ See *Ayşar* (2003) 37 E H R R 53 at [283]; and *Barbu Anghelescu v Romania* (46430/99) October 5, 2004 at [52]

⁵⁴ See *Ireland v United Kingdom* (1979–80) 2 E H R R 25 at [161]; and *Orhan v Turkey* (25656/94) June 18, 2002 at [264]

⁵⁵ See *Ribitsch v Austria* (1996) 21 E H R R 573 at [32]; *Ilaşcu v Moldova* (2005) 40 E H R R 46 at [26]; *Nachova v Bulgaria* (2006) 42 E H R R 43 at [147]; and *Solomou* (36832/97) June 24, 2008 at [66]

⁵⁶ See, mutatis mutandis, *Ribitsch* (1996) 21 E H R R 573 at [32]

of international law. The responsibility of a state under the Convention, arising for the acts of its organs, agents and servants, is not to be confused with the domestic legal issues of individual criminal responsibility under examination in the national criminal courts. The Court is not concerned with reaching any findings as to guilt or innocence in that sense.⁵⁷

(b) Application of these principles to the present case

- 183 The Court deems it appropriate to begin its analysis on the basis of the following facts, which are not disputed between the parties. On July 20, 2001, during the day, numerous clashes had taken place between demonstrators and the law-enforcement agencies: in particular, Marassi Prison had come under attack,⁵⁸ the *carabinieri* had charged the *Tute Bianche* march⁵⁹ and an armoured vehicle belonging to the *carabinieri* had been set on fire.⁶⁰ Following these incidents, at around 17.00, when the situation was relatively calm, a battalion of *carabinieri* took up positions on Piazza Alimonda, where two Defender jeeps were located; on board one of the jeeps were two *carabinieri*, MP and DR, who were unfit to remain on duty.⁶¹
- 184 Shortly afterwards, the *carabinieri* left their positions to confront a group of aggressive demonstrators; the jeeps followed the *carabinieri*. However, the latter were forced to retreat rapidly as the demonstrators succeeded in repelling the charge. The jeeps then tried to reverse away, but the one in which MP and DR were travelling found its way blocked by an overturned refuse container and was unable to leave the scene rapidly as its engine had stalled.⁶²
- 185 This is one of those rare cases in which the moments leading up to and following the use of lethal force by a state agent were photographed and filmed. Accordingly, the Court cannot but attach considerable importance to the video footage produced by the parties, which it had the opportunity to view⁶³ and the authenticity of which has not been called into question.
- 186 This footage and the photographs in the file show that, as soon as it became hemmed in by the refuse container, the jeep driven by FC was attacked and at least partially surrounded by the demonstrators, who launched an unrelenting onslaught on the vehicle and its occupants, tilting it sideways and throwing stones and other hard objects. The jeep's rear window was smashed and a fire extinguisher was thrown into the vehicle, which MP managed to fend off. The footage and photographs also show one demonstrator thrusting a wooden beam through the side window, causing shoulder injuries to DR, the other *carabiniere* who had been taken off duty.⁶⁴
- 187 This was quite clearly an unlawful and very violent attack on a vehicle of the law-enforcement agencies which was simply trying to leave the scene and posed no threat to the demonstrators. Whatever may have been the demonstrators' intentions towards the vehicle and/or its occupants, the fact remains that the

⁵⁷ See *Tanlı v Turkey* (2004) 38 E.H.R.R. 3 at [111]; and *Avşar* (2003) 37 E.H.R.R. 53 at [284]

⁵⁸ See [134] above

⁵⁹ See [18]–[19], [122]–[124] and [132]–[136] above

⁶⁰ See [20] above

⁶¹ See [21], [23] and [29] above

⁶² See [21]–[22] above

⁶³ See [9] and [139] above

⁶⁴ See [84] above

possibility of a lynching could not be excluded, as the Genoa District Court also pointed out.⁶⁵

- 188 The Court reiterates in that regard the need to consider the events from the viewpoint of the victims of the attack at the time of the events.⁶⁶ It is true, for instance, that other *carabinieri* were positioned nearby who could have intervened to assist the jeep's occupants had the situation degenerated further. However, this fact could not have been known to MP, who, injured and panic-stricken, was lying in the rear of the vehicle surrounded by a large number of demonstrators and who therefore could not have had a clear view of the positioning of the troops on the ground or the logistical options available to them. As the footage shows, the jeep was entirely at the mercy of the demonstrators shortly before the fatal shooting.
- 189 In the light of the foregoing, and bearing in mind the extremely violent nature of the attack on the jeep, as seen on the images which it viewed, the Court considers that MP acted in the honest belief that his own life and physical integrity, and those of his colleagues, were in danger because of the unlawful attack to which they were being subjected. MP was accordingly entitled to use appropriate means to defend himself and the other occupants of the jeep.
- 190 The photographs show, and the statements made by MP and some of the demonstrators confirm,⁶⁷ that before firing, MP had shown his pistol by stretching out his hand in the direction of the jeep's rear window, and had shouted at the demonstrators to leave unless they wanted to be killed. In the Court's view, MP's actions and words amounted to a clear warning that he was about to open fire. Moreover, the photographs show at least one demonstrator hurrying away from the scene at that precise moment.
- 191 In this extremely tense situation Carlo Giuliani decided to pick up a fire extinguisher which was lying on the ground, and raised it to chest height with the apparent intention of throwing it at the occupants of the vehicle. His actions could reasonably be interpreted by MP as an indication that, despite the latter's shouted warnings and the fact that he had shown his gun, the attack on the jeep was not about to cease or diminish in intensity. Moreover, the vast majority of the demonstrators appeared to be continuing the assault. MP's honest belief that his life was in danger could only have been strengthened as a result. In the Court's view, this served as justification for recourse to a potentially lethal means of defence such as the firing of shots.
- 192 The Court further notes that the direction of the shots was not established with certainty. According to one theory supported by the prosecuting authorities' experts,⁶⁸ which was contested by the applicants⁶⁹ but accepted by the Genoa investigating judge,⁷⁰ MP had fired upwards and one of the bullets had hit the victim after being accidentally deflected by one of the numerous stones thrown by the demonstrators. Were it to be proven that the events occurred in this manner, it would have to be concluded that Carlo Giuliani's death was the result of a stroke

⁶⁵ See [128] above

⁶⁶ See [179] above

⁶⁷ See [36], [39] and [45] above

⁶⁸ See [60]–[62] above

⁶⁹ See [80] and [159] above

⁷⁰ See [87]–[91] above

of misfortune, a rare and unforeseeable occurrence having caused him to be struck by a bullet which would have otherwise have disappeared into the air.⁷¹

193 However, in the instant case the Court does not consider it necessary to examine the well-foundedness of the “intermediate object theory”, on which there was disagreement between the experts who conducted the third set of ballistics tests, the applicants’ experts and the findings of the autopsy report.⁷² It simply observes that, as the Genoa investigating judge rightly remarked,⁷³ and as shown by the photographs, MP’s field of vision was restricted by the jeep’s spare wheel, since he was half-lying or crouched on the floor of the vehicle. Given that, in spite of his warnings, the demonstrators were persisting in their attack and that the danger he faced—in particular, a likely second attempt to throw a fire extinguisher at him—was imminent, MP could only fire, in order to defend himself, into the narrow space between the spare wheel and the roof of the jeep. The fact that a shot fired into that space risked causing injury to one of the assailants, or even killing him, as was sadly the case, does not in itself mean that the defensive action was excessive or disproportionate.

194 In the light of the foregoing, the Court concludes that in the instant case the use of lethal force was absolutely necessary “in defence of any person from unlawful violence” within the meaning of art.2(2)(a) of the Convention.⁷⁴

195 It follows that there has been no violation of art.2 in its substantive aspect in this regard.

196 This finding makes it unnecessary for the Court to consider whether the use of force was also unavoidable “in action lawfully taken for the purpose of quelling a riot or insurrection” within the meaning of subpara.(c) of para.2 of art.2.

B. Whether the respondent State took the necessary legislative, administrative and regulatory measures to reduce as far as possible the adverse consequences of the use of force

197 As they had done before the Chamber, the applicants also complained of deficiencies in the domestic legislative framework. The Government contested their arguments. The Chamber did not address these issues.

1. The parties’ submissions

(a) The applicants

198 The applicants complained of the absence of a legislative framework capable of protecting the lives of the demonstrators. In their submission, the domestic law had made the use of a firearm inevitable, as demonstrated by the fact that the case had been discontinued because MP’s actions came within the scope of arts 52 and 53 of the CC. According to the Court’s case law, an inadequate legislative framework reduced the statutory protection of the right to life required in a democratic society. The applicants drew the Court’s attention to the following points in particular.

⁷¹ See, in particular, *Bakan v Turkey* (50939/99) June 12, 2007 at [52]–[56], in which the Court ruled out any violation of art 2 of the Convention, finding that the fatal bullet had ricocheted before hitting the applicants’ relative

⁷² See [60]–[62], [66] and [50] above

⁷³ See [92] above

⁷⁴ See [176] above

(i) Failure to equip law-enforcement personnel with non-lethal weapons

199 The applicants stressed that MP would not have been able to kill anyone if he had been issued with a non-lethal weapon such as a gun firing rubber bullets.⁷⁵ The pre-eminence of respect for human life and the obligation to minimise the risk to life meant that law-enforcement personnel should be equipped with non-lethal weapons (such as electric stun guns, glue guns or guns firing rubber bullets) during demonstrations; this was the case in the United Kingdom and had also been the case at the G20 summit in Pittsburgh. On this point, the applicants relied on para.2 of the UN Principles,⁷⁶ observing that in the instant case it had been easy to foresee that disturbances would occur. The Beretta SB 9mm parablellum pistol with which MP had been equipped was a semi-automatic pistol classified as a combat weapon under the Italian legislation: once loaded, it did not need to be reloaded for subsequent rounds and allowed 15 shots to be fired within a few seconds, rapidly and with a high degree of accuracy.

200 In the course of a parliamentary inquiry the Government had stated that the legislation in force did not permit the use of non-lethal weapons such as guns firing rubber bullets.⁷⁷ This assertion was incorrect, as these weapons were specifically provided for in the rules of engagement issued to the Italian forces in Iraq, who had the task of maintaining law and order in a war zone.

201 Furthermore, while it was true that rubber bullets could be dangerous in some circumstances, they could not be compared to live ammunition.⁷⁸ The applicants also asserted that some *carabinieri* had used non-regulation weapons such as metal batons.

(ii) Absence in Italian law of adequate provisions governing the use of lethal weapons during demonstrations

202 The applicants observed that the relevant provisions on the use of force by law-enforcement personnel were art.53 of the CC and art.24 of the Public Safety Code.⁷⁹ Those provisions, enacted in 1930 and 1931, during the Fascist era, were not compatible with more recent international standards or with liberal legal principles. They were symptomatic of the authoritarianism that had prevailed at that time. In particular, the concepts of “necessity” legitimising the use of weapons and “use of force” were not equivalent to the principles developed by Strasbourg case law, which was based on “absolute necessity”.

203 Furthermore, according to art.52 of the CC, self-defence applied where “the defensive response [was] proportionate to the attack”. This was in no way equivalent to the expressions “strictly unavoidable in order to protect life” and “strictly proportionate [to the circumstances]” which featured in the Court’s case law.

204 In addition, there were no clear regulations in Italy conforming to international standards concerning the use of firearms. None of the service instructions from the Genoa *questore* submitted by the Government had dealt with this issue. The applicants referred to the UN Principles,⁸⁰ and in particular to the obligation for governments and law-enforcement agencies to adopt and implement rules and

⁷⁵ They referred to *Güleç v Turkey* (1999) 28 E H R R 121 at [71]; and *Şimşek v Turkey* (35072/97 and 37194/97) July 26, 2005 at [111]

⁷⁶ See [154] above

⁷⁷ See [118]–[119] above

⁷⁸ The applicants referred, in particular, to *Stewart* (1985) 7 E H R R CD453 at [28]

⁷⁹ See [143] and [146] above

⁸⁰ See [154] above

regulations in this sphere.⁸¹ They further referred to para.11, which specified the required content of such rules and regulations.

(b) *The Government*

- 205 The Government observed first of all that Italian law did not permit the use of rubber bullets. The latter were liable to cause loss of life if fired from a distance of less than 50m.⁸² In the instant case the distance between MP and Carlo Giuliani had been less than 1m, which suggested that even a rubber bullet would have proved fatal. The experiments with “non-lethal” weapons and ammunition conducted in the 1980s had been suspended following incidents which demonstrated that they were capable of killing or causing very serious injury. Furthermore, rubber bullets would encourage officers to use weapons in the mistaken belief that they would not cause harm.
- 206 In any event, weapons with live ammunition were designed for personal defence in the event of imminent and serious danger and were not used for public-order purposes: law-enforcement personnel in Italy did not fire on crowds, either with live rounds or with rubber bullets. Non-lethal weapons were designed for use against large crowds in order to counter a mass attack by demonstrators or disperse them. In the instant case, the law-enforcement agencies had at no point been ordered to fire and their equipment had been intended for their personal protection.
- 207 No specific provisions concerning the use of firearms had been adopted with a view to the G8 summit, but the circulars issued by the senior command of the *carabinieri* had referred to the provisions of the CC.

3. The Court’s assessment

(a) *General principles*

- 208 Article 2(1) enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.⁸³
- 209 The primary duty on the state to secure the right to life entails, in particular, putting in place an appropriate legal and administrative framework defining the limited circumstances in which law enforcement officials may use force and firearms, in the light of the relevant international standards.⁸⁴ In line with the principle of strict proportionality inherent in art.2,⁸⁵ the national legal framework must make recourse to firearms dependent on a careful assessment of the situation.⁸⁶ Furthermore, the national law regulating policing operations must secure a system of adequate and effective safeguards against arbitrariness and abuse of force and even against avoidable accident.⁸⁷
- 210 Applying these principles, the Court has, for instance, characterised as deficient the Bulgarian legal framework which permitted the police to fire on any fugitive member of the armed forces who did not surrender immediately in response to an oral warning and the firing of a warning shot in the air, without containing any

⁸¹ UN Principles para 1

⁸² The Government referred to *Stewart* (1985) 7 E.H.R.R. CD453

⁸³ See *LCB v United Kingdom* (1999) 27 E.H.R.R. 212 at [36]; and *Osman v United Kingdom* (2000) 29 E.H.R.R. 245 at [115]

⁸⁴ See *Makaratzis v Greece* (2005) 41 E.H.R.R. 49 at [57]–[59]; and *Bakan* (50939/99) June 12, 2007 at [49]; see also the relevant paragraphs of the UN Principles, at [154] above

⁸⁵ See [176] above

⁸⁶ See, *mutatis mutandis*, *Nachova* (2006) 42 E.H.R.R. 43 at [96]

⁸⁷ See *Makaratzis* (2005) 41 E.H.R.R. 49 at [58]

clear safeguards to prevent the arbitrary deprivation of life.⁸⁸ The Court also identified deficiencies in the Turkish legal framework, adopted in 1934, which listed a wide range of situations in which a police officer could use firearms without being liable for the consequences.⁸⁹ On the other hand, it held that a regulation setting out an exhaustive list of situations in which gendarmes could make use of firearms was compatible with the Convention. The regulation specified that the use of firearms should only be envisaged as a last resort and had to be preceded by warning shots, before shots were fired at the legs or indiscriminately.⁹⁰

(b) Application of these principles to the present case

- 211 The Court notes that the Genoa investigating judge took the view that the legitimacy of the use of force by MP should be assessed in the light of arts 52 and 53 of the CC. It therefore considers that these provisions constituted, in the instant case, the legal framework defining the circumstances in which the use of firearms was authorised.
- 212 The first of these provisions concerns the ground of justification of self-defence, a common concept in the legal systems of the Contracting States. It refers to the “need” for defensive action and the “real” nature of the danger, and requires the defensive response to be proportionate to the attack.⁹¹ Even though the terms used are not identical, this provision echoes the wording of art.2 of the Convention and contains the elements required by the Court’s case law.
- 213 Although art.53 of the CC is couched in vaguer terms, it nevertheless refers to the person concerned being “obliged” to act in order to repel an act of violence.⁹²
- 214 It is true that from a purely semantic viewpoint the “need” mentioned in the Italian legislation appears to refer simply to the existence of a pressing need, whereas “absolute necessity” for the purposes of the Convention requires that, where different means are available to achieve the same aim, the means which entails the least danger to the lives of others must be chosen. However, this is a difference in the wording of the law which can be overcome by the interpretation of the domestic courts. As is clear from the decision to discontinue the case, the Italian courts have interpreted art.52 of the CC as authorising the use of lethal force only as a last resort where other, less damaging, responses would not suffice to counter the danger.⁹³
- 215 It follows that the differences between the standards laid down and the term “absolutely necessary” in art.2(2) are not sufficient to conclude on this basis alone that no appropriate domestic legal framework existed.⁹⁴
- 216 The applicants next complained of the fact that the law-enforcement agencies had not been equipped with non-lethal weapons, and in particular with guns firing rubber bullets. However, the Court notes that the officers on the ground had available to them means of dispersing and controlling the crowd which were not life-threatening, in the form of tear gas.⁹⁵ In general terms, there is room for debate

⁸⁸ See *Nachova* (2006) 42 E H R R 43 at [99]–[102]

⁸⁹ See *Erdoğan v Turkey* (19807/92) April 25, 2006 at [77]–[78]

⁹⁰ See *Bakan* (50939/99) June 12, 2007 at [51]

⁹¹ See [144] above

⁹² See [143] above

⁹³ See [101] above, which mentions the references made by the Genoa investigating judge to the Court of Cassation’s case law in this sphere

⁹⁴ See *Perk v Turkey* (50739/99) March 28, 2006 at [60]; and *Bakan* (50939/99) June 12, 2007 at [51]; see also, conversely, *Nachova* (2006) 42 E H R R 43 at [96]–[102]

⁹⁵ See, conversely, *Güleç* (1999) 28 E H R R 121 at [71]; and *Şimşek* (35072/97 and 37194/97) July 26, 2005 at [108] and [111]

as to whether law-enforcement personnel should also be issued with other equipment of this type, such as water cannons and guns using non-lethal ammunition. However, such discussions are not relevant in the present case, in which a death occurred not in the course of an operation to disperse demonstrators and control a crowd of marchers, but during a sudden and violent attack which, as the Court has just observed,⁹⁶ posed an imminent and serious threat to the lives of three *carabinieri*. The Convention, as interpreted by the Court, provides no basis for concluding that law-enforcement officers should not be entitled to have lethal weapons at their disposal to counter such attacks.

- 217 Lastly, as to the applicants' submission that some *carabinieri* had used non-regulation weapons such as metal batons,⁹⁷ the Court does not discern any connection between this circumstance and the death of Carlo Giuliani.
- 218 It follows that there has been no violation of art.2 of the Convention in its substantive aspect as regards the domestic legislative framework governing the use of lethal force or as regards the weapons issued to the law-enforcement agencies during the G8 summit in Genoa.

C. Whether the organisation and planning of the policing operations were compatible with the obligation to protect life arising out of article 2 of the Convention

- 219 The applicants submitted that the state's responsibility was also engaged on account of shortcomings in the planning, organisation and management of the public-order operations. The Government contested that argument.

1. The parties' submissions

(a) The applicants

- 220 In the applicants' submission, the planning and conduct of the law-enforcement agencies' operations had been beset by a number of failings, omissions and errors. They contended that Carlo Giuliani's life could have been saved if the appropriate measures had been taken. They referred in particular to the following circumstances.
- (i) Lack of a clear chain of command and of proper organisation of the operations
- 221 The applicants pointed out that changes had been made to the organisation of the operations on the eve of the demonstrations, giving the *carabinieri* a dynamic role (rather than a stationary one, as originally planned). The commanding officers had been informed of the change orally on the morning of July 20. As was clear from the statements made during the "trial of the 25" by police officer Lauro and *carabinieri* officer Zappia, the commanding officers had not been correctly informed of the decision to authorise the *Tute Bianche* march. Moreover, the law-enforcement personnel deployed in Genoa had not been familiar with the city and its streets.
- 222 The communications system chosen had merely allowed information to be exchanged between the police and *carabinieri* control centres but not direct radio contact between the police officers and *carabinieri*. In the applicants' view, these anomalies had led to the critical situation in which MP had found himself and which prompted him to resort to lethal force. There was a cause-and-effect relationship here which the Chamber had not identified. The applicants pointed

⁹⁶ See [185]–[189] above

⁹⁷ See [201] above

out in that regard that policing operations had to be organised and planned in such a way as to avoid any arbitrariness, abuse of force or foreseeable incident. They referred to the Court's case law,⁹⁸ to para.24 of the UN Principles and to the partly dissenting opinion of Judge Bratza, joined by Judge Šikuta, annexed to the Chamber judgment.

223 The lack of a clear chain of command had been the reason for the *carabinieri* attack on the *Tute Bianche* march and for the fact that a few hours later the jeeps had followed the *carabinieri*, having received no instructions to the contrary. MP, who had been given permission to board one of the jeeps, had sustained burns, was reacting badly to his gas mask, was having trouble breathing and was injured and panic-stricken. Although the jeep's task had been to transport MP and DR to hospital, it had not left Piazza Alimonda before the *carabinieri* charge, and the two men, in distress and in a highly nervous state, had remained in the back of the vehicle.

224 The investigation had not provided any explanation as to why the jeeps had followed the detachment when the latter moved off to confront a group of demonstrators. Officers Lauro and Cappello, who had been in charge, stated at the "trial of the 25" that they had not noticed the two jeeps following behind. Officer Cappello had also stated: "The jeep following behind has to be armoured, anything else is suicide." Furthermore, the jeeps had been left without supervision, further evidence of the lack of organisation of the law-enforcement operation.

(ii) MP's physical and mental state and his lack of training

225 The applicants stressed that, owing to his physical and mental state, MP had been judged by his superior officers to be unfit to remain on duty. He had nevertheless been left in possession of a gun loaded with live ammunition and instead of being taken straight to hospital had been allowed to board a jeep which had no protection. MP's situation had prevented him from making an accurate assessment of the danger he faced. If he had received the appropriate training he would not have panicked and would have had the necessary presence of mind to assess and deal with the situation correctly. The shots would have been avoided if the rear of the jeep and the side windows had been equipped with protective metal grilles and if MP's tear-gas gun, which he could have used to defend himself, had not been taken from him.

226 MP, who was 20 years of age at the time of the G8,⁹⁹ had been young and inexperienced. He had been with the *carabinieri*, with whom he was performing his military service, for only 10 months. He had attended a three-month course at the *carabinieri* training college and a week-long course in the Velletri centre which amounted in substance to combat training.¹⁰⁰ Hence, in the applicants' submission, he had not received the appropriate training in the use of firearms and had not undergone the necessary tests of his mental, physical and psychological capacities. By issuing him with a lethal weapon at the G8 summit, the authorities had placed both demonstrators and law-enforcement personnel at considerable risk.

227 The other two *carabinieri* in the jeep had also been young and lacking in experience: DR had been 19-and-a-half and had been in military service for four

⁹⁸ *Makaratzis* (2005) 41 E H R R 49 at [68]

⁹⁹ See [35] above

¹⁰⁰ Contrary to para 20 of the UN Principles

months, while FC had not reached his 24th birthday and had been serving for 22 months.

(iii) Criteria for selecting armed forces personnel for the G8

- 228 The applicants argued that the CCIR company of *carabinieri* had been led by persons experienced in conducting international military police operations abroad but who had no experience in maintaining and restoring public order. This had been the case with officers Leso, Truglio and Cappello. At the material time there had been no regulations laying down criteria for recruiting and selecting personnel to work on public-order operations, and the Government had omitted to specify the minimum requirements to be met by *carabinieri* deployed at events such as the G8. This was in breach of paras 18 and 19 of the UN Principles. Three quarters of the troops deployed in Genoa had been young men who were performing military service within the *carabinieri* or who had recently been appointed as auxiliaries; this gave some idea of their lack of experience. The applicants also pointed to the observations made by the CPT in the report on its visit to Italy.¹⁰¹

(iv) Events following the fatal shooting

- 229 In the applicants' submission, there had been a violation of art.2 of the Convention also on account of the fact that neither the law-enforcement officers present on Piazza Alimonda and in the vicinity nor the *carabinieri* on board the jeep had rendered assistance to Carlo Giuliani after the fatal shot was fired. They relied in that regard on para.5 of the UN Principles. They further stressed that the jeep in which MP had been travelling, which was driven by another *carabiniere*, had driven twice over the body of the victim, who had been shot but was still alive.

(b) *The Government*

- 230 The Government observed that Carlo Giuliani's death had resulted from the individual action taken by MP, which had not been ordered or authorised by his superior officers. It had therefore been an unforeseen and unforeseeable reaction. The conclusions of the investigation ruled out any responsibility on the part of the state, including indirect responsibility on account of supposed shortcomings in the organisation or management of the public-order operations. The "problems" referred to by the public prosecutor in the request for the proceedings to be discontinued, in particular on account of the organisational changes made the night before the events,¹⁰² had not been specified nor had their existence been established.

- 231 In any event, there was no indication of any error of assessment in the organisation of the operation which could be linked to the events at issue. It was not possible to establish a causal link between the death of Carlo Giuliani and the attack on the *Tute Bianche* march, which had "nothing to do" with the events on Piazza Alimonda. Nor were there any grounds for asserting that the contingent of *carabinieri* should not have been sent to Piazza Alimonda, been given time to regroup and been deployed to deal with the demonstrators.

- 232 What distinguished the present case from *Ergi v Turkey*,¹⁰³ *Oğur v Turkey*¹⁰⁴ and *Makaratzis*¹⁰⁵ was the fact that, in the context of the G8, the planning of operations had inevitably been incomplete and approximate, given that the demonstrators

¹⁰¹ See [155] above

¹⁰² See [67] above

¹⁰³ *Ergi v Turkey* (2001) 32 E H R R 18

¹⁰⁴ *Oğur v Turkey* (2001) 31 E H R R 40

¹⁰⁵ *Makaratzis* (2005) 41 E H R R 49

could either have remained peaceful or have engaged in violence. The authorities had been unable to predict in detail what would happen and had to ensure that they could intervene in a flexible manner, which was difficult to plan for.

233 Likewise, the principles articulated in *McCann* and *Andronicou and Constantinou* had no bearing on the present case, since they related to a policing operation with a precise target rather than an urban guerrilla-type situation lasting three days, which was in constant flux and was spread over an entire city. In the latter situation, preventive planning was impossible as the decisions were taken by the commanding officers on the ground in the light of the scale of the violence and the dangers.

234 The demonstrations in Genoa should have been peaceful and lawful. The video footage showed that most of the demonstrators had acted within the law and without recourse to violence. The authorities had done everything in their power to prevent disruptive elements from mingling with the demonstrators and causing the demonstrations to degenerate. Despite that, several criminal incidents, often unrelated, had occurred in different parts of the city. Considerable precautions had been taken against a possible deterioration of the situation. However, no authority—“without the help of a clairvoyant”—could have predicted exactly when, where and how violence would break out and in what directions it would spread.

235 While denying the existence of any shortcomings imputable to the state which could be connected to the death of Carlo Giuliani, the Government drew the Court’s attention to the following points.

236 The change of plan on July 19, 2001 which had given the *carabinieri* a more dynamic role had been justified by the evolving situation and the demonstrators’ increasingly aggressive behaviour.

237 There was nothing to show that the selection and training of personnel had been defective. The training received by MP, DR and FC had included basic technical training when they were recruited and further courses on public-order operations and use of the equipment issued. In addition, MP, DR and FC had acquired considerable experience at sporting and other events. Ahead of the G8 summit all the personnel to be deployed in Genoa, including the three abovementioned *carabinieri*, had taken part in training sessions in Velletri at which experienced instructors had dispensed advanced training in public-order techniques.¹⁰⁶ Furthermore, as the state had deployed approximately 18,000 officers on the ground,¹⁰⁷ it would be unrealistic to expect that all the police officers and *carabinieri* would belong to elite units.

238 In the Government’s submission, the communications system chosen by the *carabinieri* had had no bearing on events on Piazza Alimonda. The jeeps had not been armoured (but had been equipped with metal grilles protecting the front windscreen and the driver and front passenger windows) because they were merely logistical support vehicles not designed for operational use in a public-order setting. That was why the side windows at the back and the rear window were not fitted with grilles. Moreover, the demonstrators had managed to set fire even to a fully armoured vehicle.¹⁰⁸ The jeeps had followed the *carabinieri* who were engaged in clashes with demonstrators most probably on the drivers’ initiative and to avoid being cut off, which would have made them an easy target for aggressive demonstrators.

¹⁰⁶ See [108]–[109] above

¹⁰⁷ See [141] above

¹⁰⁸ See [20] above

- 239 MP had had a loaded pistol because, although he had finished firing tear gas, he had to be able to defend himself in the event of an attack. Had that not been the case it was likely that he, rather than the attacker, would have died.
- 240 As to why the law-enforcement officers who had been close to the jeep had not intervened, the Government observed that the *carabinieri* at the scene had just withdrawn under an attack by demonstrators and thus needed time to regroup. As to the police officers who had been “a relatively short distance away but not in the immediate vicinity”, they had intervened as rapidly as possible. Moreover, the tragic events had occurred very rapidly (within some tens of seconds in total).
- 241 The Government also pointed out that, according to the autopsy report, the fact that the vehicle had driven over Carlo Giuliani’s body had not entailed any serious consequences for the latter.¹⁰⁹ The emergency services had intervened promptly at the scene.
- 242 In the Government’s submission, the authorities and the law-enforcement agencies had had no other course of action available to them. Although art.2(2)(c) of the Convention permitted the taking of life for the purpose of “quelling a riot”, the *carabinieri* had confined themselves to trying to disperse the violent demonstrators without causing damage and, after finding themselves trapped, to withdrawing in order to avoid being surrounded, which could have had more serious consequences. The attack on the jeep had been the result of the trap set by the demonstrators rather than of any malfunction. In view of the foregoing, the Court should avoid conveying the message that the state was to be held liable in all cases where rioting resulted in loss of human life.

2. The Chamber judgment

- 243 The Chamber examined the shortcomings complained of by the applicants, relating to the authorities’ choice of communications system, the supposedly inadequate circulation of the service instructions for July 20 and the alleged lack of co-ordination between the law-enforcement agencies. It concluded that the latter had had to respond to sudden and unpredictable disturbances and that in the absence of an in-depth domestic investigation into the matter no immediate and direct link could be established between the shortcomings complained of and the death of Carlo Giuliani. Lastly, it held that the emergency services had been summoned with sufficient promptness, and stressed the severity of Carlo Giuliani’s injuries.¹¹⁰

3. The Court’s assessment

(a) General principles

- 244 According to the Court’s case law, art.2 may imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.¹¹¹
- 245 That does not mean, however, that a positive obligation to prevent every possibility of violence can be derived from this provision. The obligation in question must be interpreted in a way which does not impose an impossible or

¹⁰⁹ See [50] above

¹¹⁰ See [228]–[244] of the Chamber judgment

¹¹¹ See *Mastromatteo v Italy* (37703/97) October 24, 2002 at [67] *in fine*; *Branko Tomašić v Croatia* (46598/06) January 15, 2009 at [50]; and *Opuz v Turkey* (2010) 50 E H R R 28 at [128]

disproportionate burden on the authorities, bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources.¹¹²

246 Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. The Court has held that a positive obligation will arise where the authorities knew or ought to have known of the existence of a real and immediate risk to the life of an identified individual or individuals and failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.¹¹³

247 In this connection it should be pointed out that in *Mastromatteo*,¹¹⁴ the Court drew a distinction between cases concerning the requirement of personal protection of one or more individuals identifiable in advance as the potential target of a lethal act,¹¹⁵ and those in which the obligation to afford general protection to society was in issue.¹¹⁶

248 Furthermore, for the state's responsibility under the Convention to be engaged, it must be established that the death resulted from a failure on the part of the national authorities to do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they had or ought to have had knowledge.¹¹⁷

249 According to its case law, the Court must examine the planning and control of a policing operation resulting in the death of one or more individuals in order to assess whether, in the particular circumstances of the case, the authorities took appropriate care to ensure that any risk to life was minimised and were not negligent in their choice of action.¹¹⁸ The use of lethal force by police officers may be justified in certain circumstances. Nonetheless, art.2 does not grant a *carte blanche*. Unregulated and arbitrary action by state agents is incompatible with effective respect for human rights. This means that policing operations must be sufficiently regulated by national law, within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force. Accordingly, the Court must take into consideration not only the actions of the agents of the state who actually administered the force but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination. Police officers should not be left in a vacuum when performing their duties: a legal and administrative framework should define the limited circumstances in which law-enforcement officials may use force and firearms, in the light of the international standards which have been developed in this respect.¹¹⁹

250 In particular, law-enforcement agents must be trained to assess whether or not there is an absolute necessity to use firearms, not only on the basis of the letter of

¹¹² See *Osman* (2000) 29 E H R R 245 at [116]; and *Maiorano v Italy* (28634/06) December 15, 2009 at [105]

¹¹³ See *Bromiley v United Kingdom* (33747/96) November 23, 1999; *Edwards v United Kingdom* (2002) 35 E H R R 19 at [55]; and *Branko Tomašić v Croatia* (46598/06) January 15, 2009 at [50]–[51]

¹¹⁴ *Mastromatteo* (37703/97) October 24, 2002 at [69]

¹¹⁵ See *Osman* (2000) 29 E H R R 245 and *Edwards* (2002) 35 E H R R 19; see also the judgments adopted in the wake of *Mastromatteo* (37703/97) October 24, 2002, namely *Branko Tomašić* (46598/06) January 15, 2009; and *Opuz* (2010) 50 E H R R 28

¹¹⁶ See *Maiorano* (28634/06) December 15, 2009 at [107]

¹¹⁷ See *Osman* (2000) 29 E H R R 245 at [116]; *Mastromatteo* (37703/97) October 24, 2002 at [74]; and *Maiorano* (28634/06) December 15, 2009 at [109]

¹¹⁸ See *McCann* (1996) 21 E H R R 97 at [194] and [201]; and *Andronicou* (1998) 25 E H R R 491 at [181]

¹¹⁹ See *Makaratzis* (2005) 41 E H R R 49 at [58]–[59]

the relevant regulations, but also with due regard to the pre-eminence of respect for human life as a fundamental value.¹²⁰

- 251 Lastly, it should not be overlooked that Carlo Giuliani's death occurred in the course of a mass demonstration. While it is the duty of Contracting States to take reasonable and appropriate measures with regard to lawful demonstrations to ensure their peaceful conduct and the safety of all citizens, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used. In this area the obligation they enter into under art.11 of the Convention is an obligation as to measures to be taken and not as to results to be achieved.¹²¹ However, it is important that preventive security measures such as, for example, the presence of first-aid services at the site of demonstrations, be taken in order to guarantee the smooth conduct of any event, meeting or other gathering, be it political, cultural or of another nature.¹²² Moreover, where demonstrators do not engage in acts of violence, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by art.11 of the Convention is not to be deprived of all substance.¹²³ On the other hand, interferences with the right guaranteed by that provision are in principle justified for the prevention of disorder or crime and for the protection of the rights and freedoms of others where demonstrators engage in acts of violence.¹²⁴

(b) Application of these principles to the present case

- 252 The Court notes first of all that the demonstrations surrounding the G8 summit in Genoa degenerated into violence. On July 20, 2001 numerous clashes took place between the law-enforcement agencies and a section of the demonstrators. This is amply demonstrated by the video footage produced by the parties. These images also show violence being perpetrated by some police officers against demonstrators.¹²⁵
- 253 The fact remains, however, that the present application does not concern the organisation of the public-order operations during the G8 as a whole. It is confined to examining, among other things, whether, in the organisation and planning of that event, failings occurred which can be linked directly to the death of Carlo Giuliani. In that connection it should be noted that violent incidents had been observed well before the tragic events on Piazza Alimonda. In any event, there are no objective grounds for believing that, had those violent incidents not occurred, and had the *Tute Bianche* march not been charged by the *carabinieri*, MP would not have fired shots to defend himself against the unlawful violence to which he was being subjected. The same conclusion must be reached as regards the changes to the instructions issued to the *carabinieri* on the eve of the events and the choice of communications system.
- 254 The Court observes in that regard that the intervention of the *carabinieri* on Via Caffa¹²⁶ and the attack on the jeep by demonstrators took place at a time of relative calm when, following a long day of clashes, the detachment of *carabinieri* had

¹²⁰ See *Nachova* (2006) 42 E.H.R.R. 43 at [97]; see also the Court's criticism of the "shoot to kill" instructions given to soldiers in *McCann* (1996) 21 E.H.R.R. 97 at [211]–[214].

¹²¹ See *Plattform Ärzte für das Leben v Austria* (1991) 13 E.H.R.R. 204 at [34]; *Oya Ataman v Turkey* (74552/01) December 5, 2006 at [35]; and *Protapapa v Turkey* (16084/90) February 24, 2009 at [108].

¹²² See *Oya Ataman* (74552/01) December 5, 2006 at [39].

¹²³ See *Patyi v Hungary* (5529/05) October 7, 2008 at [43].

¹²⁴ See *Protapapa* (16084/90) February 24, 2009 at [109].

¹²⁵ See [139] above.

¹²⁶ See [42]–[44] above.

taken up position on Piazza Alimonda in order to rest, regroup and allow the injured officers to board the jeeps. As the footage shows, the clash between demonstrators and law-enforcement officers occurred suddenly and lasted only a few minutes before the fatal shooting. It could not have been predicted that an attack of such violence would take place in that precise location and in those circumstances. Moreover, the reasons which drove the crowd to act as it did can only be speculated upon.

255 It should also be noted that the Government had deployed considerable numbers of personnel to police the event (18,000 officers)¹²⁷ and that all the personnel either belonged to specialised units or had received ad-hoc training in maintaining order during mass gatherings. MP, in particular, had taken part in training courses in Velletri.¹²⁸ In view of the very large numbers of officers deployed on the ground, they could not all be required to have lengthy experience and/or to have been trained over several months or years. To hold otherwise would be to impose a disproportionate and unrealistic obligation on the state. Furthermore, as the Government rightly stressed,¹²⁹ a distinction has to be made between cases where the law-enforcement agencies are dealing with a precise and identifiable target¹³⁰ and those where the issue is the maintenance of order in the face of possible disturbances spread over an area as wide as an entire city, as in the instant case. Only in the first category of cases can all the officers involved be expected to be highly specialised in dealing with the task assigned to them.

256 It follows that no violation of art.2 of the Convention can be found solely on the basis of the selection, for the G8 summit in Genoa, of a *carabiniere* who, like MP, was only 20 years and 11 months of age at the material time and had been serving for only 10 months.¹³¹ The Court also points out that it has already held that MP's actions during the attack on the jeep did not amount to a breach of art.2 in its substantive aspect.¹³² It has not been established that he took unconsidered initiatives or acted without proper instructions.¹³³

257 It therefore remains to be ascertained whether the decisions taken on Piazza Alimonda immediately before the attack on the jeep by the demonstrators were in breach of the obligation to protect life. To that end the Court must take account of the information available to the authorities at the time the decisions were taken. There was nothing at that juncture to indicate that Carlo Giuliani, more than any other demonstrator or any of the persons present at the scene, was the potential target of a lethal act. Hence, the authorities were not under an obligation to provide him with personal protection, but were simply obliged to refrain from taking action which, in general terms, was liable to clearly endanger the life and physical integrity of any of the persons concerned.

258 The Court considers it conceivable, in an emergency situation such as that prevailing after the clashes of July 20, 2001, that the law-enforcement agencies might have to use non-armoured logistical support vehicles to transport injured officers. Likewise, it does not appear unreasonable not to have required the vehicles concerned to travel to hospital immediately, as this would have placed them at risk

¹²⁷ See [141] and [237] above

¹²⁸ See [108]–[109] and [237] above; contrast *Makaratzis* (2005) 41 E H R R 49 at [70]

¹²⁹ See [233] above

¹³⁰ See, for instance, *McCann* (1996) 21 E H R R 97 and *Andronicou* (1998) 25 E H R R 491

¹³¹ See [35] above

¹³² See [194]–[195] above

¹³³ Contrast *Makaratzis* (2005) 41 E H R R 49 at [70]

of crossing, without protection, a part of the city where further disturbances could have broken out. Before the attack in Via Caffa which, as the Court has just observed, was entirely sudden and unforeseeable,¹³⁴ everything seemed to indicate that the jeeps were better protected on Piazza Alimonda, where they were next to a contingent of *carabinieri*. Furthermore, there is nothing in the file to suggest that the physical condition of the *carabinieri* in the jeep was so serious that they needed to be taken to hospital straightaway as a matter of urgency; the officers concerned were for the most part suffering from the effects of prolonged exposure to tear gas.

259 The jeeps next followed the detachment of *carabinieri* when the latter moved off towards Via Caffa; the reasons for this decision are not clear from the file. It may be that the move was made to avoid being cut off, which, as subsequent events demonstrated, could have been extremely dangerous. Furthermore, when the move was made, there was no reason to suppose that the demonstrators would be able to force the *carabinieri*, as they did, to withdraw rapidly and in disorderly fashion, thereby prompting the jeeps to retreat in reverse gear and leading to one of them becoming hemmed in. The immediate cause of these events was the violent and unlawful attack by the demonstrators. It is quite clear that no operational decision previously taken by the law-enforcement agencies could have taken account of this unforeseeable element. Moreover, the fact that the communications system chosen apparently only allowed information to be exchanged between the police and *carabinieri* control centres, but not direct radio contact between the police officers and *carabinieri* themselves,¹³⁵ is not in itself sufficient basis for finding that there was no clear chain of command, a factor which, according to the Court's case law, is liable to increase the risk of some police officers shooting erratically.¹³⁶ MP was subject to the orders and instructions of his superior officers, who were present on the ground.

260 Moreover, the Court does not see why the fact that MP was injured and deemed unfit to remain on duty should have led those in command to take his weapon from him. The weapon was an appropriate means of personal defence with which to counter a possible violent and sudden attack posing an imminent and serious threat to life, and was indeed used for that precise purpose.

261 Lastly, as regards the events following the fatal shooting,¹³⁷ the Court observes that there is no evidence that the assistance afforded to Carlo Giuliani was inadequate or delayed or that the jeep drove over his body intentionally. In any case, as demonstrated by the autopsy report,¹³⁸ the brain injuries sustained as a result of the shot fired by MP were so severe that they resulted in death within a few minutes.

262 It follows that the Italian authorities did not fail in their obligation to do all that could reasonably be expected of them to provide the level of safeguards required during operations potentially involving the use of lethal force. There has therefore been no violation of art.2 of the Convention on account of the organisation and planning of the policing operations during the G8 summit in Genoa and the tragic events on Piazza Alimonda.

¹³⁴ See [254] above

¹³⁵ See [222] above

¹³⁶ See *Makaratzis* (2005) 41 E H R R 49 at [68]

¹³⁷ See [229] above

¹³⁸ See [50] above

II. Alleged violation of article 2 of the Convention in its procedural aspect

263 The applicants alleged that the respondent State had failed in several respects to comply with the procedural obligations arising out of art.2 of the Convention. The Government contested that allegation.

A. The issues raised by the applicants

1. Alleged shortcomings in the performance of the autopsy and the cremation of the body

(a) The parties' submissions

(i) The applicants

264 The applicants observed that on July 21, 2001 the public prosecutor had ordered an autopsy of Carlo Giuliani's body and had appointed two experts (Mr Canale and Mr Salvi) who were to begin work at 15.00 the same day. The public prosecutor had asked the police to inform MP and the victim's parents before 13.00. It had been impossible for the applicants at such short notice to appoint a forensic medical expert of their choosing to attend the autopsy. Moreover, the public prosecutor had authorised the cremation of the body on July 23, 2001, well before the results of the autopsy were known (the experts had been given 60 days in which to complete their report).

265 The applicants had at no point been "parties" to the proceedings, since under Italian law an application to join the proceedings as a civil party could only be made once the accused had been committed for trial. As injured parties, they had had only limited powers to participate in the investigation. These were even more restricted when the public prosecutor ordered technical examinations which could not be repeated, on the basis of art.360 of the CCP¹³⁹; in that case, the injured party could only request the public prosecutor to apply to the judge for the immediate production of evidence. Only if that application was granted could the injured party request the investigating judge to put questions to the prosecuting authorities' experts. In the instant case the autopsy had been classified as a technical examination which could not be repeated.

266 Lastly, the applicants observed that the full body scan carried out on Carlo Giuliani's body¹⁴⁰ had revealed a metal fragment lodged in his head, but that this fragment had not been found or recorded.¹⁴¹

(ii) The Government

267 The Government argued that extracting the metal fragment would have been not just pointless but impossible. It would not have yielded any useful additional information regarding the circumstances in which MP had had recourse to lethal force. Micro-fragments of lead had already been found on the victim's balaclava, the analysis of which had confirmed the intermediate object theory. Furthermore, at the time Carlo Giuliani's body was returned to his family for cremation there had been no reason to suppose that the autopsy report, which had not yet been written, would be "superficial". It was usual practice, moreover, to hand over the body to the relatives once the experts had indicated that they had no further need

¹³⁹ See [150] above

¹⁴⁰ See [60] above

¹⁴¹ See Mr Salvi's statement during the "trial of the 25"—[130] above

of it. This spared the victim's relatives a further ordeal and respected their rights under art.8 of the Convention.

268 The cremation had been requested by the applicants themselves, who had been informed that an autopsy was due to take place and could have attended it. Moreover, the applicants' representative had not made any application for the immediate production of evidence.¹⁴²

269 As the Court had had occasion to state,¹⁴³ whether or not an investigation had been conducted properly had to be assessed *ex ante*, on the basis of the facts known when the decision was taken, and not *ex post facto*. An investigation was defective for the purposes of the Convention if the shortcomings identified undermined its capability of establishing the circumstances of the case or the persons responsible.¹⁴⁴ Only unusual circumstances had led the Court, in certain cases, to find a procedural violation of art.2 without finding a substantive violation of the same provision or of art.38 of the Convention,¹⁴⁵ and this had in any case given rise to dissenting opinions.¹⁴⁶ In the instant case, the conclusions of the domestic authorities as to the existence of self-defence had been endorsed by the Chamber. Accordingly, any defect there might have been in the investigation had no impact on its effectiveness.

270 In any event, the effectiveness requirement was an obligation as to means rather than results. The Government conceded that "certain documents noted difficulties in reconstructing the events, on account, *inter alia*, of the unavailability of some elements". However, those difficulties had not been attributable to the authorities or to any negligence on their part, but had resulted from objective circumstances beyond their control. The investigators had therefore complied with their obligation as to means. Moreover, even assuming that any doubts persisted with regard to some elements, it was the accused and not the victim who had to be given the benefit of the doubt in criminal matters. Lastly, it should not be overlooked that the Court had judged domestic investigations to be "effective" where errors had been committed by the authorities.¹⁴⁷

(b) The Chamber judgment

271 The Chamber observed that the scan performed on Carlo Giuliani's body had revealed the presence of a metal fragment lodged in his head which was not extracted or recorded, although analysing it would have been important "for the purposes of the ballistic analysis and for the reconstruction of events". Moreover, the doctors performing the autopsy had not "explicitly stated whether the shot had been direct". Crucial questions had therefore remained unanswered, leading the public prosecutor's office to describe the autopsy report as "superficial". These shortcomings had been aggravated by the fact that authorisation had been given to cremate the body before the content of the expert medical report was known, preventing any further tests from being carried out. The Chamber also deplored the short notice given to the applicants for the purposes of appointing an expert of

¹⁴² The Government referred to *Sottani v Italy* (26775/02) February 24, 2005, in which the Court had dismissed a similar complaint

¹⁴³ The Government referred, *mutatis mutandis*, to *K v United Kingdom* (2009) 48 E.H.R.R. 29 at [36]

¹⁴⁴ The Government referred to *Makaratzis* (2005) 41 E.H.R.R. 49 at [74]

¹⁴⁵ The Government referred, by way of example, to *Jordan v United Kingdom* (2003) 37 E.H.R.R. 2

¹⁴⁶ The Government cited the example of *Ramsahai v Netherlands* (2008) 46 E.H.R.R. 43

¹⁴⁷ The Government referred to *Grams* (33677/96) October 5, 1999; and *Menson v United Kingdom* (2003) 37 E.H.R.R. CD220

their choosing to participate in the autopsy. Accordingly, it held that there had been a violation of art.2 of the Convention in its procedural aspect.¹⁴⁸

2. Failure to institute proceedings with a view to establishing possible liability on the part of certain police officers

(a) The parties' submissions

(i) The applicants

- 272 In the applicants' submission, art.2 of the Convention had been breached also on account of the absence of an administrative or criminal investigation into the conduct of the law-enforcement agencies at the G8 in Genoa. An investigation could have shed light on responsibilities within the chain of command and enabled administrative sanctions to be imposed if necessary. The absence of any administrative investigation had been confirmed by the Government¹⁴⁹ and by the statements made by Colonel Truglio at the "trial of the 25".
- 273 It followed that no assessment had been made at any point of the authorities' overall liability with regard to the shortcomings in the planning, co-ordination and conduct of the operations and their inability to ensure proportionate use of force in order to disperse the demonstrators. There had been no scrutiny of the instructions issued to the law-enforcement officers or the reasons why the latter had been issued only with live ammunition. The prosecuting authorities had never considered whether MP's superior officers could be held liable for having left a lethal weapon in the hands of a *carabiniere* who was considered unfit to remain on duty.
- 274 If the Government was correct in its assertion that the investigation could not be extended to persons other than those suspected of having committed the offence, it was the domestic law that was incompatible with art.2 of the Convention. Furthermore, the public prosecutor, in requesting that the proceedings be discontinued, had referred to problems (without specifying what they might be). Since this finding had not prompted an investigation into the causes of the problems and who was responsible for them, the Convention had also been breached on account of the prosecuting authorities' choice to conduct an incomplete investigation.
- 275 The applicants deplored the fact that, far from being punished, MP's superior officers (officers Leso, Truglio, Cappello and Mirante) had all obtained promotion. Furthermore, some police officers suspected of unlawful arrest and violence towards demonstrators had likewise been promoted. However, in a judgment of May 18, 2010 the Genoa Court of Appeal had sentenced some of these senior officers to prison terms ranging from three years and eight months to five years for offences committed at Diaz school during the G8 (25 of the 27 accused had been convicted and had received custodial sentences totalling 85 years). The day after that judgment was delivered, the Under-Secretary of the Interior had stated that none of the senior officers convicted would be dismissed and that they continued to enjoy the Minister's confidence.

¹⁴⁸ See [245]–[251] of the Chamber judgment

¹⁴⁹ See [280] below

(ii) The Government

- 276 Referring to its observations concerning the circumstances in which an investigation could be considered to be defective,¹⁵⁰ the Government alleged that, since no liability arose in connection with the conduct of the public-order operations, the fact that it had not been the subject of investigation was without consequence. The Chamber itself had concluded that the planning and organisation of the G8 in Genoa had been compatible with the obligation to protect life under art.2. Accordingly, there was no reason to investigate the persons responsible for the planning.
- 277 The Chamber had criticised the investigation for not elucidating the reasons why MP had not been taken straight to hospital, had been left in possession of a loaded pistol and had been placed in a jeep that was cut off and had no protection. The Government observed that the domestic investigation had been unable to establish with certainty whether the jeeps had followed the detachment of *carabinieri* on the drivers' own initiative or because they were ordered to do so. In any event, this had been the only reasonable course of action given that the jeeps were required to travel together and under cover of the detachment. MP had been placed in the jeep because of a sudden event (his personal state) and the vehicle had become cut off because of the "trap" set by the demonstrators. The pistol had been MP's means of defending himself.
- 278 As MP had acted in self-defence, it was difficult to see what offence could be imputed to those responsible for the public-order operations. Article 7 of the Convention required, for the purpose of imposing a penalty, an intellectual link (knowledge and intent) disclosing an element of responsibility in the conduct of the person who had physically carried out the offence.¹⁵¹ In the instant case no physical offence or knowledge of and intention to commit such an offence could be imputed to those responsible for policing the G8 summit.
- 279 Furthermore, criminal responsibility was strictly personal and presupposed a causal relationship whereby the offence concerned was the direct and immediate consequence of the act complained of. Any errors or problems there might have been in the organisation, management and conduct of the public-order operations could in no way be considered to have been the direct cause of the tragic events on Piazza Alimonda. It would therefore have been superfluous to extend the investigation to include high-ranking police officers or to try to identify other persons potentially responsible. If the Chamber judgment were upheld on this point the state would be obliged to institute pointless and damaging investigations which would yield no results and would interfere in an arbitrary manner in the lives of innocent individuals.
- 280 No administrative or disciplinary investigation had been opened concerning the *carabinieri*. However, two sets of criminal proceedings were pending against several police officers for acts of violence allegedly committed against demonstrators on July 21 and 22, 2001, after Carlo Giuliani's death. The "overall context" of the G8 had also been examined in the course of the parliamentary

¹⁵⁰ See [269] above

¹⁵¹ The Government referred to *Sud Fondi Srl v Italy* (75909/01) January 20, 2009 at [116]

inquiry,¹⁵² the “trial of the 25”¹⁵³ and the investigations conducted by the Ministry of the Interior.¹⁵⁴

(b) The Chamber judgment

- 281 The Chamber deplored the fact that the domestic investigation had been confined to ascertaining whether MP and FC were to be held liable and had not studied the “overall context” in order to determine whether the authorities had planned and managed the public-order operations in such a way as to prevent the type of incident which had caused Carlo Giuliani’s death. In particular, no light had been shed on the reasons why MP had not been taken to hospital immediately, had been left in possession of a loaded pistol and had been placed in an isolated jeep that had no protection. These questions had required an answer, given that “the fatal shot [was] closely linked to the situation in which M.P. and F.C. found themselves”.¹⁵⁵

3. Other alleged shortcomings in the domestic investigation

- 282 The applicants contended that there had been numerous other shortcomings in the domestic investigation. The Government contested this assertion. The Chamber did not consider it necessary to examine these issues.¹⁵⁶

(a) The parties’ submissions

(i) The applicants

- 283 The applicants alleged that the investigation had lacked impartiality and independence, had not been thorough and, having resulted in a decision to discontinue the proceedings, had deprived them of a public hearing and hence of public scrutiny of the circumstances surrounding their relative’s death.
- 284 In their request for the proceedings to be discontinued the prosecuting authorities had expressed uncertainty as to MP’s intentions when he fired the shots, finding that it was not possible to determine whether MP had simply wanted to frighten his assailants or had sought to defend himself by firing in their direction, accepting the risk that he might hit someone. According to the prosecuting authorities, it could have been a case of causing death by negligence, of knowingly taking the risk of killing someone or of intentional homicide. After dismissing the third possibility (without due explanation), the public prosecutor had concluded that MP had acted in self-defence and that a request should be made for the proceedings to be discontinued owing to the existence of “doubts” based on grounds of justification.¹⁵⁷ In the applicants’ submission, the prosecuting authorities’ lack of certainty regarding the establishment of the facts had made public proceedings and further investigation necessary.
- 285 The applicants conceded that they had been able to object to the public prosecutor’s request to discontinue the proceedings and that following that objection a hearing had been held in private before the investigating judge. However, the hearing had been conducted in camera, with only the parties and their counsel allowed to attend. Furthermore, the investigating judge had had to take a decision on the basis of the evidence submitted by the prosecuting authorities, who had

¹⁵² See [107]–[117] above

¹⁵³ See [121]–[138] above

¹⁵⁴ See [140] above

¹⁵⁵ See [252]–[254] of the Chamber judgment

¹⁵⁶ See [255] of the Chamber judgment

¹⁵⁷ See [72]–[75] above

effectively accepted without question the version of events given by the law-enforcement agencies' representatives, without the injured party having the opportunity of questioning the accused, witnesses or experts. The investigating judge had established the facts on the basis of an anonymous account posted on a website with possible links to French anarchists; a public hearing should have been held to test the accuracy of that account. Finally, the applicants had had no effective remedy by which to challenge the investigating judge's decision to discontinue the proceedings, as an appeal on points of law was admissible only on grounds of nullity, which did not apply in the instant case.¹⁵⁸

286 It also had to be borne in mind that the forensic examinations ordered by the public prosecutor had produced contradictory findings. The applicants stressed the following points:

- (a) according to the "Cantarella" ballistics report (December 5, 2001), there was a 90 per cent probability that the spent cartridge found inside the jeep matched MP's gun, while the cartridge found near Carlo Giuliani's body was only a 10 per cent match (see [54] above);
- (b) the "Manetto" ballistics report (January 15, 2002) stated that the two cartridges had come from MP's pistol and that the fatal shot had been fired in a downward direction, from a distance of between 110 and 140cm¹⁵⁹;
- (c) the ballistics report of July 26, 2002 by a panel of experts concluded that before hitting Carlo Giuliani the bullet had collided with an object which had deflected its trajectory¹⁶⁰;
- (d) according to the autopsy report, MP had fired downwards and the shot had not been deflected.¹⁶¹

287 Furthermore, Mr Romanini should not have been appointed as an expert, owing to the fact that in September 2001 he had published an article in a specialist weapons journal in which he stated that MP's conduct was to be regarded as a "clear and wholly justified defensive reaction".¹⁶² Questions regarding Mr Romanini's impartiality had been raised by the daily newspaper *Il Manifesto* on March 19, 2003, that is to say, before the decision to discontinue the proceedings was taken on May 5, 2003. As the case had not progressed beyond the preliminary investigation stage, the applicants had not had an opportunity to request Mr Romanini's exclusion. The forensic examination in which he had participated had, moreover, been of great significance, as it had given rise to the intermediate object theory, which the investigating judge had accepted.

288 In any case, since the judicial authority had not acted promptly at the scene of the events and had not managed to preserve the scene, the bullets had never been recovered, with the result that no proper ballistics examination had been possible. Only two spent cartridges had been found, and it was not even certain that they were from the bullets fired by MP.

289 With regard to the first and second sets of ballistics tests, the applicants conceded that it had been open to them in theory to request the public prosecutor to apply to the judge for the immediate production of evidence. However, as the prosecuting

¹⁵⁸ CCP art 409(6)—see [151] above

¹⁵⁹ See [55] above

¹⁶⁰ See [56]–[62] above

¹⁶¹ See [50] above

¹⁶² See [56] above

authorities themselves had made such an application and it had been refused, the applicants had seen no point in making the request.

290 The public prosecutor had also decided to entrust a significant part of the investigation to the *carabinieri*, and in particular to the Genoa provincial command and the mobile brigade of the Genoa *questura*. In particular, the *carabinieri* had:

- seized MP's weapon and certified that it had a magazine containing fewer than 15 rounds of ammunition;
- carried out the initial inspection of Carlo Giuliani's body and of the jeeps;
- seized one of the jeeps and the material inside it, including a spent cartridge;
- compiled photographic evidence of the equipment which MP had at the time of the events;
- acquired, checked and examined the audiovisual material relating to the events of July 20, 2001;
- drawn up the records of some of the statements made to the public prosecutor.

291 The applicants further stressed that immediately after Carlo Giuliani's death, MP, DR and FC had left the scene (with the jeep and weapons) and had been absent until the public prosecutor had begun hearing evidence several hours later. They had had an interview with their superior officers and had been able to communicate among themselves before being questioned by the public prosecutor. Moreover, DR had not given evidence until the day after the events and some of the law-enforcement officers present at the scene had been questioned only after a considerable delay (Captain Cappello had made a statement on September 11, 2001 and his deputy Zappia on December 21, 2001).

292 In the applicants' view, several *carabinieri* and police officers, and the *questore* himself, should have been placed under investigation in the judicial proceedings concerning Carlo Giuliani's death. The Genoa *questura* had played a "major" role in the planning, organisation and management of the public-order operations during the G8 summit. The Genoa *questore* was the most senior official responsible for public order, the police control centre had been run by the *questura* and officers from the latter had issued and carried out orders to intervene against the *Tute Bianche* march. To guarantee the independence and impartiality of the investigation the public prosecutor should have entrusted it to the revenue police, a branch of the police which was not implicated in the events.

(ii) The Government

293 The Government submitted that the investigation had been conducted with the requisite promptness. The judicial authority had spared no effort in seeking to establish the facts and had deployed the most advanced technologies as well as more traditional methods. Hence, the prosecuting authorities and the investigators had carried out further questioning of persons who had already given evidence once, where this was deemed necessary, and had also taken evidence from local residents who had witnessed the events. A reconstruction of the events and test shootings had been carried out at the scene. A large body of audiovisual material, from the law-enforcement agencies and private sources, had been included in the case file. Three sets of ballistics tests had been ordered by the public prosecutor's office and the investigating judge had relied on material from sources close to the demonstrators themselves (an account published on an anarchist website).

- 294 The investigation had been opened as a matter of course and the applicants had had the opportunity to participate in it fully from the outset by being represented by lawyers and appointing experts of their own choosing. In particular, the applicants' experts had participated in the third set of ballistics tests and in the reconstruction of the events.¹⁶³
- 295 The applicants had also been able to make criticisms and requests when objecting to discontinuation of the case, and the investigating judge had provided them with sufficiently detailed reasons for refusing their requests for further investigation.¹⁶⁴ While it was true that the applicants had not been able to request the immediate production of evidence in relation to the first steps in the investigation, checks of that kind were a matter exclusively for the police. When it came to the third set of ballistics tests, the public prosecutor had asked the parties whether they had any objections to the use of the procedure under art.360 of the CCP, and there had been no objections. While the Government conceded that the first and second sets of ballistics tests had been carried out unilaterally,¹⁶⁵ it submitted that these had been no more than routine checks, aimed solely at establishing whether or not the two spent cartridges that had been found matched MP's weapon. Moreover, MP had already admitted firing two shots and the weapon had in any case been examined again during the third set of ballistics tests.
- 296 Within moments of the tragedy the Genoa police had intervened and taken the investigation in hand. The *carabinieri* had been involved only in tasks of lesser importance and mainly when it came to seizing objects in their possession—for example, the vehicle and the weapon—or summoning members of the *carabinieri* to appear. In addition, the prosecuting authorities had kept the number of tasks delegated to a minimum, preferring to conduct the most important interviews themselves and also those liable to be influenced by the fact that the interviewer was a law-enforcement officer. Given the level of autonomy and independence of the judiciary in Italy and the fact that the investigation had to be entrusted to a police authority, the state could not be said to have lacked impartiality in any sense. Furthermore, the findings of the investigation and the reasons given for discontinuing the proceedings had provided no grounds for supposing that there had been any attempt at a cover-up.
- 297 All the experts appointed by the public prosecutor's office had been civilians, with the exception of the second ballistics expert, who was a police officer.¹⁶⁶ At the time of Mr Romanini's appointment the prosecuting authorities had been unaware that he had expressed the view that MP had acted in self-defence.¹⁶⁷ In the Government's submission, the aim of Mr Romanini's article had been simply to propound a political theory based on a comparison between the incident in question and an earlier tragedy in Naples. The fact that he had written the article did not render Mr Romanini unfit to fulfil his mandate in an objective and impartial manner, as his task had not consisted in examining whether the facts supported the hypothesis that MP had acted in self-defence. The panel of experts had been asked in particular to give its views on the trajectory of the bullet. Moreover, Mr Romanini's role had been confined to conducting test shootings in the presence of

¹⁶³ See [57] above

¹⁶⁴ See [104] above

¹⁶⁵ See [54] and [55] above

¹⁶⁶ See [55] above

¹⁶⁷ See [56] above

the other experts, the applicants and the latter's experts. That "purely technical and essentially physical" procedure had not afforded scope for preconceived judgments liable to influence the outcome of the investigation. The Government further observed that the applicants had not raised any objections to Mr Romanini's appointment.

B. The Court's assessment

1. General principles

298 Having regard to their fundamental character, arts 2 and 3 of the Convention contain a procedural obligation to carry out an effective investigation into alleged breaches of the substantive limb of these provisions.¹⁶⁸ A general legal prohibition of arbitrary killing by the agents of the state would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by state authorities. The obligation to protect the right to life under this provision, read in conjunction with the state's general duty under art.1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the state.¹⁶⁹ The state must therefore ensure, by all means at its disposal, an adequate response—judicial or otherwise—so that the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished.¹⁷⁰

299 The state's obligation to carry out an effective investigation has in the Court's case law been considered as an obligation inherent in art.2, which requires, *inter alia*, that the right to life be "protected by law". Although the failure to comply with such an obligation may have consequences for the right protected under art.13, the procedural obligation of art.2 is seen as a distinct obligation.¹⁷¹ It can give rise to a finding of a separate and independent "interference". This conclusion derives from the fact that the Court has consistently examined the question of procedural obligations separately from the question of compliance with the substantive obligation (and, where appropriate, has found a separate violation of art.2 on that account) and the fact that on several occasions a breach of a procedural obligation under art.2 has been alleged in the absence of any complaint as to its substantive aspect.¹⁷²

300 For an investigation into alleged unlawful killing by state agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events.¹⁷³ This means not only a lack of hierarchical or institutional connection but

¹⁶⁸ See *Ergi v Turkey* (2001) 32 E H R R 18 at [82]; *Assenov v Bulgaria* (1999) 28 E H R R 652 at [101]–[106]; and *Mastromatteo* (37703/97) October 24, 2002 at [89]

¹⁶⁹ See *McCann* (1996) 21 E H R R 97 at [161]

¹⁷⁰ See *Zavoloka v Latvia* (58447/00) July 7, 2009 at [34]

¹⁷¹ See *Ilhan v Turkey* (2002) 34 E H R R 36 at [91]–[92]; *Öneryıldız v Turkey* (2005) 41 E H R R 20 at [148]; and *Šilih v Slovenia* (2009) 49 E H R R 37 at [153]–[154]

¹⁷² See *Šilih* (2009) 49 E H R R 37 at [158]–[159]

¹⁷³ See, e.g. *Güleç* (1999) 28 E H R R 121 at [81]–[82]; and *Oğur* (2001) 31 E H R R 40 at [91]–[92]

also a practical independence. What is at stake here is nothing less than public confidence in the state's monopoly on the use of force.¹⁷⁴

- 301 The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the circumstances¹⁷⁵ and of identifying and—if appropriate—punishing those responsible.¹⁷⁶ This is not an obligation of result, but of means. The authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of the clinical findings, including the cause of death.¹⁷⁷ Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard.¹⁷⁸
- 302 In particular, the investigation's conclusions must be based on thorough, objective and impartial analysis of all relevant elements. Failing to follow an obvious line of inquiry undermines to a decisive extent the investigation's ability to establish the circumstances of the case and the identity of those responsible.¹⁷⁹ Nevertheless, the nature and degree of scrutiny which satisfy the minimum threshold of the investigation's effectiveness depend on the circumstances of the particular case. They must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work.¹⁸⁰
- 303 In addition, the investigation must be accessible to the victim's family to the extent necessary to safeguard their legitimate interests. There must also be a sufficient element of public scrutiny of the investigation, the degree of which may vary from case to case.¹⁸¹
- 304 However, disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects to private individuals or other investigations and, therefore, cannot be regarded as an automatic requirement under art.2. The requisite access of the public or the victim's relatives may therefore be provided for in other stages of the procedure.¹⁸² Moreover, art.2 does not impose a duty on the investigating authorities to satisfy every request for a particular investigative measure made by a relative in the course of the investigation.¹⁸³
- 305 A requirement of promptness and reasonable expedition is implicit in this context.¹⁸⁴ It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be

¹⁷⁴ See *Jordan* (2003) 37 E.H.R.R. 2 at [106]; *Ramsahai* (2008) 46 E.H.R.R. 43 at [325]; and *Kolevi v Bulgaria* (1108/02) November 5, 2009 at [193]

¹⁷⁵ See, e.g. *Kaya v Turkey* (1999) 28 E.H.R.R. 1 at [87]

¹⁷⁶ See *Oğur* (2001) 31 E.H.R.R. 40 at [88]

¹⁷⁷ As regards autopsies, see, e.g. *Salman v Turkey* (2002) 34 E.H.R.R. 17 at [106]; on the subject of witnesses, see, e.g. *Tanrikulu v Turkey* (2000) 30 E.H.R.R. 950 at [109]; as regards forensic examinations, see, e.g. *Gül v Turkey* (2002) 34 E.H.R.R. 28 at [89]

¹⁷⁸ See *Avşar* (2003) 37 E.H.R.R. 53 at [393]–[395]

¹⁷⁹ See *Kolevi* (1108/02) November 5, 2009 at [201]

¹⁸⁰ See *Velcea v Romania* (64301/01) December 1, 2009 at [105]

¹⁸¹ See *Jordan* (2003) 37 E.H.R.R. 2 at [109]; and *Varnava v Turkey* (2010) 50 E.H.R.R. 21 at [191]; see also *Güleç* (1999) 28 E.H.R.R. 121 at [82], where the victim's father was not informed of the decision not to prosecute; and *Oğur* (2001) 31 E.H.R.R. 40 at [92], where the family of the victim had no access to the investigation or the court documents

¹⁸² See, among other authorities, *McKerr v United Kingdom* (2002) 34 E.H.R.R. 20 at [129]

¹⁸³ See *Ramsahai* (2008) 46 E.H.R.R. 43 at [348]; and *Velcea* (64301/01) December 1, 2009 at [113]

¹⁸⁴ See *Yaşa v Turkey* (1999) 28 E.H.R.R. 408 at [102]–[104]; *Tanrikulu* (2000) 30 E.H.R.R. 950 at [109]; and *Kaya v Turkey* (1999) 28 E.H.R.R. 1 at [106]–[107]

regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.¹⁸⁵

306 However, it cannot be inferred from the foregoing that art.2 may entail the right to have third parties prosecuted or sentenced for a criminal offence¹⁸⁶ or an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence.¹⁸⁷

On the other hand, the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished. The Court's task therefore consists in reviewing whether and to what extent the courts, in reaching their conclusion, may be deemed to have submitted the case to the careful scrutiny required by art.2 of the Convention, so that the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations of the right to life are not undermined.¹⁸⁸

2. Application of these principles to the present case

307 The Court observes at the outset that it has just concluded, from the standpoint of the substantive limb of art.2, that the use of lethal force was “absolutely necessary in defence of any person from unlawful violence”¹⁸⁹ and that there has been no violation of the positive obligation to protect life on account of the organisation and planning of the policing operations during the G8 summit in Genoa and the tragic events on Piazza Alimonda.¹⁹⁰

308 In arriving at that conclusion the Court, on the basis of the information provided by the domestic investigation, had available to it sufficient evidence to satisfy it that MP had acted in self-defence in order to protect his life and physical integrity and those of the other occupants of the jeep against a serious and imminent threat, and that no liability in respect of Carlo Giuliani's death could be attributed under art.2 of the Convention to the persons responsible for the organisation and planning of the G8 summit in Genoa.

309 It follows that the investigation was sufficiently effective to enable it to be determined whether the use of lethal force had been justified in the present case¹⁹¹ and whether the organisation and planning of the policing operations had been compatible with the obligation to protect life.

310 The Court further notes that several decisions taken by the organisers of the G8 and by the commanding officers of the battalions present on the ground were examined and subjected to critical scrutiny in the course of the “trial of the 25”¹⁹² and of the inquiry conducted by the Parliamentary Commission.¹⁹³ Furthermore, the Genoa *questura* was the subject of an administrative inspection (which identified problems in the organisation of the law-enforcement operations and “potentially punishable” incidents) and the Public Safety Department of the Ministry of the

¹⁸⁵ See *McKerr* (2002) 34 E H R R 20 at [111] and [114]; and *Opuz* (2010) 50 E H R R 28 at [150]

¹⁸⁶ See *Şilih* (2009) 49 E H R R 37 at [194]; see also, mutatis mutandis, *Perez v France* (2005) 40 E H R R 39 at [70]

¹⁸⁷ See *Zavoloka* (58447/00) July 7, 2009 at [34(c)]

¹⁸⁸ See *Öneriyıldız* (2005) 41 E H R R 20 at [96]; and *Mojsiejew v Poland* (11818/02) March 24, 2009 at [53]

¹⁸⁹ See [194] above

¹⁹⁰ See [262] above

¹⁹¹ See the case law cited at [301] above

¹⁹² See [121]–[138] above

¹⁹³ See [107]–[117] above

Interior proposed taking disciplinary action against several police officers and the Genoa *questore*.¹⁹⁴

- 311 It remains to be determined whether the applicants were afforded access to the investigation to the extent necessary to safeguard their legitimate interests, whether the proceedings satisfied the requirement of promptness arising out of the Court's case law and whether the persons responsible for and conducting the investigation were independent from those implicated in the events.
- 312 In that connection the Court observes that it is true that under Italian law the injured party may not apply to join the proceedings as a civil party until the preliminary hearing, and that no such hearing took place in the present case. Nevertheless, at the stage of the preliminary investigation injured parties may exercise rights and powers expressly afforded to them by law. These include the power to request the public prosecutor to apply to the investigating judge for the immediate production of evidence¹⁹⁵ and the right to appoint a legal representative. In addition, injured parties may submit pleadings at any stage of the proceedings and, except in cassation proceedings, may request the inclusion of evidence.¹⁹⁶
- 313 It is not disputed in the instant case that the applicants had the option to exercise these rights. In particular, they appointed experts of their own choosing, whom they instructed to prepare expert reports which were submitted to the prosecuting authorities and the investigating judge,¹⁹⁷ and their representatives and experts participated in the third set of ballistics tests.¹⁹⁸ Furthermore, they were able to lodge an objection against the request to discontinue the proceedings and to indicate additional investigate measures which they wished to see carried out. The fact that the Genoa investigating judge, making use of her powers to assess the facts and the evidence, refused their requests¹⁹⁹ does not in itself amount to a violation of art.2 of the Convention, particularly since the investigating judge's decision on these points does not appear to the Court to have been arbitrary.
- 314 The applicants complained in particular that they had not had enough time to appoint an expert of their choosing ahead of the autopsy on July 21, 2001. They also complained of the "superficial" nature of the autopsy report and the impossibility of conducting further expert medical examinations because of the cremation of the body.²⁰⁰
- 315 The Court accepts that giving notice of an autopsy scarcely three hours before the beginning of the examination²⁰¹ may make it difficult in practice, if not impossible, for injured parties to exercise their power to appoint an expert of their choosing and secure the latter's attendance at the forensic examinations. The fact remains, however, that art.2 does not require, as such, that the victim's relatives be afforded this possibility.
- 316 It is also true that, where an expert medical examination is of crucial importance in determining the circumstances of a death, significant shortcomings in the conduct of that examination may amount to serious failings capable of undermining the

¹⁹⁴ See [140] above

¹⁹⁵ CCP art 394

¹⁹⁶ CCP art 90—see *Sottani* (26775/02) February 24, 2005, where these considerations led the Court to conclude that the civil limb of art 6(1) of the Convention was applicable to criminal proceedings in which the applicant participated as an injured party but not as a civil party

¹⁹⁷ See [64]–[66] above

¹⁹⁸ See [57] above

¹⁹⁹ See [104] above

²⁰⁰ See [264] above

²⁰¹ See [48] above

effectiveness of the domestic investigation. The Court reached that conclusion, in particular, in a case where, following allegations that the death had been the result of torture, the autopsy report, signed by doctors who were not forensic specialists, had failed to answer some fundamental questions.²⁰²

- 317 The present case, however, differs significantly from *Tanli*. Moreover, the applicants did not provide evidence of any serious failings in the autopsy performed on Carlo Giuliani. It was not alleged, either, that the forensic experts had failed to establish the cause of death with certainty; the applicants did not contest before the Court the domestic authorities' conclusion that Carlo Giuliani had died as a result of the shot fired by MP.
- 318 The applicants stressed that the forensic experts had omitted to extract and record a fragment of bullet which, according to the results of the scan performed on the body, was lodged in the victim's head.²⁰³ The Court notes that Mr Salvi, one of the experts, explained at the "trial of the 25" that the fragment had been very small and very difficult to find because of the damage to the brain tissue and the large amount of blood present. It had been regarded as a "minor detail" and the search for it had been discontinued.²⁰⁴
- 319 The Court does not consider it necessary to assess the pertinence of this explanation. For the purposes of examining the applicants' complaint, it simply observes that the fragment in question might have served to shed light on the trajectory of the fatal bullet (and in particular whether it had been deflected by another object before hitting Carlo Giuliani). However, as the Court has just noted in relation to the substantive aspect of art.2,²⁰⁵ the use of force would have been justified under this provision even if the "intermediate object theory" had been dismissed. It follows that the metal fragment in question was not crucial to the effectiveness of the investigation. Moreover, the Court observes that the cremation of Carlo Giuliani's body, which made any further expert medical examinations impossible, was authorised at the applicants' request.²⁰⁶
- 320 The Court also notes that the procedural obligations arising out of art.2 require that an effective "investigation" be carried out and do not require the holding of public hearings. Hence, if the evidence gathered by the authorities is sufficient to rule out any criminal responsibility on the part of the state agent who had recourse to force, the Convention does not prohibit the discontinuation of the proceedings at the preliminary investigation stage. As the Court has just found, the evidence gathered by the prosecuting authorities, and in particular the footage of the attack on the jeep, led to the conclusion, beyond reasonable doubt, that MP had acted in self-defence, which constitutes a ground of justification under Italian criminal law.
- 321 Furthermore, it cannot be said that the prosecuting authorities accepted without question the version supplied by the law-enforcement officers implicated in the events. They not only questioned numerous witnesses, including demonstrators and third parties who had witnessed the events on Piazza Alimonda,²⁰⁷ but also ordered several forensic examinations, including an expert medical examination and three sets of ballistics tests.²⁰⁸ The fact that the experts did not agree on all

²⁰² See *Tanli* (2004) 38 E H R R 3 at [149]–[154]

²⁰³ See [266] above

²⁰⁴ See [130] above

²⁰⁵ See [192]–[193] above

²⁰⁶ See [49] above

²⁰⁷ See [45]–[46] above

²⁰⁸ See [48]–[50] and [54]–[62] above

aspects of the reconstruction of events (and, in particular, on the distance from which the shot had been fired and the trajectory of the bullet) was not, in itself, such as to make further investigations necessary, given that it was for the judge to assess the pertinence of the explanations given by the various experts and whether they were compatible with the existence of grounds of justification exempting the accused from criminal responsibility.

- 322 It is true that the *carabinieri*, that is, the armed force to which MP and FC belonged, were given the task of conducting certain checks.²⁰⁹ However, in view of the technical and objective nature of those checks, this fact cannot be said to have adversely affected the impartiality of the investigation. To hold otherwise would be to impose unacceptable restrictions in many cases on the ability of the courts to call on the expertise of the law-enforcement agencies, which often have particular competence in the matter.²¹⁰ In the instant case, the law-enforcement agencies were already present at the scene and were thus able to secure the area and search for and record any items of relevance to the investigation. Given the number of people on Piazza Alimonda and the confusion reigning after the shots were fired, the authorities cannot be criticised for not finding objects as small as the bullets fired by MP.
- 323 In the Court's view, Mr Romanini's appointment as an expert raises some more delicate issues, as he had openly defended the view, in an article written for a specialist journal, that MP had acted in self-defence.²¹¹ It should be observed in this connection that the expert reports ordered in the context of the investigation were designed, among other things, to provide evidence for or against that view. The presence of an expert who had preconceived ideas on the subject was therefore far from reassuring.²¹² Nevertheless, Mr Romanini was just one member of a four-expert team.²¹³ He had been appointed by the prosecuting authorities and not by the investigating judge and was therefore not acting as a neutral and impartial auxiliary of the latter.²¹⁴ Furthermore, the tests he was required to carry out for the purposes of the ballistics report were of an essentially objective and technical nature. Accordingly, his presence was not capable, in itself, of compromising the impartiality of the domestic investigation.
- 324 Furthermore, it has not been established by the applicants that the investigation lacked impartiality and independence or that the branch of the police which performed certain steps in the investigation was implicated in the events to such an extent that the entire investigation should have been entrusted to the revenue police.²¹⁵
- 325 Finally, as regards the promptness of the investigation, the Court observes that it was conducted with the requisite diligence. Carlo Giuliani died on July 20, 2001 and the public prosecutor's office closed the preliminary investigation, with a request for the case to be discontinued, approximately one year and four months later, in late 2002. On December 10, 2002 the applicants objected to that request²¹⁶

²⁰⁹ See [290] above

²¹⁰ See, *mutatis mutandis* and from the standpoint of art 6 of the Convention, *Emmanuel v Italy* (35791/97) August 31, 1999

²¹¹ See [56] above

²¹² As regards the expert's role in judicial proceedings, see *Brandstetter v Austria* (1993) 15 E H R R 378 at [59]

²¹³ See, *mutatis mutandis*, *Mirilashvili v Russia* (6293/04) December 11, 2008 at [179]

²¹⁴ See, conversely, *Bönisch v Austria* (1987) 9 E H R R 191 at [33]; and *Sara Lind Eggertsdóttir v Iceland* (2009) 48 E H R R 32 at [47]

²¹⁵ See the applicant's allegations at [283] and [292] above

²¹⁶ See [76] above

and the hearing before the Genoa investigating judge took place four months later, on April 17, 2003.²¹⁷ The text of the decision discontinuing the proceedings was deposited with the registry 23 days later, on May 5, 2003.²¹⁸ In the circumstances, it cannot be said that the investigation was beset by excessive delays or lapses of time.

326 In the light of the foregoing, the Court concludes that there has been no violation of art.2 of the Convention in its procedural aspect.

III. Alleged violation of article 3 of the Convention

327 The applicants alleged that the lack of immediate assistance after Carlo Giuliani had fallen to the ground and the jeep had driven over his body had contributed to his death and amounted to inhuman treatment. They referred to paras 5 and 8 of the UN Principles²¹⁹ and relied on art.3 of the Convention, which provides: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

328 The Government maintained that this complaint was manifestly ill-founded, given that the autopsy report had found that the jeep’s having driven over Carlo Giuliani’s body had not entailed any serious consequences for him, and given the rapid attempts to render assistance to the victim.

329 The Chamber, observing that it could not be inferred from the law-enforcements officers’ conduct that they had the intention to inflict pain or suffering on Carlo Giuliani, took the view that it was not necessary to examine the case under art.3 of the Convention.²²⁰

330 The Court considers that the facts complained of fall within the scope of the examination it has carried out under art.2 of the Convention. Accordingly, it sees no reason to depart from the approach taken by the Chamber.

IV. Alleged violation of articles 6 and 13 of the Convention

331 The applicants complained that they had not had the benefit of an investigation that conformed to the procedural requirements arising out of arts 6 and 13 of the Convention.

Article 6(1), in its relevant parts, provides:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

Article 13 of the Convention provides:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

²¹⁷ See [80] above

²¹⁸ See [82] above

²¹⁹ See [154] above

²²⁰ See [260]–[261] of the Chamber judgment

- 332 The applicants submitted that, in view of the inconsistent and incomplete findings of the investigation, the case had required more detailed examination within a framework of genuine adversarial proceedings.
- 333 The Government called on the Court to find that no separate issue arose under arts 6 and 13 of the Convention or, alternatively, that there had been no breach of those provisions, given the way in which the investigation had been conducted and the fact that the applicants had participated in it.
- 334 The Chamber considered that, in view of its finding of a violation of art.2 of the Convention in its procedural aspect, it was not necessary to examine the case under art.13 or art.6(1).²²¹
- 335 Bearing in mind that in the instant case the applicants did not have the possibility under Italian law of applying to join the criminal proceedings against MP as civil parties,²²² the Court considers that their complaints should not be examined under art.6(1) of the Convention, but rather in the light of the more general obligation on the Contracting States under art.13 of the Convention to provide an effective remedy in respect of breaches of the Convention, including of art.2.²²³
- 336 The Court reiterates that the “effectiveness” of a “remedy” within the meaning of art.13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the “authority” referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of art.13, the aggregate of remedies provided for under domestic law may do so.²²⁴
- 337 In the instant case the Court has found that an effective domestic investigation satisfying the requirements of promptness and impartiality under art.2 of the Convention was conducted into the circumstances surrounding the death of Carlo Giuliani.²²⁵ That investigation was capable of leading to the identification and punishment of the persons responsible. It is true that the applicants were not able to apply to join the proceedings as civil parties; nevertheless, they were able to exercise the powers afforded to injured parties under Italian law. In any event, their lack of status as civil parties resulted from the fact that the criminal judge had concluded that no offence punishable under criminal law had been committed. Finally, there was nothing to prevent the applicants from bringing a civil action for compensation either before or in parallel with the criminal proceedings.
- 338 In these circumstances, the Court considers that the applicants had effective remedies available to them in respect of their complaint under art.2 of the Convention.
- 339 It follows that there has been no violation of art.13 of the Convention.

V. Alleged violation of article 38 of the Convention

- 340 The applicants alleged that the Government had not co-operated sufficiently with the Court. They relied on art.38 of the Convention, which provides:

²²¹ See [265]–[266] of the Chamber judgment

²²² See, conversely and mutatis mutandis, *Perez* (2005) 40 E.H.R.R. 39 at [73]–[75]

²²³ See, mutatis mutandis, *Aksoy v Turkey* (1997) 23 E.H.R.R. 553 at [93]–[94]

²²⁴ See *Abramiuc v Romania* (37411/02) February 24, 2009 at [119]

²²⁵ See [307]–[326] above

“The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.”

341 In the applicants’ submission, the Government had given false or incomplete replies (for instance, regarding the professional experience of the *carabinieri* in the jeep and the presence of a riot shield in the vehicle). It had also omitted to give details of some essential circumstances. In particular, it had failed to:

- provide details of the command structure of the police and *carabinieri* extending to the top of the structure;
- specify the criteria for selecting officers to be deployed on public-order operations;
- produce the documents certifying the professional experience of the *carabinieri* concerned;
- submit the orders which police officer Lauro and the officers in charge of the company had received from their superiors;
- indicate the identity of the person who had ordered the attack on the *Tute Bianche* march;
- produce transcripts of the relevant radio conversations.

342 The Government observed that its right to defend its case was “sacrosanct” and that, in any case, it had made all the relevant information available to the Court. As to the information concerning the attack on the *Tute Bianche* march, it submitted that this was unconnected to the events at the centre of the present application.

343 The Chamber was of the view that there had been no violation of art.38 of the Convention because, although the information provided by the Government did not deal exhaustively with all the points listed above, the incomplete nature of that information had not prevented the Court from examining the case.²²⁶

344 The Court sees no reason to depart from the approach taken by the Chamber on this point. It therefore concludes that there has been no violation of art.38 of the Convention in the instant case.

For these reasons, THE COURT:

(1) *Holds*, by 13 votes to four, that there has been no violation of art.2 of the Convention in its substantive aspect as regards the use of lethal force.

(2) *Holds*, by 10 votes to seven, that there has been no violation of art.2 of the Convention in its substantive aspect as regards the domestic legislative framework governing the use of lethal force or as regards the weapons issued to the law-enforcement agencies at the G8 summit in Genoa.

(3) *Holds*, by 10 votes to seven, that there has been no violation of art.2 of the Convention in its substantive aspect as regards the organisation and planning of the policing operations during the G8 summit in Genoa.

(4) *Holds*, by 10 votes to seven, that there has been no violation of art.2 of the Convention in its procedural aspect.

(5) *Holds*, unanimously, that it is not necessary to examine the case under arts 3 and 6 of the Convention.

²²⁶ See [269]–[271] of the Chamber judgment

(6) *Holds*, by 13 votes to four, that there has been no violation of art.13 of the Convention.

(7) *Holds*, unanimously, that there has been no violation of art.38 of the Convention.

Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Zupančič, Gyulumyan, Ziemele, Kalaydjieva and Karakas²²⁷

O-11 We are unable to agree with the majority's conclusions concerning points 2, 3 and 4 of the operative provisions, according to which there has been no violation of art.2 of the Convention in its substantive and procedural aspects.

O-12 1. As regards the substantive aspect, the state's positive obligation to protect life under art.2 of the Convention raises two main questions in the instant case which, as we shall see, are closely linked. First, did the state take the necessary legislative, administrative and regulatory measures to reduce as far as possible the risks and consequences of the use of force? Secondly, were the planning, organisation and management of the policing operations compatible with that obligation to protect life?

O-13 2. We further believe that the obligation to protect life has to be considered in the specific context of the facts of the case: where a state accepts the responsibility of organising a high-risk international event, that obligation implies a duty to put in place the appropriate measures and strategies to maintain law and order. In that connection, it cannot be argued that the authorities were not aware of the possible dangers entailed in an event such as the G8 summit. Moreover, the number of law-enforcement officers deployed on the ground demonstrates this clearly.²²⁸ In these circumstances, art.2 of the Convention cannot be interpreted or applied as if the case merely concerned an isolated incident occurring in the course of accidental clashes, as the majority suggest. In the case of mass demonstrations, which are becoming more and more frequent in a globalised world, the obligation to protect the right to life safeguarded by the Convention necessarily takes on another dimension.

O-14 3. First of all, as regards the domestic legislative framework governing the use of lethal force, which, under the terms of art.2 of the Convention, must be capable of protecting the lives of the demonstrators, we observe shortcomings which played a decisive role in the death of the applicant's son. The Government did not make reference to any specific provisions governing the use of firearms during police operations, and indeed observed that circulars had simply been issued by the senior command of the *carabinieri* referring to the general provisions of the CC.²²⁹

O-15 4. The 1990 UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, which the judgment cites among the relevant international materials,²³⁰ provide pointers in this regard which it is now impossible to ignore. The preamble states that:

“[These] basic principles ..., which have been formulated to assist Member States in their task of ensuring and promoting the proper role of law enforcement officials, should be taken into account and respected by

²²⁷ Paragraph numbering added by the publisher. Original numbering has been retained for ease of reference.

²²⁸ See [255] of the judgment.

²²⁹ See [207] of the judgment.

²³⁰ See [154] of the judgment.

Governments within the framework of their national legislation and practice, and be brought to the attention of law enforcement officials as well as other persons, such as judges, prosecutors, lawyers, members of the executive branch and the legislature, and the public.”

O-16 5. As regards the use of firearms, para.2 of the Principles is crucial:

“Governments and law enforcement agencies should develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a *differentiated* use of force and firearms. These should include the development of non-lethal incapacitating weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons. For the same purpose, it should also be possible for law enforcement officials to be equipped with self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind.”

O-17 6. Admittedly, in the particular circumstances of this case, given the violence of the attack to which MP and his colleagues were subjected, there is no guarantee that rubber bullets would have had a sufficient deterrent effect to avert the danger posed by large numbers of demonstrators wielding blunt instruments. The same may be true in many similar situations with which the law-enforcement agencies are confronted. For that reason we would not argue that the officers in the present case should have been issued *only* with non-lethal weapons; the state was empowered to decide that the law-enforcement personnel should *also* be equipped with guns firing live ammunition. Nevertheless, one thing is certain: MP did *not* have any alternative means of defence available to him. While he could have fired into the air or at a different angle, he had no weapon with which to defend himself other than the Beretta parabellum pistol.

O-18 7. Next, as regards the second aspect of the obligation to protect life arising out of art.2 of the Convention, namely the planning and management of the policing operations, we believe that there was a lack of organisation imputable to the state. In its judgment in *Akin v Turkey*,²³¹ the Court reiterated that:

“In keeping with the importance of this provision in a democratic society, [it] must, in making its assessment, subject instances of the use of deliberate lethal force to the most careful scrutiny, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination.”

O-19 8. MP, one of the large number of *carabinieri* present at the scene and the person who fired the fatal shot, was a young man aged 20 years and 11 months who had been performing military service for only 10 months. Furthermore, it does not appear from the case file that he had received specific training concerning public-order operations or how to act in the event of disturbances during demonstrations. Finally, given his youth and lack of experience, it is difficult to accept the fact that he did not receive more support from his superior officers and,

²³¹ *Akin v Turkey* (30304/02) January 13, 2009 at [24]

above all, that he was not given particular attention once he had been judged unfit to continue on active duty because of his physical and mental state. In these circumstances, moreover, the fact that he was left in possession of a gun loaded with live ammunition is especially problematic.

- O-I10 9. That situation is in clear contradiction with para.18 of the 1990 United Nations Basic Principles, according to which:

“Governments and law enforcement agencies shall ensure that all law enforcement officials are selected by proper screening procedures, have appropriate moral, psychological and physical qualities for the effective exercise of their functions and receive continuous and thorough professional training. Their continued fitness to perform these functions should be subject to periodic review.”

- O-I11 10. Lastly, as regards the attack on the jeeps—which, incidentally, were not fitted with protective grilles on the rear and side windows—it was obviously conceivable that the vehicles might come under attack, even though they were intended for the transport of wounded officers rather than to support law-enforcement personnel in the event of clashes with demonstrators. In an urban guerrilla-type situation it was to be expected that the demonstrators would not necessarily differentiate between armoured vehicles and those providing logistical back-up.

- O-I12 11. In the light of the foregoing, we believe that the failings in the organisation of the law-enforcement operations should be assessed from the standpoint of both the criteria for selecting the armed *carabinieri* deployed in Genoa and the failure to give proper consideration to the particular situation of MP, who, despite being in a state of distress and panic, had been left in a vehicle which was not adequately protected, with a lethal weapon as his only means of defence. The requirement to protect human life called for greater support to be provided to the young officer.

- O-I13 12. At [253] of the judgment the majority state that the application did not concern the organisation of the public-order operations during the G8 as such, but was confined to examining, among other things, whether, in the organisation and planning of that event, failings had occurred which could be linked directly to the death of Carlo Giuliani. Our answer to that question is in the affirmative. The lack of an appropriate legislative framework governing the use of firearms, *coupled* with the shortcomings in the preparation of the policing operations and in the training of the law-enforcement personnel, disclose real and serious problems in the maintenance of public order during the G8 summit. In our opinion, these shortcomings should be regarded as linked to the death of Carlo Giuliani. Had the necessary measures been taken, the chances of the demonstrators’ attack on the jeep ending so tragically could have been significantly reduced.

- O-I14 13. In relation to the procedural aspect of art.2 of the Convention, two questions arise. The first concerns the issue whether the conditions in which the autopsy and the cremation of the body were carried out undermined the effectiveness of the investigation, while the second relates to the decision not to institute proceedings against the police officials.

- O-I15 14. The circumstances surrounding the autopsy disclose failings imputable to the authorities. First of all, the applicants were given notice very late of this fundamental step in the investigation, making it virtually impossible for them to appoint an expert of their choosing. Furthermore, as the prosecuting authorities

themselves stressed, the expert report was “superficial”, the doctors having omitted, in particular, to extract and record a crucial piece of evidence, namely the fragment of bullet lodged in the victim’s head. Of course, there is no certainty that any tests carried out on the fragment would have yielded a definitive answer to the question whether the fatal bullet had been deflected by an object before hitting the applicants’ son. Nevertheless, it was not beyond the bounds of possibility that they might have shed considerable light on the matter (the way in which the fragment was deformed, for instance, or the presence of traces of material might have helped to reconstruct its trajectory). Moreover, it is common practice in conducting autopsies to extract and record any object found in the body which might have contributed to the person’s death.

O-I16 One of the experts, Mr Salvi, stated at the “trial of the 25” that the fragment in question had been very small and very difficult to recover from the mass of brain tissue and, above all, was of no use for the purposes of the ballistics tests. Be that as it may, it was up to the forensic experts to undertake the necessary efforts to record any object capable of clarifying the circumstances of the death and lethal act in a homicide case that had attracted an exceptional degree of media attention. The experts’ assumption that the fragment was of no relevance for ballistics purposes proved, moreover, to be mistaken: in view of MP’s statements it was vital to establish whether he had fired upwards with the aim of frightening off his assailants or at chest height with the aim of hitting them or accepting the risk of killing them.

O-I17 In the light of the foregoing, we believe that the conditions in which the autopsy was carried out gave rise to a violation of art.2 of the Convention in its procedural aspect.

O-I18 15. The Government judged the applicants’ conduct to be “ambiguous”. The applicants, so the Government argued, had been aware that the results of the autopsy ordered by the public prosecutor would not be known for another 60 days. Concern to ensure that the examinations were carried out in a professional and reliable manner might have prompted them either to contest the lawfulness of the autopsy or to request that it be performed again. Far from doing this, they had requested permission to cremate the remains. In doing so they had known, or should have known, that if their request was granted no further examination of the body would be possible. If the applicants had wished to retain the option of further forensic examination, according to the Government, they should have opted to have their son buried.

O-I19 16. It is our belief that a family dealing with such a tragic event cannot be criticised for failing to weigh up carefully all the ramifications of a request to have the remains returned to them, made immediately after their son’s death. Although the applicants requested permission to cremate the body, the public prosecutor’s office could have refused the request or insisted that the cremation should not take place until the results of the autopsy had been published. On the latter point it would have been preferable for the forensic experts to be given a shorter deadline for completion of their task. A period of 60 days for the preparation of a report a few pages long in such a sensitive and widely publicised case seems excessive.

O-I20 17. In these circumstances we believe that the Grand Chamber should have upheld and reinforced the Chamber’s finding that the circumstances surrounding the autopsy and the cremation of the applicants’ son’s body were in breach of art.2 in its procedural aspect.

- O-I21 18. The second question is whether the lack of an investigation aimed at establishing possible liability on the part of certain police officials breached the procedural obligations arising out of art.2.
- O-I22 We have just concluded that there were a number of failings, imputable to the Italian authorities, in terms of the support provided to MP and the consideration of his particular situation during the G8 summit in Genoa, and in terms of the organisation of the policing operations. This being so, was there an obligation to institute investigations to elucidate these aspects of the case? The domestic investigation in the instant case was confined to the exact circumstances of the incident itself, examining only whether those immediately involved should be held liable, without seeking to shed light on possible shortcomings in the planning and management of the public-order operations.
- O-I23 19. Of course we agree that it would be unreasonable to require a state to institute a criminal investigation where no offence has been committed. In line with the general principles of criminal law common to the Contracting States, in the circumstances of the present case the only persons who might have been held criminally responsible for the death of the applicants' son were MP and FC, who were placed under investigation and against whom proceedings were brought. However, those proceedings, conducted by the prosecuting authorities, ended with a request to discontinue the case on the basis of arts 52 and 53 of the CC,²³² which was granted by the Genoa investigating judge,²³³ thus excluding any possibility of adversarial proceedings before a judge.
- O-I24 20. It is true that extending the procedural obligations arising out of art.2 to the point of requiring other individuals to be charged would impose an excessive and impracticable burden on the respondent State and would be liable to be contrary to art.7 of the Convention. The fact remains, however, that an investigation capable of leading to the identification and, possibly, the punishment of the persons responsible could also be disciplinary in character. In this regard it is astonishing that, in the wake of the death of a demonstrator following the use of lethal force by an agent of the state (an exceedingly rare occurrence in Italy), the Government should acknowledge that no administrative or disciplinary investigation was commenced concerning the representatives of the law-enforcement agencies. Admittedly, any such investigation might have concluded that there was no evidence of any disciplinary offence in the training and support given to MP or, more broadly, in the organisation of the policing operations. However, it might equally have shed light on the circumstances surrounding some crucial aspects of the case which have unfortunately remained obscure (in particular, the criteria used in selecting and training the officers conducting the public-order operations at the G8 and the reasons why MP's personal situation was not taken duly into account).
- O-I25 21. The fact that no disciplinary proceedings of any kind were instituted against the *carabinieri* appears to have been based on the preconceived idea that despite the tragic turn taken by events there was no criticism to be made of the manner in which the officers had been deployed on the ground or the way in which orders had been given throughout the chain of command. However, it is clear from all the arguments put forward by the Government in this case that the dangers linked to the rioting and the risks facing the law-enforcement officers had been largely

²³² See [67] et seq. of the judgment

²³³ See [82] et seq. of the judgment

foreseeable. The approach taken is difficult to reconcile with the procedural obligations arising out of art.2 of the Convention.

Joint Partly Dissenting Opinion of Judges Tulkens, Zupančič, Gyulumyan and Karakaş²³⁴

- O-II1 To our considerable regret we are unable to subscribe to the majority view, not just in relation to the finding that there has been no violation of art.2 of the Convention in its substantive and procedural aspects as regards the domestic legislative framework governing the use of lethal force, the weapons with which the law-enforcement agencies were issued during the G8 summit in Genoa and the organisation and planning of the policing operations at the G8 (on which points we would refer to our partly dissenting opinion shared by Judges Rozakis, Ziemele and Kalaydjieva), but also in relation to the finding²³⁵ that the use of lethal force was “absolutely necessary” in the particular circumstances of this case.
- O-II2 1. On the subject of art.2 of the Convention and the issue whether the fatal shot was justified, we do not doubt the existence of a serious and objective threat to MP at the moment he fired the fatal shot. As the photographs and audiovisual footage submitted by the parties show, the jeep with MP on board was surrounded by demonstrators who were throwing an assortment of objects and had tried to grab MP by the legs in order to pull him out of the vehicle; the possibility of a lynching could not be ruled out. Furthermore, before firing the shots, MP had displayed his gun and clearly warned the demonstrators, shouting at them to leave unless they wanted to be killed. Even amidst the confusion reigning around the jeep at the material time, the sight of a loaded weapon, together with the threats uttered by MP, must have indicated to the demonstrators in no uncertain terms that the *carabiniere* was prepared to defend his life and/or his physical integrity by using potentially lethal force.
- O-II3 2. Despite this, the applicants’ son decided to continue his assault on the *carabinieri* vehicle and its occupants, approaching the jeep brandishing a fire extinguisher above his chest, prompting fears that he might use it as a blunt instrument. It could therefore be argued that the applicants’ son bore responsibility for his unlawful action, which triggered the tragic course taken by events²³⁶; according to this argument, he knew or ought to have known that his action placed him at risk of a response from the vehicle’s occupants, possibly involving the use of the weapons with which the *carabinieri* were equipped.
- O-II4 3. There is, however, one factor which runs counter to this interpretation of events and which the Grand Chamber’s judgment does not take into consideration. When questioned by a representative of the public prosecutor’s office, MP stated that he had not aimed at anyone and that no one had been within his field of vision at the moment he fired the shots. If we are to believe this statement—which was made by MP himself and the credibility of which was never called into question by the domestic courts—the implication is that the *carabiniere* did not see the assailant approaching with a fire extinguisher and did not aim at him. Article 52 of the CC states that persons who commit an offence may claim self-defence if they were forced to commit the offence by the need to defend their rights against

²³⁴ Paragraph numbering added by the publisher. Original numbering has been retained for ease of reference.

²³⁵ Point 1 of the operative provisions.

²³⁶ See, *mutatis mutandis*, *Solomou v Turkey* (36832/97) June 24, 2008 at [48].

a real danger. That need implies a subjective perception of the existence of such danger, as demonstrated by the fact that Italian law²³⁷ provides for the possibility of prosecuting the perpetrator of the offence for unintentional homicide where he or she, as a result of negligence or of a mistaken but punishable assessment of the situation, oversteps the limits “dictated by necessity”. It would follow that the shots were motivated by MP’s attempts to defend himself not against Carlo Giuliani’s unlawful action but against the overall danger created by the demonstrators’ attack on the jeep.

- O-II5 4. It remains to be determined whether MP’s reaction was “proportionate” to the danger he sought to avert. To that end, establishing the trajectory of the shot fired by MP was of decisive importance. While the imminent threat of an object with considerable destructive potential being thrown justifies firing at chest height, an overall state of danger can only justify firing shots into the air.²³⁸ If MP did not see anyone targeting him directly and individually, his response should have been aimed at dispersing rather than eliminating the assailants.
- O-II6 5. In other words, only the firing of warning shots would be compatible with the requirements of art.2 of the Convention in its substantive aspect were it to transpire that MP’s “defence” was not justified by the need to halt an attack liable to result in immediate consequences of a serious nature which could not be averted by means of less radical action (the “*real* danger of an unjust attack” referred to in art.52 of the CC). This follows from the test of “absolute necessity”, which dictates that the force used must be strictly proportionate to the aims pursued.²³⁹ If methods less dangerous to human life can reasonably be regarded as sufficient to achieve the aim of “defence of any person from unlawful violence” or “for the purpose of quelling a riot”, then those methods must be deployed. Moreover, the Italian CC²⁴⁰ appears to adopt a similar approach in requiring that the “defensive response [be] proportionate to the attack”.
- O-II7 6. In short, if MP was seeking to defend himself against the demonstrators’ assault on the jeep rather than against the applicants’ son individually, it cannot be concluded that there was a serious threat to his person of such imminence that only shots fired at chest height could have averted it. While it is true that the jeep was surrounded by demonstrators and that various objects were being thrown at it, the fact remains, as shown by the photographs in the file, that when MP drew his pistol and opened fire no one with the exception of Carlo Giuliani was attacking him directly, individually and at close range. The firing of shots into the air would probably have been enough to disperse the assailants; if not, MP would still have had time to defend himself by means of further shots, this time targeting those individuals who, despite the warning shots, chose to continue the attack. It should be borne in mind in that regard that MP had an automatic pistol which was loaded with fifteen rounds of ammunition.
- O-II8 7. In the light of the foregoing, and as we have already observed, it was of decisive importance to establish the trajectory of the bullets fired by MP. On this point, two theories were put forward. According to the first, defended by the applicants, the fatal shot was fired at chest height; according to the second,

²³⁷ CC art 55

²³⁸ See, in particular, *Panayi v Turkey* (45388/99) October 27, 2009 at [63], where the Court stated that the opening of fire should, *whenever possible*, be preceded by warning shots

²³⁹ See *Andronicou v Cyprus* (1998) 25 E H R R 491 at [171]

²⁴⁰ CC art 52 *in fine*

supported by the Government and considered more likely by the investigating judge, the bullet was fired upwards and was deflected in the direction of Carlo Giuliani after colliding with an object (probably a stone) thrown by the demonstrators.

- O-II9 8. If we accept the latter version of events, namely that the bullet was fired upwards, any appearance of a violation of art.2 can be ruled out, on the basis that an unforeseeable and uncontrollable factor turned MP's warning action into a fatal shot.²⁴¹ Even amidst the panic generated by a violent and unexpected attack, law-enforcement officers should be expected to fire warning shots before resorting to lethal force. However, they cannot be deprived of any means of defence by being required to allow for the possibility—statistically unlikely but theoretically always present during clashes between police and demonstrators—that the trajectory of a missile could be deflected following a collision with a flying object.
- O-III0 9. If, on the other hand, MP fired at chest height, it would have to be concluded, in our view, that the use of lethal force was not “absolutely necessary” within the meaning of art.2 of the Convention.
- O-III1 10. In these circumstances it is regrettable that the domestic investigation was unable to establish with certainty whether or not the bullet ricocheted off an object before striking Carlo Giuliani. The investigating judge simply stated that the powerful nature of the weapon and the low resistance of the body tissue through which the bullet had travelled “served to confirm” “the intermediate object theory”.
- O-III2 11. We would observe that the authorities had a number of elements available to them in calculating the trajectory of the fatal bullet: the various forensic medical and ballistics reports; the fact that the bullet had fragmented; the fact that an object is shown on film disintegrating in the air shortly before Carlo Giuliani fell to the ground; the theory advanced by the applicants' experts according to which the fragmentation of the bullet could have been caused by factors other than collision with a stone; and the photographs taken shortly before and shortly after the fatal shot and during the autopsy.
- O-III3 12. The photograph taken a few moments before the shot shows the gun positioned at chest height,²⁴² at an angle compatible with the wound sustained by Carlo Giuliani (according to the autopsy report, the bullet entered the body through the left eye socket and exited through the back of the skull, travelling through the body in a downward direction). Accordingly, although it is not impossible, it is unlikely that: (a) MP raised his gun just as he fired the shot; (b) the bullet ricocheted off a flying object; (c) the angle of collision between the object and the bullet was such as to make the bullet strike the victim very close to where it would have struck him had the gun not changed position.
- O-III4 13. As regards scenario (b) above, it should be noted that the photographs taken just before the fatal shot do not show any stone or other object hovering in the air. This would seem to indicate that in the moments surrounding the firing of the shots the demonstrators were not engaged in intensive throwing of missiles. That suggests that the statistical probability of any of the three scenarios having occurred is low; the likelihood of all three occurring in rapid succession is smaller still.

²⁴¹ See *Bakan v Turkey* (50939/99) June 12, 2007 at [52]–[56], in which a warning shot fired during a chase ricocheted and accidentally killed the applicants' relative, prompting the Court to find that the death had been caused by “misadventure”

²⁴² See also point 6 of Judge Bratza's partly dissenting Opinion, annexed to the Chamber judgment

- O-III15 14. In terms of the Court's case law, when an applicant adduces *prima facie* evidence that excessive use was made of lethal force, the onus is on the Government to prove otherwise.²⁴³ We believe that the same should apply where the Government relies on a statistically-unlikely theory in order to counter the applicants' version of events, which is corroborated by visual evidence; it was for the authorities to prove that the very rare events which they alleged actually occurred. However, no such proof was furnished either at domestic level or before the Court. In her decision to discontinue the proceedings the investigating judge herself observed that the ballistics tests had not succeeded in establishing the initial trajectory of the shot.
- O-III16 15. Finally, it seems to us that the Grand Chamber judgment does not place the events giving rise to this tragic case in their proper context. Proceeding as though the case concerned a situation of individual violence, the Grand Chamber concludes that the use of lethal force was necessary in defence of the person concerned under art.2(2)(a) of the Convention.²⁴⁴ Accordingly, it considers it unnecessary to examine whether the use of force was also unavoidable "in action lawfully taken for the purpose of quelling a riot or insurrection" within the meaning of subpara.(c) of the second paragraph of art.2.²⁴⁵ However, that was precisely the crucial issue to be examined in this case.
- O-III17 16. These considerations lead us to the conclusion that there has been a violation of art.2 of the Convention in its substantive aspect.

Joint Partly Dissenting Opinion of Judges Tulkens, Zupančič, Ziemele and Kalaydjieva²⁴⁶

- O-III1 We cannot agree with the majority's conclusions in relation to point 6 of the operative provisions, to the effect there has been no violation of art.13 concerning the right to an effective remedy.
- O-III2 One of the crucial issues in terms of art.13 of the Convention is the fact that the applicants were unable to join the criminal proceedings as civil parties because the investigating judge discontinued the case. They were thereby deprived of the support of the prosecuting authorities in seeking to establish the facts and obtain the evidence.
- O-III3 To contend in that regard, as the judgment does, that

"there was nothing to prevent the applicants from bringing a civil action for compensation either before or in parallel with the criminal proceedings"²⁴⁷

strikes us as not merely theoretical but also illusory, since in any event the Grand Chamber considers the entire policing operation to have been perfectly lawful.

²⁴³ See *Toğcu v Turkey* (27601/95) May 31, 2005 at [95]; and *Akkum v Turkey* (2006) 43 E.H.R.R. 26 at [211]

²⁴⁴ See [194] of the judgment

²⁴⁵ See [196] of the judgment

²⁴⁶ Paragraph numbering added by the publisher

²⁴⁷ See [337] of the judgment

Procedures at inquiries - the duty to be fair

RICHARD SCOTT.*

Journal Article

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**L.Q.R. 596* MY choice of subject has been, I confess, somewhat self-indulgent. This is a time when procedural innovations that may radically affect the way in which civil litigation in this country is organised are, it is believed, flowing from Lord Woolf's pen. This is a time when the Lord Chancellor's Department has given notice that it is contemplating multiple increases in the daily charges to be made of litigants for the use of the civil courts, thereby raising, it may be thought, some profound constitutional questions about the extent of the obligation of a civilised state to provide for its citizens a court system to which they may have recourse to enforce or defend their legal rights. But I am not going to discuss either of these topical and highly important subjects. Instead I want to take the perhaps less demanding course of sharing some of my thoughts about the procedures to be adopted at Inquiries such as that with which I have been dealing for the past two and a half years and, in particular, the procedures necessary for **L.Q.R. 597* achieving fairness to witnesses and others who may become involved in the work of the Inquiry.

It is not, I think, an oversimplification to say that the objects to be served by procedures, for Inquiries as for litigation generally, are likely to be threefold; first, the need to be fair and to be seen to be fair to those whose interests, reputations, or fortunes may be adversely affected by the proceedings; second, the need for the proceedings to be conducted with efficiency and as much expedition as is practicable; third, the need for the cost of the proceedings to be kept within reasonable bounds. While the second and third of these desiderata should never be allowed to submerge the need to be fair, nonetheless there is an inevitable tension between, on the one hand, the requirements of fairness and, on the other the need for an efficient process. This tension is apparent in the very familiar procedural rules that govern civil litigation. It is unfair to give judgment against a litigant without allowing his case to be heard. But a judgment in default of defence will not always be set aside at the instance of a defaulting defendant who, late in the day, wants to defend. The circumstances of the case, and the need to maintain an efficient and expeditious system of justice will sometimes lead to the refusal of an application to set aside a judgment obtained in default of appearance or in default of defence. The right to cross-examine and the right to make submissions to the court can, at the discretion of the trial judge, be subjected to time limits. I mention these examples in order to make the point that some of the fundamental procedures that fairness to litigants in civil litigation may be thought to require may, in the interests of efficiency and expedition, sometimes have to be curtailed. As I have said, there is a tension and a balance between the need to be fair and the need to be expeditious that is well understood in ordinary civil litigation.

Similar tension and a similar balance will apply to the procedures to be adopted at an Inquiry. There is, however, a significant and fundamental difference between litigation and Inquiries that makes procedural comparisons unsafe. Litigation in this country, whether civil or criminal, is adversarial in character. The nature of an Inquiry on the other hand is, with very rare exceptions, investigative or inquisitorial. It is of the essence of adversarial proceedings that each side has a case to be placed before the court for the court's consideration. The procedures are designed to ensure that each side knows the nature and broad outline, if not the details, of the case to be put forward by the other side, the adversary. I am aware that this analysis is only half true of a criminal prosecution. The prosecution's case may be disclosed to the defence, but, with isolated exceptions, and subject to some changes that are currently under consideration, the case of the **L.Q.R. 598* defendant need not be disclosed to the prosecution. All the defendant need say is whether he is guilty or not guilty as charged. Nonetheless, the proceedings are adversarial. The court does not undertake an investigation. It simply considers whether or not the Crown has proved its case. So it is, in general, true that, in an adversarial system, fairness to the litigants requires that each side should have notice of the opposing case. The rules of pleading are designed to achieve this. Fairness in an adversarial system requires that each side should be able to formulate and place before the court the most favourable case that the available evidence permits. Rules of discovery are designed to achieve this. Fairness requires that each side should have an opportunity to challenge and, if possible, to demolish the testimony of the

witnesses on which the opposing case is built. The right to cross-examine is designed to achieve this. The right of each side to make submissions to the court, in support of his own case and in denigration of the opponents case is a necessary part of fairness in adversarial proceedings. Accordingly, the procedural rules applicable in both civil and criminal litigation provide an opportunity for submissions to be made. In all these respects, the procedural rules with which we are so very familiar--to be found in the *White Book*,¹ in the *County Court Practice* or in *Archbold*²--are designed to achieve fairness to litigants. But all of these rules have been designed to serve the cause of fairness in an adversarial system. Lawyers in this country have been brought up in and spent their professional lives dealing with an adversarial system of litigation, and it is easy to forget the provenance of the rules. There is a consequent danger of assuming that the familiar procedures to which I have been referring have some universal validity and are as necessary for fairness in an inquisitorial Inquiry as they are in adversarial litigation. Whether that is so, is one of the issues that I want to examine.

In an inquisitorial Inquiry there are no litigants. There are simply witnesses who have, or may have, knowledge of some of the matters under investigation. The witnesses have no "case" to promote. It is true that they may have an interest in protecting their reputations, and an interest in answering as cogently and comprehensively as possible allegations made against them. But they have no "case" in the adversarial sense. Similarly, there is no "case" against any witnesses. There may be damaging factual evidence given by others which the witness disputes. There may be opinion evidence given by others which disparages the witness. In these events the witness may need an **L.Q.R. 599* opportunity to give his own evidence in refutation. But still he is not answering a case against himself in the adversarial sense. He is simply a witness giving his own evidence in circumstances in which he has a personal interest in being believed.

It is generally accepted that the procedures to be adopted at an Inquiry must take into account the need to be fair to witnesses. But, if I may digress for a moment, it is a striking feature of the procedural rules that apply to adversarial litigation that virtually no provision is made for the need to protect the interests of witnesses. The reputation, personal and sometimes professional, of a witness may depend upon his evidence being believed or, at least, sympathetically received by the court. The reputation of a stranger to the litigation may be blackened by evidence given to the court by others. The witness in the one case, the stranger in the other, has no means of defending his or her reputation. He is not allowed to address the court nor to cross-examine the witnesses who have given the hurtful evidence nor to give evidence in rebuttal. In criminal cases, the victim of an assault may be outraged by allegations made by the accused about the circumstances that led to the assault. Even in Lincoln's Inn Great Hall we know what is meant by the "Guard'sman's Defence"--or, in nautical circles, the "Portsmouth Defence". The extent to which the offending allegations are challenged, by cross-examination of the accused, by adducing evidence in rebuttal, by submissions to the court, is a matter for the prosecution, not for the aggrieved victim. The victim has no right to intervene. The absence of procedures that would permit intervention by an aggrieved witness or victim is, I suggest, directly attributable to the adversarial character of litigation. The court is concerned with and must adjudicate on the respective cases of the adversaries, the litigants. The witness, the stranger, has no case which he is entitled to promote or which the court has to consider.

In contrast, where Inquiries are concerned, it is well accepted that procedures may need to be put in place to protect the interests of individuals, witnesses or non-witnesses, who become involved in the Inquiry's investigation. In the report dated November 1, 1966 of the Salmon Commission³ (of which more later) it was noted:

"Even in the normal judicial processes innocent persons are forced to attend court and give evidence and are subjected to accusations which may be hurtful to them and damaging to their reputations",

**L.Q.R. 600* that

"This is the inevitable price that has to be paid for arriving at the truth",

but that

"... the risk [of personal hurt and injustice] can and should be minimised".⁴

And in *In re Pergamon Press Ltd*⁵ Lord Denning M.R., noting that the findings of D.T.I. inspectors might be "very damaging" and might "ruin reputations or careers" found it easy to conclude that "the inspectors must act fairly".⁶ The question, of course, is what procedures should be put in place at an Inquiry in order to discharge the obligation to act fairly, in order to minimise the risk of personal hurt and injustice.

In considering the answer to this broad question, the starting point must be the Salmon Report.⁷ In 1966 a distinguished Royal Commission under the chairmanship of Lord Justice Salmon (as he then was) was asked to consider and make recommendations on, inter alia, the procedures to be followed at inquiries set up under the Tribunals of Inquiry (Evidence) Act 1921. The Royal Commission was part of the aftermath of Lord Denning's Inquiry into the so-called *Profumo case*.⁸

The Royal Commission's terms of reference directed a review of the working of the 1921 Act and, not surprisingly, the report concentrated on statutory Inquiries set-up under that Act. So far as procedures to be adopted for the purposes of fairness are concerned, however, it is difficult to discern any necessary difference between statutory Inquiries, *i.e.* those set up under the 1921 Act, and other *ad hoc* Inquiries, such as my own.

More significant differences, from a procedural point of view, may be whether or not the Inquiry is to conduct its proceedings in public, whether the Inquiry has been set up to investigate specific identifiable issues or whether the function of the Inquiry is to investigate a more diffuse area of concern.

In paragraph 30 of the Salmon Report, attention was drawn to the feature of Inquiries on which I have already commented, namely, the distinction between inquisitorial proceedings and civil or criminal litigation. "It is inherent in the inquisitorial procedure" said the report "that there is no *lis*. The Tribunal directs the Inquiry and the witnesses are the Tribunal's witnesses. There is no plaintiff or defendant, no prosecutor or accused; there are no pleadings defining issues to be tried, no charges, indictments or depositions". With all of that I am in respectful and complete agreement. The report then proceeded to identify "six cardinal principles" which, it was recommended, all tribunals (set up under the 1921 Act) should strictly observe. These six "cardinal principles" are principles of procedure designed to achieve fairness to witnesses and other whose interests might be damaged by the Inquiry's proceedings or conclusions. Since 1966 these cardinal principles have been regarded as constituting a procedural framework for Inquiries. They have generally been adopted in the relatively few statutory Inquiries under the 1921 Act that have taken place since 1966. They have been broadly applied in several *ad hoc* Inquiries. They have not, however, all been applied to D.T.I. Companies Act inquiries.

Let me examine these six cardinal principles in turn.

(i) The first of the six principles is expressed in these terms:

"Before any person becomes involved in an inquiry, the Tribunal must be satisfied that there are circumstances which affect him and which the Tribunal proposes to investigate".⁹

The purpose of this principle is plain. It is to prevent the potentially hurtful consequences of involvement in an Inquiry being visited on individuals with no real connection with the Inquiry's terms of reference. But the principle is one to which, in an inquisitorial Inquiry, literal effect cannot always be given. I can explain why that is so by reference to my own Inquiry. Allegations of illegal or improper defence exports from this country to Iraq had been rife for some time before the Inquiry was set up. They had pre-dated Iraq's August 1990 invasion of Kuwait. They were particularly prevalent at the time of the Matrix Churchill trial in October 1992. Some have been repeated during the currency of the Inquiry. The allegations have, obviously, needed investigation. The contents of the voluminous documents supplied to the Inquiry identified a number of individuals who it was plain had some knowledge of some of the matters to be investigated. But in respect of some allegations, no documentary evidence could be found. So it was necessary to put questions to the individuals who, if there had been any substance in the allegations, might have been expected to have had some knowledge of them. If the first Salmon principle had been literally applied, these individuals would not have been questioned. But the questions needed to be put if the allegations were to be properly investigated. More generally, it will be necessary *L.Q.R. 602 in almost every investigation to question some people, not in order to elicit relevant evidence, but simply in order to ascertain whether they have any relevant evidence to give. The answers given to these preliminary questions may exclude the individuals from any further involvement with the Inquiry or may enable more pointed questions, based on the answers, to be put to them. It seems to me quite absurd to say that there is any unfairness in proceedings on those lines. Indeed, the proposition, implicit in the first Salmon principle, that no one should be questioned in the course of an Inquiry until the tribunal has been "satisfied" that he or she was involved in matters under investigation would, as it stands, unnecessarily obstruct a sensible investigation. I would, for my part, qualify this first principle by saying that the Inquiry should not *publicly* involve anyone until the Inquiry has been satisfied that there are circumstances which affect him. If the preliminary questioning that will almost always be necessary, and was, in my own Inquiry, necessary, is carried out privately, I do not believe that a complaint of want of fairness would have any substance at all.

(ii) The second Salmon principle is in these terms:

"Before any person who is involved in an inquiry is called as a witness he should be informed of any allegations which are made against him and the substance of the evidence in support of them" ¹⁰

Note the contrast in the formulation of the principle between the "allegations" and "the evidence in support" of the allegations. What is apparently contemplated is that evidence will be to hand from which some form of prima facie case against the proposed witness has been or can be constructed. There may be some types of Inquiry to which this sort of approach can be applied but it really makes very little sense when applied to an inquisitorial Inquiry such as that in which I have been and still am engaged.

The point of inquisitorial Inquiries is to investigate and, at the end of the investigation, to draw such conclusions as the evidence allows. At the outset of the investigation there may be no allegations against anyone. The Inquiry, at least, will not have formulated any. Of course, as the Inquiry proceeds, evidence, written or oral, will be given which may involve others. If the evidence is potentially damaging to those affected by it, and is relevant to the matters being investigated by the Inquiry, those affected must be given notice of the evidence and invited to give their responses. If an individual against **L.Q.R. 603* whom damaging evidence has been given is himself invited to give evidence on the matter in question, he should, unless there is some special reason to the contrary, be referred to the damaging evidence and to relevant background documents. The second cardinal principle should, in my opinion, be understood and applied in that sense. But, as formulated in the Salmon Report, the principle is, in my opinion, inappropriate to inquisitorial proceedings. It is adverse evidence of which a proposed witness must be given notice, not some form of adversarial case. A conclusion to the same effect was reached by the Crown Agents Tribunal chaired by Mr Justice Croom-Johnson (as he then was). The Tribunal appended to its report ¹¹ a note on the procedures it had used, with particular reference to the Salmon principles. The Tribunal, too, found difficulty with the second Salmon principle and made the following observations:

"Our experience has been that the use of the word 'allegation' fosters an adversary approach, and tends to introduce rigidity into a process which ought to be flexible. There is no difficulty in warning witnesses of matters about which they may be criticised without using the word. It leads to misunderstandings and protracted discussions. There may be cases where it is appropriate, but we suggest that its use should be avoided wherever possible." ¹²

It is pertinent for me to mention that the wording of this second principle led to a tediously lengthy exchange of correspondence between my Inquiry and a firm of London solicitors acting for an important witness. The solicitors, who had presumably been reading the Salmon Report, told the Inquiry that their client would not be prepared to give evidence unless the allegations against him and the evidence in support of the allegations were first disclosed. It took several letters from the Inquiry to drive home the point that there were no "allegations" in the Salmon sense being made either against the client or against any other witness. We said the client would, like the other witnesses, be given notice of any relevant documents, and notice of any relevant evidence given by other witnesses which adversely affected him and about which we wanted to ask questions. Eventually the solicitors subsided. A lengthy questionnaire (and supplementary questions) were sent to him and the witness gave some very pertinent and valuable evidence, both in writing and orally.

**L.Q.R. 604* (iii) I come to the third cardinal principle:

"(a) He should be given an adequate opportunity of preparing his case and of being assisted by legal advisers.

(b) His legal expenses should normally be met out of public funds." ¹³

The formulation of this cardinal principle exposes, yet again, the extent to which familiarity with procedures in adversarial proceedings has coloured the language of the principle. Note the phrase "an adequate opportunity of preparing his case". What case? Persons who are asked to assist an inquisitorial Inquiry by giving evidence on matters being investigated do not have a "case". They have evidence to give. There may be adverse evidence that they wish to counter. They may have an interest in trying to ward off various conclusions which they fear the investigating Inquiry might reach. And in preparing their evidence with all these things in mind, they may very well need the assistance of legal advisers. But the conception that a witness needs to prepare "a case" introduces an element inherent in adversarial proceedings but alien to an inquisitorial Inquiry, at least at the investigative stage.

The need to prepare "a case" may, of course, come at a later stage. At the end of the day every inquisitorial Inquiry will endeavour to reach and express conclusions. The conclusions may be adverse to some individuals. Those adversely affected by

the conclusions will be likely to have been, but may not have been, witnesses. In either event fairness would normally require that the individuals be given notice of the proposed criticisms and an opportunity to make representations about them. At this stage in the proceedings it might be accurate to speak of the individual preparing "a case". But this stage will not arise until conclusions, preliminary or in draft (as the case may be), have been reached by the Inquiry. It will not apply at the stage when, in the course of the investigation, individuals are asked to give evidence.

As to legal assistance, there are, it seems to me, two distinct stages at which an individual may require this assistance. The first will be when he or she is preparing to give evidence, written, oral or both. The second will be when he or she is deciding what, if any, response to make to proposed conclusions.

So far as my Inquiry is concerned, the opportunity of legal assistance, at Government expense, was made available at both stages. Nearly all those involved availed themselves of the opportunity. In addition, most of those who gave oral evidence had an adviser sitting **L.Q.R. 605* next to them while they did so. A few witnesses, most of them officials from the Foreign Office, chose not to have legal assistance.

(iv) The fourth cardinal principle was expressed as follows:

"He should have the opportunity of being examined by his own solicitor or counsel and of stating his case in public at the hearing." ¹⁴

The language of this principle shows, I respectfully suggest, the same derivation from adversarial proceedings evident in the formulation of both the second and the third principles. I need not repeat my remarks about the inappropriateness in inquisitorial proceedings of concentrating on a witness's "case". As to the requirement that the witness be given "the opportunity of being examined by his own solicitor or counsel", this too, seems to me to represent a quite unnecessary importation into inquisitorial proceedings of procedures designed for those of an adversarial character. Every witness, as the Salmon Report had earlier observed, is the Inquiry's witness. Every witness must, for the sake not only of fairness but also of efficiency, be given proper notice of the matters in respect of which he or she will be asked questions. For the purposes of an inquisitorial hearing conducted before an Inquiry, however, the distinction between examination-in-chief, cross-examination and re-examination is meaningless. All questions to the witness are part of the investigative process designed to uncover the truth about the matter under investigation. They are not designed to prove or disprove a "case". If, however, in order to provide some particular context in which his answers to the Inquiry's questions should, in his view, be considered, the witness wants to provide additional evidence, going beyond the Inquiry's questions, or to make some particular comments, he must, of course, be given the opportunity of doing so. I suspect that that is really what this fourth principle is directed towards. But it is not necessary that preliminary or supplementary statements by witnesses should be elicited in question and answer mode by lawyers. All that is necessary is that witnesses be given an opportunity to make preliminary or supplementary statements as they may be advised.

In my Inquiry we provided the requisite opportunity in three separate ways. First, every witness was the recipient of a document setting out the initial questions to which answers were sought, together with the background evidence that gave rise to the questions. Two hundred and forty eight witnesses received these questionnaires. The questionnaires were, in the case of the first few witnesses, relatively short and simple. But, as the Inquiry progressed and the volume of **L.Q.R. 606* relevant evidence, oral as well as written, accumulated, the amount of background that it was necessary to draw to witnesses' attention increased accordingly. The result of this was that the questionnaires sent to some of the later witnesses were well in excess of 100 pages. And supplemental questionnaires needed to be sent to several of the earlier witnesses. The written answers to these questionnaires provided the first opportunity for witnesses to make a statement dealing with the matters being investigated. A considerable number of the written answers to the questionnaires were preceded by a general statement in which the witness drew my attention to various matters in order to place in an appropriate context his or her answers to the specific questions in the questionnaire.

Second, half a dozen or so of the witnesses who attended oral hearings read out statements at the commencement of the Inquiry. In one case, the legal adviser who accompanied the witness, made a closing statement on behalf of his client.

And, third, each witness who attended an oral hearing was sent a transcript of the proceedings and invited both to correct the transcript where necessary and to provide supplementary answers if he or she so wished. A number of witnesses did both things. These supplemental statements were, for my purposes in conducting the Inquiry, very valuable; much more so than an oral re-examination process taking place at the end of the oral hearing would have been. The ability to take time to consider the answers

they had given at the oral hearing and to reflect on the line of the questioning enabled witnesses to provide me with a much more considered supplemental statement than would have been possible in re-examination.

In preparing these written statements, the witnesses had, of course, the opportunity of legal assistance. The opportunities that I have described for witnesses to place before the Inquiry whatever statements or documents they wished in order to provide balance or context to their answers to the Inquiry's questions achieved, I believe, the substance of the fairness to which the fourth Salmon principle was directed. I can see no sensible argument whatever for the proposition that the content of these statements needed, for fairness purposes, to be adduced orally in question and answer mode conducted by the witnesses' lawyers.

(v) The fifth Salmon principle is as follows:

"Any material witnesses he [*i.e.* the person to be called as a witness] wishes called at the inquiry should, if reasonably practicable, be heard." ¹⁵

***L.Q.R. 607** Subject to the qualification that written evidence may suffice and render the calling of the material witness and oral evidence unnecessary, this principle would, I think, be accepted and applied by every Inquiry. One of the problems facing most Inquiries, it was certainly a problem facing mine, is that witnesses of whose existence and of whose evidence the Inquiry has no knowledge cannot be asked to give evidence. The proposition is self-evident. Part of the investigative process involves identifying those who have information material to the Inquiry. So assistance in that regard would always be welcome. I would add that, in my own Inquiry, no one has suggested to me that in order to protect his or her interests some particular person (from whom the Inquiry did not intend to obtain evidence) should be asked to give evidence.

(vi) The final Salmon "cardinal principle" is in these terms:

"He [*i.e.* the person to be called as a witness] should have the opportunity of testing by cross-examination conducted by his own solicitor or counsel any evidence which may affect him." ¹⁶

There may be circumstances in which fairness does require that an opportunity to cross-examine other witnesses should be given. But the proposition that cross-examination of other witnesses should automatically be allowed to every person affected by the witnesses' evidence is one I would unhesitantly reject. The proposition is one which, in my opinion, fairness does not require and which would be likely in many Inquiries, certainly in my own, to be wholly inimical to, perhaps destructive of, the efficient conduct of the Inquiry. I have to say that I regard this principle as an unnecessary implant from procedures designed for adversarial proceedings. Inquiries are, of course, almost infinitely various in their character. There may be some single issue Inquiries in which opposing sides can be readily identified and in which procedures necessary for adversarial litigation, such as the right to cross-examine opposing witnesses, can be usefully applied. But many Inquiries are of a much more diffuse character. The Crown Agents Inquiries conducted by Mr Justice Croom-Johnson is, perhaps, an example. My own Inquiry is another. At the outset of my Inquiry there were no issues. There was, of course, a matter of public concern identified in my terms of reference.

Under my terms of reference I was charged (*inter alia*) to examine "the facts in relation to the export of defence equipment and dual use goods to Iraq between December 1984 and August 1990 and the decisions reached on the export licence applications for such goods ***L.Q.R. 608** and the basis of them and to report on whether the relevant Departments, Agencies and responsible Ministers acted in accordance with the policies of the Government ...". ¹⁷ The terms of reference extended also to the decisions taken in connection with the various related prosecutions. In the course of the Inquiry, in the course of trying to ascertain what the relevant facts were, any number of issues have arisen. A few of the issues became apparent at a fairly early stage. Most did not become apparent until very much later. A few issues did not become apparent until the actual writing of the report was under way. On many of these issues, different Departments had different interests. Within Departments, different sections had different interests. Within sections, different individuals had different interests.

May I illustrate the point by reference to a hypothetical export licence application that was, eventually, granted and that led to the export of goods that, arguably, ought not to have been licensed for export. In the course of an investigation into the manner in which and the reasons for which the licence came to be granted, evidence might be expected to be given which, to use the language of the sixth Salmon principle, "affects" individuals, whether officials or Ministers, in the three licensing Departments, the Department of Trade and Industry, the Ministry of Defence, the Foreign and Commonwealth Office, in the three intelligence agencies, S.I.S., the Security Service and G.C.H.Q., and, perhaps, in the Cabinet Office. Within the D.T.I., the Export Licensing Unit, the Overseas Trade Section and the Export Credits Guarantee Department could be involved. In the

Ministry of Defence, Defence Intelligence Staff, the Defence Export Sales Organisation and other sections could be involved. The F.C.O.'s Middle East Department almost certainly would be involved, as also might be S.E.N.D. (its Science, Energy and Nuclear Department), and N.P.D.D. (its Non-Proliferation and Defence Department). The interests of individuals in each of these sections of government could conflict depending on the evidence being given. Arrangements for counsel or solicitors to represent, say, the D.T.I.'s Export Licensing Unit, or the F.C.O.'s Middle East Department, would, therefore, not work. Sooner or later, inevitably, conflicts of interest between individuals in the E.L.U. or in the M.E.D. would emerge.

I am told that in the Crown Agents Inquiry, rows and rows of seats were filled by the lawyers representing all the various interests that might be affected by evidence being given. There were 27 individuals or departments separately represented. I believe that, in my Inquiry, **L.Q.R. 609* the number would have been very much higher. For much of the time many of the lawyers at the Crown Agents Inquiry had nothing to do. But they had to be there while any witness was giving evidence which might affect their clients. Although the Crown Agents Inquiry hearings were broken up into sections, up to 15 lawyers might rise to cross-examine a witness. The public hearings lasted for 260 days. These arrangements for cross-examination derived, no doubt, from an earnest regard for Salmon's sixth principle. Whether they were necessary in order to achieve fairness in the conduct of the Crown Agents Inquiry it is not for me to say. I am, however, in no doubt but that a comparable approach in my Inquiry was not necessary in order to achieve fairness and would, if adopted, at best have extended the oral hearings by years rather than months and, at worst, might have prevented the Inquiry from completing its task at all.

The question whether and to what extent the Salmon sixth principle procedure needs to be adopted should, in my opinion, be decided on a pragmatic, inquiry by inquiry, basis.

The need for facilities for cross-examination of witnesses by or on behalf of other witnesses was always likely in my Inquiry, whatever might be the case in other Inquiries, to be limited. The reason for this was the absence of much scope for significant disputes of primary fact. This feature of the evidence was attributable to the Whitehall habit of making a written record of the issues to be decided, of the arguments and recommendations on those issues, of the decisions reached and the action taken to implement the decisions, coupled with the habit of copying documents to all interested desks. These habits have resulted in a comprehensive volume of documentary records from which the course of events can be traced. Disputes between witnesses have, mainly, related to the reasons why things happened and to inferences that should be drawn, rather than to primary facts. On occasions witnesses have given different, and sometimes inconsistent, explanations of the implications of particular documents or of particular events. The resolution of these differences, mainly differences of opinion, did not, in my opinion, need, and would not have been usefully advanced by, an adversarial style cross-examination conducted by or on behalf of the disputants.

There were, on a few occasions, significant disputes of fact that did emerge. Where this happened the evidence was drawn to the attention of those who had given conflicting accounts and comments were invited. The Inquiry's published procedures did leave open the possibility for applications for leave to cross-examine particular witnesses to be made. On one occasion a warning that such an application was being considered was given. But the provision of a transcript of the offending evidence and an opportunity to make comments thereon in **L.Q.R. 610* response satisfied the individual and his lawyers who had given the warning. No application to cross-examine in respect of that evidence or any other evidence was, in the event, made. The procedure to which I have referred would, however, have allowed cross-examination if, in the particular circumstances, fairness to individuals affected by disputed evidence had seemed to require it. But a general facility for individuals or their lawyers to cross-examine witnesses whose evidence adversely affected them, was not, in my opinion, necessary in order to achieve fairness in my Inquiry. The absence of any application to cross-examine goes some way to demonstrate that that was so. It would be so, I think, in the case of most inquisitorial Inquiries. Notice of any adverse evidence and an opportunity to those affected to give their own evidence in answer, coupled with an opportunity to make representations, including further evidence, on any proposed adverse conclusions, would, in my opinion, constitute in most cases adequate procedural safeguard against unfairness. For my own Inquiry to have allowed lawyers to participate in its oral hearings in the manner contemplated by the sixth Salmon principle would have turned the oral hearings into a procedural morass to the serious detriment of the Inquiry and with no gain, save that of delay, to anyone, other than the lawyers.

The overall problem, in my view, with the six Salmon "cardinal principles" is that they are too heavily based on procedural requirements of fairness in an adversarial system. In an inquisitorial Inquiry, the questioning of the witnesses by the Inquiry is not an examination-in-chief, nor is it a cross-examination. Hearsay evidence may be sought. Opinions, whether or not expert, may be sought. Questions to which the questioner does not know the answer will frequently be asked--and, indeed, will be asked *because* the questioner does not know the answer. The techniques of questioning witnesses in adversarial litigation can be set aside. The questioning process is, or should be, a part of a thorough investigation to determine the truth. It is not a process designed either to promote or to demolish a "case".

In 1974 Lord Scarman gave procedural directions for the purpose of the Red Lion Square Inquiry on which he was about to embark. After stressing that "... this is an Inquiry not a piece of litigation. It is not the sort of adversary-type confrontation between parties with which we English lawyers are familiar in the criminal and civil trials of our country", Lord Scarman said this:

"This Inquiry is to be conducted--and I stress it--by myself. This means that all the decisions have to be taken by me. Let me indicate now so that there need be no misunderstanding, what are the implications of what I have just said. First of all, it is I, and I alone, who will decide what witnesses will be called. I also **L.Q.R. 611* decide to what matters their evidence will be directed. There is, in an Inquiry of this sort, no legal right to cross-examination, but I propose, within limits, to allow cross-examination to the extent that I think it helpful to the forwarding of the Inquiry, but no further." ¹⁸

The pragmatic approach adopted by Lord Scarman to the procedure to be adopted at his Inquiry must, I respectfully suggest, be right.

The defects, as I would regard them, of the Salmon recommendations were noted in an illuminating article by Sir Louis Blom-Cooper Q.C. published in the year before last. ¹⁹ He noted that "The prime characteristic of the 1921 Act tribunals, underlined by the Salmon recommendations, was in effect to elbow out the inquisitorial aspects of public inquiries in favour of procedural safeguards borrowed from the legal system" and perceptively continued:

"Indeed, the Salmon Commission ... positively encouraged administrators and participants to turn the inquiry into an accusatorial procedure (a) by the framing of specific issues couched in the terms of reference, and (b) by conducting an adjudication of those issues by the methods familiar to English lawyers engaged in the court system." ²⁰

Whether the encouragement to which Sir Louis referred was, so far as the members of the Royal Commission were concerned, a matter of intent or simply a result of the language in which the recommendations were couched may be a matter of debate. What is not, however, open to debate--in my opinion at least--is that the adoption of procedures that translate an inquisitorial Inquiry into a series of adversarial issues, with the Inquiry on one side and a shifting collection of individuals on the other side of each issue, is likely, depending on the nature of the Inquiry, to be a grave impediment to the proper functioning of the Inquiry. That impediment might have to be accepted if fairness to the individuals could not otherwise be achieved. But, provided vision is not blinkered by an inability to see beyond the procedures of adversarial litigation, the impediment can, in my opinion, in most cases be avoided. In particular, an insistence on an essential role for witnesses' lawyers in oral hearings, is, in my view, unnecessary.

Examination-in-chief by a witness's own lawyer? Why cannot witnesses simply submit a preliminary written statement? This is now a common practice in civil litigation. Re-examination by a witness's **L.Q.R. 612* own lawyer? Why cannot the witness, instead, submit whatever supplemental written statement he wishes? Lawyers or the witness can play whatever role in the preparation of these statements the witness may wish. Cross-examination of the other witnesses? Why does it not suffice for the offending evidence to be drawn to the attention of any person adversely affected by it, leaving that individual to submit a written response and, as a supplement, to apply for the witness to be recalled for cross-examination? Why should oral submissions by lawyers be thought essential? What advantage of fairness is thereby obtained that cannot be obtained by a written submission made in response to a draft of proposed criticisms?

In each of the respects I have mentioned, rights of audience for lawyers at oral hearings conducted by inquisitorial Inquiries should not be regarded as indispensable in the pursuit of fairness, nor even, in my opinion, as usually necessary.

In my opinion, a useful guide to the approach to be adopted to the requirements of fairness at an inquisitorial Inquiry is to be found in the judgments in the Court of Appeal in *In re Pergamon Press Ltd.* ²¹ The case arose, it may be recalled, out of a D.T.I. inspectors' investigation of Pergamon Press Ltd, a company controlled by the late Mr Robert Maxwell. Mr Maxwell had refused to answer questions put to him by the inspectors. He had refused because, he said, their procedures were unfair. His complaint led to the examination by the court of the requirements of fairness in what was quintessentially an inquisitorial proceeding. Lord Denning M.R. noted that the inspectors' report "may ruin reputations or careers". He was "clearly of the opinion that the inspectors must act fairly". He said that "the inspectors can obtain information in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him." He went on:

"That is what the inspectors here propose to do, but the directors of the company want more. They want to see the transcripts of the witnesses who speak adversely of them, and to see any documents which may be used against them. They, or some of them, even claim to cross-examine the witnesses. In all this the directors go too far."²²

Later in Lord Denning's judgment there is this:

"It was suggested before us that whenever the inspectors thought of deciding a conflict of evidence or of making adverse criticism of someone, they should draft the proposed passage of their **L.Q.R. 613* report and put it before the party for his comments before including it. But I think this is also going too far. They must be masters of their own procedure. They should be subject to no rules save this: they must be fair. This being done, they should make their report with courage and frankness keeping nothing back. The public interest demands it."²³

Sachs L.J., too, concluded that "there must be an appropriate measure of natural justice, or as it is often nowadays styled "fair play in action". He said that "In the application of the concept of fair play there must be real flexibility, so that very different situations may be met without producing procedures unsuitable to the object in hand."²⁴

This seems to me a very useful injunction and warning. The inflexible and literal application of the six Salmon principles to each and every Inquiry would produce in many cases "procedures unsuitable to the object in hand". It would have done exactly that in the case of my own Inquiry. In considering what procedures should be adopted in order to achieve fairness to witnesses, Sachs L.J. said that "it is impracticable and indeed ill-advised to attempt to lay down a set of rules applicable to all witnesses at all times". I respectfully agree.

The third member of the Court, Buckley L.J., emphasised that D.T.I. inspectors were discharging "an inquisitorial function". He, too, concluded that the procedures to be adopted were matters which rested "in the discretion of the inspectors, a discretion which they must exercise with due regard for fair treatment of anyone likely to be adversely affected by their report".²⁵

The conclusion to be drawn from the guidance provided by the *Pergamon Press* judgments is, in my opinion, that the procedures to be adopted in order to achieve fairness in an Inquiry must be designed to fit the circumstances and requirements of the particular Inquiry. Lord Denning did not think that even a draft of proposed criticism need necessarily be supplied to the objects of the proposed criticism. The factors to be taken into account in coming to a decision on such a point must, in my opinion, include the extent to which the person concerned has already had an opportunity of putting his or her evidence on the matter in issue before the Inquiry. The general practice adopted in my own Inquiry is that draft criticisms are sent to the object of the proposed criticism but that the rewritten text, after comments on the proposed criticism have been received and taken into account, is not submitted for further comments. This procedure seems to me to deal fairly with those who had already given evidence, **L.Q.R. 614* written or oral, to the Inquiry on the matter in question. In some cases, however, the proposed criticism has been of an individual who had not been asked to give evidence on the relevant matter. In these, relatively few, cases, fairness has seemed to me to require not only that a draft of the proposed criticism should be supplied to the individual in question, but also that any revision of the original draft should, if the revision still retains some criticism of the individual in question, be submitted for further comments if the individual desires to make any.

There is one final aspect of fairness to which I want to refer.

An important procedural issue for any Inquiry is likely to be whether and to what extent oral hearings at which witnesses are questioned should be held in public. This is another issue in respect of which the important differences between adversarial proceedings and inquisitorial proceedings should be kept in mind. We all believe, or so I would hope, that litigation ought, unless there is some good reason to the contrary, to be conducted in public. Public trial is one of the essential foundation stones of our adversarial system. The respective cases of the adversaries are expounded and adjudicated upon in public. The part to be played by witnesses, as well as by the litigants themselves, in helping to build up one side's case or to demolish the other's will be known in advance. It is otherwise with witnesses giving evidence to an Inquiry engaged in an investigation. I have already noted, in connection with the first of the Salmon principles, that, initially, a witness may be questioned not in order to elicit relevant evidence, but in order to discover what relevant evidence the witness has to give. Unless a witness is known to have relevant evidence to give, there can be no reason for exposing the witness to a public hearing. But even where the witness is known to be able to give relevant evidence, the value and weight of that evidence will probably not be apparent until the Inquiry's investigations are nearing their conclusion. An investigation is, after all, an on-going process, developing and sometimes changing direction, as evidence from various sources accumulates. It is, therefore, worth asking on what basis

an investigative hearing ought to be a public hearing. The police are not expected to conduct their investigations in public, nor are D.T.I. inspectors. There is no general principle of public interest applicable to Inquiries, unlike civil or criminal litigation (I leave out of account litigation in the Family Division where special considerations apply), that hearings should be in public.

There is no doubt that a public hearing, particularly where the circumstances that have led to the setting-up of the Inquiry have been the subject of publicity and media interest, exposes witnesses to considerable pressures. Their evidence, which, as I have said, may at the **L.Q.R. 615* end of the day be of only marginal relevance or weight, may be picked over, analysed and criticised by news reporters and others, whose purposes in doing so may have little in common with the Inquiry's purposes. Is that fair to witnesses? The weight on witnesses, particularly those who, for whatever reason, have a high public profile, of the pressures of a public hearing should not be underestimated. I conclude that fairness to witnesses requires that they should not be subjected to those pressures unless the public interest factors that favour public hearings are clearly apparent and are of evident weight. The public interest factors that may argue in favour of public hearings will, of course, vary from case to case. In the case of my own Inquiry, however, a decision as to how the balance fell did not seem to me a difficult one. The Inquiry was set up in order to investigate the manner in which Government officials and Ministers had discharged their official duties. The public, on whose behalf and for whose benefit all government is conducted, is entitled, in my opinion, to expect that an inquiry into the propriety of acts of Government will, where practicable and unless some overriding and countervailing public interest requires the contrary, be conducted in public. The same opinion was expressed by Sir Louis Blom-Cooper Q.C. in the article to which I have already referred²⁶: "... those who are public servants expect to undergo public scrutiny and accountability for their actions" he said.

There is a further point. One of the main purposes behind the setting up of many Inquiries, it was certainly so of my own, is the allaying of public disquiet. That purpose would often have no real chance of being achieved if all the oral hearings were conducted behind closed doors. In the case of my own Inquiry, public scrutiny of at least the part of the investigative process taking place at oral hearings was desirable, in my opinion, so that if, and to the extent that, any allegations or suspicions of government impropriety were eventually held to be unfounded, public disquiet would be at rest. Without public hearings I doubt whether this would have been achievable. As of today, with my Report still unpublished, the success of the Inquiry in that respect remains a matter of conjecture.

In summary, as a general rule, fairness at an Inquiry certainly requires that witnesses be given adequate advance notice of the matters in respect of which questions will be asked. It requires that adverse and damaging allegations (if they are relevant but not otherwise) should be drawn to the attention of the object of the allegations so that he or she can, if desired, respond to them. It requires that proposed criticisms be drawn to the attention of the object of the criticism so that he or she can, if desired, make representations in response. It requires that legal assistance be available to those involved, both at the stage of giving evidence and at the stage of responding to criticism. Fairness does not, in my opinion, require that adversarial procedures such as the right to cross-examine other witnesses, the right to have an examination-in-chief or a re-examination conducted orally by a party's lawyer or the right for a party to participate, over the above the extent mentioned, in the oral hearings, should always be incorporated into the procedure at inquisitorial Inquiries. The golden rule, in my opinion, is that there should be procedural flexibility, with procedures to achieve fairness tailored to suit the circumstances of each Inquiry.

<FNTI> The Chancery Bar Association Spring Lecture, delivered at Lincoln's Inn Great Hall on May 2, 1995.</FNTI>
RICHARD SCOTT.

Footnotes

- 1 *The Supreme Court Practice.*
- 2 Archbold, *Criminal Pleading, Evidence and Practice* (1993).
- 3 *Report of the Royal Commission on Tribunals of Inquiry* (chaired by Lord Justice Salmon), Cmnd. 3121 (1966).
- 4 Para. 29.
- 5 [1971] 1 Ch. 388.
- 6 *ibid.* at p. 399.
- 7 *Supra*, n. 4.

- 8 *Profumo Affair: Lord Denning's Report* (Cmnd. 2152, 1963).
9 Para. 32.
10 *ibid.*
11 *Report of the Tribunal appointed to inquire into certain issues arising out of the operations of the Crown Agents as financiers on own account in the years 1967-1974*: H.L. 149, H.C. 364; H.M.S.O., May 26, 1982.
12 Para. 10, at p. 571.
13 Para. 32, at p. 18.
14 *ibid.*
15 *ibid.*
16 *ibid.*
17 *Hansard*, H.C., Written Answers, November 16, 1992, cols. 74-75.
18 *The Red Lion Square Disorders of 15 June 1974*: Report of Inquiry by the Rt Hon. Lord Justice Scarman (Cmnd. 5919, 1975).
19 Sir Louis Blom-Cooper Q.C., "Public Inquiries" [1993] C.L.P. 204.
20 At p. 207.
21 [1971] 1 Ch. 388.
22 At p. 400.
23 *ibid.*
24 At p. 403.
25 At p. 407.
26 *Supra*, n. 20 at p. 205.

Common Factors in the Application of the Porter Test

De Smith's Judicial Review 9th Ed.

Mainwork updated to include amendments from First Supplement

Part II - Grounds of Judicial Review

Chapter 12 - Procedural Fairness: Bias and Predetermination

Common Factors in the Application of the Porter Test

- 12-028 The *Porter* test is acutely context-sensitive,⁶² requiring an “intense focus on the essential facts of the case”.⁶³ There is, accordingly, a need for special care to be taken when attempting to draw analogies with decided cases.⁶⁴ That said, the case law offers helpful general guidance on the relevance of the following factors.

Decision-maker involvement in an earlier stage of decision-making

- 12-029 It is impermissible for a decision-maker to hear an appeal or a challenge to their own decision.⁶⁵ Where a single decision is taken in multiple stages, however, the same decision-maker may, depending on the circumstances, be permitted to act at more than one stage. In *R. (on the application of Hofstetter) v Brent LBC*, for instance, the High Court dismissed a challenge to a decision by a local authority officer to affirm their earlier decision to rescind an applicant’s approval to adopt a child. The relevant Regulations supported the conclusion that stages subsequent to the initial determination were in the nature of a review, not an appeal, and the process required the officer to take account of the recommendation of an independent review panel.⁶⁶ Where, however, an interim or initial decision is expressed in terms that would lead the fair-minded and informed observer to conclude there is a real possibility the decision-maker will not be prepared to change their mind, they should not participate in subsequent stages of decision-making.⁶⁷ It is not permissible for a person involved in a decision to prosecute an individual for misconduct to take part in the disciplinary hearing.⁶⁸
- 12-030 Ordinarily the judge (or other decision-maker) who dealt with a substantive application will be best placed to decide consequential issues, such as costs and proceedings for contempt. Indeed, in *Otkritie International Investment Management Ltd v Urumov* the Court of Appeal stressed the importance of judges not recusing themselves too readily, especially in long and complex cases “otherwise the convenience of having a single judge in charge of both the procedural and substantive parts of the case will be seriously undermined”. The general rule is that a judge:
- “...should not recuse himself, unless he either considers that he genuinely cannot give one or other party a fair hearing or that a fair-minded and informed observer would conclude that there was a real possibility that he would not do so.”

⁶⁹

- 12-031 However, in exceptional cases, criticisms of a party at a hearing may give rise to an appearance of bias. For instance, in *Mengiste v Endowment Fund for the Rehabilitation of Tigray* a judge’s disparaging remarks about a solicitor meant he should have recused himself from hearing a wasted costs application.⁷⁰

12-032

The mere fact that a judge (or other decision-maker) determined an interim application against a party does not give rise to apparent bias.⁷¹ However the fair-minded and informed observer may identify a real possibility of bias where a judge's comments indicate that they have formed a concluded view of a matter.⁷² Similarly, involvement in determining a paper application for permission to appeal does not preclude a judge from later hearing the substantive appeal or an oral renewal of the application unless they have expressed their views in a manner which indicates they are unlikely to be open to further argument.⁷³

- 12-033** Where a judge (or other decision-maker) has previously decided a separate matter in which one or more of the parties was involved this will not, without more, give rise to an appearance of bias,⁷⁴ even if the judge offered condemning remarks about the party in the course of decision-making.⁷⁵ Apparent bias may arise, however, where for instance the judge's comments indicate a concluded view⁷⁶ or where a judge's findings in an earlier dispute are likely to be crucial to the decision at hand.⁷⁷

Presence of another during deliberations

- 12-034** The presence of a third party during a decision-making panel's deliberations may compromise the fairness of proceedings if a private discussion takes place with the outsider in which points are raised which the parties have not been given an opportunity to address, or the outsider has a "brooding presence" which influences the panel members.⁷⁸ Apparent bias will arise if, considering all the relevant circumstances (including any available evidence about what actually happened during the deliberations⁷⁹), the fair-minded and informed observer would conclude there is a real possibility a panel was influenced in one of these ways.
- 12-035** There clearly are circumstances in which the presence of a third party is legally unobjectionable. For instance, in *R. (on the application of DM Digital Television Ltd) v Office of Communications* the presence of an officer who had undertaken an initial investigation during the decision-making panel's deliberations did not give rise to an appearance of bias.⁸⁰ Similarly, the Court of Appeal in *Virdi v Law Society* rejected a challenge to a decision by the Solicitors Disciplinary Tribunal on the basis that the presence of, and drafting assistance given by, a clerk employed by the Law Society gave rise to apparent bias.⁸¹

Friendship and family ties

- 12-036** Friendship or familial relationships with parties or witnesses will give rise to apparent bias where the connection is such that a fair-minded and informed observer would conclude there is a real possibility of bias.⁸² For instance, in *AWG Group Ltd (formerly Anglian Water Group Plc) v Morrison* apparent bias arose from the judge's long-standing acquaintance with a witness.⁸³ The proper approach was for the judge to recuse himself, rather than to continue with the hearing and to hear from alternative witnesses.⁸⁴ However, in *Gough*,⁸⁵ the fact that a juror was a neighbour of the defendant's brother was held, on the facts of that case, not to create the appearance of bias. Similarly, the friendship of an assistant deputy coroner with the former chief executive of an NHS trust involved in an inquest was not indicative of bias where the executive had left the post before the matter giving rise to the inquest arose, and the inquest concerned the hospital's specialist medical team, rather than management.⁸⁶
- 12-037** Interests of a spouse, partner or other family member or friend will only give rise to apparent bias on the part of the decision-maker where the link between the interest and the decision is "so close and direct as to render the interest of that other person,

for all practical purposes, indistinguishable from an interest of the judge himself'.⁸⁷ The Court of Appeal has held that the fact that the husband of the judge was a barrister in chambers that undertook work for one of the parties did not, in the circumstances of that case, lead to any implication of bias.⁸⁸ Similarly, an appearance of bias did not arise where a judge determined to grant a private hire vehicle operator's licence to a company when her husband had offered consultancy services to an investor in its parent company.⁸⁹

Advice

- 12-038** An appearance of bias may arise if a decision-maker relies on advice given by a party with a connection with the case. In *R. (on the application of Primary Health Investment Properties Ltd) v Secretary of State for Health*, for instance, an Appeal Unit acted unlawfully when, in determining a rent dispute it approached the chief executive of the valuation office for assistance.⁹⁰ In contrast, the Court of Appeal held that no appearance of bias arose as a result of a Committee's reliance on the advice of an advisory body in *R. (on the application of Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts*. The members of the advisory body included consultants who worked at the two hospitals which the Committee decided should continue to provide paediatric congenital cardiac services, but there was no representative of the applicant hospital. The advisory body had performed a limited steering role in identifying the questions and information to be put out for public consultation and the fair-minded and informed observer would recognise the relevance of the expertise of the two consultants.⁹¹

Role of a person who decision-maker has previously looked to as a guide

- 12-039** In *Lawal v Northern Spirit* the House of Lords held that the practice whereby barristers were appointed to sit as part time judges in the Employment Appeals Tribunal should be discontinued. A result of the practice was that counsel may present argument to a lay panel member with whom they had previously sat on a panel. The fair-minded and informed observer would recognise that the lay member may have previously looked to the barrister for guidance on the law and may be influenced by the relationship of trust and confidence they had formed.⁹²
- 12-040** The Court of Appeal in *Resolution Chemicals Ltd v H Lundbeck A/S*, however, distinguished the case from *Lawal v Northern Spirit*. In the course of determining an application for revocation of a supplementary protection certificate on the grounds that the patent on which it was based was invalid the judge had heard evidence from an expert witness who had supervised a research project during his undergraduate degree. In the absence of a specific continuing link between the judge's studies and the science involved in the case, the fair-minded and informed observer would not detect a possibility of bias.⁹³

Unilateral communications with a party

- 12-041** Courts and tribunals should generally avoid engaging in unilateral communications with a party to a dispute.⁹⁴ In *Bubbles and Wine Ltd v Lusha* the Court of Appeal was critical of the trial judge's conduct at a trial in which he had requested a private conversation with the defendant's counsel and remarked on the weaknesses of the claimant's case. Apparent bias did not arise on the facts because the judge's purpose had been to express a provisional view to be shared with both parties and contemporaneous emails left no room for doubt about what was said. However, the Court of Appeal emphasised the need for judges to be scrupulous in refraining from conduct which may give rise to concerns about their impartiality.⁹⁵ It is also

improper for a litigant to attempt to correspond with the court on a “private and confidential basis”; a judge who receives such a communication should return it unread, explaining shortly to the litigant the impropriety of sending unilateral correspondence.⁹⁶

- 12-042** A similar approach applies to arbitrators. In *Paice v Harding (t/a Harding Contractors)*, for instance, the High Court refused to enforce an arbitrator’s decision in circumstances in which his office manager (who was his wife) had engaged in a lengthy telephone conversation with one of the parties, partly concerning the poor service the party alleged it had received in earlier adjudications handled by the arbitrator.⁹⁷

Access to prejudicial material

- 12-043** Where irrelevant and prejudicial material is included in the documentation to be taken into account, whether it gives rise to an appearance of bias will depend on all of the circumstances including the identity of the decision-maker. Professional judges are not, for example, the same as lay juries “whose decision-making may be contaminated if they are exposed to irrelevant or inadmissible material”: “if the material is irrelevant the judge will not rely on it. If he is alerted to the fact that it is irrelevant he will be particularly careful to put it out of his mind.”⁹⁸ Similarly, “it is likely to be a common occurrence in tribunals... that members will read documents or hear oral evidence which might be inadmissible, irrelevant or prejudicial.” It will be a “rare case”, involving material that is “so extreme in its prejudice” that a fair-minded and informed observer would conclude there is a real possibility the tribunal member would be unable to put it out of their mind, that access to such material would give rise to apparent bias.⁹⁹
- 12-044** Similarly, whether a decision-maker’s awareness of prejudicial publicity gives rise to apparent bias depends on the context. In the case of decision-making by juries the question is “whether the risk of prejudice is so grave that no direction by a trial judge however careful could reasonably be expected to remove it”.¹⁰⁰ In other contexts, such as disciplinary panels with legal expertise, the fair-minded and informed observer may more readily assume that the decision-maker “understand[s] the proper approach to issues of law and... the need to disregard irrelevant material”.¹⁰¹ For instance, a finding by the General Medical Council’s disciplinary committee of serious professional misconduct was not tainted by apparent bias where panel members were aware of newspaper reports of a previous finding of misconduct.¹⁰²

Oaths and codes of conduct

- 12-045** That a decision-maker has taken an oath¹⁰³ or committed to comply with a code of conduct¹⁰⁴ may be a relevant factor in determining whether an appearance of bias has arisen. In *Harb v Aziz*, for instance, the judge had written to Blackstone Chambers, following publication of a critical article by one of its members, withdrawing his support from the Chambers in future years. Counsel for one of the parties were members of Blackstone Chambers. The Court of Appeal held, however, that despite the “deeply worrying” conduct of the judge, there was no appearance of bias. The fair-minded and informed observer is assumed to know that “from time to time, the patience of judges can be sorely tested by the behaviour of an advocate... but judges are expected to be true to their judicial oaths and not allow their feelings about an advocate to affect their determination of the case they are hearing”.¹⁰⁵ The fair-minded and informed observer would not, however, regard an oath as a “panacea”. It is to be regarded as “more a symbol than of itself a guarantee of the impartiality that any professional judge is by training and experience expected to practice and display”.¹⁰⁶

Membership of an organisation

- 12-046** Membership of particular organisations which adopt well-known attitudes towards particular issues may or may not disqualify a decision-maker for bias. In *R. (on the application of Port Regis School Ltd) v North Dorset DC* it was held that members of the Society of Freemasons were not barred on the ground of bias from participating in local government decisions whenever another Freemason had an interest in the decision's outcome.¹⁰⁷ Similarly, in *Helow v Secretary of State for the Home Department*, the fact that Lady Cosgrove was a member of the International Association of Jewish Lawyers and Jurists was insufficient to establish bias in her hearing an appeal by a Palestinian woman in an asylum case.¹⁰⁸ However, in *Re Duffy's Application for Judicial Review*,¹⁰⁹ the appointment of two members of the Orange Order to the Northern Ireland Parades Commission was held to be unlawful. The appointees had both been prominent and committed proponents of the loyalist parade along the Garvaghy Road to Portadown and, when appointed, neither had resigned from the bodies to which they belonged.

Decision-maker's employment and funding

- 12-047** Where a decision-maker is a current or previous employee of a body connected to a dispute whether an appearance of bias arises will depend on the circumstances. In *P v Secretary of State for Justice* the close connections of a former prison governor and prison service manager with policy areas on which he was being asked to make recommendations rendered him insufficiently independent to undertake an investigation.¹¹⁰ In *Secretary of State for Communities and Local Government* a planning inspector should not have dealt with an appeal concerning an area of transport policy with which he had been closely involved in formulated in his previous employment by the county council.¹¹¹ Police officers and CPS solicitors are not, however, automatically prevented from acting as jurors, even if they serve(d) in the same force as victims or witnesses.¹¹²
- 12-048** In determining whether prior employment gives rise to an appearance of bias, the courts have been particularly mindful of the value of enabling expertise and experience to be brought to bear in decision-making. *Gillies v Secretary of State for Work and Pensions* concerned a challenge to the composition of a disability appeal tribunal on the basis that its medical member had previously worked as a part-time report writer for the Benefits Agency, a party to the dispute. The UK Supreme Court concluded there was no appearance of bias. The fair-minded and informed observer would understand the crucial difference between approaching the issues with a predisposition in favour of the Agency and the bringing to bear of expertise. They would also recognise that the expertise of the medical member could cut both ways. To hold otherwise would have "greatly undermine[d] the practical utility of the [tribunal] system if panel members were to be disabled from sitting on cases because their experience was likely to give them an advantage when examining the evidence over those who did not have the same background".¹¹³
- 12-049** The conditions in which a decision-maker is employed may be relevant in determining whether an appearance of bias has arisen. Prosecutions conducted by temporary sheriffs have been held to violate the right to an independent and impartial tribunal guaranteed by art.6.¹¹⁴ The combination of a "one-year appointment with liability to either recall or suspension or limited use" was held to be "wholly inconsistent with the requirement of independence".¹¹⁵ In *Misick v The Queen*, however, the Privy Council observed that temporary or ad hoc judicial appointments are not uncommon and need not necessarily involve any lack of independence. For example, if the judge has accepted appointment for a specific task, at least in the absence of some special factor, they will have no expectation of renewal or of further appointment. No objective observer would therefore fear that they would be unable independently to discharge their duty as a judge because they were in place for a limited period; indeed, their ad hoc position often strengthens their independence.¹¹⁶ Similarly, the appointment of Criminal Case Review Commissioners on a three-year fee-paid basis was held to be lawful. While the power to reappoint lay with the Secretary of State, the evidence demonstrated she invariably had regard to the recommendations of the CCRC Chair as to whether commissioners had demonstrated the necessary skillset.¹¹⁷

- 12-050 The manner in which a decision-making body is funded may be a relevant factor in determining whether an appearance of bias arises.¹¹⁸ In *R. (on the application of Sandhar) v Office of the Independent Adjudicator for Higher Education* the Court of Appeal considered but rejected the argument that an appearance of bias arose in circumstances in which the Office of Independent Adjudication was funded by the institutions of higher education against which it was hearing appeals.¹¹⁹

Hostility towards a party

- 12-051 Personal animosity towards a party outside of a case disqualifies a judge from adjudicating on the ground of bias. Thus, a conviction by an Irish magistrate was quashed when it was shown, by an uncontradicted affidavit, that very bad feeling (originating in a trespass by a fowl) existed between him and the defendant's family, and that shortly after the conviction he had used words indicative of enmity towards the defendant.¹²⁰ In Canada, a magistrate was held to be disqualified from hearing a charge against a person with whom he had recently come to blows.¹²¹ Where a judge had been involved in unsuccessful negotiations to join a firm and had indicated that he was very unimpressed with the firm, he should have recused himself from a case in which the partners of the firm were involved.¹²²
- 12-052 Hostility towards a party during the course of a hearing has sometimes been argued to give rise to an appearance of bias.¹²³ The UK Supreme Court has, however, inclined to the view that such cases are better understood as challenges to the fairness of proceedings. The court assumed but did not decide that the correct definition of bias is a "prejudice against one party or its case for reasons unconnected with the legal or factual merits".¹²⁴ This "narrow definition" was said not to capture cases in which a decision-maker demonstrated hostility to a party as a result of reaching an "immediate conclusion that the claim was hopeless and that the hearing of it represented a disgraceful waste of judicial resources."¹²⁵
- 12-053 That said, in unusual cases, the manner in which a decision-maker addresses the parties may properly be described as giving rise to the appearance of bias.¹²⁶ For instance, in one case it was held that when a coroner used the terms "unhinged" and "mentally unwell" to describe relatives of the deceased, these expressions indicated a real possibility that he had unconsciously allowed himself to be influenced against the applicant's argument that the inquest should be reopened.¹²⁷ A judge who joked about whether a respondent who was an Arab Sheikh would disappear on his flying carpet, that an affidavit was "a bit like Turkish delight", and about a "relatively fast-free time of the year", was found to have used language which was "mocking and disparaging of the respondent for his status as a Sheikh and/or his Saudi nationality and/or his ethnic origins and/or his Muslim faith". It was concluded therefore that there was an appearance to the fair-minded and informed observer that there was a real possibility that the judge would carry into his judgment the scorn and contempt his words conveyed.¹²⁸ In contrast, a remark made at the start of a trial that, in light of past experience, the judge was "naturally suspicious" of everybody in the court did not give rise to apparent bias.¹²⁹

Footnotes

- 62 *Harb v Aziz* [2016] EWCA Civ 556 at [75].
- 63 *Man O'War Station Ltd v Oakland City Council (No.1)* [2002] UKPC 28 at [11].
- 64 *Resolution Chemicals Ltd v H Lundbeck A/S* [2013] EWCA Civ 1515; [2014] 1 W.L.R. 1943 at [37].
- 65 e.g. *R. (on the application of B) v X Crown Court* [2009] EWHC 1149 (Admin); [2009] P.N.L.R. 30. It may also be unlawful for a clerk who has taken part in deliberations to sit as clerk in an appeal against a decision: *R. v Salford*

Assessment Committee Ex p. Ogden [1937] 2 K.B. 1; [1937] 2 All E.R. 98 CA. The UK Supreme Court may, pursuant to s.13 of the Administration of Justice Act 1960, lawfully hear appeals against its own orders when it has acted as a court of first instance in the exercise of its contempt jurisdiction if different justices determine the appeal: *Attorney General v Crosland* [2021] UKSC 15; [2021] 4 W.L.R. 103.

Hofstetter v Barnet LBC [2009] EWHC 3282 (Admin); [2010] P.T.S.R. 1527.

Mitchell v Georges [2014] UKPC 43.

P (A Barrister) v General Council of the Bar [2005] 1 W.L.R. 3019; [2005] P.N.L.R. 32.

Otkritie International Investment Management Ltd v Urumov [2014] EWCA Civ 1315; [2015] C.P. Rep. 6 at [13] and [32]. See also *Local Authority v AZ* [2024] EWHC 1450 (Fam) at [17]–[18] and [24]–[28] for discussion of these principles as they apply in the Family Court.

Mengiste v Endowment Fund for the Rehabilitation of Tigray [2013] EWCA Civ 1003; [2014] P.N.L.R. 4 See also *Kearney v Bar Standards Board* [2024] EWHC 924 (Admin); [2024] I.C.R. 853.

Zuma's Choice Pet Products Ltd v Azumi Ltd [2017] EWCA Civ 2133.

Re Q (Children) [2014] EWCA Civ 918; [2014] 3 F.C.R. 517.

Broughal v Walsh Brothers Builders Ltd [2018] EWCA Civ 1610 at [35].

e.g. *R. v Bristol Crown Court Ex p. Cooper* [1990] 1 W.L.R. 1031; [1990] 2 All E.R. 193 CA (Civ Div); *R. (on the application of Forge Field Society) v Sevenoaks DC* [2014] EWHC 1895 (Admin); [2015] J.P.L. 22.

e.g. *O'Neill (Charles Bernard) v HM Advocate* [2013] UKSC 36; [2013] 1 W.L.R. 1992.

e.g. *K (A Child)* [2014] EWCA Civ 905 at [56]–[57].

e.g. *Dar Al Arkan Real Estate Development Co v Majid Al-Sayed Bader Hashim Al Refai* [2014] EWHC 1055 (Comm).

Flaherty v National Greyhound Racing Club Ltd [2005] EWCA Civ 1117; (2005) 102(37) L.S.G. 31 at [73].

See 12-021.

R. (on the application of DM Digital Television Ltd) v Office of Communications [2014] EWHC 961 (Admin).

Viridi v Law Society [2010] EWCA Civ 100; [2010] 1 W.L.R. 2840.

For older examples see *Vernon v Manners* (1572) 2 Plowd. 425; *R. v Rand* (1865-66) L.R. 1 Q.B. 230 at 232–233; *R. (Murray and Wortley) v Armagh County Justices* (1915) 49 I.L.T. 56; and *Becquet v Lempriere* (1830) 1 Knapp 376 (Jurat of Royal Court of Jersey held by PC to be disqualified from hearing case in which deceased wife's nephew a party); cf. *Auten v Rayner (No.1)* [1958] 1 W.L.R. 1300; [1958] 3 All E.R. 566 CA.

Contrast Man O'War Station Ltd v Auckland City Council (No.1) [2002] UKPC 28 where no appearance of bias arose where the judge had previously been in partnership with the father and brother of a witness.

AWG Group Ltd (formerly Anglian Water Plc) v Morrison [2006] EWCA Civ 6; [2006] 1 W.L.R. 1163.

R. v Gough (Robert) [1993] A.C. 646 HL.

R. (on the application of Shaw) v HM Coroner for Leicester City and South Leicestershire [2013] EWHC 386 (Admin).

Locabail (UK) Ltd v Bayfield Properties Ltd [2000] Q.B. 451 CA at [10].

Jones v DAS Legal Expenses Insurance Co Ltd [2003] EWCA Civ 1071; [2004] I.R.L.R. 218. See also *R. (on the application of Compton) v Wiltshire Primary Care Trust* [2009] EWHC 1824 (Admin); [2010] P.T.S.R. (C.S.) 5.

R. (on the application of United Cabbies Group (London) Ltd) v Westminster Magistrates' Court [2019] EWHC 409 (Admin) at [36] (a judge's decision to grant a private hire vehicle operator's licence to Uber had not been tainted by actual or apparent bias arising from her husband's consulting work for a company whose clients included an investor in Uber's parent company).

R. (on the application of Primary Health Investment Properties Ltd) v Secretary of State for Health [2009] EWHC 519 (Admin); [2009] P.T.S.R. 1563.

R. (on the application of Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts [2012] EWCA Civ 472; (2012) 126 B.M.L.R. 134.

Lawal v Northern Spirit Ltd [2003] UKHL 35; [2004] 1 All E.R. 187 at [21].

Resolution Chemicals Ltd v H Lundbeck A/S [2013] EWCA Civ 1515; [2014] 1 W.L.R. 1943.

Although there is no blanket rule that a judge is required to notify parties of all unilateral communications which take place for administrative or case management purposes: *CD v MD* [2024] EWHC 118 (Fam) at [19].

Bubbles and Wine Ltd v Lusha [2018] EWCA Civ 468 at [23].

Zuma's Choice Pet Products Ltd v Azumi Ltd [2017] EWCA Civ 2133 at [8]. *R. (on the application of Holborn Studios Ltd) v Hackney LBC* [2020] EWHC 1509 (Admin); [2021] J.P.L. 17, however, suggested that guidance directing councillors not to read lobbying messages from members of the public relating to planning applications would likely contravene ECHR art.10 ([79]).

- 97 *Paice v Harding (t/a MJ Harding Contractors)* [2015] EWHC 661 (TCC); [2015] 2 All E.R. (Comm) 1118 See also *HI v W* [2024] EWHC 382 (Comm).
- 98 *Zuma's Choice Pet Products Ltd v Azumi Ltd* [2017] EWCA Civ 2133 at [39].
- 99 For a successful challenge to a decision by an adjudicator, see *AZ v BY* [2023] EWHC 2388 (TCC); [2023] B.L.R. 664.
- 100 *Montgomery v HM Advocate* [2003] 1 A.C. 641 PC at 667 (Lord Hope).
- 101 *R. (on the application of Mahfouz) v General Medical Council* [2004] EWCA Civ 233; [2004] Lloyd's Rep. Med. 377 at [24].
- 102 *Subramanian v General Medical Council* [2002] UKPC 64; [2003] Lloyd's Rep. Med. 69.
- 103 *Belize Bank Ltd v Attorney General of Belize* [2011] UKPC 36.
- 104 e.g. *National Assembly of Wales v Condrón* [2006] EWCA Civ 1573; [2007] B.L.G.R. 87.
- 105 *Harb v Aziz* [2016] EWCA Civ 556 at [71].
- 106 *Helow v Secretary of State for the Home Department* [2008] UKHL 62; [2008] 1 W.L.R. 2416 at [27] and [57].
- 107 *R. (on the application of Port Regis School Ltd) v North Dorset DC* [2006] EWHC 742 (Admin); [2006] B.L.G.R. 696.
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- 113 *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2; [2006] 1 W.L.R. 781 at [22].
- 114 *Millar (David Cameron) v Dickson* [2001] UKPC D 4; [2002] 1 W.L.R. 1615.
- 115 *Starrs v Ruxton* 2000 J.C. 208 at 233.
- 116 *Misick v The Queen* [2015] UKPC 31; [2015] 1 W.L.R. 3215 at [25]–[26].
- 117 *R. (on the application of Warner) v Secretary of State for Justice* [2021] EWHC 1894 (Admin); [2021] 1 W.L.R. 151.
- 118 See e.g. *R. (on the application of Brooke) v Parole Board* [2008] EWCA Civ 29; [2008] 1 W.L.R. 1950.
- 119 *R. (on the application of Sandhar) v Office of the Independent Adjudicator for Higher Education* [2011] EWCA Civ 1614; [2012] E.L.R. 160.
- 120 *R. (Donoghue) v Cork County Justices* [1910] 2 I.R. 271; *R. (Kingston) v Cork County Justices* [1910] 2 I.R. 658.
- 121 *R. v Handley* (1921) 61 D.L.R. 656.
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- 123 e.g. *R. (on the application of Bates) v Parole Board* [2008] EWHC 2653 (Admin); [2009] Prison L.R. 234.
- 124 *Bubbles & Wine Ltd v Lusha* [2018] EWCA Civ 468 at [17].
- 125 See *Serafin v Malkiewicz* [2020] UKSC 23; [2020] 1 W.L.R. 2455 at [37]–[39]. See also *H (A child) (Recusal), Re* [2023] EWCA Civ 860; [2023] 4 W.L.R. 64.
- 126 See e.g. *MS (Judicial Interventions: Complaints: Safety Concerns: Bangladesh)* [2023] UKUT 114 (IAC); [2023] Imm. A.R. 1103; *Rolec (Electrical and Mechanical Services) Ltd v Georgiou* [2023] EAT 46.
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PUBLIC INQUIRIES

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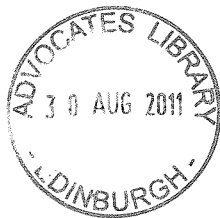
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where the issues are more subjective or controversial, a chairman may benefit from the support of additional panel members, who can bring to the inquiry a different perspective and perhaps provide specific experience. Panel members can also help reduce the identification of the inquiry with a single personality.⁴

- 3.04** The appointment of the chairman and any other members of the panel falls, under the 2005 Act, to the minister.⁵ In this respect, the 2005 Act follows the practice of Canada, where the Executive makes appointments to both federal and provincial inquiries,⁶ New Zealand, where the selection of commissioners is the prerogative of ministers, who take advice from relevant government departments and the Solicitor-General, especially in regard to the need for a judge as chairman,⁷ and Australia, where the Executive makes appointments to both federal and state inquiries.⁸

B. The Chairman

(1) The appointment of the chairman

- 3.05** The chairman of an inquiry is appointed by a minister, often from the department with the closest connection to, or interest in, the events which require investigation.⁹ Where those events are of national importance, the decision may be made by the Prime Minister. In a non-statutory inquiry, or one held otherwise than under the 2005 Act, the minister will write a letter to the chairman, confirming his appointment. In a 2005 Act inquiry, the chairman's appointment must be made by

⁴ CP 14/04, para 13.

⁵ The idea that the function should be delegated to some alternative body or should be performed by Parliament was rightly rejected in *Effective Inquiries*, (CP 12/04), paras 28–33 (in relation to the former idea because inquiries cover a broad range of subject areas and very few non-governmental bodies have a sufficiently wide remit to appoint both judicial and non-judicial figures in all such areas; in relation to the latter idea because issues would be raised about independence, because political and partisan elements would be introduced into the process, and because many candidates may be deterred from allowing their names to go forward if this required them to appear before confirmation hearings in which their suitability was questioned).

⁶ See the Public Inquiries Act, RSA 2000 (Alberta), the Inquiry Act, RSBS 1996 (British Columbia), An Act Respecting Public Inquiry Commissions, RSQ 1981 (Quebec), the Public Inquiries Act, RSS 1978 (Saskatchewan), the Public Inquiries Act, RSO 1990 (Ontario), the Public Inquiries Act, RSNS 1989 (Nova Scotia), the Inquiries Act, RSNB 1973 (New Brunswick), the Public Inquiries Act, PSPEI 1988 (Prince Edward Island), the Public Inquiries Act, RSNL 1990 (Newfoundland and Labrador), the Public Inquiries Act, RSY 2002 (the Yukon Territory), the Public Inquiries Act, RSNWT 1988 (the North Western Territory and Nunavut (Nunavut was established in 1999; prior to that it formed part of the North Western Territory)).

⁷ See the Commissions of Inquiry Act 1908.

⁸ See, generally, the Royal Commissions Act 1902, the Inquiries Act 1991 (ACT), the Inquiries Act 1985 (NT), the Commissions of Inquiry Act 1950 (Tas), and the Special Commissions of Inquiry Act 1983 (NSW).

⁹ Under the 2005 Act, 'minister' means a UK minister, the Scottish ministers, a Northern Ireland minister, or the National Assembly for Wales (s 1(2)).

a written instrument¹⁰ stating that the inquiry is to be held under the 2005 Act.¹¹ The minister is also obliged to make a statement to the relevant Parliament or Assembly, as soon as is reasonably practicable,¹² setting out the inquiry's terms of reference¹³ and who is to be, or has been, appointed as the chairman¹⁴ and inquiry members, if any.¹⁵ This follows the convention prior to the 2005 Act.

A Ministerial Code, published by the Cabinet Office in May 2010, states that a UK Government minister must consult the Prime Minister 'in good time' about any proposal to set up a 'major public inquiry' under the 2005 Act.¹⁶ The Code does not make clear whether *any* inquiry under the 2005 Act would meet the definition of 'major', or only those inquiries whose subject matter is of particular political importance. Nor does the Code specify which issues require discussion with the Prime Minister, though they are likely to include whether or not the inquiry should proceed, and if so, the suggested terms of reference, and proposed candidates for the position of chairman. **3.06**

In choosing a chairman, the minister will ordinarily seek advice from his senior civil servants. In England, he may also consult with the Cabinet Office or the Treasury Solicitor's Department, which have been closely involved in several major public inquiries. Discussions will also need to take place with potential candidates to determine their suitability and willingness to undertake the role, in light of the inquiry's predicted duration and difficulty, and other relevant considerations, such as the possibility of adverse personal publicity. **3.07**

As originally drafted, the Inquiry Rules 2006 contained a provision enabling the chairman of the inquiry to delegate responsibility for certain tasks to the inquiry team.¹⁷ A majority of consultees felt that this provision did not add anything that was not already current practice, so it was removed from the draft.¹⁸ A review of the 2005 Act and the 2006 Rules recently conducted by the Ministry of Justice has suggested the opposite view.¹⁹ **3.08**

We also agree that the Act could have been more helpful in terms of specifying the tasks to be carried out by an inquiry chairman and those which can be delegated to the inquiry team members. This would ensure that Inquiry chairs are not unduly

¹⁰ Inquiries Act 2005, s 4(1).

¹¹ Ibid, s 4(2).

¹² Ibid, s 6(1).

¹³ Ibid, s 6(2)(c).

¹⁴ Ibid, s 6(2)(a).

¹⁵ Ibid, s 6(2)(b).

¹⁶ Ministerial Code §4.10.b, p 10.

¹⁷ *Draft Inquiry Procedure (UK Inquiries) Rules*, draft r 11.

¹⁸ See the *Draft Inquiry Procedure (UK Inquiries) Rules—Response to Consultation CP(R) 04/06*,

p 8.

¹⁹ *Memorandum to the Justice Select Committee: Post-Legislative Assessment of the Inquiries Act 2005* (Cm 7943, 2010), para 56.

inter alia, to any provision of the 2005 Act. So, for example, the rules of evidence in relation to privilege *are* applicable in relation to inquiries under the 2005 Act: see section 22.¹⁸³

(3) **The examination, cross-examination, and re-examination of witnesses**

(a) *The options*

There are, in very general summary, three models by which the questioning of witnesses may take place at an inquiry: **5.177**

- (1) the traditional model;
- (2) the restricted model; and
- (3) the hybrid model.

The traditional model The traditional model has most in common with the way in which the majority of legal proceedings are conducted in courts and tribunals in England and Wales. It has the following features: **5.178**

- (1) It is essentially adversarial in nature.
- (2) Counsel to the inquiry conducts the examination in chief and re-examination of all witnesses.
- (3) Counsel for participants cross-examines such witnesses as he sees fit.
- (4) Counsel cross-examines witnesses without written or other notice to the inquiry (whether to the chairman or the inquiry's legal team).
- (5) Counsel cross-examines witnesses without having received prior written or other permission (and therefore subject only to the control of the chairman in the course of the proceedings and subject to objections from other participants).
- (6) The examination and re-examination of witnesses by counsel to the inquiry tends to be strictly neutral in tone and content—simply eliciting evidence and leaving it to others to put their cases.

This model has been used in a substantial number of inquiries, including the Stephen Lawrence Inquiry, the Bloody Sunday Inquiry, the Shipman Inquiry, the Mubarek Inquiry, and the Billy Wright Inquiry. **5.179**

The advantages of this model include the following: **5.180**

- (1) Every participant has the opportunity fully to put his case—this may engender a feeling (partly because it is the norm in legal proceedings) that every party has had a fair crack of the whip.
- (2) Evidence is fully tested in the normal way.

¹⁸³ See paras 5.57–5.121 above.

- (3) The difficulties faced by counsel to the inquiry, for example when putting contrary cases to the same witnesses on behalf of two or more participants and or when accused of improperly prosecuting a case, do not—or are less likely to—arise.
- (4) The burden on counsel to the inquiry, and support staff, is reduced considerably.

5.181 The disadvantages of this model include the following:

- (1) It leads to a lengthening of the inquiry, which adds very considerably to its cost (and is therefore contrary to section 17(3) of the 2005 Act¹⁸⁴).
- (2) Witnesses may be discouraged from appearing or, if they do appear, may not be as forthcoming as otherwise they might have been.
- (3) Positions become polarized and the inquiry is distracted from its task.
- (4) The issues which the inquiry considers important are neglected; instead, the inquiry is left at the whim of the participants as to the direction it takes and the issues it considers.
- (5) Proceedings are disrupted (by objections and rulings on the propriety of questions), causing delay and interference with witness scheduling.
- (6) Witnesses are ambushed, as the inquiry has little idea of the issues to be pursued with witnesses before they give evidence (and therefore cannot give them proper notice in accordance with rule 13 of the 2006 Rules).

5.182 (ii) **The restricted model** This model seeks to restrict to the greatest possible extent the role and involvement of participants in questioning witnesses. It has the following features:

- (1) Counsel for participants asks no, or virtually no, questions of witnesses.
- (2) Counsel to the inquiry instead asks all, or nearly all, of the questions of witnesses.
- (3) The role of counsel for participants is reduced instead to feeding to counsel to the inquiry lists of issues to pursue or questions to be put. These are served well in advance of the date on which a witness gives evidence. They are considered by counsel to the inquiry, who (i) agrees to pursue the issue or (ii) does not agree to pursue the issue, in which case the participant may make an application to do so to the chairman.

5.183 This model was employed in the Rosemary Nelson Inquiry. It was the subject of an unsuccessful challenge by way of judicial review in the High Court of Northern Ireland—see *Chief Constable of the Police Service of Northern Ireland, Re Judicial Review* [2008] NIQB 145 (discussed below).

¹⁸⁴ Section 17(3) states: 'In making any decision as to the procedure or conduct of an inquiry, the chairman must act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others)'.

The advantages of this model include the following:

5.184

- (1) It may encourage witnesses to assist the inquiry by giving witness statements, by making themselves available to give evidence, and by speaking freely once at the inquiry.
- (2) It leaves absolute control of the inquiry in the inquiry's own hands: the issues to be pursued, the time to be spent on them, and the manner and tone of the inquiry are all tightly controlled.
- (3) It is a very efficient way of doing business.

The disadvantages of this model include the following:

5.185

- (1) It may lead to satellite litigation—in particular, applications for judicial review.
- (2) It may (perhaps even will) leave some parties feeling that the inquiry is being conducted unfairly. This may not assist in ensuring that the conclusions of the inquiry are accepted.
- (3) In an inquiry to which the 2006 Rules apply, it may be inconsistent with rule 10 of the Rules (this was not a point that could be taken in the Rosemary Nelson judicial review as it was not such an inquiry).
- (4) It may place counsel to the inquiry in an invidious position, for example having to put both account A and account B to a witness, where A and B are in conflict.

(iii) **The hybrid model** This model is, as its names suggests, a fusion of the models set out above. It takes parts from each of them. Its main features are as follows:

5.186

- (1) The vast majority of questioning of witnesses is performed by counsel to the inquiry.
- (2) Such questioning is in the nature of mixed examination and cross-examination (and then probing re-examination).
- (3) Counsel for participants feeds to counsel to the inquiry issues, topics, or questions to be pursued in writing in advance of a witness giving evidence.
- (4) Counsel to the inquiry indicates that (i) he will pursue the topic/issue/question with the witness, (ii) counsel for the participant should pursue the topic/issue/question with the witness (in which case no separate application to the chairman to do so need be made), or (iii) the topic/issue/questions cannot be pursued (unless the participant makes an application to the chairman to do so).
- (5) Therefore, there is no general right for counsel for participants to ask questions.
- (6) There is a right for participants to ask questions of their own clients with permission (such general permission having been given by standing written protocol).
- (7) There is a time limit on cross-examination by participants.

5.187 This model was followed in the Baha Mousa Inquiry and is to be followed in the Al Sweady Inquiry.

5.188 The advantages of this model include the following:

- (1) It is in compliance (with cooperation and goodwill by participants) with the 2006 Rules.
- (2) Topics and issues important to participants are, one way or the other, pursued before the chairman.
- (3) A feeling of participation, and therefore fairness, is engendered amongst participants.
- (4) It ensures the smooth running of the inquiry—everyone knows where they are before a witness gives evidence.
- (5) It ensures fairness to witnesses—the notices of questions require full preparation by advocates well in advance of a witness giving evidence: witnesses can be warned of likely areas of criticism in advance of giving evidence.
- (6) Some ‘proper’ cross-examination occurs.
- (7) Counsel to the inquiry is not placed in difficulty by being required to pursue conflicting cases.

5.189 The disadvantages of this model include the following:

- (1) It requires an enormous amount of work by counsel to the inquiry.
- (2) It requires additional administrative support (to handle the volume of incoming and outgoing material).
- (3) It requires discipline by core participants in serving the notices of questions, and sticking to the replies given by counsel to the inquiry.
- (4) It requires the chairman to be interventionist (cf frequency and nature of the chairman’s intervention in the Baha Mousa Inquiry).
- (5) It may add to the cost of the inquiry in that advocates will seek to recover costs for (i) preparation for the notices and (ii) appearances at the inquiry.

5.190 It should be noted that the Hutton Inquiry fitted none of these models. It was conducted in two parts. In the first part, counsel to the inquiry examined the witnesses. There was then a break, during which core participants served notices requesting some witnesses to be recalled for cross-examination, and indicating which topics/issues were to be pursued with them. Counsel to the inquiry and the chairman determined these requests. In the second part, witnesses were cross-examined by counsel to the inquiry and counsel for core participants. These cross-examinations were time limited. This procedure was adopted because of the special circumstances of the inquiry: (i) it needed to begin very quickly after the death of Dr Kelly (so there was no time to proof many witnesses and give proper disclosure—Part 1 served as, effectively, proofing witnesses in the witness box), and (ii) it needed to conclude speedily (so elaborate procedures could not be adopted). This therefore effectively took elements from the restricted and hybrid models described above.

essential that on the very rare occasions when crises of public confidence occur, the evil, if it exists, shall be exposed so that it may be rooted out; or if it does not exist, the public shall be satisfied that in reality there is no substance in the prevalent rumours and suspicions by which they have been disturbed. We are satisfied that this would be difficult if not impossible without public investigation by an inquisitorial Tribunal possessing the powers conferred by the Act of 1921. Such a Tribunal is appointed by Parliament to inquire and report. The task of inquiring cannot be delegated by the Tribunal for it is the Tribunal which is appointed to inquire as well as to report. The public reposes its confidence not in some other body or person but in the Tribunal to make and direct all the necessary searching investigations and to produce the witnesses in order to arrive at the truth. It is only thus that public confidence can be fully restored.

The Royal Commission observed how it was necessary for consideration to be given **9.09** to the need for better safeguards to be put in place to ensure fairness towards those involved in a public inquiry:⁷

During the last 30 years some of the safeguards of our ordinary judicial processes against causing unnecessary pain and injustice to individuals have been incorporated in this inquisitorial procedure. If this procedure is to be retained, it becomes an important part of our duties to consider how these safeguards can be maintained, extended and improved. We are convinced that much can be done to this direction. In the end, however, one must accept that it is impossible to eliminate all risk of personal hurt and injustice. This risk is inherent in any procedure which is effective for arriving at the truth, but the risk can and should be minimised. Even in the normal judicial processes innocent persons are sometimes forced to attend court and give evidence and are subjected to accusations which may be hurtful to them and damaging to their reputations. This is the inevitable price that has to be paid for arriving at the truth. And in matters with which Tribunals of Inquiry are concerned it is vital in the public interest that the truth should be established.

There are important distinctions between inquisitorial procedure and the procedure in an ordinary civil or criminal case. It is inherent in the inquisitorial procedure that there is no *lis*. The Tribunal directs the inquiry and the witnesses are necessarily the Tribunal's witnesses. There is no plaintiff or defendant, no prosecutor or accused; there are no pleadings defining issues to be tried, no charges, indictments, or dispositions. The inquiry may take a fresh turn at any moment. It is therefore difficult for persons involved to know in advance of the hearing what allegations may be made against them.

(b) The six 'cardinal principles'

The Royal Commission suggested that the difficulty and injustice with which persons involved in an inquiry may be faced could be largely removed if the six cardinal principles that it identified were strictly observed.⁸ **9.10** An examination of all the six principles is beyond the scope of this chapter, but the second principle is the

⁷ Ibid, paras 29–30.

⁸ Ibid, para 48.

origin of what thereafter became known as the process of sending 'Salmon letters' and therefore requires specific examination.

(c) The second principle—the requirement to be informed

9.11 The second of the cardinal principles set out in the Salmon Report was that⁹

Before any person who is involved in an inquiry is called as a witness he should be informed of any allegations which are made against him and the substance of the evidence in support of them.

9.12 The process that the Royal Commission recommended for the working out of this principle was as follows:¹⁰

Any potential witness from whom a statement is taken by the Treasury Solicitor should be told that, if he so wishes, his solicitor may be present when the statement is taken. In many cases a witness will not require legal assistance. If, however, he does wish his solicitor to be present he should be given a reasonable opportunity to secure his solicitor's attendance even if this entails a day or two's delay. As soon as possible after he has given his statement, and certainly well in advance, usually not less than seven days before he gives evidence, he should be supplied with a document setting out the allegations against him and the substance of the evidence in support of those allegations.

9.13 It will be seen that the principle requires notice to be given to a person *before* he is called as a witness to the inquiry and that the notice has two parts: (i) a statement of the allegations against him and (ii) disclosure of the substance of the evidence in support of those allegations.

(d) The second principle at work

9.14 Set out below are just two examples of how pre-2005 Act public inquiries dealt with the issue of the implementation of the second principle and the process of issuing Salmon letters.

9.15 The traditional approach is exemplified by the procedures adopted by the Royal Liverpool Children's Inquiry. In 1999 a public inquiry was set up to investigate the removal, retention, and disposal of human organs and tissues following post-mortem examination at the Royal Liverpool Children's Hospital.¹¹ The inquiry issued Salmon letters and said this in its final report:¹²

10. Salmon Letters

10.1 We ensured that before witnesses were called to give evidence they were informed of any general allegations to be made and the substance of the

⁹ Royal Commission on Tribunals of Inquiry (n 5 above), para 32.

¹⁰ Ibid, para 50.

¹¹ See <<http://www.rlcinquiry.org.uk/>>.

¹² *Return to an Address of the Honourable the House of Commons dated January 30 2001 for the Royal Liverpool Children's Inquiry*: see <<http://www.rlcinquiry.org.uk/download/index.htm>>.

evidence in support. This information was contained in an initial letter known as a Salmon letter (a requirement of The Royal Commission on Tribunals of Inquiry) which was served on each witness. A written statement was then provided. The Solicitor to the Inquiry took the statements. Witnesses had the lawyer of their choice present at the interview. They had the opportunity to alter, add to or amend their statements before signing. Where appropriate a more detailed Salmon letter was then served with details of relevant allegations and documents likely to be referred to at the hearing. In Appendix 5 we enclose examples of both an initial and a more detailed Salmon letter.

- 10.2 The purpose of the Salmon letters was to assist witnesses who faced possible criticism to understand the issues which were likely to be raised at the hearing. They were not designed to prejudice issues but merely to give witnesses a full opportunity to consider all matters to be dealt with in evidence. Matters set out in the Salmon letter, but not referred to at the hearing, were not used as the basis for criticism in the Report.

The inquiry helpfully gives examples of the types of letters that it issued at Appendix 5 of its report.¹³ **9.16**

A less-rigid approach was demonstrated in the Inquiry into the Personality Disorder Unit at Ashworth Special Hospital. In 1997 the then Secretary of State for Health established a statutory inquiry under section 84 of the National Health Service Act 1977 to investigate serious allegations of misconduct made by a former patient of the Personality Disorder Unit at Ashworth High Security Hospital. The inquiry reported in 1999.¹⁴ **9.17**

It warned against too rigid an adherence to the Salmon principles, and stated: **9.18**

- 1.7.4 In their Report into Complaints at Ashworth Hospital Sir Louis Blom-Cooper and his team warn against the tendency to interpret the Salmon letter process too rigidly. We agree. There is a lack of precision in the machinery of an inquisitorial inquiry. If this were not so the *raison d'être* for its use would be defeated.
- 1.7.5 We would also note in passing that all of the six Salmon principles are recommendations, rather than rules. As Sir Richard Scott, Vice Chancellor, said in the context of his own Inquiry:

‘... there has been a tendency for the media and some commentators to regard the six cardinal principles in the Salmon Report not as recommendations but as rules. I regard this as an unhelpful approach. The Salmon recommendations are rightly recognized as providing important guidelines to inquiries about how injustice and unfairness to witnesses can be avoided. But ... every inquiry must adapt its procedures to meet its own circumstances.’

Our general procedure, however, was different from that adopted by Sir Richard Scott.

- 1.7.6 In this spirit it must be understood that a Salmon letter is not a precise document. It is intended to help a witness who may be criticized to understand what he may have to address when he gives evidence. It does not however

¹³ Ibid, App 5, pp 510–20.

¹⁴ See <<http://www.archive.official-documents.co.uk/document/cm41/4194/ash4194.htm>>.

circumscribe permitted questioning of a witness, and any attempt by legal representatives to seek to treat it as a quasi-pleading must be resisted.

- 1.7.7 In this Inquiry we were conscious that a large number of individuals could potentially be subject to Salmon letters in relation to relatively minor criticisms. It seemed more appropriate to restrict the use of Salmon letters to more central figures.
- 1.7.8 We adopted a policy of sending those individuals who were judged to be at risk of serious criticism a letter setting out the main areas where the Committee requested their assistance. These letters made clear that further issues might arise during the course of the Inquiry to which individuals would have to respond. We tried to draw these letters as a series of issues or questions.¹⁵

(2) Beyond Salmon—the development of Maxwellisation

- 9.19 In addition to the Salmon letter process that arose out of the implementation of the second cardinal principle, in the 1990s some public inquiries began to adopt a process which has become known as ‘Maxwellisation’.

(a) What is ‘Maxwellisation’?

- 9.20 Mr Justice Burton, in *R v Ministry of Agriculture Fisheries and Food* 2000 WL 1274197, gave a useful summary of the concept of ‘Maxwellisation’ when he remarked that what was being suggested to him was

some form of ‘Maxwellisation’, the phraseology that is used by reference to the well-known entrepreneur, Mr Maxwell, in the 1970s whereby it was formulated by the court in the context of company inspectors’ reports that a draft of the proposed conclusions on the inspector should be sent to someone who might be criticised in that report, so that he or she could have an opportunity of a last minute comment on such criticisms.

- 9.21 In *Maxwell v Department of Trade and Industry* [1974] QB 523 Robert Maxwell alleged that the inspectors carrying out the investigation into the affairs of Pergamon Press Limited had breached the rules of natural justice by failing to give him a draft of their first interim report for comment before it was published. At an interlocutory hearing in the proceedings Mr Justice Forbes, while making no order, expressed the view that the inspectors had breached the rules of natural justice in not forming tentative conclusions and giving the directors an opportunity to comment on them prior to their publication.
- 9.22 However, Mr Justice Wien, who heard the trial of the action, came to the opposite conclusion and found that the inspectors had been eminently fair by giving Mr Maxwell proper notice of what was said against him and a fair opportunity of meeting the criticisms; and that their duty to act fairly did not require them to engage in a third stage of putting their proposed conclusions to the person criticized and considering his answers before making their report.

¹⁵ See <http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4009322> Pt 1.

English law of reputation does not recognize as actionable any injury to reputation falling short of a determination. *Strizhak et al*¹⁰ might wish that signatories to the ECHR would make such injury actionable, but they cannot compel them to do so. Accordingly, the argument vanishes into the margin of appreciation. Since an inquiry determines nothing, Article 6 is not engaged.

More promising is the prospect of Article 8 challenge, and challenges to the ambit of the inquiry under Article 2 and/or by reference to the terms of reference of the inquiry. These are discussed below. **11.13**

C. The Court's Approach in Judicial Review Proceedings

This chapter is no substitute for the standard textbooks on judicial review. All the classic grounds for judicial review discussed in detail in those books could conceivably apply also to public inquiries. They cannot all be listed here, let alone discussed. The sections below on challenges in the course of an inquiry and challenges to the final conclusions of an inquiry do however deal with some of the grounds most likely to be relevant to inquiries. **11.14**

R (A) v Lord Saville of Newdigate [2000] 1 WLR 1855 ('*Saville I*') contains an extensive review of the principles to be applied by the courts in judicial review proceedings involving public inquiries.¹¹ **11.15**

Those principles are as follows: **11.16**

- (1) The tribunal is subject to the supervisory role of the courts.¹²
- (2) The courts 'have to perform that role even though they are naturally loath to do anything which could in any way interfere with or complicate the . . . task of the tribunal'.¹³
- (3) The courts must bear in mind at all times that the members of the inquiry are likely to have a much greater understanding of the inquiry's task than the courts.¹⁴
- (4) The court exercises a discretionary jurisdiction: where this is consistent with the performance of the court's duty it should avoid interfering with the activities of the inquiry to any greater extent than upholding the rule of law that applies.¹⁵

¹⁰ See nn 6 and 8 above.

¹¹ *R (A) v Lord Saville of Newdigate* [2000] 1 WLR 1855, 1865–70.

¹² *Ibid*, 1865.

¹³ *Ibid*.

¹⁴ *Ibid*.

¹⁵ *Ibid*, 1866. See also the decision of the Supreme Court of Ireland in *Flood v Lawlor* [2000] IESC 76, in which it was stated: 'It is not necessary to stress, because it has been repeatedly said in this court, that the courts in interpreting the relevant legislation must afford a significant discretion to the tribunal as to the way in which it conducts these proceedings. It must, of course, observe the

- (5) Because the body being reviewed, rather than the court, has the primary responsibility for making decisions, and that body will generally be better qualified than the court to make the material decisions, an applicant must clear the high bar of the *Wednesbury* test.¹⁶ While it is true that straightforward *Wednesbury* irrationality has been dethroned from its former place as the supreme adjudicator in all judicial review cases, it is likely that in most public inquiry contexts, debates (subject to what is said at (7) below about the criterion of fairness) will continue to be framed in old-fashioned *Wednesbury* terms. It should be remembered, though, that lawyers' reference to the *Wednesbury* test is sometimes rather lazy shorthand for one or more of the other sub-principles which now nestle more or less uncomfortably under the umbrella of irrationality.
- (6) The *Wednesbury* test does not cease to operate simply because an issue of human rights is engaged, but where this is the case the test is that adopted by Sir Thomas Bingham MR in *R v Ministry of Defence, ex p Smith* [1996] QB 517:

The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above.¹⁷

Thus, said the court in *Saville 1*:

What is important to note is that when a fundamental right such as the right to life is engaged, the options available to the reasonable decision-maker are curtailed. They are curtailed because it is unreasonable to reach a decision which contravenes or could contravene human rights unless there are sufficiently significant countervailing considerations. In other words it is not open to the decision-maker to risk interfering with fundamental rights in the absence of compelling justification. Even the broadest discretion is constrained by the need for there to be countervailing circumstances justifying interference with human rights. The courts will anxiously scrutinise the strength of the countervailing circumstances and the degree of the interference with the human right involved and then apply the test accepted by Sir Thomas Bingham MR in *R v Ministry of Defence Ex p Smith* [1996] QB 517 which is not in issue.¹⁸

- (7) An alternative approach, canvassed in *Saville 1*, was to focus not on the issue of *Wednesbury* unreasonableness but on the question of the fairness of the

constitutional rights of the persons who appear before it or upon whom the decisions of the tribunal may impinge but making every allowance for that important qualification the principle remains as indicated'. This passage was cited with approval in *Chief Constable of the Police Service of Northern Ireland, Re Judicial Review* [2008] NIQB 145, para 10, per Girvan LJ.

¹⁶ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

¹⁷ See also *R v Secretary of State for the Home Department, ex p Bugdaycay* [1987] 514; *R v Secretary of State for the Home Department, ex p Brind* [1991] AC 696.

¹⁸ [2000] 1 WLR 1855, 1867.

decision challenged. The Court of Appeal's conclusion on this is not completely clear from its judgment.¹⁹ It is clear, though, that if fairness is to be a (or the) criterion, it must be judged in the round. Thus, for instance, one should not ask only if a decision about anonymity was fair to the military witnesses, but whether it was fair considering the views of all the stakeholders, including the public.²⁰ The court also noted that the conclusion may well be the same whichever of the two approaches is adopted.²¹ This must be right: an unfair approach is likely to be irrational, and an irrational approach is unlikely to be fair. The express requirement of fairness in section 17(3) of the 2005 Act means that unfairness is likely to be equated with irrationality in future litigation. If the courts are unhappy about that equation, we may see a move away from irrationality as the touchstone of liability in judicial review of public inquiry decisions. If that occurs, claims for judicial review will say: 'The decision was unfair: that is a ground for judicial review in itself'; and/or: 'The decision was unfair. Accordingly it was *ultra vires* section 17(3) of the 2005 Act: that is a ground for judicial review'.

The powers and obligations of inquiries constituted under the 2005 Act are now spelled out fairly explicitly in the Act: see particularly sections 8, 9, and 17–23. Given this statutory particularity, it will be increasingly common to see applications for judicial review framed in terms of failure to follow the principles enshrined in these sections. Since the law is now clearer, it will be easier than it once was to assert simple unlawfulness. One important consequence of the nature of the court's review is that new or oral evidence will rarely be helpful or admitted.²² 11.17

D. Challenges to the Inquiry's Procedure

(1) Introduction

Section 17(1) of the 2005 Act provides that: 'Subject to any provision of this Act or of rules under section 41,^[23] the procedure and conduct of an inquiry are to be such 11.18

¹⁹ Ibid, 1868–70.

²⁰ Ibid, 1868.

²¹ Ibid, 1870. In *Saville 1* the Court of Appeal appeared to regard the two tests as interchangeable. For instance: 'We have to form our own judgment as to whether [a decision] is flawed on the grounds of unfairness or lack of reasonableness': *ibid*, 1871.

²² See, eg *Re an application under s 36 of the Inquiries Act 2005* [2009] NIQB 40, para 33, per Gillen J.

²³ Section 41 gives power to the Lord Chancellor (in relation to inquiries for which a UK minister is responsible), the First Minister and deputy First Minister of Northern Ireland acting jointly (in relation to inquiries for which they are responsible), and the Scottish and Welsh ministers respectively (in relation to inquiries for which they are responsible), to make rules dealing with matters of evidence and procedure, with the return or keeping after the end of the inquiry of documents given to or created by the inquiry, and with awards of expenses etc to witnesses and others.

IN THE SHEKU BAYOH PUBLIC INQUIRY

LIST OF AUTHORITIES FOR CRER

RE

APPLICATION FOR RECUSAL ON BEHALF OF (1) THE SCOTTISH POLICE FEDERATION; (2) PC CRAIG
WALKER; AND (3) MS NICOLE SHORT

1. *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119
2. *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451,
3. *National Assembly for Wales v Condon* [2006] EWCA Civ 1573
4. *Helow v Secretary of State for the Home Department* 2009 SC HL 1
5. *R(Associated Newspapers Ltd) v The Right Hon Lord Justice Leveson* [2012] EWHC 57 (Admin)
6. *Resolution Chemicals Ltd v H Lundbeck A/S* [2013] EWCA Civ 1515
7. *Al-Skeini v United Kingdom* (2011) 53 EHRR 18
8. *Turner v The Secretary of State for Communities and Local Government* [2015] EWCA Civ 582
9. *Congregation of the Poor Sisters of Nazareth v Scottish Ministers* 2015 SLT 445
10. *R (Cabinet Office) v Chair of the UK Covid Inquiry* [2024] KB 319

1 A.C.

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[HOUSE OF LORDS]

REGINA v. BOW STREET METROPOLITAN STIPENDIARY
MAGISTRATE AND OTHERS, *Ex parte* PINOCHET UGARTE (No. 2)

1998 Dec. 15, 16, 17;

Lord Browne-Wilkinson, Lord Goff of Chieveley,

1999 Jan. 15

Lord Nolan, Lord Hope of Craighead
and Lord Hutton

B

Natural Justice—Bias—Judge in own cause—Request for extradition of former head of state for human rights crimes—Applicant claiming immunity—Human rights body joined as party to proceedings—Judge unpaid director and chairman of charity closely linked to human rights body—Connection not disclosed to parties—Whether judge automatically disqualified—Whether appearance of bias

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The applicant, a former head of state of Chile who was on a visit to London, was arrested under warrants issued pursuant to section 8(1) of the Extradition Act 1989 following receipt of international warrants of arrest issued by a Spanish court alleging various crimes against humanity, including murder, hostage-taking and torture, committed during the applicant's period of office and for which he was knowingly responsible. The Divisional Court quashed the warrants on the ground, *inter alia*, that as a former head of state he was immune from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was head of state. The quashing of the second warrant was stayed pending an appeal to the House of Lords by the prosecuting authorities on the issue of the immunity enjoyed by a former head of state. Before the main hearing A.I., a human rights body which had campaigned against the applicant, obtained leave to intervene in the appeal and was represented by counsel in the proceedings. The appeal was allowed by a majority of three to two and the second warrant was restored pending a decision by the Home Secretary whether to issue an authority to proceed pursuant to section 7(1) of the Act. Subsequently the applicant's advisers discovered that one of the judges who had been part of the majority was, although not a member of A.I., an unpaid director and chairman of A.I.C. Ltd., a charity which was wholly controlled by A.I. and carried on that part of its work which was charitable. One of the objects of A.I.C. Ltd. was to procure the abolition of torture, extra-judicial execution and disappearance. The Home Secretary signed the authority to proceed.

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On a petition by the applicant for the House of Lords to set aside its previous decision on the ground of apparent bias on the part of the judge:—

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Held, granting the petition, that as the ultimate court of appeal the House had power to correct any injustice caused by one of its earlier orders; that the fundamental principle that a man may not be a judge in his own cause was not limited to the automatic disqualification of a judge who had a pecuniary interest in the outcome of a case but was equally applicable if the judge's decision would lead to the promotion of a cause in which he was involved together with one of the parties; that, although the judge could not personally be regarded as having been a party to the appeal, A.I., which had been a party with the interest of securing the extradition of the applicant to Spain, and A.I.C. Ltd. were both parts of a movement working towards the same goals; that in order to maintain the absolute impartiality of the judiciary

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Reg. v. Bow Street Magistrate, Ex p. Pinochet (No. 2) (H.L.(E.)) [2000]

there had to be a rule which automatically disqualified a judge who was involved, whether personally or as a director of a company, in promoting the same causes in the same organisation as was a party to the suit; and that, accordingly, the earlier decision of the House would be set aside (post, pp. 132D, 134B-E, 135A-F, 139B-140A, 142E-143F, 146E-F).

Dimes v. Proprietors of Grand Junction Canal (1852) 3 H.L. Cas. 759, H.L.(E.) applied.

Decision of the House of Lords [2000] 1 A.C. 61 [1998] 3 W.L.R. 1456; [1998] 4 All E.R. 897 set aside.

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The following cases are referred to in their Lordships' opinions:

Bradford v. McLeod, 1986 S.L.T. 244

Broome v. Cassell & Co. Ltd. (No. 2) [1972] A.C. 1136; [1972] 2 W.L.R. 1214; [1972] 2 All E.R. 849, H.L.(E.)

C

Dimes v. Proprietors of Grand Junction Canal (1852) 3 H.L. Cas. 759, H.L.(E.)

Doherty v. McGlennan, 1997 S.L.T. 444

Frome United Breweries Co. Ltd. v. Bath Justices [1926] A.C. 586, H.L.(E.)

Law v. Chartered Institute of Patent Agents [1919] 2 Ch. 276

London and North-Western Railway Co. v. Lindsay (1858) 3 Macq. 99, H.L.(Sc.)

McGovern v. Attorney-General [1982] Ch. 321; [1981] 2 W.L.R. 222; [1981] 3 All E.R. 493

D

Reg. v. Altrincham Justices, Ex parte N. Pennington [1975] Q.B. 549; [1975] 2 W.L.R. 450; [1975] 2 All E.R. 78, D.C.

Reg. v. Fraser (1893) 9 T.L.R. 613, D.C.

Reg. v. Gough [1993] A.C. 646; [1993] 2 W.L.R. 883; [1993] 2 All E.R. 724, H.L.(E.)

Reg. v. Inner West London Coroner, Ex parte Dallaglio [1994] 4 All E.R. 139, C.A.

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Reg. v. Rand (1866) L.R. 1 Q.B. 230

Rex v. Sussex Justices, Ex parte McCarthy [1924] 1 K.B. 256, D.C.

Sellar v. Highland Railway Co., 1919 S.C.(H.L.) 19, H.L.(Sc.)

Webb v. The Queen (1994) 181 C.L.R. 41

F

The following additional cases were cited in argument:

Amnesty International, Ex parte, The Times, 11 December 1998, D.C.

Auckland Casino Ltd. v. Casino Control Authority [1995] 1 N.Z.L.R. 142

B. v. W. (Wardship: Appeal) [1979] 1 W.L.R. 1041; [1979] 3 All E.R. 83, H.L.(E.)

B.O.C. New Zealand Ltd. v. Trans Tasman Properties Ltd. [1997] N.Z.A.R. 49

Campbell and Fell v. United Kingdom (1984) 7 E.H.R.R. 165

De Cubber v. Belgium (1984) 7 E.H.R.R. 236

Gregory v. United Kingdom (1997) 25 E.H.R.R. 577

Hauschildt v. Denmark (1989) 12 E.H.R.R. 266

Holm v. Sweden (1993) 18 E.H.R.R. 79

Kennedy and Carhill, In the marriage of (1995) F.L.C. 92-605

Langborger v. Sweden (1989) 12 E.H.R.R. 416

Pfeifer and Plankl v. Austria (1992) 14 E.H.R.R. 692

Porter v. Magill (1997) 96 L.G.R. 157, D.C.

Reg. v. Camborne Justices, Ex parte Pearce [1955] 1 Q.B. 41; [1954] 3 W.L.R. 415; [1954] 2 All E.R. 850, D.C.

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1 A.C. **Reg. v. Bow Street Magistrate, Ex p. Pinochet (No. 2) (H.L.(E.))**

- A *Reg. v. Chairman of the Town Planning Board, Ex parte Mutual Luck Investment Ltd.* (1995) 5 H.K.P.L.R. 328
Reg. v. Devon County Council, Ex parte Baker [1995] 1 All E.R. 73; 91 L.G.R. 479, C.A.
Reg. v. Khan (Sultan) [1997] A.C. 558; [1996] 3 W.L.R. 162; [1996] 3 All E.R. 289, H.L.(E.)
Reg. v. Nailsworth Licensing Justices, Ex parte Bird [1953] 1 W.L.R. 1046; [1953] 2 All E.R. 652, D.C.
- B *Reg. v. Radio Authority, Ex parte Bull* [1998] Q.B. 294; [1997] 3 W.L.R. 1094; [1997] 2 All E.R. 561, C.A.
R. v. S. (R.D.) (1997) 151 D.L.R. (4th) 193
Reg. v. Secretary of State for the Environment, Ex parte Kirkstall Valley Campaign Ltd. [1996] 3 All E.R. 304
Reg. v. Secretary of State for the Home Department, Ex parte Doody [1994] 1 A.C. 531; [1993] 3 W.L.R. 154; [1993] 3 All E.R. 92, H.L.(E.)
- C *Thomas v. University of Bradford (No. 2)* [1992] 1 All E.R. 964

PETITION

- D This was an application by Senator Augusto Pinochet Ugarte to set aside the decision of the House of Lords (Lord Nicholls of Birkenhead, Lord Steyn and Lord Hoffmann; Lord Slynn of Hadley and Lord Lloyd of Berwick dissenting) of 25 November 1998 allowing an appeal by the Commissioner of Police of the Metropolis and the Government of Spain against a decision of the Divisional Court (Lord Bingham C.J., Collins and Richards JJ.) dated 28 October 1998 granting an order of certiorari to quash a warrant issued pursuant to section 8(1) of the Extradition Act 1989 at the request of the Central Court of Criminal Proceedings No. 5, Madrid, by Ronald Bartle, Bow Street Metropolitan Stipendiary Magistrate. The ground of the application was that the links between Lord Hoffmann and Amnesty International, an intervener in the proceedings, were such as to give the appearance that he might have been biased against the applicant. Leave to intervene was given to Amnesty International.

The facts are stated in the opinion of Lord Browne-Wilkinson.

- F *Clive Nicholls Q.C., Clare Montgomery Q.C., Helen Malcolm, James Cameron and Julian B. Knowles* for the applicant.
Montgomery Q.C. The jurisdiction of the House to hear the application was not in any real dispute. The decision had international implications and required acceptance by the wider international community. The links between the judge and Amnesty International, which were not disclosed prior to the hearing and not known to the applicant's legal advisors, were such as to undermine confidence in the decision. For examples of Amnesty International's charitable objectives: see *McGovern v. Attorney-General* [1982] Ch. 321. For an example of how the non-charitable parts of Amnesty International have continuously campaigned against the applicant: see *Ex parte Amnesty International*, The Times, 11 December 1998.
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A failure of disclosure is a relevant factor in deciding whether justice was seen to be done although it does not necessarily vitiate the decision. It cannot be seriously suggested that there is a duty on the applicant's

solicitors to trawl around for information and request disclosure: see *Shetreet, Judges on Trial* (1976), pp. 305–306, 308, 311; *In the marriage of Kennedy and Carhill* (1995) F.L.C. 92–605.

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It is doubtful whether the test established in *Reg. v. Gough* [1993] A.C. 646, of a real “danger of bias” meets the objective of the common law rule which is to preserve the appearance of non-bias rather than the fact of non-bias as determined by the court (see how the test in *Gough* has been interpreted in, for example, *Reg. v. Inner West London Coroner, Ex parte Dallaglio* [1994] 4 All E.R. 139, 151, 161). The court cannot rely on its knowledge of the integrity of the judge concerned to outweigh the appearance of bias to the eye of the bystander. The reference point must remain the reasonable observer. This is consistent with the test laid down under article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969): see *Harris, O’Boyle, Warbrick, Law of the European Convention on Human Rights* (1995), p. 235; *Hauschildt v. Denmark* (1989) 12 E.H.R.R. 266; *Langborger v. Sweden* (1989) 12 E.H.R.R. 416 and *Holm v. Sweden* (1993) 18 E.H.R.R. 79. Impartiality and independence are different concepts, one is sub group of the other. The position under article 6(1) should be the position under English law: see *Reg. v. Sultan Khan* [1997] A.C. 558 and *Porter v. Magill* (1997) 96 L.G.R. 157.

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The New Zealand courts have preferred to follow the Australian case of *Webb v. The Queen* (1994) 181 C.L.R. 41 rather than *Reg. v. Gough* [1993] A.C. 646: see *B.O.C. New Zealand Ltd. v. Trans Tasman Properties Ltd.* [1997] N.Z.A.R. 49. For the Canadian approach see: *Reg. v. S. (R.D.)* (1997) 151 D.L.R. (4th) 193. The court in *Reg. v. Gough* [1993] A.C. 646 was not referred to the Australian authorities nor even to the Scottish case of *Bradford v. McLeod*, 1986 S.L.T. 244.

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A high standard should apply to the higher courts. At the lower levels local interests can involve everyone in the area at the higher level there is no need for any conflict of interest.

The applicant could not be said to have waived any objection he had to the judge by his subsequent actions. The connection with Amnesty International was not a matter of public record and the parties had been entitled to assume there was no such connection. Even if there was a waiver there is the issue of public interest in seeing that the judiciary is acting fairly and a duty on the House to see that confidence is maintained.

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The application cannot be regarded as an abuse of process by reason of delay. Between the date of knowledge of the connection to the point of issuing proceedings there were practical problems and time was spent in investigating the facts.

G

The appropriate test is whether a fair minded observer with knowledge of the relevant facts would have a suspicion of bias. Non-disclosure alone is a procedural impropriety which is sufficient to raise such suspicion.

Alun Jones Q.C., David Elvin, James Lewis, Campaspe Lloyd-Jacob and James Maurici for the Commissioner of Police and the Government of Spain. The applicant raised the issue of bias with the Secretary of State before issuing the present petition. Very strong representations were made to the Secretary of State urging him to disregard the decision of the House and refuse to issue an authority to proceed. All the facts which the

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A applicant relies on now were known to his advisers then yet the submissions to the Secretary of State suggest that he is the only person who can uphold this point.

In effect by taking that course of action the applicant had elected to pursue his grievance before the Secretary of State rather than the House: see *Auckland Casino Ltd. v. Casino Control Authority* [1995] 1 N.Z.L.R. 142; *Reg. v. Nailsworth Licensing Justices, Ex parte Bird* [1953] 1 W.L.R. 1046; B *Thomas v. University of Bradford (No. 2)* [1992] 1 All E.R. 964 and *Reg. v. Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41. It was only after the Secretary of State had made his decision that the current petition was issued. This raises issues of waiver, abuse of process and acquiescence.

The applicant's advisers had denied having any knowledge of the link between the judge and Amnesty International yet it is clear that at least C two of them had some knowledge of the connection. That is surely relevant to the discretionary aspects of relief because if one is complaining about non-disclosure one should have regard to one's own position.

Applying the "real danger of bias" test laid down in *Reg. v. Gough* [1993] A.C. 646 to the facts in the case it was clear that there was no such danger. The duty of disclosure is subsumed in the *Gough* test. The test propounded in *Reg. v. S. (R.D.)* (1997) 151 D.L.R. (4th) 193 of a D "reasonable apprehension of bias" is effectively the same as the *Gough* test. That case also establishes that it is accepted that a judge brings his attitudes, experiences and views to the job.

The judge's involvement with the Amnesty International charity is an embodiment of his broader approach to the law which he brings to his decision making. Being against torture can hardly be regarded as bias. The E applicant's real objection is to the judge's perceived liberal instincts. The fact that the subject matter of the complaint has a personal link with an organisation which has interests in the outcome of the decision is not determinative of there being a "real danger" of bias: see *Reg. v. Chairman of the Town Planning Board, Ex parte Mutual Luck Investment Ltd.* (1995) 5 H.K.P.L.R. 328; *Reg. v. Secretary of State for the Environment, Ex parte Kirkstall Valley Campaign Ltd.* [1996] 3 All E.R. 304.

F New Zealand, Canada and Hong Kong have all applied and followed the *Gough* approach. See also the discussion in *Shetreet, Judges on Trial* (1976), pp. 305–306.

Elvin following. The requirement of article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms reflects principles already deeply embodied in the common law. Accordingly, nothing of substance is added by invocation of article 6(1). G This can be seen from consideration of the two interrelated elements of article 6(1), the requirements for a tribunal which is both independent and impartial. The requirement of independence has an objective test and focuses on the structural and compositional aspects of the tribunal. Impartiality means lack of prejudice or bias and has a subjective test.

H The European Court of Human Rights has not suggested that there is a duty of disclosure. It has said that if there is a ground for concern (after consideration of the objective and subjective tests) the judge must withdraw. As such it is the equivalent of the actual bias test under English law as described in *Reg. v. Gough* [1993] A.C. 646: see *Campbell and Fell*

v. United Kingdom (1984) 7 E.H.R.R. 165; *De Cubber v. Belgium* (1984) 7 E.H.R.R. 236; *Gregory v. United Kingdom* (1997) 25 E.H.R.R. 577, 584; *Reg. v. Devon County Council, Ex parte Baker* [1995] 1 All E.R. 73, 88; *Reg. v. Secretary of State for the Environment, Ex parte Kirkstall Valley Campaign Ltd.* [1996] 3 All E.R. 304. The European Court of Human Rights has ruled that the right to an impartial tribunal may be waived: see *Pfeifer and Plankl v. Austria* (1992) 14 E.H.R.R. 692.

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Reg. v. Secretary of State for the Home Department, Ex parte Doody [1994] 1 A.C. 531 and *B. v. W. (Wardship: Appeal)* [1979] 1 W.L.R. 1041 were straightforward cases of failure to disclose evidence and do not have any wider application.

B

The *Gough* test concerns the appearance of bias to a reasonable observer not to one of the parties. *Auckland Casino Ltd. v. Casino Control Authority* [1995] 1 N.Z.L.R. 142 and *Reg. v. S. (R.D.)* (1997) 151 D.L.R. (4th) 193 are both consistent with the *Gough* test.

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Peter Duffy Q.C., Owen Davies and David Scorey for Amnesty International. There are many differences between Amnesty International and Amnesty International Charity Ltd.: see *McGovern v. Attorney-General* [1982] Ch. 321. For the sum total of Amnesty International's activities which are charitable see *Reg. v. Radio Authority, Ex parte Bull* [1998] Q.B. 294.

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Amnesty International supports the position of challenging trials vitiated by bias. The issue is: what constitutes bias? It is in the public benefit for judges to be involved with charities. It cannot be that if a judge is involved with a charity which is concerned with grave human rights violations he is thereby excluded from sitting in a case in which human rights issues arise. The issue of disclosure only arises if there is an issue which needs to be disclosed. Is it necessary or desirable that a ritual should be gone through whereby judges disclose their connections with every human rights body? Charitable objectives are by definition nonpolitical and in the public interest. A judges relationship with a charity and support for its objectives should not be investigated or under suspicion.

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Montgomery Q.C. in reply. The whole argument about waiver or election is based on the false premise that the Secretary of State is an alternative remedy to petitioning the House. They are in fact parallel remedies involving different standards and tests.

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The provision of an impartial tribunal is a duty and cannot therefore be waived. Rights can be waived not duties: see *Pfeifer and Plankl v. Austria* (1992) 14 E.H.R.R. 692.

The House has indulged in no investigation of the background facts. The House cannot therefore declare on what actually occurred and has to deal only with the appearance of what occurred. A judge must not hear a case involving a matter which a charity of which he is a director is sworn to abolish in circumstances where a company closely related to that charity is an intervener in the case.

G

The duty of disclosure is established by practice. It is not just one of the incidents of a fair trial but lies at the heart of the matter: see *Reg. v. Devon County Council, Ex parte Baker* [1995] 1 All E.R. 73. The test must be that information should be disclosed which would give rise to the apprehension of bias on the part of a reasonable man in the shoes of one

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A of the parties. That is a free standing ground on which relief should be granted. *Reg. v. Secretary of State for the Home Department, Ex parte Doody* [1994] 1 A.C. 531 and *B. v. W. (Wardship: Appeal)* [1979] 1 W.L.R. 1041 show that a failure to disclose relevant information can undermine a decision.

B There is an important distinction between the appearance of bias (the actuality) and the apprehension of bias (the subjective view). *Reg. v. Gough* [1993] A.C. 646 has plainly been misunderstood as it is taken to mean that the relevant issue is only the actuality rather than the appearance. However, it is the appearance of bias to the public and the party concerned which is relevant. If that fear of bias is justified, even if knowledge of the facts would vitiate that fear, then the test of bias has been satisfied. In the instant case the judge was identified or apparently
C identified with the policy objectives of one side's case: see *Reg. v. S. (R.D.)* (1997) 151 D.L.R. (4th) 193, 227. That appearance of bias cannot stand.

Their Lordships took time for consideration.

17 December 1998. Their Lordships granted the application for reasons to be given later.

D 15 January 1999. LORD BROWNE-WILKINSON. My Lords,

Introduction

E This petition has been brought by Senator Pinochet to set aside an order made by your Lordships on 25 November 1998. It is said that the links between one of the members of the Appellate Committee who heard the appeal, Lord Hoffmann, and Amnesty International ("A.I.") were such as to give the appearance that he might have been biased against Senator Pinochet. On 17 December 1998 your Lordships set aside the order of 25 November 1998 for reasons to be given later. These are the reasons that led me to that conclusion.

F *Background facts*

Senator Pinochet was the head of state of Chile from 11 September 1973 until 11 March 1990. It is alleged that during that period there took place in Chile various crimes against humanity (torture, hostage taking and murder) for which he was knowingly responsible.

G In October 1998 Senator Pinochet was in this country receiving medical treatment. In October and November 1998 the judicial authorities in Spain issued international warrants for his arrest to enable his extradition to Spain to face trial for those alleged offences. The Spanish Supreme Court has held that the courts of Spain have jurisdiction to try him. Pursuant to those international warrants, on 16 and 23 October 1998 metropolitan stipendiary magistrates issued two provisional warrants for his arrest under section 8(1)(b) of the Extradition Act 1989. Senator
H Pinochet was arrested. He immediately applied to the Queen's Bench Divisional Court to quash the warrants. The warrant of 16 October was quashed and nothing further turns on that warrant. The second warrant of 23 October 1998 was quashed by an order of the Divisional Court of the

Queen's Bench Division (Lord Bingham of Cornhill C.J., Collins and Richards JJ.) However, the quashing of the second warrant was stayed to enable an appeal to be taken to your Lordships' House [2000] 1 A.C. 61 on the question certified by the Divisional Court as to "the proper interpretation and scope of the immunity enjoyed by a former head of state from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was head of state."

As that question indicates, the principle point at issue in the main proceedings in both the Divisional Court and this House was as to the immunity, if any, enjoyed by Senator Pinochet as a *past* head of state in respect of the crimes against humanity for which his extradition was sought. The Crown Prosecution Service ("C.P.S.") (which is conducting the proceedings on behalf of the Spanish Government) while accepting that a foreign head of state would, during his tenure of office, be immune from arrest or trial in respect of the matters alleged, contends that once he ceased to be head of state his immunity for crimes against humanity also ceased and he can be arrested and prosecuted for such crimes committed during the period he was head of state. On the other side, Senator Pinochet contends that his immunity in respect of acts done whilst he was head of state persists even after he has ceased to be head of state. The position therefore is that if the view of the C.P.S. (on behalf of the Spanish Government) prevails, it was lawful to arrest Senator Pinochet in October and (subject to any other valid objections and the completion of the extradition process) it will be lawful for the Secretary of State in his discretion to extradite Senator Pinochet to Spain to stand trial for the alleged crimes. If, on the other hand, the contentions of Senator Pinochet are correct, he has at all times been and still is immune from arrest in this country for the alleged crimes. He could never be extradited for those crimes to Spain or any other country. He would have to be immediately released and allowed to return to Chile as he wishes to do.

The court proceedings

The Divisional Court having unanimously quashed the provisional warrant of 23 October on the ground that Senator Pinochet was entitled to immunity, he was thereupon free to return to Chile subject only to the stay to permit the appeal to your Lordships' House. The matter proceeded to your Lordships' House with great speed. It was heard on 4, 5 and 9–12 November 1998 by a committee consisting of Lord Slynn of Hadley, Lord Lloyd of Berwick, Lord Nicholls of Birkenhead, Lord Steyn and Lord Hoffmann. However, before the main hearing of the appeal, there was an interlocutory decision of the greatest importance for the purposes of the present application. Amnesty International ("A.I."), two other human rights bodies and three individuals petitioned for leave to intervene in the appeal. Such leave was granted by a committee consisting of Lord Slynn, Lord Nicholls and Lord Steyn subject to any protest being made by other parties at the start of the main hearing. No such protest having been made A.I. accordingly became an intervener in the appeal. At the hearing of the appeal A.I. not only put in written submissions but was also represented by counsel, Professor Brownlie, Michael Fordham, Owen Davies and

A Frances Webber. Professor Brownlie addressed the committee on behalf of A.I. supporting the appeal.

The hearing of this case, both before the Divisional Court and in your Lordships' House, produced an unprecedented degree of public interest not only in this country but worldwide. The case raises fundamental issues of public international law and their interaction with the domestic law of this country. The conduct of Senator Pinochet and his regime have been highly contentious and emotive matters. There are many Chileans and supporters of human rights who have no doubt as to his guilt and are anxious to bring him to trial somewhere in the world. There are many others who are his supporters and believe that he was the saviour of Chile. Yet a third group believe that, whatever the truth of the matter, it is a matter for Chile to sort out internally and not for third parties to interfere in the delicate balance of contemporary Chilean politics by seeking to try him outside Chile.

This wide public interest was reflected in the very large number attending the hearings before the Appellate Committee including representatives of the world press. The Palace of Westminster was picketed throughout. The announcement of the final result gave rise to worldwide reactions. In the eyes of very many people the issue was not a mere legal issue but whether or not Senator Pinochet was to stand trial and therefore, so it was thought, the cause of human rights triumph. Although the members of the Appellate Committee were in no doubt as to their function, the issue for many people was one of moral, not legal, right or wrong.

E *The decision and afterwards*

Judgment in your Lordships' House was given on 25 November 1998. The appeal was allowed by a majority of three to two and your Lordships' House restored the second warrant of 23 October 1998. Of the majority, Lord Nicholls and Lord Steyn each delivered speeches holding that Senator Pinochet was not entitled to immunity; Lord Hoffmann agreed with their speeches but did not give separate reasons for allowing the appeal. Lord Slynn and Lord Lloyd each gave separate speeches setting out the reasons for their dissent.

As a result of this decision, Senator Pinochet was required to remain in this country to await the decision of the Home Secretary whether to authorise the continuation of the proceedings for his extradition under section 7(1) of the Extradition Act 1989. The Home Secretary had until 11 December 1998 to make that decision, but he required anyone wishing to make representations on the point to do so by the 30 November 1998.

The link between Lord Hoffmann and A.I.

H It appears that neither Senator Pinochet nor (save to a very limited extent) his legal advisers were aware of any connection between Lord Hoffmann and A.I. until after the judgment was given on 25 November. Two members of the legal team recalled that they had heard rumours that Lord Hoffmann's wife was connected with A.I. in some way. During the Newsnight programme on television on 25 November, an allegation to

that effect was made by a speaker in Chile. On that limited information the representations made on Senator Pinochet's behalf to the Home Secretary on 30 November drew attention to Lady Hoffmann's position and contained a detailed consideration of the relevant law of bias. It then read:

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"It is submitted therefore that the Secretary of State should not have any regard to the decision of Lord Hoffmann. The authorities make it plain that this is the appropriate approach to a decision that is affected by bias. Since the bias was in the House of Lords, the Secretary of State represents the senator's only domestic protection. Absent domestic protection the senator will have to invoke the jurisdiction of the European Court of Human Rights."

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After the representations had been made to the Home Office, Senator Pinochet's legal advisers received a letter dated 1 December 1998 from the solicitors acting for A.I. written in response to a request for information as to Lord Hoffmann's links. The letter of 1 December, so far as relevant, reads as follows:

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"Further to our letter of 27 November, we are informed by our clients, Amnesty International, that Lady Hoffmann has been working at their international secretariat since 1977. She has always been employed in administrative positions, primarily in their department dealing with press and publications. She moved to her present position of programme assistant to the director of the media and audio visual programme when this position was established in 1994. Lady Hoffmann provides administrative support to the programme, including some receptionist duties. She has not been consulted or otherwise involved in any substantive discussions or decisions by Amnesty International, including in relation to the Pinochet case."

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On 7 December a man anonymously telephoned Senator Pinochet's solicitors alleging that Lord Hoffmann was a director of the Amnesty International Charitable Trust. That allegation was repeated in a newspaper report on 8 December. Senator Pinochet's solicitors informed the Home Secretary of these allegations. On 8 December they received a letter from the solicitors acting for A.I. dated 7 December which reads, so far as relevant, as follows:

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"On further consideration, our client, Amnesty International have instructed us that after contacting Lord Hoffmann over the weekend both he and they believe that the following information about his connection with Amnesty International's charitable work should be provided to you. Lord Hoffmann is a director and chairperson of Amnesty International Charity Ltd. ('A.I.C.L.'), a registered charity incorporated on 7 April 1986 to undertake those aspects of the work of Amnesty International Ltd. ('A.I.L.') which are charitable under U.K. law. A.I.C.L. files reports with Companies House and the Charity Commissioners as required by U.K. law. A.I.C.L. funds a proportion of the charitable activities undertaken independently by

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- A A.I.L. A.I.L.'s board is composed of Amnesty International's Secretary General and two Deputy Secretaries General. Since 1990 Lord Hoffmann and Peter Duffy Q.C. have been the two directors of A.I.C.L. They are neither employed nor remunerated by either A.I.C.L. or A.I.L. They have not been consulted and have not had any other role in Amnesty International's interventions in the case of Pinochet. Lord Hoffmann is not a member of Amnesty International.
- B In addition, in 1997 Lord Hoffmann helped in the organisation of a fund raising appeal for a new building for Amnesty International U.K. He helped organise this appeal together with other senior legal figures, including the Lord Chief Justice, Lord Bingham. In February your firm contributed £1,000 to this appeal. You should also note that in 1982 Lord Hoffmann, when practising at the Bar, appeared in the Chancery Division for Amnesty International U.K."
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Further information relating to A.I.C.L. and its relationship with Lord Hoffmann and A.I. is given below. Mr. Alun Jones for the C.P.S. does not contend that either Senator Pinochet or his legal advisers had any knowledge of Lord Hoffmann's position as a director of A.I.C.L. until receipt of that letter.

- D Senator Pinochet's solicitors informed the Home Secretary of the contents of the letter dated 7 December. The Home Secretary signed the authority to proceed on 9 December 1998. He also gave reasons for his decision, attaching no weight to the allegations of bias or apparent bias made by Senator Pinochet.

- E On 10 December 1998, Senator Pinochet lodged the present petition asking that the order of 25 November 1998 should either be set aside completely or the opinion of Lord Hoffmann should be declared to be of no effect. The sole ground relied upon was that Lord Hoffmann's links with A.I. were such as to give the appearance of possible bias. It is important to stress that Senator Pinochet makes no allegation of *actual bias* against Lord Hoffmann; his claim is based on the requirement that justice should be seen to be done as well as actually being done. There is no allegation that any other member of the committee has fallen short in the performance of his judicial duties.
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Amnesty International and its constituent parts

- G Before considering the arguments advanced before your Lordships, it is necessary to give some detail of the organisation of A.I. and its subsidiary and constituent bodies. Most of the information which follows is derived from the directors' reports and notes to the accounts of A.I.C.L. which have been put in evidence.

- H A.I. itself is an unincorporated, non-profit-making organisation founded in 1961 with the object of securing throughout the world the observance of the provisions of the Universal Declaration of Human Rights in regard to prisoners of conscience. It is regulated by a document known as the statute of Amnesty International. A.I. consists of sections in different countries throughout the world and its international headquarters in London. Delegates of the sections meet periodically at the international council meetings to coordinate their activities and to elect an international

executive committee to implement the council's decisions. The international headquarters in London is responsible to the international executive committee. It is funded principally by the sections for the purpose of furthering the work of A.I. on a worldwide basis and to assist the work of sections in specific countries as necessary. The work of the international headquarters is undertaken through two United Kingdom registered companies, Amnesty International Ltd. ("A.I.L.") and Amnesty International Charity Ltd. ("A.I.C.L.").

A.I.L. is an English limited company incorporated to assist in furthering the objectives of A.I. and to carry out the aspects of the work of the international headquarters which are not charitable.

A.I.C.L. is a company limited by guarantee and also a registered charity. In *McGovern v. Attorney-General* [1982] Ch. 321, Slade J. held that a trust established by A.I. to promote certain of its objects was not charitable because it was established for political purposes; however the judge indicated that a trust for research into the observance of human rights and the dissemination of the results of such research could be charitable. It appears that A.I.C.L. was incorporated on 7 April 1986 to carry out such of the purposes of A.I. as were charitable. Clause 3 of the memorandum of association of A.I.C.L. provides:

"Having regard to the statute for the time being of Amnesty International, the objects for which the company is established are: (a) To promote research into the maintenance and observance of human rights and to publish the results of such research. (b) To provide relief to needy victims of breaches of human rights by appropriate charitable (and in particular medical, rehabilitational or financial) assistance. (c) To procure the abolition of torture, extra-judicial execution and disappearance . . ."

Under article 3(a) of A.I.C.L. the members of the company are all the elected members for the time being of the international executive committee of Amnesty International and nobody else. The directors are appointed by and removable by the members in general meetings. Since 8 December 1990 Lord Hoffmann and Mr. Duffy have been the sole directors, Lord Hoffmann at some stage becoming the chairperson.

There are complicated arrangements between the international headquarters of A.I., A.I.C.L. and A.I.L. as to the discharge of their respective functions. From the reports of the directors and the notes to the annual accounts, it appears that, although the system has changed slightly from time to time, the current system is as follows. The international headquarters of A.I. are in London and the premises are, at least in part, shared with A.I.C.L. and A.I.L. The conduct of A.I.'s international headquarters is (subject to the direction of the international executive committee) in the hands of A.I.L. A.I.C.L. commissions A.I.L. to undertake charitable activities of the kind which fall within the objects of A.I. The directors of A.I.C.L. then resolve to expend the sums that they have received from A.I. sections or elsewhere in funding such charitable work as A.I.L. performs. A.I.L. then reports retrospectively to A.I.C.L. as to the moneys expended and A.I.C.L. votes sums to A.I.L. for such part of A.I.L.'s work as can properly be regarded as charitable. It was confirmed

A in the course of argument that certain work done by A.I.L. would therefore be treated as in part done by A.I.L. on its own behalf and in part on behalf of A.I.C.L.

I can give one example of the close interaction between the functions of A.I.C.L. and A.I. The report of the directors of A.I.C.L. for the year ended 31 December 1993 records that A.I.C.L. commissioned A.I.L. to carry out charitable activities on its behalf and records as being included in the work of A.I.C.L. certain research publications. One such publication related to Chile and referred to a report issued as an A.I. report in 1993. Such 1993 report covers not only the occurrence and nature of breaches of human rights within Chile, but also the progress of cases being brought against those alleged to have infringed human rights by torture and otherwise in the courts of Chile. It records that "no one was convicted during the year for past human rights violations. The military courts continued to claim jurisdiction over human rights cases in civilian courts and to close cases covered by the 1978 Amnesty law." It also records "Amnesty International continued to call for full investigation into human rights violations and for those responsible to be brought to justice. The organisation also continued to call for the abolition of the death penalty." Again, the report stated that "Amnesty International included references to its concerns about past human rights violations against indigenous peoples in Chile and the lack of accountability of those responsible." Therefore A.I.C.L. was involved in the reports of A.I. urging the punishment of those guilty in Chile for past breaches of human rights and also referring to such work as being part of the work that it supported.

E The directors of A.I.C.L. do not receive any remuneration. Nor do they take any part in the policy-making activities of A.I. Lord Hoffmann is not a member of A.I. or of any other body connected with A.I.

F In addition to the A.I. related bodies that I have mentioned, there are other organisations which are not directly relevant to the present case. However, I should mention another charitable company connected with A.I. and mentioned in the papers, namely, "Amnesty International U.K. Section Charitable Trust" registered as a company under number 3139939 and as a charity under 1051681. That was a company incorporated in 1995 and, so far as I can see, has nothing directly to do with the present case.

The parties' submissions

G Miss Montgomery in her very persuasive submissions on behalf of Senator Pinochet contended (1) that, although there was no exact precedent, your Lordships' House must have jurisdiction to set aside its own orders where they have been improperly made, since there is no other court which could correct such impropriety; (2) that (applying the test in *Reg. v. Gough* [1993] A.C. 646) the links between Lord Hoffmann and A.I. were such that there was a real danger that Lord Hoffmann was biased in favour of A.I. or alternatively (applying the test in *Webb v. The Queen* (1994) 181 C.L.R. 41) that such links give rise to a reasonable apprehension or suspicion on the part of a fair minded and informed member of the public that Lord Hoffmann might have been so biased.

On the other side, Mr. Alun Jones accepted that your Lordships had power to revoke an earlier order of this House but contended that there was no case for such revocation here. The applicable test of bias, he submitted, was that recently laid down by your Lordships in *Reg. v. Gough* and it was impossible to say that there was a real danger that Lord Hoffmann had been biased against Senator Pinochet. He further submitted that, by relying on the allegations of bias in making submissions to the Home Secretary, Senator Pinochet had elected to adopt the Home Secretary as the correct tribunal to adjudicate on the issue of apparent bias. He had thereby waived his right to complain before your Lordships of such bias. Expressed in other words, he was submitting that the petition was an abuse of process by Senator Pinochet. Mr. Duffy for A.I. (but not for A.I.C.L.) supported the case put forward by Mr. Alun Jones.

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Conclusions

1. Jurisdiction

As I have said, the respondents to the petition do not dispute that your Lordships have jurisdiction in appropriate cases to rescind or vary an earlier order of this House. In my judgment, that concession was rightly made both in principle and on authority.

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In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In *Broome v. Cassell & Co. Ltd. (No. 2)* [1972] A.C. 1136 your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point.

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However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong.

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2. Apparent bias

As I have said, Senator Pinochet does not allege that Lord Hoffmann was in fact biased. The contention is that there was a real danger or reasonable apprehension or suspicion that Lord Hoffmann might have been biased, that is to say, it is alleged that there is an appearance of bias not actual bias.

G

The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is

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A not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.

B In my judgment, this case falls within the first category of case, viz. where the judge is disqualified because he is a judge in his own cause. In such a case, once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure: see *Shetreet, Judges on Trial* (1976), p. 303; *De Smith, Woolf and Jowell, Judicial Review of Administrative Action*, 5th ed. (1995), p. 525. I will call this “automatic disqualification.”

C In *Dimes v. Proprietors of Grand Junction Canal* (1852) 3 H.L.Cas. 759, the then Lord Chancellor, Lord Cottenham, owned a substantial shareholding in the defendant canal which was an incorporated body. In the action the Lord Chancellor sat on appeal from the Vice-Chancellor, whose judgment in favour of the company he affirmed. There was an appeal to your Lordships’ House on the grounds that the Lord Chancellor was disqualified. Their Lordships consulted the judges who advised, at p. 786, that Lord Cottenham was disqualified from sitting as a judge in the cause because he had an interest in the suit. This advice was unanimously accepted by their Lordships. There was no inquiry by the court as to whether a reasonable man would consider Lord Cottenham to be biased and no inquiry as to the circumstances which led to Lord Cottenham sitting. Lord Campbell said, at p. 793:

F “No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause *in which he is a party*, but applies to a cause in which he has an interest.” (Emphasis added.)

G On occasion, this proposition is elided so as to omit all references to the disqualification of a judge who is a party to the suit: see, for example, *Reg. v. Rand* (1866) L.R. 1 Q.B. 230; *Reg. v. Gough* [1993] A.C. 646, 661. This does not mean that a judge who is a party to a suit is not disqualified just because the suit does not involve a financial interest. The authorities cited in the *Dimes* case show how the principle developed. The starting-point was the case in which a judge was indeed purporting to decide a case in which he was a party. This was held to be absolutely prohibited. That absolute prohibition was then extended to cases where, although not nominally a party, the judge had an interest in the outcome.

H The importance of this point in the present case is this. Neither A.I., nor A.I.C.L., have any financial interest in the outcome of this litigation. We are here confronted, as was Lord Hoffmann, with a novel situation where the outcome of the litigation did not lead to financial benefit to

anyone. The interest of A.I. in the litigation was not financial; it was its interest in achieving the trial and possible conviction of Senator Pinochet for crimes against humanity.

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By seeking to intervene in this appeal and being allowed so to intervene, in practice A.I. became a party to the appeal. Therefore if, in the circumstances, it is right to treat Lord Hoffmann as being the alter ego of A.I. and therefore a judge in his own cause, then he must have been automatically disqualified on the grounds that he was a party to the appeal. Alternatively, even if it be not right to say that Lord Hoffmann was a party to the appeal as such, the question then arises whether, in non-financial litigation, anything other than a financial or proprietary interest in the outcome is sufficient automatically to disqualify a man from sitting as judge in the cause.

B

Are the facts such as to require Lord Hoffmann to be treated as being himself a party to this appeal? The facts are striking and unusual. One of the parties to the appeal is an unincorporated association, A.I. One of the constituent parts of that unincorporated association is A.I.C.L. A.I.C.L. was established, for tax purposes, to carry out part of the functions of A.I. those parts which were charitable which had previously been carried on either by A.I. itself or by A.I.L. Lord Hoffmann is a director and chairman of A.I.C.L., which is wholly controlled by A.I., since its members (who ultimately control it) are all the members of the international executive committee of A.I. A large part of the work of A.I. is, as a matter of strict law, carried on by A.I.C.L. which instructs A.I.L. to do the work on its behalf. In reality, A.I., A.I.C.L. and A.I.L. are a close-knit group carrying on the work of A.I.

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However, close as these links are, I do not think it would be right to identify Lord Hoffmann personally as being a party to the appeal. He is closely linked to A.I. but he is not in fact A.I. Although this is an area in which legal technicality is particularly to be avoided, it cannot be ignored that Lord Hoffmann took no part in running A.I. Lord Hoffmann, A.I.C.L. and the executive committee of A.I. are in law separate people.

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Then is this a case in which it can be said that Lord Hoffmann had an "interest" which must lead to his automatic disqualification? Hitherto only pecuniary and proprietary interests have led to automatic disqualification. But, as I have indicated, this litigation is most unusual. It is not civil litigation but criminal litigation. Most unusually, by allowing A.I. to intervene, there is a party to a criminal cause or matter who is neither prosecutor nor accused. That party, A.I., shares with the government of Spain and the C.P.S., not a financial interest but an interest to establish that there is no immunity for ex-heads of state in relation to crimes against humanity. The interest of these parties is to procure Senator Pinochet's extradition and trial a non-pecuniary interest. So far as A.I.C.L. is concerned, clause 3(c) of its memorandum provides that one of its objects is "to procure the abolition of torture, extra-judicial execution and disappearance." A.I. has, amongst other objects, the same objects. Although A.I.C.L., as a charity, cannot campaign to change the law, it is concerned by other means to procure the abolition of these crimes against humanity. In my opinion, therefore, A.I.C.L. plainly had a non-pecuniary interest, to establish that Senator Pinochet was not immune.

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- A That being the case, the question is whether in the very unusual circumstances of this case a non-pecuniary interest to achieve a particular result is sufficient to give rise to automatic disqualification and, if so, whether the fact that A.I.C.L. had such an interest necessarily leads to the conclusion that Lord Hoffmann, as a director of A.I.C.L., was automatically disqualified from sitting on the appeal? My Lords, in my judgment, although the cases have all dealt with automatic disqualification
- B on the grounds of pecuniary interest, there is no good reason in principle for so limiting automatic disqualification. The rationale of the whole rule is that a man cannot be a judge in his own cause. In civil litigation the matters in issue will normally have an economic impact; therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if, as in the present case,
- C the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties. Thus in my opinion if Lord Hoffmann had been a member of A.I. he would have been automatically disqualified because of his non-pecuniary interest in establishing that Senator Pinochet was not entitled to immunity. Indeed, so much I understood to have been conceded by
- D Mr. Duffy.

- Can it make any difference that, instead of being a direct member of A.I., Lord Hoffmann is a director of A.I.C.L., that is of a company which is wholly controlled by A.I. and is carrying on much of its work? Surely not. The substance of the matter is that A.I., A.I.L. and A.I.C.L. are all various parts of an entity or movement working in different fields towards the same goals. If the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a director of a company, in promoting the same causes in the same organisation as is a party to the suit. There is no room for fine distinctions if Lord Hewart C.J.'s famous dictum is to be observed: it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done:" see *Rex v. Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256, 259.
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- Since, in my judgment, the relationship between A.I., A.I.C.L. and Lord Hoffmann leads to the automatic disqualification of Lord Hoffmann to sit on the hearing of the appeal, it is unnecessary to consider the other factors which were relied on by Miss Montgomery, viz. the position of
- G Lady Hoffmann as an employee of A.I. and the fact that Lord Hoffmann was involved in the recent appeal for funds for Amnesty. Those factors might have been relevant if Senator Pinochet had been required to show a real danger or reasonable suspicion of bias. But since the disqualification is automatic and does not depend in any way on an implication of bias, it is unnecessary to consider these factors. I do, however, wish to make it clear
- H (if I have not already done so) that my decision is not that Lord Hoffmann has been guilty of bias of any kind: he was disqualified as a matter of law automatically by reason of his directorship of A.I.C.L., a company controlled by a party, A.I.

For the same reason, it is unnecessary to determine whether the test of apparent bias laid down in *Reg. v. Gough* [1993] A.C. 646 ("is there in the view of the court a real danger that the judge was biased?") needs to be reviewed in the light of subsequent decisions. Decisions in Canada, Australia and New Zealand have either refused to apply the test in *Reg. v. Gough*, or modified it so as to make the relevant test the question whether the events in question give rise to a reasonable apprehension or suspicion on the part of a fairminded and informed member of the public that the judge was not impartial: see, for example, the High Court of Australia in *Webb v. The Queen*, 181 C.L.R. 41. It has also been suggested that the test in *Reg. v. Gough* in some way impinges on the requirement of Lord Hewart C.J.'s dictum that justice should appear to be done: see *Reg. v. Inner West London Coroner, Ex parte Dallaglio* [1994] 4 All E.R. 139, 152A-B. Since such a review is unnecessary for the determination of the present case, I prefer to express no view on it.

It is important not to overstate what is being decided. It was suggested in argument that a decision setting aside the order of 25 November 1998 would lead to a position where judges would be unable to sit on cases involving charities in whose work they are involved. It is suggested that, because of such involvement, a judge would be disqualified. That is not correct. The facts of this present case are exceptional. The critical elements are (1) that A.I. was a party to the appeal; (2) that A.I. was joined in order to argue for a particular result; (3) the judge was a director of a charity closely allied to A.I. and sharing, in this respect, A.I.'s objects. Only in cases where a judge is taking an active role as trustee or director of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or disclose the position to the parties. However, there may well be other exceptional cases in which the judge would be well advised to disclose a possible interest.

Finally on this aspect of the case, we were asked to state in giving judgment what had been said and done within the Appellate Committee in relation to Amnesty International during the hearing leading to the order of 25 November. As is apparent from what I have said, such matters are irrelevant to what we have to decide: in the absence of any disclosure to the parties of Lord Hoffmann's involvement with A.I., such involvement either did or did not in law disqualify him regardless of what happened within the Appellate Committee. We therefore did not investigate those matters and make no findings as to them.

Election, waiver, abuse of process

Mr. Alun Jones submitted that by raising with the Home Secretary the possible bias of Lord Hoffmann as a ground for not authorising the extradition to proceed, Senator Pinochet had elected to choose the Home Secretary rather than your Lordships' House as the arbiter as to whether such bias did or did not exist. Consequently, he submitted, Senator Pinochet had waived his right to petition your Lordships and, by doing so immediately after the Home Secretary had rejected the submission, was committing an abuse of the process of the House.

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- A This submission is bound to fail on a number of different grounds, of which I need mention only two. First, Senator Pinochet would only be put to his election as between two alternative courses to adopt. I cannot see that there are two such courses in the present case, since the Home Secretary had no power in the matter. He could not set aside the order of 25 November and as long as such order stood, the Home Secretary was bound to accept it as stating the law. Secondly, all three concepts—
- B election, waiver and abuse of process—require that the person said to have elected etc. has acted freely and in full knowledge of the facts. Not until 8 December 1998 did Senator Pinochet's solicitors know anything of Lord Hoffmann's position as a director and chairman of A.I.C.L. Even then they did not know anything about A.I.C.L. and its constitution. To say that by hurriedly notifying the Home Secretary of the contents of the letter
- C from A.I.'s solicitors, Senator Pinochet had elected to pursue the point solely before the Home Secretary is unrealistic. Senator Pinochet had not yet had time to find out anything about the circumstances beyond the bare facts disclosed in the letter.

Result

- D It was for these reasons and the reasons given by my noble and learned friend, Lord Goff of Chieveley, that I reluctantly felt bound to set aside the order of 25 November 1998. It was appropriate to direct a rehearing of the appeal before a differently constituted committee, so that on the rehearing the parties were not faced with a committee four of whom had already expressed their conclusion on the points at issue.

- E LORD GOFF OF CHIEVELEY. My Lords, I have had the opportunity of reading in draft the opinion prepared by my noble and learned friend, Lord Browne-Wilkinson. It was for the like reasons to those given by him that I agreed that the order of your Lordships' House in this matter dated 25 November 1998 should be set aside and that a rehearing of the appeal should take place before a differently constituted Committee. Even so,
- F having regard to the unusual nature of this case, I propose to set out briefly in my own words the reasons why I reached that conclusion.

- Like my noble and learned friend, I am of the opinion that the principle which governs this matter is that a man shall not be a judge in his own cause—*nemo iudex in sua causa*: see *Dimes v. Proprietors of Grand Junction Canal*, 3 H.L.Cas. 759, 793, *per* Lord Campbell. As stated by
- G Lord Campbell the principle is not confined to a cause to which the judge is a party, but applies also to a cause in which he has an interest. Thus, for example, a judge who holds shares in a company which is a party to the litigation is caught by the principle, not because he himself is a party to the litigation (which he is not), but because he has by virtue of his shareholding an interest in the cause. That was indeed the ratio decidendi of the famous *Dimes* case itself. In that case the then Lord Chancellor,
- H Lord Cottenham, affirmed an order granted by the Vice-Chancellor granting relief to a company in which, unknown to the defendant and forgotten by himself, he held a substantial shareholding. It was decided, following the opinion of the judges, that Lord Cottenham was disqualified,

by reason of his interest in the cause, from adjudicating in the matter, and that his order was for that reason voidable and must be set aside. Such a conclusion must follow, subject only to waiver by the party or parties to the proceedings thereby affected.

In the present case your Lordships are not concerned with a judge who is a party to the cause, nor with one who has a financial interest in a party to the cause or in the outcome of the cause. Your Lordships are concerned with a case in which a judge is closely connected with a party to the proceedings. This situation has arisen because, as my noble and learned friend has described, Amnesty International ("A.I.") was given leave to intervene in the proceedings; and, whether or not A.I. thereby became technically a party to the proceedings, it so participated in the proceedings, actively supporting the cause of one party (the Government of Spain, represented by the Crown Prosecution Service) against another (Senator Pinochet), that it must be treated as a party. Furthermore, Lord Hoffmann is a director and chairperson of Amnesty International Charity Ltd. ("A.I.C.L."). A.I.C.L. and Amnesty International Ltd. ("A.I.L.") are United Kingdom companies through which the work of the International Headquarters of A.I. in London is undertaken, A.I.C.L. having been incorporated to carry out those purposes of A.I. which are charitable under U.K. law. Neither Senator Pinochet nor the lawyers acting for him were aware of the connection between Lord Hoffmann and A.I. until after judgment was given on 25 November 1998.

My noble and learned friend has described in lucid detail the working relationship between A.I.C.L., A.I.L. and A.I., both generally and in relation to Chile. It is unnecessary for me to do more than state that not only was A.I.C.L. deeply involved in the work of A.I., commissioning activities falling within the objects of A.I. which were charitable, but that it did so specifically in relation to research publications including one relating to Chile reporting on breaches of human rights (by torture and otherwise) in Chile and calling for those responsible to be brought to justice. It is in these circumstances that we have to consider the position of Lord Hoffmann, not as a person who is himself a party to the proceedings or who has a financial interest in such a party or in the outcome of the proceedings, but as a person who is, as a director and chairperson of A.I.C.L., closely connected with A.I. which is, or must be treated as, a party to the proceedings. The question which arises is whether his connection with that party will (subject to waiver) itself disqualify him from sitting as a judge in the proceedings, in the same way as a significant shareholding in a party will do, and so require that the order made upon the outcome of the proceedings must be set aside.

Such a question could in theory arise, for example, in relation to a senior executive of a body which is a party to the proceedings, who holds no shares in that body; but it is, I believe, only conceivable that it will do so where the body in question is a charitable organisation. He will by reason of his position be committed to the well-being of the charity, and to the fulfilment by the charity of its charitable objects. He may for that reason properly be said to have an interest in the outcome of the litigation, though he has no financial interest, and so to be disqualified from sitting as a judge in the proceedings. The cause is "a cause in which he has an

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A interest,” in the words of Lord Campbell in the *Dimes* case, at p. 793. It follows that in this context the relevant interest need not be a financial interest. This is the view expressed in *Shetreet, Judges on Trial* (1976), p. 310, where he states that “[a] judge may have to disqualify himself by reason of his association with a body that institutes or defends the suit,” giving as an example the chairman or member of the board of a charitable organisation.

B Let me next take the position of Lord Hoffmann in the present case. He was not a member of the governing body of A.I., which is or is to be treated as a party to the present proceedings: he was chairperson of an associated body, A.I.C.L., which is not a party. However, on the evidence, it is plain that there is a close relationship between A.I., A.I.L. and A.I.C.L. A.I.C.L. was formed following the decision in *McGovern v. Attorney-General* [1982] Ch. 321, to carry out the purposes of A.I. which were charitable, no doubt with the sensible object of achieving a tax saving. So the division of function between A.I.L. and A.I.C.L. was that the latter was to carry out those aspects of the work of the international headquarters of A.I. which were charitable, leaving it to A.I.L. to carry out the remainder, that division being made for fiscal reasons. It follows that A.I., A.I.L. and A.I.C.L. can together be described as being, in practical terms, one organisation, of which A.I.C.L. forms part. The effect for present purposes is that Lord Hoffmann, as chairperson of one member of that organisation, A.I.C.L., is so closely associated with another member of that organisation, A.I., that he can properly be said to have an interest in the outcome of proceedings to which A.I. has become party. This conclusion is reinforced, so far as the present case is concerned, by the evidence of A.I.C.L. commissioning a report by A.I. relating to breaches of human rights in Chile, and calling for those responsible to be brought to justice. It follows that Lord Hoffmann had an interest in the outcome of the present proceedings and so was disqualified from sitting as a judge in those proceedings.

E It is important to observe that this conclusion is, in my opinion, in no way dependent on Lord Hoffmann personally holding any view, or having any objective, regarding the question whether Senator Pinochet should be extradited, nor is it dependent on any bias or apparent bias on his part. Any suggestion of bias on his part was, of course, disclaimed by those representing Senator Pinochet. It arises simply from Lord Hoffmann’s involvement in A.I.C.L.; the close relationship between A.I., A.I.L. and A.I.C.L., which here means that for present purposes they can be regarded as being, in practical terms, one organisation; and the participation of A.I. in the present proceedings in which as a result it either is, or must be treated as, a party.

H LORD NOLAN. My Lords, I agree with the views expressed by noble and learned friends, Lord Browne-Wilkinson and Lord Goff of Chieveley. In my judgment the decision of 25 November had to be set aside for the reasons which they give. I would only add that in any case where the impartiality of a judge is in question the appearance of the matter is just as important as the reality.

LORD HOPE OF CRAIGHEAD. My Lords, I have had the advantage of reading in draft the speeches which have been prepared by my noble and learned friends, Lord Browne-Wilkinson and Lord Goff of Chieveley. For the reasons which they have given I also was satisfied that the earlier decision of this House cannot stand and must be set aside. But in view of the importance of the case and its wider implications, I should like to add these observations.

One of the cornerstones of our legal system is the impartiality of the tribunals by which justice is administered. In civil litigation the guiding principle is that no one may be a judge in his own cause: *nemo debet esse iudex in propria causa*. It is a principle which is applied much more widely than a literal interpretation of the words might suggest. It is not confined to cases where the judge is a party to the proceedings. It is applied also to cases where he has a personal or pecuniary interest in the outcome, however small. In *London and North-Western Railway Co. v. Lindsay* (1858) 3 Macq. 99 the same question as that which arose in *Dimes v. Proprietors of Grand Junction Canal*, 3 H.L.Cas. 759 was considered in an appeal from the Court of Session to this House. Lord Wensleydale stated that, as he was a shareholder in the appellant company, he proposed to retire and take no part in the judgment. The Lord Chancellor said that he regretted that this step seemed to be necessary. Although counsel stated that he had no objection, it was thought better that any difficulty that might arise should be avoided and Lord Wensleydale retired.

In *Sellar v. Highland Railway Co.*, 1919 S.C.(H.L.) 19 the same rule was applied where a person who had been appointed to act as one of the arbiters in a dispute between the proprietors of certain fishings and the railway company was the holder of a small number of ordinary shares in the railway company. Lord Buckmaster, after referring to the *Dimes* and *Lindsay* cases, gave this explanation of the rule, at pp. 20–21:

“The law remains unaltered and unvarying today, and, although it is obvious that the extended growth of personal property and the wide distribution of interests in vast commercial concerns may render the application of the rule increasingly irksome, it is none the less a rule which I for my part should greatly regret to see even in the slightest degree relaxed. The importance of preserving the administration of justice from anything which can even by remote imagination infer a bias or interest in the judge upon whom falls the solemn duty of interpreting the law is so grave that any small inconvenience experienced in its preservation may be cheerfully endured. In practice also the difficulty is one easily overcome, because, directly the fact is stated, it is common practice that counsel on each side agree that the existence of the disqualification shall afford no objection to the prosecution of the suit, and the matter proceeds in the ordinary way, but, if the disclosure is not made, either through neglect or inadvertence, the judgment becomes voidable and may be set aside.”

As my noble and learned friend, Lord Goff of Chieveley, said in *Reg. v. Gough* [1993] A.C. 646, 661, the nature of the interest is such that public confidence in the administration of justice requires that the judge must withdraw from the case or, if he fails to disclose his interest and sits in

- A judgment upon it, the decision cannot stand. It is no answer for the judge to say that he is in fact impartial and that he will abide by his judicial oath. The purpose of the disqualification is to preserve the administration of justice from any suspicion of partiality. The disqualification does not follow automatically in the strict sense of that word, because the parties to the suit may waive the objection. But no further investigation is necessary and, if the interest is not disclosed, the consequence is inevitable. In practice the application of this rule is so well understood and so consistently observed that no case has arisen in the course of this century where a decision of any of the courts exercising a civil jurisdiction in any part of the United Kingdom has had to be set aside on the ground that there was a breach of it.

- C In the present case we are concerned not with civil litigation but with a decision taken in proceedings for extradition on criminal charges. It is only in the most unusual circumstances that a judge who was sitting in criminal proceedings would find himself open to the objection that he was acting as a judge in his own cause. In principle, if it could be shown that he had a personal or pecuniary interest in the outcome, the maxim would apply. But no case was cited to us, and I am not aware of any, in which it has been applied hitherto in a criminal case. In practice judges are well aware that they should not sit in a case where they have even the slightest personal interest in it either as defendant or as prosecutor.

- E The ground of objection which has invariably been taken until now in criminal cases is based on that other principle which has its origin in the requirement of impartiality. This is that justice must not only be done; it must also be seen to be done. It covers a wider range of situations than that which is covered by the maxim that no one may be a judge in his own cause. But it would be surprising if the application of that principle were to result in a test which was less exacting than that resulting from the application of the *nemo iudex in sua causa* principle. Public confidence in the integrity of the administration of justice is just as important, perhaps even more so, in criminal cases. Article 6(1) of the European Convention on Fundamental Rights and Freedoms makes no distinction between civil and criminal cases in its expression of the right of everyone to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

- G Your Lordships were referred by Miss Montgomery in the course of her argument to *Bradford v. McLeod*, 1986 S.L.T. 244. This is one of only two reported cases, both of them from Scotland, in which a decision in a criminal case has been set aside because a full-time salaried judge was in breach of this principle. The other is *Doherty v. McGlennan*, 1997 S.L.T. 444. In neither of these cases could it have been said that the sheriff had an interest in the case which disqualified him. They were cases where the sheriff either said or did something which gave rise to a reasonable suspicion about his impartiality.

- H The test which must be applied by the appellate courts of criminal jurisdiction in England and Wales to cases in which it is alleged that there has been a breach of this principle by a member of an inferior tribunal is different from that which is used in Scotland. The test which was approved by your Lordships' House in *Reg. v. Gough* [1993] A.C. 646 is whether

there was a real danger of bias on the part of the relevant member of the tribunal. I think that the explanation for this choice of language lies in the fact that it was necessary in that case to formulate a test for the guidance of the lower appellate courts. The aim, as Lord Woolf explained, at p. 673, was to avoid the quashing of convictions upon quite insubstantial grounds and the flimsiest pretexts of bias. In Scotland the High Court of Justiciary applies the test which was described in *Gough* as the reasonable suspicion test. In *Bradford v. McLeod*, 1986 S.L.T. 244, 247 it adopted as representing the law of Scotland the rule which was expressed by Eve J. in *Law v. Chartered Institute of Patent Agents* [1919] 2 Ch. 276, 289:

“Each member of the council in adjudicating on a complaint thereunder is performing a judicial duty, and he must bring to the discharge of that duty an unbiased and impartial mind. If he has a bias which renders him otherwise than an impartial judge he is disqualified from performing his duty. Nay, more (so jealous is the policy of our law of the purity of the administration of justice), if there are circumstances so affecting a person acting in a judicial capacity as to be calculated to create in the mind of a reasonable man a suspicion of that person’s impartiality, those circumstances are themselves sufficient to disqualify although in fact no bias exists.”

The Scottish system for dealing with criminal appeals is for all appeals from the courts of summary jurisdiction to go direct to the High Court of Justiciary in its appellate capacity. It is a simple, one-stop system, which absolves the High Court of Justiciary from the responsibility of giving guidance to inferior appellate courts as to how to deal with cases where questions have been raised about a tribunal’s impartiality. Just as Eve J. may be thought to have been seeking to explain to members of the council of the chartered institute in simple language the test which they should apply to themselves in performing their judicial duty, so also the concern of the High Court of Justiciary has been to give guidance to sheriffs and lay justices as to the standards which they should apply to themselves in the conduct of criminal cases. The familiar expression that justice must not only be done but must also be seen to be done serves a valuable function in that context.

Although the tests are described differently, their application by the appellate courts in each country is likely in practice to lead to results which are so similar as to be indistinguishable. Indeed it may be said of all the various tests which I have mentioned, including the maxim that no one may be a judge in his own cause, that they are all founded upon the same broad principle. Where a judge is performing a judicial duty, he must not only bring to the discharge of that duty an unbiased and impartial mind. He must be seen to be impartial.

As for the facts of the present case, it seems to me that the conclusion is inescapable that Amnesty International has associated itself in these proceedings with the position of the prosecutor. The prosecution is not being brought in its name, but its interest in the case is to achieve the same result because it also seeks to bring Senator Pinochet to justice. This distinguishes its position fundamentally from that of other bodies which seek to uphold human rights without extending their objects to issues

A concerning personal responsibility. It has for many years conducted an international campaign against those individuals whom it has identified as having been responsible for torture, extra-judicial executions and disappearances. Its aim is that they should be made to suffer criminal penalties for such gross violations of human rights. It has chosen, by its intervention in these proceedings, to bring itself face to face with one of those individuals against whom it has for so long campaigned.

B But everyone whom the prosecutor seeks to bring to justice is entitled to the protection of the law, however grave the offence or offences with which he is being prosecuted. Senator Pinochet is entitled to the judgment of an impartial and independent tribunal on the question which has been raised here as to his immunity. I think that the connections which existed between Lord Hoffmann and Amnesty International were of such a character, in view of their duration and proximity, as to disqualify him on this ground. In view of his links with Amnesty International as the chairman and a director of Amnesty International Charity Ltd. he could not be seen to be impartial. There has been no suggestion that he was actually biased. He had no financial or pecuniary interest in the outcome. But his relationship with Amnesty International was such that he was, in effect, acting as a judge in his own cause. I consider that his failure to disclose these connections leads inevitably to the conclusion that the decision to which he was a party must be set aside.

E LORD HUTTON. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Browne-Wilkinson. I gratefully adopt his account of the matters (including the links between Amnesty International and Lord Hoffmann) leading to the bringing of this petition by Senator Pinochet to set aside the order made by this House on 25 November 1996. I am in agreement with his reasoning and conclusions on the issue of the jurisdiction of this House to set aside that order and on the issues of election, waiver and abuse of process. In relation to the allegation made by Senator Pinochet, not that Lord Hoffmann was biased in fact, but that there was a real danger of bias or a reasonable apprehension or suspicion of bias because of Lord Hoffmann's links with Amnesty International, I am also in agreement with the reasoning and conclusion of Lord Browne-Wilkinson, and I wish to add some observations on this issue.

F In the middle of the last century the Lord Chancellor, Lord Cottenham, had an interest as a shareholder in a canal company to the amount of several thousand pounds. The company filed a bill in equity seeking an injunction against the defendant who was unaware of Lord Cottenham's shareholding in the company. The injunction and the ancillary order sought were granted by the Vice-Chancellor and were subsequently affirmed by Lord Cottenham. The defendant subsequently discovered the interest of Lord Cottenham in the company and brought a motion to discharge the order made by him, and the matter ultimately came on for hearing before this House in *Dimes v. Proprietors of Grand Junction Canal*, 3 H.L.Cas. 759. The House ruled that the decree of the Lord Chancellor should be set aside, not because in coming to his decision Lord Cottenham was influenced by his interest in the company, but

because of the importance of avoiding the appearance of the judge labouring under the influence of an interest. Lord Campbell said, at pp. 793–794:

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“No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest. Since I have had the honour to be Chief Justice of the Court of Queen’s Bench, we have again and again set aside proceedings in inferior tribunals because an individual, who had an interest in a cause, took a part in the decision. And it will have a most salutary influence on these tribunals when it is known that this High Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence.”

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In his judgment in *Reg. v. Gough* [1993] A.C. 646, 659 my noble and learned friend, Lord Goff of Chieveley, made reference to the great importance of confidence in the integrity of the administration of justice, and he said:

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“In any event, there is an overriding public interest that there should be confidence in the integrity of the administration of justice, which is always associated with the statement of Lord Hewart C.J. in *Rex v. Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256, 259, that it is ‘of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.’”

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Then referring to the *Dimes* case, he said, at p. 661:

“... I wish to draw attention to the fact that there are certain cases in which it has been considered that the circumstances are such that they must inevitably shake public confidence in the integrity of the administration of justice if the decision is to be allowed to stand. Such cases attract the full force of Lord Hewart C.J.’s requirement that justice must not only be done but must manifestly be seen to be done. These cases arise where a person sitting in a judicial capacity has a pecuniary interest in the outcome of the proceedings. In such a case, as Blackburn J. said in *Reg. v. Rand* (1866) L.R. 1 Q.B. 230, 232: “any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter.” The principle is expressed in the maxim that nobody may be judge in his own cause (*nemo judex in sua causa*). Perhaps the most famous case in which the principle was applied is *Dimes v. Proprietors of Grand Junction Canal* (1852) 3 H.L.Cas. 759, in which decrees affirmed by Lord Cottenham L.C. in favour of a canal company in which he was a substantial shareholder were set aside by this House, which then

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A proceeded to consider the matter on its merits, and in fact itself affirmed the decrees. Lord Campbell said, at p. 793: 'No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred.' In such a case, therefore, not only is it irrelevant that there was in fact no bias on the part of the tribunal, but there is no question of investigating, from an objective point of view, whether there was any real likelihood of bias, or any reasonable suspicion of bias, on the facts of the particular case. The nature of the interest is such that public confidence in the administration of justice requires that the decision should not stand."

C Later in his judgment Lord Goff said, at p. 664F, agreeing with the view of Lord Woolf, at p. 673F, that the only special category of case where there should be disqualification of a judge without the necessity to inquire whether there was any real likelihood of bias was where the judge has a direct pecuniary interest in the outcome of the proceedings. However I am of opinion that there could be cases where the interest of the judge in the subject matter of the proceedings arising from his strong commitment to some cause or belief or his association with a person or body involved in the proceedings could shake public confidence in the administration of justice as much as a shareholding (which might be small) in a public company involved in the litigation. I find persuasive the observations of Lord Widgery C.J. in *Reg. v. Altrincham Justices, Ex parte N. Pennington* [1975] Q.B. 549, 552:

E "There is no better known rule of natural justice than the one that a man shall not be a judge in his own cause. In its simplest form this means that a man shall not judge an issue in which he has a direct pecuniary interest, but the rule has been extended far beyond such crude examples and now covers cases in which the judge has such an interest in the parties or the matters in dispute as to make it difficult for him to approach the trial with the impartiality and detachment which the judicial function requires. Accordingly, application may be made to set aside a judgment on the so-called ground of bias without showing any direct pecuniary or proprietary interest in the judicial officer concerned."

A similar view was expressed by Deane J. in *Webb v. The Queen*, 181 C.L.R. 41, 74:

G "The area covered by the doctrine of disqualification by reason of the appearance of bias encompasses at least four distinct, though sometimes overlapping, main categories of case. The first is disqualification by interest, that is to say, cases where some direct or indirect interest in the proceedings, *whether pecuniary or otherwise*, gives rise to a reasonable apprehension of prejudice, partiality or prejudgment . . . The third category is disqualification by association. It will often overlap the first and consists of cases where the apprehension of prejudgment or other bias results from some direct or indirect relationship, experience or contact with a person or persons

interested in, or otherwise involved in, the proceedings.” (My emphasis.) A

An illustration of the approach stated by Lord Widgery and Deane J. in respect of a non-pecuniary interest is found in the earlier judgment of Lord Carson in *Frome United Breweries Co. Ltd. v. Bath Justices* [1926] A.C. 586, 618 when he cited with approval the judgments of the Divisional Court in *Reg. v. Fraser* (1893) 9 T.L.R. 613. Lord Carson described *Fraser’s* case as one: B

“where a magistrate who was a member of a particular council of a religious body one of the objects of which was to oppose the renewal of licences, was present at a meeting at which it was decided that the council should oppose the transfer or renewal of the licences, and that a solicitor should be instructed to act for the council at the meeting of the magistrates when the case came on. A solicitor was so instructed, and opposed the particular licence, and the magistrate sat on the bench and took part in the decision. The court in that case came to the conclusion that the magistrate was disqualified on account of bias, and that the decision to refuse the licence was bad. No one imputed mala fides to the magistrate, but Cave J., in giving judgment, said: ‘the question was, What would be likely to endanger the respect or diminish the confidence which it was desirable should exist in the administration of justice?’ Wright J. stated that although the magistrate had acted from excellent motives and feelings, he still had done so contrary to a well settled principle of law, which affected the character of the administration of justice.” C D

I have already stated that there was no allegation made against Lord Hoffmann that he was actually guilty of bias in coming to his decision, and I wish to make it clear that I am making no finding of actual bias against him. But I consider that the links, described in the judgment of Lord Browne-Wilkinson, between Lord Hoffmann and Amnesty International, which had campaigned strongly against General Pinochet and which intervened in the earlier hearing to support the case that he should be extradited to face trial for his alleged crimes, were so strong that public confidence in the integrity of the administration of justice would be shaken if his decision were allowed to stand. It was this reason and the other reasons given by Lord Browne-Wilkinson which led me to agree reluctantly in the decision of the Appeal Committee on 17 December 1998 that the order of 25 November 1998 should be set aside. E F

Petition granted. G

Solicitors: Kingsley Napley; Crown Prosecution Service, Headquarters; Bindman & Partners.

B. L. S.

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Q.B.

A

[COURT OF APPEAL]

LOCABAIL (U.K.) LTD. v. BAYFIELD PROPERTIES LTD.
AND ANOTHER

LOCABAIL (U.K.) LTD. AND ANOTHER v. WALDORF INVESTMENT
CORPORATION AND OTHERS

B

TIMMINS v. GORMLEY

WILLIAMS v. H.M. INSPECTOR OF TAXES AND OTHERS

REGINA v. BRISTOL BETTING AND GAMING LICENSING
COMMITTEE, *Ex parte* O'CALLAGHAN

C 1999 Oct. 18,19,20; Lord Bingham of Cornhill C.J.,
Nov. 17 Lord Woolf M.R. and Sir Richard Scott V.-C.

*Natural Justice—Bias—Judge in own cause—Duty and extent of inquiry
required of judge—Whether direct interest in outcome of
proceedings—Whether automatic disqualification—Whether real
danger of bias—Waiver of objection*

D

In the first two cases the plaintiffs sought to enforce charges securing the repayment of advances made, inter alia, to the former husband of one of the defendants, E., in respect of two properties over which she asserted equitable interests. Both actions were heard by a solicitor, the senior partner in a large firm of solicitors, sitting as a deputy judge of the High Court. During the hearing E. produced material relating to her matrimonial proceedings which included a press cutting from which the judge learnt that his firm was acting for clients in litigation for the enforcement of financial claims and of bankruptcy against E.'s former husband. The judge immediately disclosed that connection, stating that he knew no more of that litigation than had appeared from the cutting. Neither party sought an adjournment, no objection was raised and the hearing continued. The judge gave judgment for the plaintiffs and thereafter E. applied to the judge to disqualify himself from further involvement in the cases and to set aside his judgment on the ground of bias. The judge concluded that his firm's engagement to clients involved in litigation against E.'s former husband had not created a conflict of interest such as to disqualify him from dealing with the cases and he accordingly refused her application.

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In the third case the defendant admitted liability for personal injuries sustained by the claimant but disputed the quantum of damage. Trial of that issue was heard by a member of the Bar, sitting as a recorder, who was a specialist practitioner in personal injury cases and had, by regular contributions to specialist literature, shown consistent support for claimants in obtaining damages from defendants and their insurers. At the outset of the proceedings the recorder disclosed his membership of an association which ordinarily represented claimants rather than defendants. No objection was taken by either party, although the defendant was unaware of the recorder's written work, and the hearing continued. Following judgment in the claimant's favour the defendant learnt of an article written by the recorder and published shortly after trial in which he had expressed views in trenchant terms in favour of claimants and critical of defendants

and their insurers. The defendant considered that the terms of the article disclosed a real danger that the recorder had been biased against him and that in consequence the judgment should be set aside.

A

In the fourth case the applicant complained to an industrial tribunal of racial discrimination by her former employers. The tribunal's chairman disclosed during the hearing that he had many years previously been employed for a short period by the same employers. The applicant did not specify any objection, the hearing continued and her complaint was dismissed. Her appeal on the ground of bias was dismissed by the Employment Appeal Tribunal.

B

In the fifth case the applicant obtained leave to apply for judicial review of a local licensing authority's decisions to renew bookmakers' licences, dismissing his applications by way of objection and making a costs order in a fixed sum against him. Following his failing to enter and serve the proceedings within the prescribed period he applied for an extension of time. The judge concluded that, since the licences had been renewed, the only surviving issue in the proceedings related to the costs order and that, given the applicant's considerable delay, the application should be refused. After his decision the judge learnt from a newspaper article that the bookmakers were tenants of premises let to them by a property investment company owned by the judge's family in which he held shares and a non-executive directorship. The applicant also learnt of the connection and sought to appeal against the judge's decision on the grounds that his interest automatically disqualified him from dealing with the application and in any event gave rise to a real danger of bias. The judge, in a statement sent to the court confirming the contents of the article, indicated that he was not involved in the management of the company, that until reading the article he had been unaware that the bookmakers were its tenants and that the rent payable for the single shop let to them represented approximately four per cent. of the company's total receivable rent.

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On applications for permission to appeal:—

Held, (1) that where a judge had a direct personal interest, which was other than de minimis, in the outcome of proceedings bias was presumed to exist and he was automatically disqualified from hearing or continuing to hear the case and any judgment he had given would be set aside; that such disqualification arose irrespective of the judge's state of knowledge as to his interest; but that a party with an irresistible right to object to his hearing or continuing to hear the case might waive that right so long as he did so in clear and unequivocal terms and with full knowledge of the relevant facts (post, pp. 472G-474A, 475C).

F

Dimes v. Proprietors of Grand Junction Canal (1852) 3 H.L.Cas. 759, H.L.(E.) and *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)* [2000] 1 A.C. 119, H.L.(E.) applied.

G

(2) That where apparent bias was asserted it was for the reviewing court, personifying the reasonable man with knowledge of the relevant circumstances and adopting a broad approach, to assess whether there was a real danger of bias; that in making that assessment the court might properly inquire whether the judge knew of the matter relied on as undermining his impartiality, since ignorance would preclude its having influenced his mind and dispel any such danger; that, although the judge could not be cross-examined or required to give disclosure, the reviewing court might properly receive, but would not necessarily accept, a

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Q.B.

Locabail (U.K.) Ltd. v. Bayfield Properties Ltd. (C.A.)

A statement from him as to his state of knowledge, but not as to its effect on him since that issue was for the court, not the judge, to assess (post, pp. 475D-E, 476H-477C, E-478A).

Reg. v. Gough [1993] A.C. 646, H.L.(E.) applied.

(3) That in any case of personal embarrassment, or of automatic disqualification where the judge had knowledge of his interest, he should recuse himself before objection was raised and at the earliest possible stage; that in any other case where he was or became aware of a matter which could arguably give rise to a real danger of bias he should make disclosure to the parties in advance of any hearing so that where objection was taken he might consider and adjudicate on it; that where, following appropriate disclosure, no objection was taken to his hearing or continuing to hear a case no subsequent complaint of bias could be made in respect of the matter so disclosed; that what constituted appropriate disclosure would largely depend on the stage reached in the proceedings so that where, in advance of the hearing, the judge became aware of a matter which might affect his fitness to sit he should inquire fully into it and make full disclosure but where such a matter emerged during the hearing the judge, while being required to disclose what he then knew, was not obliged to conduct any fuller inquiry (post, pp. 478F-479A, 480A-C, 481A-D).

(4) That, while members of the Bar would not ordinarily have any knowledge of or responsibility for the affairs of other members of chambers, since a solicitor who was a partner in a firm bore responsibility for his partners and owed a duty to their clients of whose affairs he might personally be ignorant, he should, prior to sitting in any assigned civil case, conduct a careful conflict search within the firm; that where any association was discovered during the hearing it should be disclosed to the parties and addressed on the particular facts by reference to the test whether a real danger of bias arose; but that where a conflict of interest, such as would prohibit the solicitor from acting for one of the parties under the solicitors' professional rules, emerged before or during the hearing he was not necessarily barred from hearing or continuing to hear the case nor was any judgment he had given necessarily to be set aside (post, pp. 478A-F, 488F-489B).

(5) Refusing permission to appeal in the first two cases, that, while it could be inferred that the judge had conducted a conflict search within his firm before the hearing, such a search had been confined to the parties themselves; that partnership in a firm acting for clients whose success in litigation against E.'s former husband might attract profit and goodwill did not give him a sufficient interest in the outcome of the proceedings before him either to attract the principle of automatic disqualification or to give rise to a real danger of bias; that although he might not have acted as a solicitor for E. under his professional rules he was not necessarily debarred from continuing with the hearing; that any conflict of interest between the firm's clients and E., whereby the former might recover more substantially against her former husband if her claim failed, would not have occurred to a reader of the press cutting and did not occur to the judge, any party or their representatives at the time despite their knowledge of the facts on which the alleged conflict depended; that, given the large number of partners and size of the judge's firm, his statement as to his state of knowledge was cogent and convincing; that it was unchallenged by any party when it was made and there was nothing to cast doubt on its credibility; and that, accordingly, there was no real danger of bias; further that since no objection was taken when he disclosed the connection E., having been put to her election at that

time, could not subsequently complain after the dismissal of her claims (post, pp. 486B-E, 487C, E-488B, B-F, 489E-F, 490D-G, 491D-E).

(6) Granting permission to appeal in the third case and allowing the appeal, that, although extra-curricular comment in textbooks and articles was not incompatible with the discharge of judicial functions and would not ordinarily of itself give rise to a real danger of bias, the intemperate terms in which the recorder had expressed views critical of defendants and their insurers could have given rise to the possibility that in resolving the case he had favoured the claimant against the defendant; and that, accordingly, there was a real danger of bias which required the court to set aside his judgment and to order a retrial (post, pp. 480B-C, 496B-E, 496D-497A).

(7) Refusing permission to appeal in the fourth case, that in the circumstances the former employment of the chairman of the industrial tribunal with the employers against whom the applicant's complaint was made would not suggest any danger of bias; and that, accordingly, the appeal tribunal had correctly dismissed her appeal (post, p. 498A-C).

(8) Refusing permission to appeal in the fifth case, that, since at the time of the application before the judge the only remaining issue in the judicial review proceedings related to the costs order made against the applicant, and since such a sum could not affect the bookmakers' ability to meet their obligations to the judge's family company, the judge had only a nominal and indirect interest arising from his directorship and shares in that company; and that, accordingly, the principle of automatic disqualification did not apply; that his role in the family company was non-executive, there was no reason why he should know of the tenancy and no reason to doubt his statement; and that, accordingly, there was no real danger of bias; further that, in any event, given the applicant's gross delay and the limited scope of the issue before him the judge's order, which was well within his discretion, was correctly made (post, p. 500B-G).

Per curiam. It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided (post, p. 480A-B).

The following cases are referred to in the judgment of the court:

Auckland Casino Ltd. v. Casino Control Authority [1995] 1 N.Z.L.R. 142

B.T.R. Industries South Africa (Pty.) Ltd. v. Metal and Allied Workers' Union, 1992 (3) S.A. 673

Bradford v. McLeod, 1986 S.L.T. 244

Clenae Pty. Ltd. v. Australia and New Zealand Banking Group Ltd. [1999] V.S.C.A. 35

De Cubber v. Belgium (1984) 7 E.H.R.R. 236

Dimes v. Proprietors of Grand Junction Canal (1852) 3 H.L.Cas. 759, H.L.(E.)

Doherty v. McGlennan, 1997 S.L.T. 444

Ebner, In re (1999) 161 A.L.R. 557

Hauschildt v. Denmark (1989) 12 E.H.R.R. 266

J.R.L., In re; Ex parte C.J.L. (1986) 161 C.L.R. 342

K.F.T.C.I.C. v. Icori Estero S.p.A., 28 June 1991, vol. 6, 8/91, International Arbitration Report, C.A. Paris

Laker Airways Inc. v. F.L.S. Aerospace Ltd. [1999] 2 Lloyd's Rep. 45

Langborger v. Sweden (1989) 12 E.H.R.R. 416

Law v. Chartered Institute of Patent Agents [1919] 2 Ch. 276

Q.B. Locabail (U.K.) Ltd. v. Bayfield Properties Ltd. (C.A.)

- A** *McKenzie v. McKenzie* [1971] P. 33; [1970] 3 W.L.R. 472; [1970] 3 All E.R. 1034, C.A.
Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon [1968] 1 W.L.R. 815; [1968] 1 All E.R. 354, D.C. [1969] 1 Q.B. 577; [1968] 3 W.L.R. 694; [1968] 3 All E.R. 304, C.A.
Moch v. Nedtravel (Pty.) Ltd. 1996 (3) S.A. 1
Piersack v. Belgium (1982) 5 E.H.R.R. 169
- B** *President of the Republic of South Africa v. South African Rugby Football Union*, 1999 (4) S.A. 147
Reg. v. Barnsley Licensing Justices, Ex parte Barnsley and District Licensed Victuallers' Association [1960] 2 Q.B. 167; [1960] 3 W.L.R. 305; [1960] 2 All E.R. 703, C.A.
Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2) [2000] 1 A.C. 119; [1999] 2 W.L.R. 272; [1999] 1 All E.R. 577, H.L.(E.)
- C** *Reg. v. Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41; [1954] 3 W.L.R. 415; [1954] 2 All E.R. 850, D.C.
Reg. v. Gough [1993] A.C. 646; [1993] 2 W.L.R. 883; [1992] 4 All E.R. 481, C.A.; [1993] A.C. 646; [1993] 2 W.L.R. 883; [1993] 2 All E.R. 724, H.L.(E.)
Reg. v. Inner West London Coroner, Ex parte Dallaglio [1994] 4 All E.R. 139, C.A.
- D** *Reg. v. Liverpool City Justices, Ex parte Topping* [1983] 1 W.L.R. 119; [1983] 1 All E.R. 490, D.C.
Reg. v. Mulvihill [1990] 1 W.L.R. 438; [1990] 1 All E.R. 436, C.A.
Reg. v. Rand (1866) L.R. 1 Q.B. 230
Reg. v. Spencer [1987] A.C. 128; [1986] 3 W.L.R. 348; [1986] 2 All E.R. 928, H.L.(E.)
Reg. v. Watson, Ex parte Armstrong (1976) 136 C.L.R. 248
- E** *Rex v. Essex Justices, Ex parte Perkins* [1927] 2 K.B. 475, D.C.
Rex v. Sunderland Justices [1901] 2 K.B. 357, C.A.
Rex v. Sussex Justices, Ex parte McCarthy [1924] 1 K.B. 256, D.C.
Shrager v. Basil Dighton Ltd. [1924] 1 K.B. 274, C.A.
Vakauta v. Kelly (1989) 167 C.L.R. 568
Webb v. The Queen (1994) 181 C.L.R. 41
Wells v. Wells [1999] 1 A.C. 345; [1998] 3 W.L.R. 329; [1998] 3 All E.R. 481, H.L.(E.)
- F**

The following additional cases were cited in argument:

- A. T. & T. Corporation v. Saudi Cable Co.* [2000] 1 Lloyd's Rep. 22
Alfred McAlpine Construction Ltd. v. Panatown Ltd. (unreported), 25 July 1996; Court of Appeal (Civil Division) Transcript No. 937 of 1996, C.A.
- G** *Arab Monetary Fund v. Hashim* (1993) 6 Admin.L.R. 348, C.A.
Aussie Airlines Pty. Ltd. v. Australian Airlines Pty. Ltd. (1996) 135 A.L.R. 753
B.O.C. New Zealand Ltd. v. Trans Tasman Properties Ltd. [1997] N.Z.A.R. 49
Bolkiah (Prince Jefri) v. KPMG [1999] 2 A.C. 222; [1999] 2 W.L.R. 215; [1999] 1 All E.R. 517, H.L.(E.)
Borgers v. Belgium (1991) 15 E.H.R.R. 92
Bryan v. United Kingdom (1995) 21 E.H.R.R. 342
Bulut v. Austria (1996) 24 E.H.R.R. 84
- H** *Campbell and Fell v. United Kingdom* (1984) 7 E.H.R.R. 165
Committee for Justice and Liberty v. National Energy Board (1976) 68 D.L.R. (3d) 716
Cormac Moore's Application, In re (unreported), 21 January 1994, C.A.(N.I.)

- D. v. Ireland* (1986) 51 D. & R. 117
Dallas' Application, In re [1996] N.I. 276
De Haan v. Netherlands (1997) 26 E.H.R.R. 417
Delcourt v. Belgium (1970) 1 E.H.R.R. 355
Demicoli v. Malta (1991) 14 E.H.R.R. 47
Fey v. Austria (1993) 16 E.H.R.R. 387
Findlay v. United Kingdom (1997) 24 E.H.R.R. 221
Gregory v. United Kingdom (1997) 25 E.H.R.R. 577
Hannam v. Bradford Corporation [1970] 1 W.L.R. 937; [1970] 2 All E.R. 690, C.A.
Howard Holdings Inc., In re [1998] B.C.C. 549
Incal v. Turkey (unreported), 9 June 1998, E.C.H.R.
Kristinsson v. Iceland (1990) 13 E.H.R.R. 238
Leckie (Judge), In re; Ex parte Felman (1977) 52 A.L.J.R. 155
Liljeberg v. Health Services Acquisition Corporation (1988) 486 U.S. 847
Liteky v. United States (1994) 510 U.S. 540
Najjar v. Haines (1991) 25 N.S.W.L.R. 224
Peyman v. Lanjani [1985] Ch. 457; [1985] 2 W.L.R. 154; [1984] 3 All E.R. 703, C.A.
Pfeifer and Plankl v. Austria (1992) 14 E.H.R.R. 692
Procola v. Luxembourg (1995) 22 E.H.R.R. 193
Pullar v. United Kingdom (1996) 22 E.H.R.R. 391
Reg. v. Altrincham Justices, Ex parte N. Pennington [1975] Q.B. 549; [1975] 2 W.L.R. 450; [1975] 2 All E.R. 78, D.C.
Reg. v. Box [1964] 1 Q.B. 430; [1963] 3 W.L.R. 696; [1963] 3 All E.R. 240, C.C.A.
Reg. v. Chesterfield Borough Council, Ex parte Darker Enterprises Ltd. (unreported), 18 May 1992, Brooke J.
Reg. v. Commonwealth Conciliation and Arbitration Commission, Ex parte Angliss Group (1969) 122 C.L.R. 546
Reg. v. Gregory (unreported), 19 January 1993, C.A.
Reg. v. Panel on Takeovers and Mergers, Ex parte Cheng Kai-man (unreported), 30 October 1995, P.C.
Reg. v. S. (R. D.) (1997) 151 D.L.R. (4th) 193
Reg. v. Secretary of State for the Environment, Ex parte Kirkstall Valley Campaign Ltd. [1996] 3 All E.R. 304
Reg. v. South Worcestershire Justices, Ex parte Lilley [1995] 1 W.L.R. 1595; [1995] 4 All E.R. 186, D.C.
Reg. v. Uxbridge Justices, Ex parte Burbridge, The Times, 20 June 1972, D.C.
Roylance v. General Medical Council (No. 2) [2000] 1 A.C. 311; [1999] 3 W.L.R. 541, P.C.
Rustal Trading Ltd. v. Gill & Duffus S.A. [2000] 1 Lloyd's Rep. 14
Serjeant v. Dale (1877) 2 Q.B.D. 558

The following additional cases, although not cited, were referred to in the skeleton arguments:

- Ardahalian v. Unifert International S.A.* [1984] 2 Lloyd's Rep. 84, C.A.
Banque Financière de la Cité v. Parc (Battersea) Ltd. [1999] 1 A.C. 221; [1998] 2 W.L.R. 475; [1998] 1 All E.R. 737, H.L.(E.)
Barnard v. Wieland (1882) 30 W.R. 947
Bentham v. The Netherlands (1985) 8 E.H.R.R. 1
Berry v. Director of Public Prosecutions (No. 2), The Times, 28 October 1996, P.C.
Biesheuvel v. Birrell [1999] P.I.Q.R. Q40

Q.B. Locabail (U.K.) Ltd. v. Bayfield Properties Ltd. (C.A.)

- A** *Borelli v. Commission of the European Communities* (Case C-97/91) [1992] E.C.R. I-6313, E.C.J.
Bremer Handelsgesellschaft m.b.H. v. Ets. Soules et Cie. [1985] 1 Lloyd's Rep. 160; [1985] 2 Lloyd's Rep. 199, C.A.
Bristol and West Building Society v. Mothew [1998] Ch. 1; [1997] 2 W.L.R. 436; [1996] 4 All E.R. 698, C.A.
Castle Phillips Finance Co. Ltd. v. Piddington (1994) 70 P. & C.R. 592, C.A.
Cleather v. Twisden (1884) 28 Ch.D. 340, C.A.
- B** *Cochrane (E. H.) Ltd. v. Ministry of Transport* [1987] 1 N.Z.L.R. 146
Council of Review, South African Defence Force v. Mönnig, 1992 (3) S.A. 482
Crociani v. Italy (1980) 22 D.R. 147
Derby's (Earl of) Case (1614) 12 Co.Rep. 114
Eckersley v. Mersey Docks and Harbour Board [1894] 2 Q.B. 667, C.A.
Elliniki Radiophonia Tiléorassi A.E. v. Pliroforissis (Case C-260/89) [1991] E.C.R. I-2925, E.C.J.
- C** *Ellis v. Allen* [1914] 1 Ch. 904
Equity & Law Home Loans Ltd. v. Prestidge [1992] 1 W.L.R. 137; [1992] 1 All E.R. 909, C.A.
Frome United Breweries Co. Ltd. v. Bath Justices [1926] A.C. 586, H.L.(E.)
Gardiner Fire Ltd. v. Jones, The Times, 22 October 1998; Court of Appeal (Civil Division) Transcript No. 1638 of 1998, C.A.
Hickman v. Berens [1895] 2 Ch. 638, C.A.
- D** *Johnston v. Chief Constable of the Royal Ulster Constabulary* (Case 222/84) [1987] Q.B. 129; [1986] 3 W.L.R. 1038; [1986] 3 All E.R. 135; [1986] E.C.R. 1651, E.C.J.
Kik v. Council of the European Union (Case T-107/94) [1995] E.C.R. II-1717, C.F.I.
Ladd v. Marshall [1954] 1 W.L.R. 1489; [1954] 3 All E.R. 745, C.A.
Laws v. Australian Broadcasting Tribunal (1990) 170 C.L.R. 70
- E** *Le Compte, Van Leuven & De Meyere v. Belgium* (1981) 4 E.H.R.R. 1
Lenz v. Commission of the European Communities (Case T-47/92) [1992] E.C.R. II-2523, C.F.I.
Livesey v. New South Wales Bar Association (1983) 151 C.L.R. 288
London and North Western Railway Co. v. Lindsay (1858) 3 Macq. 99, H.L.(Sc.)
Lusink, In re; Ex parte Shaw (1980) 55 A.L.J.R. 12
- F** *Matthews v. United Kingdom* (unreported), 18 February 1999, E.C.H.R.
Matua Finance Ltd. v. Equiticorp Industries Group Ltd. [1993] 3 N.Z.L.R. 650
Metropolitan Properties Co. Ltd. v. Cordery (1979) 251 E.G. 567, C.A.
Nye Saunders & Partners v. Alan E. Bristow (1987) 37 B.L.R. 92, C.A.
Oberschlick v. Austria (1991) 19 E.H.R.R. 389
Porter v. Magill [2000] 2 W.L.R. 1420, C.A.
Practice Direction (Court of Appeal (Civil Division)) [1999] 1 W.L.R. 1027; [1999] 2 All E.R. 490, C.A.
- G** *Rees v. Crane* [1994] 2 A.C. 173; [1994] 2 W.L.R. 476; [1994] 1 All E.R. 833, P.C.
Reg. v. Bassetlaw District Council, Ex parte Oxby, The Times, 18 December 1997; Court of Appeal (Civil Division) Transcript No. 2283 of 1997, C.A.
Reg. v. Batth, The Times, 11 April 1990, C.A.
Reg. v. Cameron (1991) 64 C.C.C. (3d) 96
Reg. v. Cheltenham Commissioners (1841) 1 Q.B. 467
- H** *Reg. v. Gaming Board for Great Britain, Ex parte Kingsley* (unreported), 4 July 1996; Court of Appeal (Civil Division) Transcript No. 851 of 1996, C.A.
Reg. v. Hammond (1863) 9 L.T. 423
Reg. v. Handsley (1881) 8 Q.B.D. 383, D.C.

- Reg. v. Horne* (1987) 35 C.C.C. (3d) 427 A
Reg. v. Lessard (1992) 74 C.C.C. (3d) 552
Reg. v. McLean, Ex parte Aikens (1974) 139 J.P. 227, D.C.
Reg. v. Marylebone Magistrates' Court, Ex parte Joseph, *The Times*, 7 May 1993, D.C.
Reg. v. Mayor and Justices of Deal, Ex parte Curling (1881) 45 L.T. 439
Reg. v. Morris (orse. Williams) (1990) 93 Cr.App.R. 102, C.A.
Reg. v. North and East Devon Health Authority, Ex parte Coughlan [2000] 2 W.L.R. 622, C.A. B
Reg. v. Panel on Take-overs and Mergers, Ex parte Guinness Plc. [1990] 1 Q.B. 146; [1989] 2 W.L.R. 863; [1989] 1 All E.R. 509, C.A.
Reg. v. Pennington (1985) 81 Cr.App.R. 217, C.A.
Reg. v. Putnam (1991) 93 Cr.App.R. 281, C.A.
Reg. v. Romsey Justices, Ex parte Gale, *The Times*, 24 January 1992, D.C.
Reg. v. Sawyer (1980) 71 Cr.App.R. 283, C.A.
Reg. v. Te Pou [1992] 1 N.Z.L.R. 522 C
Reichhold Norway A.S.A. v. Goldman Sachs International [2000] 1 W.L.R. 173, C.A.
Ringeisen v. Austria (No. 1) (1971) 1 E.H.R.R. 455
Sellar v. Highland Railway Co., 1919 S.C. (H.L.) 19, H.L.(Sc.)
Shannon v. Country Casuals Holdings Plc. (unreported), 23 October 1997; Court of Appeal (Civil Division) Transcript No. 1697 of 1997, C.A.
Smith v. Liverpool and London and Globe Insurance Co. (1887) 14 R. 931 D
Sramek v. Austria (1984) 7 E.H.R.R. 351
Wentworth v. Lloyd (1864) 10 H.L.Cas. 589, H.L.(E.)
Williamson v. Barbour (1877) 9 Ch.D. 529

APPLICATIONS for permission to appeal.

LOCABAIL (U.K.) LTD. v. BAYFIELD PROPERTIES LTD. AND ANOTHER LOCABAIL (U.K.) LTD. AND ANOTHER v. WALDORF INVESTMENT CORPORATION AND OTHERS E

In 1996 the plaintiff, Locabail (U.K.) Ltd., sought as legal mortgagee by assignment to enforce a possession order made against the first defendant, Bayfield Properties Ltd., in the Guildford County Court on 18 June 1986 in respect of property at Hawks Hill, Chertsey Road, Chobham, Surrey. Following her application made on 13 January 1997 the second defendant, Barbara Emmanuel, was joined as a party to the proceedings. By her re-amended defence and counterclaim dated 7 February 1997 she claimed a beneficial interest in the property in priority to the plaintiff's claim and that the possession order be set aside. On 9 March 1999 Mr. Lawrence Collins Q.C., sitting as a deputy judge of the High Court, gave judgment for the plaintiff and dismissed the second defendant's counterclaim. On 29 March 1999 the second defendant applied to the judge for orders that he disqualify himself from further hearing the action and direct a rehearing before a different judge. By his judgment dated 29 March he dismissed the application and refused leave to appeal from his decision. F G

By an application dated 10 May 1999 the second defendant sought permission to appeal on the grounds, inter alia, that the judge erred in law in that (1) he should not have held that the particular facts of the case viewed objectively did not give rise to a reasonable apprehension or H

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- A suspicion of bias on his part as judge in reaching his decision on 9 March 1999; (2) he wrongly held that the financial interest of other clients of his firm was insufficient to raise any reasonable apprehension that his decision might not have been impartial; he should have held that despite such an interest being indirect it was not remote nor speculative but created an obvious conflict of interest between the second defendant and the firm's other clients which either alone or coupled with the adverse decision he
- B had given against the second defendant was sufficient to raise a reasonable doubt in the mind of a reasonable and informed observer as to whether she had received a fair and impartial assessment of her case; (3) he, while accepting that the Guide to the Professional Conduct of Solicitors, 7th ed. (1996), para.15.01 would have prevented him from acting as a solicitor for the second defendant in the litigation, held that no appearance of bias
- C arose from his hearing the action; (4) he was wrong to discount the appearance of bias arising out of the claims made by his firm's other clients against the second defendant's former husband and those associated with him, since as a partner he would have had access in his firm to material on which allegations were made of their discreditable conduct such as might unfairly influence him against the second defendant and her witnesses; and (5) his disclosure of the press cutting was
- D incomplete and misleading, neither the cutting nor his comment revealed the true nature of all relevant proceedings in which his firm was or had been engaged and accordingly he wrongly held that the second defendant, by her failure to object to his continuing to hear the case after he had drawn attention to the cutting, had waived of her right to object.

- E By a writ dated 23 April 1998 and an amended statement of claim, the plaintiffs, Locabail (U.K.) Ltd. and Locabail International Finance Ltd., began proceedings against the defendants, Waldorf Investment Corporation, Ares Emmanuel and Barbara Emmanuel, claiming possession as mortgagees of property at Hans House, 3, Hans Street, Chelsea, London, S.W.1. By her amended defence and counterclaim dated 17 June 1998 the third defendant denied the claims and asserted her
- F entitlement to a 50 per cent. beneficial interest in the property. By his order made on 3 August 1998 Deputy Master Farringdon entered summary judgment for the plaintiffs under R.S.C., Ord. 14. By a notice dated 10 August 1998 the third defendant appealed and on 9 March 1999 Mr. Lawrence Collins Q.C., sitting as a deputy judge of the High Court, dismissed her appeal. On 29 March 1999 on her application the judge refused to disqualify himself on the ground of bias from further dealing
- G with the matter and to direct a rehearing. He refused her application for leave to appeal. By a notice of appeal dated 10 May 1999 she applied to the Court of Appeal for permission to appeal on the same grounds as those she advanced in the first case.

The facts are stated in the judgment of the court.

H TIMMINS v. GORMLEY

By a summons and particulars of claim dated 1 November 1995 and issued in the Liverpool County Court the claimant, Margaret Timmins, sought damages for negligence against the defendant, Timothy Gormley,

arising out of a road traffic accident. By his defence dated 20 November 1995 the defendant admitted liability but disputed the particulars of injury and special damage. On 22 November 1995 judgment was entered for the claimant with damages to be assessed. By his order dated 3 June 1999 Mr. Recorder Braithwaite Q.C. awarded the claimant the sum of £22,7123 together with costs. By notice of application for permission to appeal dated 30 June 1999 the defendant sought to appeal on grounds, inter alia, that by reason of published materials written by the judge on the subject of damages in personal injury claims, his decision should be set aside for actual or apparent bias.

The facts are stated in the judgment of the court.

WILLIAMS V. H.M. INSPECTOR OF TAXES AND OTHERS

By a complaint made on 17 January 1996 Mrs. Dorothy Williams complained to an industrial tribunal of sexual harassment and racial discrimination suffered during her employment in 1991 and 1992 by the Commissioners of Inland Revenue at their Croydon office. By a complaint made on 17 April 1996 she further alleged that the employers' representatives, Miss Celia Woodward and Mr. C. S. Barnes, victimised and discriminated against her contrary to the Race Relations Act 1976 by failing properly to investigate her complaints of harassment and discrimination. On 7 May 1996 the London (South) Industrial Tribunal by its chairman Mr. D. Booth concluded that the first complaint should not proceed and on 19 November 1996 the tribunal (Mr. D. Booth, chairman, Miss J. G. Wright and Mr. A. McGuinness) dismissed her complaint of 17 April 1996. By a notice of appeal dated 9 January 1997 the complainant appealed to the Employment Appeal Tribunal, inter alia, on the ground that the chairman acted improperly and/or unlawfully and/or displayed bias or the appearance of bias by failing to disclose until challenged by the complainant during the hearing of her second complaint that he had been an employee of the Commissioners of Inland Revenue and that he had made prejudicial remarks concerning the hearing by the tribunal of complaints against the Commissioners. By its order dated 20 November 1998 the appeal tribunal (Lindsay J., Mr. W. Morris and Mrs. R. A. Vickers) dismissed her appeal and on 15 January 1999 refused her application for leave to appeal. By a notice dated 12 February 1999 the complainant applied to the Court of Appeal for permission to appeal from the appeal tribunal, inter alia, on the ground that appeal tribunal erred in law in not allowing her appeal on the ground of bias.

The facts are stated in the judgment of the court.

REGINA V. BRISTOL BETTING AND GAMING LICENSING COMMITTEE, *Ex parte* O'CALLAGHAN

By his order date 2 December 1997 Tucker J. granted the applicant, Terence O'Callaghan, leave to move for judicial review of decisions of the Bristol Betting and Gaming Licensing Committee (i) refusing his applications for the issue of witness summonses in respect of the application by Coral Racing Ltd. for the renewal of bookmaker licences, (ii) refusing to adjourn the hearing of the application for renewal of such

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- A licences and (iii) ordering that the applicant pay the costs of Coral Racing Ltd. in the sum of £5,000. By way of relief the applicant sought orders of certiorari and mandamus to quash the committee's decisions and to oblige it to reconsider and to issue the witness summonses. By notice of motion dated 11 December 1998 the applicant sought an extension of the time specified in R.S.C., Ord. 53, r. 5(5) for entering the originating motion for hearing. On 9 February 1999 Dyson J. declined to extend time and refused
- B the applicant leave to appeal. By a notice dated 13 May 1999 the applicant sought permission to appeal on the ground, inter alia, that unknown to the applicant the judge was a director of a property company, the assets of which included premises of which Coral Racing Ltd. were tenants; that the judge did not disclose that interest before the hearing of the application, and that had he done so, the applicant would have objected to his hearing the application on the ground of apparent bias.

C The facts are stated in the judgment of the court.

- David Lloyd Jones Q.C.* as amicus curiae. Three different categories of case may be distinguished: (1) where a decision is shown in fact to have been influenced by prejudice, predilection or personal interest, actual bias exists the decision cannot be allowed to stand; (2) where the decision-maker has a direct pecuniary or proprietary interest in the outcome of the case before him he is automatically disqualified from hearing the case and any decision made by him cannot stand; and (3) situations which fall within the wider principle of judicial impartiality.
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The rule with regard to actual bias is recognised as being on its own insufficient to protect against judicial bias since (1) it is undesirable that the decision-maker's state of mind should be investigated, given the confidential nature of the decision-making process; (2) the decision-maker may be unaware or unconscious of any bias; (3) actual bias is difficult to establish; and (4) the public interest in maintaining confidence in the integrity of the administration of justice requires the avoidance of the appearance of bias.

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Two tests have been used to establish apparent bias: (1) whether there is a real danger of bias (see *Reg. v. Gough* [1993] A.C. 646 and *Reg. v. Inner West London Coroner, Ex parte Dallaglio* [1994] 4 All E.R. 139) and (2) whether a reasonable and fair-minded member of the public knowing all the relevant facts would have a reasonable suspicion that a fair trial was not possible. In the first test a real possibility of bias, not a probability, is required and the court personifies the reasonable man so that it is unnecessary to consider the question from the viewpoint of the informed observer.

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The tests are based on the same broad principle, namely, that a judge in performing his judicial duty must bring to it not only an unbiased and impartial mind but the appearance of impartiality: see *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)* [2000] 1 A.C. 119. Within that principle there is scope for differences of approach and emphasis: see *Reg. v. Rand* (1866) L.R. 1 Q.B. 230; *Rex v. Sunderland Justices* [1901] 2 K.B. 357; *Law v. Chartered Institute of Patent Agents* [1919] 2 Ch. 276; *Reg. v. Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41; *Reg. v. Barnsley Licensing Justices, Ex parte Barnsley and*

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District Licensed Victuallers' Association [1960] 2 Q.B. 167; *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* [1969] 1 Q.B. 577; *Hannam v. Bradford Corporation* [1970] 1 W.L.R. 937; *Reg. v. Uxbridge Justices, Ex parte Burbridge*, *The Times*, 21 June 1972; *Reg. v. Liverpool City Justices, Ex parte Topping* [1983] 1 W.L.R. 119; *Reg. v. Mulvihill* [1990] 1 W.L.R. 438 and *Arab Monetary Fund v. Hashim* (1993) 6 Admin. L.R. 348.

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While the differences between the tests may not be great they are important both in principle and practice and may in certain cases lead to different results. The real danger test is the more stringent test, whereas the reasonable suspicion test gives more effect to the appearance of bias and allows a margin of error in evaluating the facts by concentrating not on whether there is a danger of bias as an objective fact but on whether a fair-minded and informed person might suspect that it existed. The operation of the reasonable suspicion test might accordingly enhance public confidence in the administration of justice. The real danger tends to substitute, for the doctrine of disqualification by reason of the appearance of bias, the doctrine of disqualification for actual bias modified by the adoption of a new standard of proof. The extent to which the real danger test accommodates the requirements of the appearance of impartiality is controversial: see *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)* [2000] 1 A.C. 119; *Auckland Casino Ltd. v. Casino Control Authority* [1995] 1 N.Z.L.R. 142, *Roylance v. General Medical Council (No. 2)* [2000] 1 A.C. 311; *Hannam v. Bradford Corporation* [1970] 1 W.L.R. 937; *Reg. v. Liverpool City Justices, Ex parte Topping* [1983] 1 W.L.R. 119; *Reg. v. Inner West London Coroner, Ex parte Dallaglio* [1994] 4 All E.R. 139 and *Webb v. The Queen* (1994) 181 C.L.R. 41.

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Under the real danger test the inquiry is not directed to the actual state of the judge's mind but to the court's assessment of the possibilities in the context of the objective facts disclosed by the material in evidence. Thus, it may be shown that the matters alleged to create the risk of bias never came to the judge's attention and, therefore, could not have given rise to possible bias. On the reasonable suspicion test it may be that the material which would establish no real danger would also render any suspicion unreasonable; but in other circumstances the lack of knowledge might not be sufficiently shown to render belief of bias unreasonable.

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The real danger test applies generally in England and Wales to all instances of apparent bias without distinguishing between different categories of decision-maker: see *Reg. v. Spencer* [1987] A.C. 128; *Reg. v. Secretary of State for the Environment, Ex parte Kirkstall Valley Campaign Ltd.* [1996] 3 All E.R. 304 and *Alfred McAlpine Construction Ltd. v. Panatown Ltd.* (unreported), 25 July 1996; Court of Appeal (Civil Division) Transcript No. 937 of 1996. It is the test reflected in section 24 of the Arbitration Act 1996: see *Laker Airways Inc. v. F.L.S. Aerospace Ltd.* [2000] 1 W.L.R. 113 and *Rustal Trading Ltd. v. Gill & Duffus S.A.* [2000] 1 Lloyd's Rep. 14. [Reference was also made to *K.F.T.C.I.C. v. Icori Estero S.p.A.*, 28 June 1991, vol. 6, 8/91, International Arbitration Report, C.A. Paris and *Prince Jefri Bolkiah v. KPMG* [1999] 2 A.C. 222.] That test is also applied by the Judicial Committee of the

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- A Privy Council on appeals from a number of jurisdictions. In Northern Ireland that test has not been applied to allegations of bias made against non-judicial or quasi-judicial bodies: see *In re Dallas' Application* [1996] N.I. 276 and *In re Cormac Moore's Application* (unreported), 21 January 1994, C.A.(N.I.). In New Zealand a modification of the real danger test has been applied: see *Auckland Casino Ltd. v. Casino Control Authority* [1995] 1 N.Z.L.R. 142 and *B.O.C. New Zealand Ltd. v. Trans Tasman Properties Ltd.* [1997] N.Z.A.R. 49.

- B However, the reasonable suspicion test continues to be applied in a number of other jurisdictions: see *Doherty v. McGlennan*, 1997 S.L.T. 444 and *Bradford v. McLeod*, 1986 S.L.T. 244 (Scotland); *Webb v. The Queen*, 181 C.L.R. 41; *Reg. v. Watson, Ex parte Armstrong* (1976) 136 C.L.R. 248; *Reg. v. Commonwealth Conciliation and Arbitration Commission, Ex parte Angliss Group* (1969) 122 C.L.R. 546; *In re Judge Leckie, Ex parte Felman* (1977) 52 A.L.J.R. 155; *In re J.R.L., Ex parte C.J.L.* (1986) 161 C.L.R. 342 and *Vakauta v. Kelly* (1989) 167 C.L.R. 568 (Australia); *B.T.R. Industries South Africa (Pty.) Ltd. v. Metal and Allied Workers' Union*, 1992 (3) S.A. 673 and *Moch v. Nedtravel (Pty.) Ltd.*, 1996 (3) S.A. 1 (South Africa); *Reg. v. S.(R.D.)* (1997) 151 D.L.R. (4th) 193 and *Committee for Justice and Liberty v. National Energy Board* (1976) 68 D.L.R. (3d) 716 (Canada); *Liljeberg v. Health Services Acquisition Corporation* (1988) 486 U.S. 847 and *Liteky v. United States* (1994) 510 U.S. 540 (United States of America)

- The case law of the European Court of Human Rights does not suggest that the real danger test is wrong or inadequate, although the approach of that court in interpreting article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969) is closer to the reasonable suspicion test than to the real danger test: see *Campbell and Fell v. United Kingdom* (1984) 7 E.H.R.R. 165; *Pullar v. United Kingdom* (1996) 22 E.H.R.R. 391; *Piersack v. Belgium* (1982) 5 E.H.R.R. 169; *Hauschildt v. Denmark* (1989) 12 E.H.R.R. 266; *De Cubber v. Belgium* (1984) 7 E.H.R.R. 236; *Fey v. Austria* (1993) 16 E.H.R.R. 387; *Gregory v. United Kingdom* (1997) 25 E.H.R.R. 577; *Reg. v. Gregory* (unreported), 19 January 1993; *Kristinsson v. Iceland* (1990) 13 E.H.R.R. 238; *Langborger v. Sweden* (1989) 12 E.H.R.R. 416; *Demicoli v. Malta* (1991) 14 E.H.R.R. 47; *Borgers v. Belgium* (1991) 15 E.H.R.R. 92; *Procola v. Luxembourg* (1995) 22 E.H.R.R. 193; *Bryan v. United Kingdom* (1995) 21 E.H.R.R. 342; *Findlay v. United Kingdom* (1997) 24 E.H.R.R. 221; *De Haan v. Netherlands* (1997) 26 E.H.R.R. 417; *Incal v. Turkey* (unreported), 9 June 1998; *Delcourt v. Belgium* (1970) 1 E.H.R.R. 355 and *Bulut v. Austria* (1996) 24 E.H.R.R. 84.

- G The principles developed in the jurisprudence of the Court of Human Rights would be likely to be applied on any question of judicial bias which arose for consideration by the Court of Justice of the European Communities.

- H Where the judge has a direct pecuniary or proprietary interest in the outcome of the proceedings the result is automatic disqualification. In such a case it is irrelevant whether there is in fact actual bias; and there is no question of investigating, objectively, whether there is any real likelihood

of bias or any reasonable suspicion of bias on the particular facts: see *Dimes v. Proprietors of Grand Junction Canal* (1852) 3 H.L.Cas. 759; *Reg. v. Gough* [1993] A.C. 646 and *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)* [2000] 1 A.C. 119. Bias is assumed because of the nature of the interest: see *Reg. v. Gough* [1993] A.C. 646; *Rex v. Sunderland Justices* [1901] 2 K.B. 357; *Reg. v. Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41; *Auckland Casino Ltd. v. Casino Control Authority* [1995] 1 N.Z.L.R. 142 and *De Smith, Woolf and Jowell, Judicial Review of Administrative Action*, 5th ed. (1995), p. 525.

The rationale of the principle is that no man should be a judge in his own cause and if he has a direct proprietary or pecuniary interest in the outcome of the litigation public confidence in the administration of justice requires that his decision should not stand: see *Reg. v. Gough* [1993] A.C. 646 and *Webb v. The Queen*, 181 C.L.R. 41. The strictness of the principle as originally formulated (see *Reg. v. Rand*, L.R. 1 Q.B. 230; *Reg. v. Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41 and *Serjeant v. Dale* (1877) 2 Q.B.D. 558) has been relaxed in favour of a de minimis exception: see *Reg. v. Inner West London Coroner, Ex parte Dallaglio* [1994] 4 All E.R. 139; *Auckland Casino Ltd. v. Casino Control Authority* [1995] 1 N.Z.L.R. 142 and *B.T.R. Industries South Africa (Pty.) Ltd. v. Metal and Allied Workers' Union*, 1992 (3) S.A. 673. The interest must be direct, in the sense that it is not remote: see *Metropolitan Properties Co. (F.G.C.) v. Lannon* [1969] 1 Q.B. 577; *Reg. v. Secretary of State for the Environment, Ex parte Kirkstall Valley Campaign Ltd.* [1996] 3 All E.R. 304 and *A. T. & T. Corporation v. Saudi Cable Co.* [2000] 1 Lloyd's Rep. 22; and contrast *Reg. v. Panel on Takeovers and Mergers, Ex parte Cheng Kai-man* (unreported), 30 October 1995. The rule enunciates an irrebuttable presumption of bias necessary to promote public confidence in the judicial system and the impartiality of decision-makers. Hence a judge's ignorance of the existence of a disqualifying interest is irrelevant. There are, however, suggestions, not in the English jurisdiction, that a judge beneficiary of a blind trust would not necessarily be disqualified. [Reference was made to *Clenae Pty. Ltd. v. Australia and New Zealand Banking Group Ltd.* [1999] V.S.C.A. 35; *Auckland Casino Ltd. v. Casino Control Authority* [1995] 1 N.Z.L.R. 142 and *Liljeberg v. Health Services Acquisition Corporation*, 486 U.S. 847.]

The category to which automatic disqualification applies has been extended to a situation where a judge has a particular and substantial personal interest in the outcome of the cause before him: see *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)* [2000] 1 A.C. 119. [Reference was also made to *Roylance v. General Medical Council (No. 2)* [2000] 1 A.C. 311.] The extended category is not clearly defined, with the result that the scope of the principle has become uncertain. [Reference was made to *D. v. Ireland* (1986) 51 D. & R. 117 and *Demicoli v. Malta*, 14 E.H.R.R. 47.] The extension is also difficult to reconcile with existing authority: see *Reg. v. Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41, *Reg. v. Rand*, L.R. 1 Q.B. 230, and *Reg. v. Altrincham Justices, Ex parte N. Pennington* [1975] Q.B. 549. The principle, which was unlikely to apply to criminal cases (see *Reg. v. Mulvihill* [1990] 1 W.L.R. 438) while it was restricted to a direct

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A pecuniary and proprietary interest, may now be applied to such cases. The extension may, however, be limited to the situation where the judge is committed to the well-being of a charitable organisation which is party to the proceedings or to the achievement of its objects. Any further extension of the principle would be undesirable.

B A person with a right of objection on grounds of bias may waive his right so long as he acts freely and in full knowledge of the facts: see *Rex v. Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256; *Shrager v. Basil Dighton Ltd.* [1924] 1 K.B. 274; *Rex v. Essex Justices, Ex parte Perkins* [1927] 2 K.B. 475; *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)* [2000] 1 A.C. 119; *Auckland Casino Ltd. v. Casino Control Authority* [1995] 1 N.Z.L.R. 142 and *Vakauta v. Kelly*, 167 C.L.R. 568; and contrast *Najjar v. Haines* (1991) 25 N.S.W.L.R. 224.

C [Reference was also made to *D. v. Ireland*, 51 D. & R. 117 and *Pfeifer and Plankl v. Austria* (1992) 14 E.H.R.R. 692.] A party should not be permitted to refrain from objection when the matter is first brought to his attention but to object once a judgment adverse to him has been delivered. If matters emerge during a hearing which may properly form the basis of an application for the judge to recuse himself, the point should be taken immediately and failure to do so will amount to waiver: see *Vakauta v. Kelly*, 167 C.L.R. 568.

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Hazel Williamson Q.C. for E. in the first and second cases. The judge should have granted permission to appeal from his decision since it is inappropriate, if justice is to be seen to be done, that he should himself be the final arbiter of an issue of apparent bias raised against him; and since the grounds of the proposed appeal stand a real prospect of success and

E raise issues of general importance for the proper administration of justice.

A judge should not sit in any case where the circumstances could give rise to a perception of prejudice in the judicial system: see *Rex v. Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256 and *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)* [2000] 1 A.C. 119. The test of apparent bias is whether, in the events which

F happened, there was a real danger of bias. The court recognises the importance of the perception of the ordinary public as founding confidence in the judicial system and applies the real danger test with flexibility so that there should be no material distinction in effect between that test and the reasonable apprehension or suspicion of bias test: see *Reg. v. Gough* [1993] A.C. 646; *Webb v. The Queen*, 181 C.L.R. 41; *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* [1969] 1 Q.B. 577;

G *Roylance v. General Medical Council (No. 2)* [2000] 1 A.C. 311; *Arab Monetary Fund v. Hashim*, 6 Admin. L.R. 348; *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)* [2000] 1 A.C. 119 and *Reg. v. Inner West London Coroner, Ex parte Dallaglio* [1994] 4 All E.R. 139.

In applying the test the reviewing court will assess the question of real

H danger, or reasonable suspicion, in the light of all the factual material available. The absence of material facts necessary for the court's assessment will itself be of significance to the court in reaching its decision. Where the relevant facts are peculiarly within the knowledge of the

tribunal under review and are not disclosed to the reviewing court any doubt should be resolved in favour of disqualification. A

The test of apparent bias in the case of a solicitor sitting as a judge can be no less strict than that imposed under the professional guidance for solicitors: the conflict rules set out in the Guide to the Professional Conduct of Solicitors, 7th ed. (1996), para. 15.01 would have prevented the judge acting as E.'s solicitor. It therefore would appear extraordinary to an intelligent and fair-minded member of the public if he could nevertheless adjudicate in a case in which she was a party. Far from there being any separation of the positions of solicitor and judge, there is a clear link: both are officers of the court. B

No distinction can be drawn between the solicitor judge and his firm. The interests of the firm are the interests of the partners own interests and the knowledge of each is the knowledge of all. The court will view with concern the potential leakage of information within a large firm and will recognise the difficulty of establishing and maintaining the necessary safeguards: see *Prince Jefri Bolkiah v. KPMG* [1999] 2 A.C. 222. The perception of prejudice can arise not only from a perception of facts giving rise to an actual or potential conflict of interest, but also from a perception of exposure to possible prejudicial influences. The perception of prejudice can therefore arise from the fact that the judge is a partner in a firm which is acting in other matters which may reasonably be feared to expose him to comment or information which may colour his judgment directly or indirectly against a party. [Reference was made to *In re Howard Holdings Inc.* [1998] B.C.C. 549.] C D

The conflict rules make no exception for absence of knowledge of matters which could give rise to a conflict of interest. If an unappreciated conflict is subsequently discovered the solicitor, just as the solicitor-judge, must withdraw. If judgment has already been delivered it must be set aside if a fair-minded and informed member of the public would conclude that there was a suspicion that the judge was not impartial. If the result of his decision is startlingly adverse to the party alleging apparent bias the reviewing court may the more easily accept the allegation: see *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* [1969] 1 Q.B. 577. E F

Since the appearance of bias is tested objectively it is irrelevant whether the judge carried out a conflict search prior to hearing the case. The requirement of disclosure is not a duty of care but a positive precondition for his conduct of a fair trial; it must therefore be strictly complied with. Even where a conflict search is made and reveals no conflict, the subsequent appearance of such a conflict will nevertheless reflect on the question of bias. The fact that the particular difficulty arises in the use of solicitors as part-time judges must not lead to relaxation of the strict requirements for openness and the objective lack of partiality which confidence in the judicial system requires. Where a solicitor judge discovers an apparent conflict of interest during a hearing he is obliged to make full inquiry into the matter and full disclosure to the parties. G

The test of apparent bias is objective so that the judge's statement as to his state of mind or of knowledge is irrelevant. In principle such a statement should not be entertained by the reviewing court. Any explanatory statement the judge gives cannot be accepted at face value. H

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- A Any cross-examination of the judge would be invidious and accordingly the court should investigate the matter for itself from the viewpoint of the reasonable ordinary person, assessing the objective facts available to it: see *Arab Monetary Fund v. Hashim*, 6 Admin.L.R. 348; *Alfred McAlpine Construction Ltd. v. Panatown Ltd.* (unreported), 25 July 1996 and *In re Judge Leckie, Ex parte Felman*, 52 A.L.J.R. 155. It is only if the objective facts justified the conclusion that he had no knowledge of the relevant
- B matter that the court can apply the principle that the judge's ignorance will dispel any fear of apparent bias: see *Auckland Casino Ltd. v. Casino Control Authority* [1995] 1 N.Z.L.R. 142. Alternatively, such a statement can only be entertained if it contains material capable of being examined in the context of all the relevant facts.

- C On the question of automatic disqualification, again the judge's position within his firm created a situation of conflict which required his automatic disqualification on established principles: see *Dimes v. Proprietors of Grand Junction Canal*, 3 H.L.Cas. 759 and *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)* [2000] A.C. 119.

- E. has not waived her right of objection. There can be no waiver without full knowledge of the facts: see *Ex parte Pinochet Ugarte (No. 2)*
- D and the *Auckland Casino* case [1995] 1 N.Z.L.R. 142. It is not a question of a party being put on notice by a partial disclosure such as the judge made here. It was the judge's responsibility to make full, relevant and voluntary disclosure; parties' relationship with the judge, by the very nature of the judicial process, is not one of equality; they cannot cross-examine him or exert pressure on him for further disclosure or fuller information. [Reference was made to *Aussie Airlines Pty. Ltd. v. Australian Airlines Pty. Ltd.* (1996) 135 A.L.R. 753.] Since there was no full disclosure
- E. never had the actual knowledge necessary for her to make her election whether to continue the hearing: see *Peyman v. Lanjani* [1985] Ch. 457.

- Robert Jay Q.C.* for the defendant in the third case. The law on apparent bias applies the real danger test as defined in *Reg. v. Gough* [1993] A.C. 646 and *Reg. v. Inner West London Coroner, Ex parte Dallaglio*
- F [1994] 4 All E.R. 139. That test comes close to requiring the court to ignore appearances. At present the test is not that of reasonable suspicion of bias which is deployed in Scotland. The two tests are not identical but there may be little practical distinction between them: see *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)* [2000] 1 A.C. 119; *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* [1969] 1 Q.B. 577; *Webb v. The Queen*, 181 C.L.R. 41 and
- G *Roylance v. General Medical Council (No. 2)* [2000] 1 A.C. 311.

- H The test of real danger is arguably the more onerous and, in applying it, the court will ascertain all relevant circumstances before asking the question whether there is a real danger of bias. There is in this respect no real distinction between the court and the hypothetical reasonable man, save that, unlike him, the court will have all the available evidence and know the relevant circumstances. The issue which the court addresses has received various formulations: is the court satisfied that there is no danger of the alleged bias creating injustice; might the tribunal unfairly regard, or have so regarded, with favour or disfavour, the case of a party; is there a

real danger that the tribunal was unconsciously influenced by pre-existing or prejudiced views; is there a real danger that the tribunal's decision was animated by unconscious extraneous prejudice or predilection? [Reference was made to the *Gough* [1993] A.C. 646 and *Dallaglio* [1994] 4 All E.R. 139 cases and *Reg. v. Barnsley Licensing Justices, Ex parte Barnsley and District Licensed Victuallers' Association* [1960] 2 Q.B. 167].

Provided that (a) the real danger test is properly interpreted to mean the court's reception, derived from all available evidence, of the possibility of the decision-maker being influenced by unconscious predilection or prejudice and (b) the reasonable suspicion test cannot be understood to mean the intuitive or gut reaction of the hypothetical reasonable man divorced from all or any of the relevant circumstances of the case, the real danger test is sufficiently flexible and the two tests are capable of being assimilated in their practical application. "Real danger" emphasises the condign rigour of the court's inquiry and, on authority, should be preferred.

The recorder's membership of the Association of Personal Injury Lawyers does not give rise to any real danger of bias, nor did his conduct of the hearing. However, his public expression of opinion in a series of articles which have come to the defendant's attention give rise to such a danger. As he sits as a part-time judge, there is a real danger that in approaching his judicial task he is not free from unwitting prejudice and/or pro-claimant predisposition. Where a judge's views are consistently expressed in the public forum in hyperbolic and partisan terms disclosing obvious predilections and where publication of those views occurs so near to the trial date a question will arise whether there is a possibility of those views unwittingly infiltrating the judicial process. In that situation, on a reasonable suspicion test, the defendant would succeed since—(i) it is rare to hold and express such views as firmly and passionately as the judge does, and (ii) parties are entitled to be confident that the judge is temperamentally capable of refraining from descending into the forensic arena. On the higher, real danger, test which requires an exceptional case to be established, the defendant can still succeed: see *Reg. v. Secretary of State for the Environment, Ex parte Kirkstall Valley Campaign Ltd.* [1996] 3 All E.R. 304.

Mrs. Williams, in person, made submissions confined to the merits of her application.

Judith Jackson Q.C. for the applicant in the fifth case. The judge's connection should have disqualified him from determining the application either automatically because of a direct interest (see *Dimes v. Proprietors of Grand Junction Canal* (1852) 3 H.L. Cas. 759 and *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)* [2000] 1 A.C. 119) or because of an indirect interest. The question, therefore, is whether there was a disqualifying interest. While the relevant interest need not be pecuniary it must be substantial: see *Ex parte Pinochet Ugarte (No. 2)* and *Rex v. Sunderland Justices* [1901] 2 K.B. 357. The connection must be with a party, and not with counsel: see *Laker Airways Inc. v. F.L.S. Aerospace Ltd.* [1999] 2 Lloyd's Rep. 45. The same principle of disqualification should apply whether the interest is direct or indirect.

- A Two tests currently co-exist for establishing the latter interest, namely, the reasonable suspicion and real danger tests. [Reference was made to *Reg. v. Mulvihill* [1990] 1 W.L.R. 438; *Reg. v. Liverpool City Justices, Ex parte Topping* [1983] 1 W.L.R. 119; *Reg. v. Chesterfield Borough Council, Ex parte Darker Enterprises Ltd.* (unreported), 18 May 1992; *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* [1969] 1 Q.B. 577; *Reg. v. Gough* [1993] A.C. 646; *Reg. v. Inner West London Coroner, Ex parte Dallaglio* [1994] 4 All E.R. 139; *Reg. v. South Worcestershire Justices, Ex parte Lilley* [1995] 1 W.L.R. 1595; *Reg. v. Secretary of State for the Environment, Ex parte Kirkstall Valley Campaign Ltd.* [1996] 3 All E.R. 304 and *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)* [2000] 1 A.C. 119.] The real danger test looks to the sufficiency of the alleged interest, both in terms of its substance and proximity. Where both are established it is no answer for the judge to assert that he was unaware of the connection. In any event, it would be unsatisfactory for him to do so since public policy militates against a complainant challenging, or the court investigating, the truth of any such assertion. [Reference was made to the *Gough* case [1993] A.C. 646 and *Reg. v. Box* [1964] 1 Q.B. 430.]
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- D There is here a continuing commercial relationship between the judge and a party involved in the case before him (see *Najjar v. Haines*, 25 N.S.W.L.R. 224) such that his ruling, which determined the proceedings adversely to the applicant, should be set aside.

- E *Anthony Mann Q.C.* and *James Barker* for the plaintiffs in the first and second cases. The judge had no direct pecuniary interest in the case. Therefore the allegation is apparent bias, and the applicable test in English law is the “real danger” test: see the *Gough* case [1993] A.C. 646 and *Ex parte Dallaglio* [1994] 4 All E.R. 139. If the test were reasonable suspicion the result of the present case would be the same. Whichever the test, it applies on the basis of all the facts, not just those which give rise to the initial misapprehension on the complainant’s part: see *Reg. v. S. (R.D.)* (1997) 151 D.L.R. (4th) 193. The reviewing court will take into account the knowledge and ability of the tribunal to ignore extraneous matters.

- F The reviewing court will consider whether the judge actually knew of the connection said to give rise to bias: see the *Auckland Casino* case [1995] 1 N.Z.L.R. 142; *Alfred McAlpine Construction Ltd. v. Panatown Ltd.* (unreported), 25 July 1996 and *Clenae Pty. Ltd. v. Australian and New Zealand Banking Group Ltd.* [1999] V.S.C.A. 35. If the link is unknown the danger of bias is the harder to establish. There is no absolute rule that the reviewing court should accept a statement from the judge as to his state of knowledge of facts relevant to the bias allegation. That court could not investigate the judge’s motives and could not accept a statement that he was not biased, but it may accept a statement as to the extent of his knowledge at relevant times. It would then be for the court to assess that statement in the context of the case and to accept or reject it. [Reference was made to the *Gough* case [1993] A.C. 646; *Arab Monetary Fund v. Hashim*, 6 Admin.L.R. 348; *Reg. v. Uxbridge Justices, Ex parte Burbidge*, *The Times*, 20 June 1972; *Reg. v. Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41; *In re Judge Leckie, Ex parte Felman*, 52 A.L.J.R. 155 and *Liljeberg v. Health Services Acquisition Corporation*,
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486 U.S. 847]. In the instant case the real danger test is not satisfied. “Real” connotes “realistic.” Rejecting E.’s case does not suggest bias against her. [Reference was made to *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* [1968] 1 W.L.R. 815; [1969] 1 Q.B. 577.] There is no suggestion of actual knowledge, nor is there any cogent and rational link between the judge’s association with his firm and the case before him: see *Aussie Airlines Pty. Ltd. v. Australian Airlines Pty. Ltd.*, 135 A.L.R. 753 and *Gregory v. United Kingdom*, 25 E.H.R.R. 577. The judge’s ignorance of any connection is a complete answer to the complaint. The judge is not contaminated by his partnership within the firm. The imputation of the knowledge of one partner to another partner is not a universal principle. Were it otherwise the erection of Chinese walls would never be proper or possible in a partnership.

The solicitors’ conflict rules are based on different considerations from the rules relating to bias. The former are founded on rules of law and equity that prevent a man from serving two masters; the latter are based on the proper administration of justice and on the principle that justice must be seen to be done. In sitting as a judge the solicitor steps outside his role as a solicitor. If he had contaminating knowledge and objection was taken to his sitting he would obviously recuse himself; but if he had no such knowledge he is not obliged to accede to an objection and to withdraw: see *Rex v. Essex Justices, Ex parte Perkins* [1927] 2 K.B. 475.

The question of waiver does not arise because the allegation of apparent bias cannot be made out. In so far as that question may be relevant, the judge’s immediate disclosure was accepted and no further facts were necessary to enable E. to decide whether to waive any objection. Since she took no point on bias she waived her right to object.

Andrew Edis Q.C. and *Ivan Woolfenden* for the plaintiff in the third case. The recorder’s approach throughout does not betray bias in favour of the claimant or disfavour against the defendant’s case. A judge who deals with cases engaging a specialist area of the law in which he is expert will bring to his task a valuable expertise. He will inevitably have formed opinions on questions arising in that area of practice and his extra-judicial expressions of view should not lead litigants to question his impartiality. The defendant should have been aware of the recorder’s reputation so that there was no need for the recorder to disclose his writings at the outset of the trial. The articles complained of do not indicate an extreme view but rather indicate one that can be reasonably held. Nor do they indicate a view that would affect impartiality in the exercise of judicial functions.

Tess Gill, for the employers in the fourth case, was not called on.

William Norris Q.C. and *Lucy Moorman* for the interested party in the fifth case. The connection between the judge and the interested party was tenuous and remote in the extreme. He cannot be accurately described as being a party to the cause or of having a financial, proprietary or other interest in the outcome of the hearing before him: see *Dimes v. Proprietors of Grand Junction Canal* (1852) 3 H.L.Cas. 759; *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)* [2000] 1 A.C. 119; *Reg. v. Gough* [1993] A.C. 646; *Reg. v. Inner West London Coroner, Ex parte Dallaglio* [1994] 4 All E.R. 139; *Clenae Pty. Ltd. v. Australia and New Zealand Banking Group Ltd.* [1999] V.S.C.A. 35;

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Q.B. Locabail (U.K.) Ltd. v. Bayfield Properties Ltd. (C.A.)

- A *A.T. & T. Corporation v. Saudi Cable Co.* [2000] Lloyd's Rep. 22; *Reg. v. Secretary of State for the Environment, Ex parte Kirkstall Valley Campaign Ltd.* [1996] 3 All E.R. 304 and *Auckland Casino Ltd. v. Casino Control Authority* [1995] 1 N.Z.L.R. 142. The matter before the judge concerned an ancillary question, and his judgment betrays no error of principle so that an appellate court should, on ordinary principles, not disturb the judgment. It would be absurd to suggest that there was a "real danger" or "reasonable suspicion" of bias. Although the real danger test is to be applied (see the *Gough* case [1993] A.C. 646) the same result would follow if the reasonable suspicion test applied.
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- Although the reviewing court may not always be able to determine the state of the judge's knowledge, it should inquire into the relevant circumstances and need not accept his statement of his knowledge at face value. [Reference was made to the *Gough* case and *Liljeberg v. Health Services Acquisition Corporation*, 486 U.S. 847.] Where the judge is wholly unaware of the connection until after he has determined the case no question of apparent bias arises.
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Williamson Q.C., *Jay Q.C.*, *Jackson Q.C.* and *Lloyd Jones Q.C.* replied.

- D *Cur. adv. vult.*

17 November. LORD BINGHAM OF CORNHILL C.J., LORD WOOLF M.R. and SIR RICHARD SCOTT V.-C. handed down the following judgment of the court. 1. This is the judgment of the court on five applications for permission to appeal. The applications have been listed and heard together since they raise common questions concerning disqualification of judges on grounds of bias. At the outset we acknowledge with gratitude the help we have received from Mr. David Lloyd Jones who has made submissions on the law as an amicus.

2. In determination of their rights and liabilities, civil or criminal, everyone is entitled to a fair hearing by an impartial tribunal. That right, guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, is properly described as fundamental. The reason is obvious. All legal arbiters are bound to apply the law as they understand it to the facts of individual cases as they find them. They must do so without fear or favour, affection or ill-will, that is, without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes to all considerations extraneous to the particular case.
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3. Any judge (for convenience, we shall in this judgment use the term "judge" to embrace every judicial decision-maker, whether judge, lay justice or juror) who allows any judicial decision to be influenced by partiality or prejudice deprives the litigant of the important right to which we have referred and violates one of the most fundamental principles underlying the administration of justice. Where in any particular case the existence of such partiality or prejudice is actually shown, the litigant has irresistible grounds for objecting to the trial of the case by that judge (if the objection is made before the hearing) or for applying to set aside any judgment given. Such objections and applications based on what, in the
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case law, is called “actual bias” are very rare, partly (as we trust) because the existence of actual bias is very rare, but partly for other reasons also. The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists.

4. There is, however, one situation in which, on proof of the requisite facts, the existence of bias is effectively presumed, and in such cases it gives rise to what has been called automatic disqualification. That is where the judge is shown to have an interest in the outcome of the case which he is to decide or has decided. The principle was briefly and authoritatively stated by Lord Campbell in *Dimes v. Proprietors of Grand Junction Canal* (1852) 3 H.L.Cas. 759, 793–794, when orders and decrees made by and on behalf of the Lord Chancellor were set aside on the ground that he had had at the relevant times a substantial shareholding in the respondent company:

“No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest. Since I have had the honour to be Chief Justice of the Court of Queen’s Bench, we have again and again set aside proceedings in inferior tribunals because an individual, who had an interest in a cause, took a part in the decision. And it will have a most salutary influence on these tribunals when it is known that this high court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence.”

5. The rule has been expressed in slightly different terms in different cases. In *Reg. v. Rand* (1866) L.R. 1 Q.B. 230 Blackburn J. said, at p. 232: “There is no doubt that any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter . . .”

6. In *Reg. v. Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41 Slade J., giving the judgment of the court, said, at p. 47: “It is, of course, clear that any direct pecuniary or proprietary interest in the subject matter of a proceeding, however small, operates as an automatic disqualification.”

7. The basic rule is not in doubt. Nor is the rationale of the rule: that if a judge has a personal interest in the outcome of an issue which he is to resolve, he is improperly acting as a judge in his own cause; and that such a proceeding would, without more, undermine public confidence in the integrity of the administration of justice: see the *Dimes* case, 3 H.L.Cas. 759, in the passage quoted, at pp. 793–794, and *Reg. v. Gough* [1993] A.C. 646, 661, *per* Lord Goff of Chieveley.

Q.B.

Locabail (U.K.) Ltd. v. Bayfield Properties Ltd. (C.A.)

- A 8. In the context of automatic disqualification the question is not whether the judge has some link with a party involved in a cause before the judge but whether the outcome of that cause could, realistically, affect the judge's interest. In the *Dimes* case the outcome of the litigation certainly could have had such an effect on the Lord Chancellor's personal position. In *Clenae Pty. Ltd. v. Australia and New Zealand Banking Group Ltd.* [1999] V.S.C.A. 35 it was held that the outcome of the litigation could not have had such an effect. That will often be the case where the judge holds a relatively small number of shares in a large company and the sums involved in the litigation are not such as could, realistically, affect the value of the judge's shares or the dividend he could expect to receive. The correct approach was in our judgment taken by the majority in the Victoria Court of Appeal in the case cited where, giving the main judgment after reviewing English and Australian authority, Charles J.A. said, at paragraph 59 of the judgment:
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"If there is a separate rule for automatic disqualification for financial interest, unrelated to a reasonable apprehension of bias, in my view the irrebuttable presumption of bias only arises (subject to questions of waiver or necessity) where the judicial officer has a direct pecuniary interest in the outcome of the proceeding."

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9. Winneke P. agreed, at paragraph 3 of the judgment:

"... I agree with Charles J.A. that authority which binds this court does not compel us to conclude that it is the mere shareholding by a judicial officer ('judge') in a party which, alone, constitutes the 'disqualifying pecuniary interest,' but rather it is the potential interest, created by that shareholding, in the subject matter or outcome of the litigation which is the disqualifying factor."

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10. While the older cases speak of disqualification if the judge has an interest in the outcome of the proceedings "however small," there has in more recent authorities been acceptance of a de minimis exception: *B.T.R. Industries South Africa (Pty.) Ltd. v. Metal and Allied Workers' Union*, 1992 (3) S.A. 673, 694; *Reg. v. Inner West London Coroner, Ex parte Dallaglio* [1994] 4 All E.R. 139, 162; *Auckland Casino Ltd. v. Casino Control Authority* [1995] 1 N.Z.L.R. 142, 148. This seems to us a proper exception provided the potential effect of any decision on the judge's personal interest is so small as to be incapable of affecting his decision one way or the other; but it is important, bearing in mind the rationale of the rule, that any doubt should be resolved in favour of disqualification. In any case where the judge's interest is said to derive from the interest of a spouse, partner or other family member the link must be so close and direct as to render the interest of that other person, for all practical purposes, indistinguishable from an interest of the judge himself.

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11. Until recently the automatic disqualification rule had been widely (if wrongly) thought to apply only in cases where the judge had a pecuniary or proprietary interest in the outcome of the litigation. That is what the *Dimes* case, 3 H.L.Cas. 759 concerned, although the statement of principle quoted above is not in terms so limited. In *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)*

[2000] 1 A.C. 119, the House of Lords made plain that the rule extended to a limited class of non-financial interests. Lord Browne-Wilkinson said, at p. 135:

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“My Lords, in my judgment, although the cases have all dealt with automatic disqualification on the grounds of pecuniary interest, there is no good reason in principle for so limiting automatic disqualification. The rationale of the whole rule is that a man cannot be a judge in his own cause. In civil litigation the matters in issue will normally have an economic impact; therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge’s decision will lead to the promotion of a cause in which the judge is involved together with one of the parties.”

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Lord Browne-Wilkinson added, at p. 136:

“It is important not to overstate what is being decided. It was suggested in argument that a decision setting aside the order of 25 November 1998 would lead to a position where judges would be unable to sit on cases involving charities in whose work they are involved. It is suggested that, because of such involvement, a judge would be disqualified. That is not correct. The facts of this present case are exceptional. The critical elements are (1) that A.I. was a party to the appeal; (2) that A.I. was joined in order to argue for a particular result; (3) the judge was a director of a charity closely allied to A.I. and sharing, in this respect, A.I.’s objects. Only in cases where a judge is taking an active role as trustee or director of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or disclose the position to the parties. However, there may well be other exceptional cases in which the judge would be well advised to disclose a possible interest.”

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12. The other members of the House agreed that the rule should be extended to the extent indicated, and Lord Hutton observed, at p. 145, that

“there could be cases where the interest of the judge in the subject matter of the proceedings arising from his strong commitment to some cause or belief or his association with a person or body involved in the proceedings could shake public confidence in the administration of justice as much as a shareholding (which might be small) in a public company involved in the litigation.”

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13. In *Reg. v. Gough* [1993] A.C. 646 Lord Woolf suggested, at p. 673, that the courts should hesitate long before creating any other special category of automatic disqualification: “since this will immediately create uncertainty as to what are the parameters of that category and what is the test to be applied in the case of that category.”

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- A 14. With that expression of view Lord Goff, it would seem, agreed, at p. 664, and it has earned support in the High Court of Australia: see *Webb v. The Queen* (1994) 181 C.L.R. 41, 75, per Deane J. In *Ex parte Pinochet (No. 2)* [2000] 1 A.C. 119, 139, Lord Goff did not envisage any wider extension. Since any extension of the automatic disqualification rule would also, inevitably, limit the power of the judge and any reviewing court to take account of the facts and circumstances of a particular case, and
- B would have the potential to cause delay and greatly increased cost in the final disposal of the proceedings, we would regard as undesirable any application of the present rule on automatic disqualification beyond the bounds set by existing authority, unless such extension were plainly required to give effect to the important underlying principles upon which the rule is based.
- C 15. Although disqualification under the rule in the *Dimes* case, 3 H.L.Cas. 759 and *Ex parte Pinochet (No. 2)* is properly described as automatic, a party with an irresistible right to object to a judge hearing or continuing to hear a case may, as in other cases to which we refer below, waive his right to object. It is however clear that any waiver must be clear and unequivocal, and made with full knowledge of all the facts relevant to the decision whether to waive or not.
- D 16. In practice, the most effective guarantee of the fundamental right recognised at the outset of this judgment is afforded not (for reasons already given) by the rules which provide for disqualification on grounds of actual bias, nor by those which provide for automatic disqualification, because automatic disqualification on grounds of personal interest is extremely rare and judges routinely take care to disqualify themselves, in
- E advance of any hearing, in any case where a personal interest could be thought to arise. The most effective protection of the right is in practice afforded by a rule which provides for the disqualification of a judge, and the setting aside of a decision, if on examination of all the relevant circumstances the court concludes that there was a real danger (or possibility) of bias. Until 1993 there had been some divergence in the
- F English authorities. Some had expressed the test in terms of a reasonable suspicion or apprehension of bias: see, for example, *Law v. Chartered Institute of Patent Agents* [1919] 2 Ch. 276, 290; *Rex v. Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256, 259; *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* [1969] 1 Q.B. 577, 599, 602, 606; *Reg. v. Liverpool City Justices, Ex parte Topping* [1983] 1 W.L.R. 119, 123; *Reg. v. Mulvihill* [1990] 1 W.L.R. 438, 444. This test had found favour in Scotland (*Bradford v. McLeod*, 1986 S.L.T. 244), Australia (*Reg. v. Watson, Ex parte Armstrong* (1976) 136 C.L.R. 248) and South Africa (the *B.T.R. Industries* case, 1992 (3) S.A. 673). Other cases had expressed the test in terms of a real danger or likelihood of bias: *Reg. v. Rand* (1866) L.R. 1 Q.B. 230, 233; *Rex v. Sunderland Justices* [1901] 2 K.B. 357, 371; *Reg. v. Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41, 51; *Reg. v. Barnsley Licensing Justices, Ex parte Barnsley and District Licensed Victuallers' Association* [1960] 2 Q.B. 167, 186; *Reg. v. Spencer* [1987] A.C. 128. Whatever the merits of these competing tests, the law was settled in England and Wales by the House of Lords' decision in *Reg. v. Gough* [1993] A.C. 646. The gist
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of that decision is to be found in two brief extracts from the leading speech of Lord Goff. The first is, at p. 668:

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"In my opinion, if, in the circumstances of the case (as ascertained by the court), it appears that there was a real likelihood, in the sense of a real possibility, of bias on the part of a justice or other member of an inferior tribunal, justice requires that the decision should not be allowed to stand. I am by no means persuaded that, in its original form, the real likelihood test required that any more rigorous criterion should be applied. Furthermore the test as so stated gives sufficient effect, in cases of apparent bias, to the principle that justice must manifestly be seen to be done, and it is unnecessary, in my opinion, to have recourse to a test based on mere suspicion, or even reasonable suspicion, for that purpose."

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The second passage is, at p. 670:

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"In conclusion, I wish to express my understanding of the law as follows. I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators. Likewise I consider that, in cases concerned with jurors, the same test should be applied by a judge to whose attention the possibility of bias on the part of a juror has been drawn in the course of a trial, and by the Court of Appeal when it considers such a question on appeal. Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him . . ."

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17. This rule has been applied in a number of English cases and Privy Council appeals. It has not commanded universal approval elsewhere; Scotland (*Doherty v. McGlennan*, 1997 S.L.T. 444), Australia (*Webb v. The Queen*, 181 C.L.R. 41) and South Africa (*Moch v. Nedtravel (Pty.) Ltd.*, 1996 (3) S.A. 1) have adhered to the reasonable suspicion or reasonable apprehension test, which may be more closely in harmony with the jurisprudence of the European Court of Human Rights: see, for example, *Piersack v. Belgium* (1982) 5 E.H.R.R. 169; *De Cubber v. Belgium* (1984) 7 E.H.R.R. 236; *Hauschildt v. Denmark* (1989) 12 E.H.R.R. 266; *Langborger v. Sweden* (1989) 12 E.H.R.R. 416. We need not debate

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- A whether the substance of the two tests is different, as suggested in *Webb v. The Queen*, 181 C.L.R. 41. Nor need we consider whether application of the two tests would necessarily lead to the same outcome in all cases. For whatever the merit of the reasonable suspicion or apprehension test, the test of real danger or possibility has been laid down by the House of Lords and is binding on every subordinate court in England and Wales. This test appears to be reflected in section 24 of the Arbitration Act 1996: see *Laker Airways Inc. v. F.L.S. Aerospace Ltd.* [1999] 2 Lloyd's Rep. 45. In the overwhelming majority of cases we judge that application of the two tests would anyway lead to the same outcome. Provided that the court, personifying the reasonable man, takes an approach which is based on broad common sense, without inappropriate reliance on special knowledge, the minutiae of court procedure or other matters outside the ken of the ordinary, reasonably well informed member of the public, there should be no risk that the courts will not ensure both that justice is done and that it is perceived by the public to be done.
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18. When applying the test of real danger or possibility (as opposed to the test of automatic disqualification under the *Dimes* case, 3 H.L.Cas. 759 and *Ex parte Pinochet (No. 2)* [2000] 1 A.C. 119) it will very often be appropriate to inquire whether the judge knew of the matter relied on as appearing to undermine his impartiality, because if it is shown that he did not know of it the danger of its having influenced his judgment is eliminated and the appearance of possible bias is dispelled. As the Court of Appeal of New Zealand observed in *Auckland Casino Ltd. v. Casino Control Authority* [1995] 1 N.Z.L.R. 142, 148, if the judge were ignorant of the allegedly disqualifying interest: "there would be no real danger of bias, as no one could suppose that the judge could be unconsciously affected by that of which he knew nothing . . ."
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19. It is noteworthy that in *Reg. v. Gough* [1993] A.C. 646 evidence was received from the juror whose impartiality was in issue (see pp. 651G and 658D), and reliance was placed on that evidence (see p. 652F); both in the Court of Appeal and the House of Lords it was accepted that if the correct test was the real danger or possibility test the appeal could not succeed, since the allegedly disqualifying association had admittedly not been known to the juror at the time when the verdict had been returned, and therefore there was no possibility that it could have affected her decision: see pp. 652D, 660G and 670G. While a reviewing court may receive a written statement from any judge, lay justice or juror specifying what he or she knew at any relevant time, the court is not necessarily bound to accept such statement at its face value. Much will depend on the nature of the fact of which ignorance is asserted, the source of the statement, the effect of any corroborative or contradictory statement, the inherent probabilities and all the circumstances of the case in question. Often the court will have no hesitation in accepting the reliability of such a statement; occasionally, if rarely, it may doubt the reliability of the statement; sometimes, although inclined to accept the statement, it may recognise the possibility of doubt and the likelihood of public scepticism. All will turn on the facts of the particular case. There can, however, be no question of cross-examining or seeking disclosure from the judge. Nor will the reviewing court pay attention to any statement by the judge concerning the impact of any
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knowledge on his mind or his decision: the insidious nature of bias makes such a statement of little value, and it is for the reviewing court and not the judge whose impartiality is challenged to assess the risk that some illegitimate extraneous consideration may have influenced the decision.

20. When members of the Bar are appointed to sit judicially, whether full-time or part-time, they may ordinarily be expected to know of any past or continuing professional or personal association which might impair or be thought to impair their judicial impartiality. They will know of their own affairs, and the independent, self-employed status of barristers practising in chambers will relieve them of any responsibility for, and (usually) any detailed knowledge of, the affairs of other members of the same chambers. The position of solicitors is somewhat different, for a solicitor who is a partner in a firm of solicitors is legally responsible for the professional acts of his partners and does as a partner owe a duty to clients of the firm for whom he or she personally may never have acted and of whose affairs he or she personally may know nothing. While it is vital to safeguard the integrity of court proceedings, it is also important to ensure that the rules are not applied in such a way as to inhibit the increasingly valuable contribution which solicitors are making to the discharge of judicial functions. Problems are, we apprehend, very much more likely to arise when a solicitor is sitting in a part-time capacity, and in civil rather than criminal proceedings. But we think that problems can usually be overcome if, before embarking on the trial of any assigned civil case, the solicitor (whether sitting as deputy district judge, assistant recorder, recorder or section 9 judge) conducts a careful conflict search within the firm of which he is a partner. Such a search, however carefully conducted and however sophisticated the firm's internal systems, is unlikely to be omission-proof. While parties for and against whom the firm has acted, and parties closely associated, would (we hope) be identified, the possibility must exist that individuals involved in such parties, and parties more remotely associated, may not be identified. When in the course of a trial properly embarked upon some such association comes to light (as could equally happen with a barrister-judge), the association should be disclosed and addressed, bearing in mind the test laid down in *Reg. v. Gough*. The proper resolution of any such problem will, again, depend on the facts of the case.

21. In any case giving rise to automatic disqualification on the authority of the *Dimes* case, 3 H.L.Cas. 759 and *Ex parte Pinochet* (No. 2) [2000] 1 A.C. 119, the judge should recuse himself from the case before any objection is raised. The same course should be followed if, for solid reasons, the judge feels personally embarrassed in hearing the case. In either event it is highly desirable, if extra cost, delay and inconvenience are to be avoided, that the judge should stand down at the earliest possible stage, not waiting until the eve or the day of the hearing. Parties should not be confronted with a last-minute choice between adjournment and waiver of an otherwise valid objection. If, in any case not giving rise to automatic disqualification and not causing personal embarrassment to the judge, he or she is or becomes aware of any matter which could arguably be said to give rise to a real danger of bias, it is generally desirable that disclosure should be made to the parties in advance of the hearing. If

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A objection is then made, it will be the duty of the judge to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance. We find force in observations of the Constitutional Court of South Africa in *President of the Republic of South Africa v. South African Rugby Football Union*, 1999 (4) S.A. 147, 177, even though these observations were directed to the reasonable suspicion test:

B “It follows from the foregoing that the correct approach to this
 C application for the recusal of members of this court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.”

22. We also find great persuasive force in three extracts from Australian authority. Mason J., sitting in the High Court of Australia, said in *In re J.R.L., Ex parte C.J.L.* (1986) 161 C.L.R. 342, 352:

F “Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.”

G 23. In *In re Ebner* (1999) 161 A.L.R. 557, 568, para. 37, the Federal Court asked:

H “Why is it to be assumed that the confidence of fair-minded people in the administration of justice would be shaken by the existence of a direct pecuniary interest of no tangible value, but not by the waste of resources and the delays brought about by setting aside a judgment on the ground that the judge is disqualified for having such an interest?”

24. In the *Clenae* case [1999] V.S.C.A. 35 Callaway J.A. observed, at paragraph 89(e):

“As a general rule, it is the duty of a judicial officer to hear and determine the cases allocated to him or her by his or her head of jurisdiction. Subject to certain limited exceptions, a judge or magistrate should not accede to an unfounded disqualification application.”

25. It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers (see *K.F.T.C.I.C. v. Icori Estero S.p.A.* (Court of Appeal of Paris, 28 June 1991, International Arbitration Report, vol. 6, 8/91)). By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakauta v. Kelly* (1989) 167 C.L.R. 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.

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- A 26. We do not consider that waiver, in this context, raises special problems: see *Shrager v. Basil Dighton Ltd.* [1924] 1 K.B. 274, 293; *Rex v. Essex Justices, Ex parte Perkins* [1927] 2 K.B. 475, 489; *Ex parte Pinochet (No. 2)* [2000] 1 A.C. 119, 136–137; the *Auckland Casino* case [1995] 1 N.Z.L.R. 142, 150, 151; *Vakautu v. Kelly*, 167 C.L.R. 568, 572, 577. If, appropriate disclosure having been made by the judge, a party raises no objection to the judge hearing or continuing to hear a case, that
- B party cannot thereafter complain of the matter disclosed as giving rise to a real danger of bias. It would be unjust to the other party and undermine both the reality and the appearance of justice to allow him to do so. What disclosure is appropriate depends in large measure on the stage that the matter has reached. If, before a hearing has begun, the judge is alerted to some matter which might, depending on the full facts, throw doubt on his
- C fitness to sit, the judge should in our view inquire into the full facts, so far as they are ascertainable, in order to make disclosure in the light of them. But, if a judge has embarked on a hearing in ignorance of a matter which emerges during the hearing, it is in our view enough if the judge discloses what he then knows. He has no obligation to disclose what he does not know. Nor is he bound to fill any gaps in his knowledge which, if filled, might provide stronger grounds for objection to his hearing or continuing
- D to hear the case. If, of course, he does make further inquiry and learn additional facts not known to him before, then he must make disclosure of those facts also. It is, however, generally undesirable that hearings should be aborted unless the reality or the appearance of justice requires that they should.

- E **LOCABAIL (U.K.) LTD. v. BAYFIELD PROPERTIES LTD AND ANOTHER.**
LOCABAIL (U.K.) LTD. AND ANOTHER v. WALDORF INVESTMENT CORPORATION
AND OTHERS

The background

- F 27. Mr. Lawrence Collins is a solicitor and a senior partner in Herbert Smith. Since 1995 he has been head of Herbert Smith's litigation and arbitration department. Herbert Smith is a firm of some 145 partners. Mr. Collins became Queen's Counsel in 1997 and in the same year was appointed by the Lord Chancellor under section 9(4) of the Supreme Court Act 1981 to sit as a deputy High Court judge in the Chancery Division. He has sat on a number of occasions in that capacity.
- G 28. In October and November 1998 Mr. Collins, sitting as a deputy High Court judge, heard two cases in each of which the plaintiff was Locabail (U.K.) Ltd. and in each of which Locabail was attempting to enforce charges securing repayment of advances made to Mr. Emmanuel, Mrs. Emmanuel's husband, or to companies controlled by him. In one case, the security consisted of Hans House in Knightsbridge. Hans House was owned by Waldorf Investment Corporation ("Waldorf"), a Liberian company controlled by Mr. Emmanuel. In the other case the security
- H consisted of Hawks Hill, a country estate in Chobham, Surrey. Hawks Hill had been owned by Aurora Enterprises S.A., a Panamanian company also controlled by Mr. Emmanuel, but in 1995, by agreement between Locabail and Mr. Emmanuel (or his companies), was transferred to Bayfield

Properties Ltd. ("Bayfield"), an Isle of Man company controlled by Mr. Emmanuel. Locabail's charge over Hawks Hill was replaced by a charge in favour of Allied Trust Bank to secure funds advanced by Allied Trust Bank to Bayfield for the purchase of Hawks Hill from Aurora.

29. Allied Trust Bank commenced mortgage proceedings for possession of Hawks Hill and obtained a possession order on 18 June 1996. A few days later Locabail took an assignment of the Allied Trust Bank charge and was substituted as plaintiff.

30. Mrs. Emmanuel claimed to be the beneficial owner of Hawks Hill. Her claim was based on representations alleged to have been made to her by Mr. Emmanuel prior to their marriage and on the expenditure by her of money in reliance on the representations. In January 1997 she became a defendant in the Bayfield action and applied to have the possession order set aside.

31. Hans House had been the matrimonial home of Mr. and Mrs. Emmanuel. It had been charged to Locabail. In April 1998 Locabail commenced mortgage proceedings for possession of Hans House. The defendants were Waldorf and Mr. and Mrs. Emmanuel. Summary judgment under R.S.C., Ord. 14 was obtained by Locabail in August 1998. Waldorf and Mr. Emmanuel consented to the order. Mrs. Emmanuel did not. She contended that Mr. Emmanuel had assured her that she had a one half share in Hans House, that in reliance on that assurance she had expended money on the property and that in consequence she had an equitable interest binding on Locabail. She had, however, signed a letter of consent to the charge and Locabail had been provided with a certificate from her solicitor stating that he had advised her separately and that she appeared to have given her consent voluntarily. So summary judgment for possession was given. After the order had been made Mrs. Emmanuel changed her solicitors, gave notice of appeal and filed evidence in support of a contention that her consent had been given as a result of undue influence.

32. The trial of the Hawks Hill action, in which Mrs. Emmanuel was applying for the order for possession of Hawks Hill to be set aside, began on 19 October 1998. The trial lasted 16 days. The deputy judge reserved his judgment. Later, in November 1998, he heard Mrs. Emmanuel's appeal against the Order 14 judgment in the Hans House action. He reserved his judgment. Both judgments were given together on 9 March 1999. They were adverse to Mrs. Emmanuel. The deputy judge did not accept, either in relation to Hawks Hill or in relation to Hans House, that Mrs. Emmanuel was entitled to the equitable interests she had claimed. It is not necessary for the purposes of this judgment to describe why it was that he came to those conclusions.

33. On 29 March 1999, before the orders made on 9 March had been drawn up, Mrs. Emmanuel made an application to the deputy judge asking him to disqualify himself from further dealing with the two cases and to direct a rehearing before another judge. Mrs. Emmanuel's application was based upon the fact that Herbert Smith had been, and probably still was, acting for a Russian company, Sudoexport, which had claims against Mr. Emmanuel and against a company, Howard Holdings Inc., controlled by Mr. Emmanuel. Sudoexport had obtained a bankruptcy

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A order against Mr. Emmanuel and a winding up order against Howard Holdings Inc. Herbert Smith were acting for the liquidator of Howard Holdings Inc., as well as for Sudoexport. It seems that the company had substantial claims against Mr. Emmanuel. For reasons which we will expand upon later, Mrs. Emmanuel contended that the deputy judge, being a partner in Herbert Smith, was not a proper person to have been the judge in the cases in which Locabail was seeking to enforce the securities obtained from Mr. Emmanuel's companies. It was said that a reasonable person, knowing the circumstances, might reasonably feel doubts as to the ability of the deputy judge to be impartial and unbiased. The deputy judge gave judgment on the same day, 29 March, dismissing the application.

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C 34. Mrs. Emmanuel has applied for permission to appeal against the judgments given on 9 March and also against the deputy judge's dismissal of her application on 29 March. She has filed, with her application for permission to appeal, a draft notice of appeal setting out the proposed grounds of appeal and a supplemental document giving details of the respects in which it is contended that the deputy judge's findings of fact and handling of evidence were unsatisfactory. The hearing before us, however, has been confined to a consideration of Mrs. Emmanuel's bias point. If she succeeds on that point, she is entitled to a new hearing before another judge of the Hawks Hill application and the Hans House appeal. If she fails on that point she is still able to prosecute her application for permission to appeal on the other grounds set out in her draft notice of appeal.

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E 35. Mrs. Emmanuel's bias case is based on the solicitor/client relationship between Herbert Smith and Sudoexport and between Herbert Smith and the liquidator of Howard Holdings Inc. These matters came to light in the course of the hearing of the Hawks Hill case. The manner in which that happened appears from the deputy judge's 29 March judgment:

F "It is not suggested that I knew of these matters prior to the commencement of the trial. On Day 7 of the trial in the Hawks Hill action"—Tuesday, 27 October 1998—"Mrs. Emmanuel produced further discovery of the file in the possession of the solicitors who had acted for her in her divorce proceedings against Mr. Emmanuel. Since her advisers in the Hawks Hill action had not previously seen the file, and since it inevitably contained privileged material, I did not sit for a substantial part of that day so that the matrimonial file could be examined by Mrs. Emmanuel's advisers and privileged material removed. The advisers to [Locabail] and I were provided with the remainder of the file towards the end of that day. The first document in the file was a fax sent in June 1996 from Mr. Peter Taroulareas, the first husband of Mrs. Emmanuel, to her solicitors, attaching a press cutting from August 1995 about a bankruptcy order obtained against Mr. Emmanuel by Sudoexport."

H The press cutting to which the deputy judge referred said, under the headline "Greek shipowner in bankruptcy puzzle," that: "Herbert Smith—

the top British solicitors working for Russian trading group Sudoexport—confirmed . . . that it had won a bankruptcy order against Emmanuel.”

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37. The article referred to Mr. Emmanuel’s purchase from Sudoexport of a ship for U.S.\$20m. and went on “The shipowning company was alleged to have collapsed owing the Russians U.S.\$10m. . . . Sudoexport applied for the company to be wound up in London. The petition was opposed but Emmanuel was asked to pay Sudoexport’s legal costs of £20,000. Emmanuel is alleged to have not done so and Herbert Smith, acting for the Russians, started proceedings for personal bankruptcy.”

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38. The shipowning company referred to in the article was Howard Holdings Inc., but it may be Mrs. Emmanuel did not know that until the deputy judge gave his 29 March judgment.

39. The deputy judge, having come across the press cutting during the course of his perusal of the matrimonial file in the evening of 27 October 1998, made an immediate disclosure on the morning of 28 October. We have been supplied with a transcript of what he said:

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“Judge: Mr. Mann and Miss Williamson, I had a quick flick through Bundle T last night and I discovered on the second page for the first time that the firm of which I am a partner seems to have had something to do with attempting to get a bankruptcy order against Mr. Emmanuel. It is the first time I have heard of it, and I had nothing whatever to do with it.”

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40. Neither Mr. Mann for Locabail nor Miss Williamson for Mrs. Emmanuel made any response to the disclosure made by the deputy judge. Neither asked for time to consider the position more fully. Neither asked for any additional information about the matters the deputy judge had referred to. Each side, of course, had its own copy of the press cutting in Bundle T. Both sides were content for the hearing to continue. It did continue for a further eight days after which, as we have said, judgment was reserved and eventually given on 9 March 1999.

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The issues

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41. The arguments put forward in support of the contention that the deputy judge should have acceded to the 29 March application were essentially the same below as those advanced before us. Three points are made by Miss Williamson.

42. She submits that there was a conflict of interest between Mrs. Emmanuel and Herbert Smith’s clients, Sudoexport and/or the liquidator of Howard Holdings Inc. The conflict of interest is constructed as follows: Sudoexport has money claims against Mr. Emmanuel. So does Howard Holdings Inc. in liquidation. Locabail is one of Mr. Emmanuel’s creditors. If Mrs. Emmanuel’s claims to equitable interests in the two properties were to succeed, there would be a reduction in the value to Locabail of its security and an increase in the unsecured debt owing by Mr. Emmanuel to Locabail. This would be detrimental to the ability of Sudoexport and the liquidator of Howard Holdings Inc. to obtain payment of the sums owing to them by Mr. Emmanuel. The deputy judge explained the point in his judgment: “if [Mrs. Emmanuel] failed, [Locabail]

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A would be removed as a creditor in competition with Sudoexport". There is, therefore, Miss Williamson submitted, a conflict of interest between Mrs. Emmanuel and Herbert Smith's clients.

43. Miss Williamson's second point was that the conflict of interest between Mrs. Emmanuel and Herbert Smith's clients would have disqualified Herbert Smith from acting as Mrs. Emmanuel's solicitor. She relied on para. 15.01 of the Guide to the Professional Conduct of Solicitors, 7th ed. (1996), published by the Law Society:

"A solicitor or firm of solicitors should not accept instructions to act for two or more clients where there is a conflict or a significant risk of a conflict between the interests of those clients . . ."

C 44. Miss Williamson's submission was that if a conflict of interest prevented a solicitor from accepting instructions to act for someone, the conflict would be sufficient to disqualify the solicitor from sitting as a judge on a case in which that person was a party.

D 45. Miss Williamson's third point was based on the likelihood that, in the proceedings in which Herbert Smith had acted for Sudoexport and for Howard Holdings Inc. (in liquidation) against Mr. Emmanuel, allegations of a discreditable nature had been made against Mr. Emmanuel. This, submitted Miss Williamson, gives rise to a risk that Mrs. Emmanuel, and her witnesses in the Locabail litigation who were associates of Mr. Emmanuel, may in the eyes of the deputy judge have become tarnished by their association with Mr. Emmanuel.

E 46. These were the three main points relied on by Miss Williamson in support of her submission that there was a real danger that the deputy judge might, in hearing the Hawks Hill application and the Hans House appeal, have been biased against Mrs. Emmanuel.

F 47. There was an additional issue. When, on Day 8 of the hearing, the deputy judge made the disclosure recorded in the transcript, Mrs. Emmanuel could then have made an objection to the deputy judge continuing to hear the case. Or she could have asked for time to consider the position. She did neither, but allowed the hearing to continue to a conclusion. She could, after the Hawks Hill hearing had come to an end, have objected to the deputy judge hearing the Hans House appeal. She did not do so, and, without objection, he heard the appeal. Thereafter, during the three and half month delay before the reserved judgment was delivered, no bias objection was made. An inference that might be drawn is that Mrs. Emmanuel wanted to await the result of the two hearings, and only made her bias objection when she knew she had lost. So the question arises whether she must be taken to have waived any bias objection.

H 48. As to this, Mrs. Williamson's response was to submit, first, that the disclosure made by the deputy judge was not complete disclosure, second, that a waiver could only be effective when made by a person with full knowledge of the relevant facts and, third, that in view of Mrs. Emmanuel's incomplete knowledge of the circumstances of Herbert Smith's involvement in the litigation against her husband, she was never put to her election as to what she should do and waiver could not be raised against her.

49. The “waiver” issue is one which, logically, falls to be considered after the bias issues have been considered.

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The bias issues

50. This is not a case in which actual bias on the part of the deputy judge is alleged. Is it a case in which the judge has a sufficient pecuniary or proprietary interest in the outcome of the trial so as to attract the automatic disqualification principle expressed in the *Dimes* case, 3 H.L.Cas. 759? If it is, then the deputy judge is automatically disqualified. If it is not, then it is a case to which the principles expressed in *Reg. v. Gough* [1993] A.C. 646 must be applied. It was suggested by Miss Williamson that this was a case to which the *Dimes* case applied. Her argument went like this. The deputy judge is a partner in Herbert Smith. Herbert Smith was acting for Sudoexport and Howard Holdings Inc. in litigation against Mr. Emmanuel. Success in achieving the maximum possible recovery from Mr. Emmanuel would enhance the goodwill of Herbert Smith and thereby tend to increase its profits. The deputy judge would share in the firm’s profits. Miss Williamson suggested, also, the possibility that Herbert Smith might be acting under a conditional fee agreement with fees dependent on the level of recoveries extracted from Mr. Emmanuel. But in order to attract the *Dimes* consequence of automatic disqualification something more must, in our judgment, be present than the tenuous connection between the firm’s success in an individual case on the one hand and the firm’s goodwill and the level of profits on the other. And if the pecuniary or proprietary interest has to depend upon the existence of a conditional fee agreement of the unusual character suggested by Miss Williamson, there must be at least some evidence to suggest the existence of such an agreement. Here there is none. Miss Williamson’s suggestion is wholly speculative and hypothetical. In our judgment this is not a case to which the *Dimes* principle of automatic disqualification applies. The *Gough* test must be applied and the court must ask itself whether “in the circumstances of the case . . . it appears that there was a real likelihood, in the sense of a real possibility, of bias” on the part of the deputy judge: see [1993] A.C. 646, 668, *per* Lord Goff.

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51. In answering this question, the court must take into account the actual facts as disclosed by the evidence and, in particular, what it was that the judge knew at the time the case was being heard. In *Reg. v. Gough* evidence was received from a juror as to whether she recognised the name “Gough” as being the name of the neighbour whom she knew as “Steve.” She said she did not. She said she had had no idea that her next door neighbour, “Steve”, was the brother of the accused. This absence of knowledge of the connection between “Steve” and the accused formed part of the basis on which the House of Lords (and the Court of Appeal) assessed whether there was any real danger of bias.

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52. In the present case, the deputy judge told the parties, when he made the disclosure on 28 October 1998, that he knew no more of the litigation in which Herbert Smith were acting than was disclosed by the article. No one then or since has suggested that that was not true. In his 29 March 1999 judgment the deputy judge referred to remarks made by

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- A Lord Denning M.R. in *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* [1969] 1 Q.B. 577, to the effect that a barrister or solicitor should not sit as a judge on a case to which one of his clients was a party, nor on a case where he was already acting against one of the parties, and continued:

- B “It is for that reason that I, and no doubt others who sit in a part time capacity, take steps to discover whether that is so. I should add that in the Hawks Hill action Bayfield Properties Ltd. (by then controlled by the mortgagees of its shares) consented to the possession order and took no further part in the proceedings; and that in the Hans House action Waldorf Investment Corporation and Mr. Emmanuel were not parties to the appeal: they did not appear in the action, and consented in writing to the possession order.”

- C 53. It is clearly to be inferred from this passage that the deputy judge, before he heard the Hawks Hill application and the Hans House appeal, had a conflict search carried out within Herbert Smith in order to make sure that his firm was not acting for or against Locabail or for or against Mrs. Emmanuel. He did not, it must also be inferred, make a conflict search to ascertain whether or not his firm was acting for or against Mr. Emmanuel.

- D 54. In his 29 March judgment the deputy judge identified an important question:

- E “No doubt there may be cases in the future where, notwithstanding conflict searches, the fact that a large firm is acting for or against a party, or an entity connected with a party, will not be known to a deputy judge, and might not emerge until after judgment has been given. The question might then arise as to whether that would in itself require the judgment of a judge who did not know of the connection to be set aside.”

- F 55. This is a question that we have put to ourselves. In our view, once the hypothesis that the judge “did not know of the connection” is accepted, the answer, unless the case is one to which the *Dimes* case, 3 H.L.Cas. 759 applies, becomes obvious. How can there be any real danger of bias, or any real apprehension or likelihood of bias, if the judge does not know of the facts that, in argument, are relied on as giving rise to the conflict of interest? In pressing her case on this point Miss Williamson argued that it was incumbent upon the deputy judge, who had acquired from the press cutting limited knowledge of a connection between his firm and Mr. Emmanuel, to make inquiries in order to discover and then to disclose to the parties the full circumstances of the connection. Unless this were done, she submitted, the real danger of bias test would be satisfied.
- G We do not accept this. Miss Williamson, in our view, is confusing the *Dimes* approach with the *Gough* approach. If the *Dimes* case applies, that is if the judge has a sufficiently significant pecuniary or proprietary interest in the outcome of the trial, the knowledge or absence of knowledge of the judge is, in principle, irrelevant. If a judge with limited knowledge of some indirect connection between himself and the case does not make any further inquiries, there may be some risk, an outside chance, that inquiries, if made, would reveal some disqualifying pecuniary or proprietary interest.
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If there is in fact such an interest, the judge's lack of knowledge of it or forgetfulness about it will not enable the *Dimes* principle of automatic disqualification to be avoided. But if there is no such interest, and there is none in the present case, the *Reg. v. Gough* test must be applied and, for that purpose, all that is necessary is to ask whether, in the light of the judge's actual knowledge at the time of the hearing and of any other relevant facts established by the evidence, the real danger of bias test has been satisfied.

56. The matters relied on by Miss Williamson as demonstrating the requisite real danger must be considered cumulatively. There are three matters relied on. Each has been previously referred to in this judgment.

57. First, there is the point that Herbert Smith's clients, Sudoexport and Howard Holding Inc. in liquidation, had an interest in the failure of Mrs. Emmanuel's claims to beneficial interests in Hawks Hill and Hans House. The success of these claims would reduce the assets to which Locabail could look in order to obtain payment of its secured debts. The balance remaining owing to Locabail would increase the amount of the debts which would rank for dividend in Mr. Emmanuel's bankruptcy and reduce the amount of any dividend that creditors might receive. Hence the conflict. The point, when explained by Miss Williamson, was easy enough to follow. It was not one, however, which would immediately occur to even an informed reader of the press cutting disclosed on 28 October. It plainly did not occur to the deputy judge, nor did it occur to Mrs. Emmanuel or her lawyers. It did not occur to anyone at the time the disclosure was made that Sudoexport might have an interest in the failure of Mrs. Emmanuel's claims. All the facts on which the alleged conflict of interest depended were known at the time. The press cutting disclosed that Herbert Smith was acting for Sudoexport, that Sudoexport had many claims against Mr. Emmanuel and that Sudoexport had obtained a bankruptcy order against Mr. Emmanuel. Mr. Emmanuel's connection with Hawks Hill and Hans House was, of course, known to everyone. So was his potential indebtedness to Locabail. So was the fact that the deputy judge was a Herbert Smith partner. But the alleged conflict of interest occurred to no-one. Why should it have occurred to the reasonable onlooker?

58. Miss Williamson placed reliance on the Law Society's conflict rules. These, it was argued, would have disqualified the deputy judge—or Herbert Smith as a firm—from acting for Mrs. Emmanuel or for Locabail in the Hawks Hill or Hans House litigation. We think that is probably correct. We see the force of Miss Williamson's submission that, if a conflict prevents a solicitor from acting for a party to litigation, the conflict must surely also disqualify the solicitor from sitting as a deputy judge in that litigation. But the submission is, in our opinion, too inflexible. Everything depends on the circumstances. If a serious conflict of interest becomes apparent well before the hearing is due to commence, it seems plain to us that the judge should not sit on the case. This is so whether the judge is a full-time judge or a solicitor deputy or a barrister deputy. On the other hand, if a conflict does not become apparent until very shortly before the hearing or during the hearing, the position may be different. The course the judge, or deputy judge, should take will depend on all the circumstances.

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- A Inflexible rules are best avoided. Plainly the judge should not sit, no matter what inconvenience to the parties may result, if he doubts his ability to be impartial. But, short of that, a number of variable factors will need to be taken into account. What is the nature of the conflict of interest? Are the parties willing for the judge to hear the case? Do they positively want him to hear the case rather than have to suffer an adjournment? Is another judge available to take on the case? If the case has already started, how long has it been going on and how much is left? What will be the expense consequences for the parties if the judge withdraws? How will it appear to the reasonable onlooker if the judge does not withdraw?
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59. Of these questions perhaps only the first and the last are directly relevant to the *Gough* test. But it must be remembered that in the *Gough* case [1993] A.C. 646 the arguably damaging relationship between the juror and the accused's brother only came to light after the trial was over. In a case in which before or during the trial the facts relating to the alleged bias have been disclosed to the parties, it seems to us right that attention should be paid to the wishes of the parties. They are the principals. If they are content that the trial should proceed the judge should, in our view, except where he doubts his ability to be impartial, be very slow to abort the trial. If one party wants the trial to continue and the other wants it aborted, the judge must decide what to do, weighing all the factors and asking the questions to which we have referred. It follows that we do not accept that the discovery of a conflict of interest which, under the Law Society's conflict rules, would disqualify a solicitor from acting for one or other of the parties to a case necessarily bars the solicitor from hearing the case as a deputy judge or requires a hearing already started to be aborted or a judgment given on the case to be set aside. Everything depends on the circumstances of the particular case.
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60. The second point relied on by Miss Williamson is based upon the deputy judge's interest in fees earned by Herbert Smith. The point has already been discussed in this judgment. It is as tenuous and insubstantial for the purposes of the *Gough* test as it is for the purpose of establishing that the deputy judge had a sufficient pecuniary or proprietary interest in the outcome of the litigation to attract automatic disqualification.
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61. Miss Williamson's third point was based upon the belief that, in the Sudoexport litigation against Mr. Emmanuel and the litigation against him brought by the Howard Holdings Inc. liquidator, discreditable allegations about him were likely to have been made, and upon a consequent fear that these allegations might tarnish Mrs. Emmanuel and her witnesses in the eyes of the deputy judge. This point has, in our judgment, no merit at all. First, Mrs. Emmanuel, who is estranged from her husband, has in hearings before the deputy judge herself made discreditable allegations about him. Second, as the deputy judge rightly pointed out in his 29 March judgment, it is the duty of a judge to put out of mind irrelevant or immaterial matters, particularly those of a prejudicial character. Knowledge by a judge of such matters goes nowhere towards establishing a real danger of bias.
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62. In considering the cumulative weight of these matters, there are one or two other submissions made by Miss Williamson that should be mentioned. A

63. She submitted that the deputy judge's statement on 28 October that he knew no more of the Sudoexport matters than was contained in the press cutting should not be entertained. His state of knowledge, she submitted, was irrelevant. This submission is contrary to authority. In *Reg. v. Gough* [1993] A.C. 646 an affidavit from the juror as to the juror's state of knowledge was accepted. B

64. Mr. Mann, counsel for Locabail, submitted that there was no absolute rule as to whether or not the court should accept a statement from the judge as to his or her state of knowledge of facts relevant to a bias allegation. He submitted that although the court could not investigate the judge's motives, and so could not accept a statement from the judge that he was not biased, the court could accept, and if necessary test by reference to the facts of the case, statements by the judge as to what he knew or did not know at the relevant time. We think this is right and in accordance with authority. If the judge's statement about his knowledge is, objectively viewed, cogent, then that is the basis on which the reasonable onlooker, or the court personifying the reasonable onlooker, will ask whether there was any real danger of bias. If the judge's statement is, objectively viewed, an improbable one, then that is how the reasonable onlooker will approach it. C D

65. Miss Williamson challenged the cogency of the deputy judge's statement that he knew nothing more about the Sudoexport litigation than was contained in the press cutting. She submitted that, in the circumstances, "the mere fact that the firm is dealing with the matter which is a conflicting matter must give rise to an expectation that the [solicitor judge] will know at least something about it." We regard this proposition, when applied to a firm like Herbert Smith with around 145 partners and over 300 assistant solicitors, as wholly unreal. We do not think there was any such expectation. E

66. We regard the deputy judge's statement that he had not known of the matters disclosed in the press cutting until he read it as eminently believable. There is nothing that casts doubt on the statement. Moreover no doubt as to the accuracy of the statement was raised by Mrs. Emmanuel or her lawyers either at the time or at any time until after judgment had been given against her. F

67. In our judgment the reasonable onlooker, and the court personifying the reasonable onlooker, would accept the deputy judge's statement about his knowledge and, on that basis, would find no difficulty in concluding that there was no real danger that the judge had been biased. G

Waiver

68. In our judgment, Mrs. Emmanuel and her lawyers had to decide on 28 October what they wanted to do. They could have asked for time to consider the position. They could have asked the deputy judge to recuse himself and order the proceedings to be started again before another H

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A judge. They could have told the judge they had no objection to him continuing with the hearing. In the event they did nothing. In doing nothing they were treating the disclosure as being of no importance. The hearing then continued for a further seven days, judgment was reserved, the Hans House appeal was heard, judgment was reserved, and judgment in both cases was given three and half months later. During all this period Mrs. Emmanuel and her lawyers did nothing about the disclosure that had been made on 28 October. They only sprang into action and began complaining about bias after learning from the deputy judge's judgment that Mrs. Emmanuel had lost.

69. Mrs. Emmanuel's application for permission to appeal and draft notice of appeal raise a large number of objections to the 9 March judgment expressed over several pages. We are concerned with none of these objections. They may or may not be well founded. The deputy judge may or may not have been unfair to Mrs. Emmanuel in the way in which he dealt with her evidence and that of her witnesses. These are matters which must be raised with another court on another occasion. We are concerned only with the complaint based upon an appearance of bias allegedly produced by Herbert Smith's involvement in the litigation against Mr. Emmanuel. This involvement was, in its essentials, disclosed on 28 October. It was not open to Mrs. Emmanuel to wait and see how her claims in the Locabail litigation turned out before pursuing her complaint of bias. Miss Williamson protests that on 28 October not enough was disclosed to put Mrs. Emmanuel to her election. We disagree. The essentials of the conflict of interest case that is now relied on were to be found in the press cutting. Mrs. Emmanuel wanted to have the best of both worlds. The law will not allow her to do so.

70. We agree with the reasons given by the deputy judge in his 29 March 1999 judgment for dismissing Mrs. Emmanuel's bias application. We refuse permission to appeal from that judgment.

TIMMINS v. GORMLEY

F 71. This case has caused us particular concern. The defendant, Timothy Gormley, seeks permission to appeal against the judgment of Mr. Recorder Braithwaite given on 3 June 1999. At the Liverpool County Court the recorder awarded the claimant, Margaret Timmins, £227,123.

G 72. Mr. Robert Jay who represents the defendant made his submissions with admirable moderation and precision. In addition to relying on a number of other grounds of appeal, the defendant contends that the judgment of the recorder should be set aside for apparent bias, that is, a real danger of bias on the part of the recorder. In support of his allegation of bias Mr. Jay relies on certain articles written by the recorder which he submits indicate that there is a real danger that the recorder at the time of the trial was or could have been influenced by an unconscious but settled prejudice against the insurers of the defendant who are the real defendants in this case. Mr. Jay also submits that the findings which the judge made were so favourable to the claimant that they provide support for this allegation of bias.

73. The action arose out of a traffic accident on 14 October 1994. The claimant commenced proceedings on 1 November 1995. She claimed damages for her injuries. These include injury to her cervical and thoracic spine. She also claimed special damages, which included continuing loss of earnings. She initially limited her claim to £25,000. Promptly on 20 November 1995 a defence was filed. The defence admitted negligence but not the damages. On 22 November 1995 the claimant obtained judgment for damages to be assessed. The defendant was guilty of no delay. However, it was not until 19 March 1999 that the claimant filed her final schedule of special damage. By that time the sum specified had grown to £199,413, including past loss of earnings amounting to £32,120 and future loss of earnings amounting to £133,750. The future loss of earnings was calculated on the basis that the claimant would never work again. A counter-schedule was filed on behalf of the defendant. This accepted the arithmetical calculation of the claim but put in issue the claimant's alleged inability to work.

74. In general it would not be unfair to say that the recorder determined almost every issue in favour of Mrs. Timmins. He found that before the accident she was a happy and fulfilled person. There were indications in the medical evidence that she was not a reliable historian. The recorder indicated in his judgment that he had "a suspicion" that part of the reason for this was that "doctors sometimes do not have the time to listen and to understand what is troubling somebody." He thought that on all matters relevant to his judgment Mrs. Timmins was in fact actually telling him the truth. The recorder considered that the defendant's doctor was "slightly dismissive" of the claimant's difficulties. He preferred the claimant's medical evidence to that of the defendant. He concluded that although the defendant relied on a video which the defence had arranged to be taken, it did not support his case but, on the contrary, showed the claimant was severely handicapped by her ongoing problems. The accident had left her "crippled" in a "holistic sense." It had spoilt her life. The recorder indicated, in case there was an appeal, that the transcript would not be able to convey the flavour of the manner in which the claimant gave evidence.

75. In addition to his practice in personal injury cases, primarily but not exclusively on behalf of claimants who are seeking damages for personal injuries, Mr. Braithwaite is a relatively prolific writer in the area in which he practises. He is a consultant editor of the well known and respected textbook *Kemp & Kemp, The Quantum of Damages*. Mr. Braithwaite in a letter to the court points out that it is a fundamental part of the policy of that book that it should not favour either claimants or defendants. He has written extensively on personal injury topics in almost all the publications devoted to that subject. He has also lectured, appeared on television and acted abroad as an expert on English personal injury law.

76. The flavour of the four articles relied on as suggesting bias can only be properly assessed by reading them as a whole. However, that in *The Lawyer* of 21 June 1999, which is after the trial, is probably the most revealing. It examines the Access to Justice reforms in the context of personal injury and clinical negligence claims. It suggests that the reforms are unrealistic in their expectations of defendants. It is not credible that

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- A they “would recognise that it was their responsibility to give the claimant real quality of life, whatever the cost. And they would refrain from attacking a claimant’s credibility without good cause. If someone’s life had been ruined they would do their utmost to deliver fair and adequate compensation within a reasonable time frame.” (See p. 28.) The Access to Justice approach, Mr. Braithwaite considered, was likely “to remain a dream.” It was inconsistent with the adversarial system in which lawyers
- B had spent their lives. “The chances of them changing behaviour overnight at this stage are as unlikely as that of global insurers willingly [opening] their coffers to pay paralysed and brain-damaged accident victims the sums to which they are justly entitled.” The article suggests that “delaying tactics” are often premeditated, in the hope that the case will just go away; that when an offer is eventually made it is intended that the victim will
- C accept a smaller sum than is deserved, in order to put an end to the ongoing stress of the litigation process. “Denying liability in cases where it is clear that liability should not be questioned—for example where drivers have already been convicted of dangerous or drunk driving—is common.” Mr. Braithwaite adds that it is only with the assistance of determined lawyers that claimants are likely to obtain a just settlement. He also makes
- D adverse comments on experts who specialise “in personal injury as ‘defendant’ experts.” The article does however end with an acknowledgement that to a limited extent lawyers of good quality and insurers who are decent and humane are coming together to resolve disputes without the intervention of the courts and the reforms may be a catalyst which will accelerate this trend.

- E 77. The next article upon which Mr. Jay relies is an article in a special issue of *Quantum* (Double issue 4 and 5, 4 September 1998) devoted to the decision of the House of Lords in *Wells v. Wells* [1999] 1 A.C. 345. That decision resulted in successful personal injury claimants receiving substantially increased damages for future long term care and long term loss of earnings. The article contained a contribution from the recorder and a contribution from a solicitor who was expressing “the defendants’
- F view.” The recorder considered the decision a “wonderful victory” for claimants generally and for Mr. Kemp who had been arguing for the change reflected in the decision of the House of Lords for many years.

- G 78. Neither of the articles to which we have referred so far are couched in language which can be criticised as being inappropriate. They do make clear that the recorder is very sympathetic to the position of claimants who are pursuing claims for personal injuries. The earlier article in addition
- H indicates that the recorder strongly disapproves of insurers who in his eyes adopt unacceptable practices. However it cannot be said it is inappropriate for a judge to hold firm views as to insurers who adopt tactics of this nature. After all, the Civil Procedure Reforms were in part designed to prevent practices of the sort of which the recorder complains occurring in the future. The recorder has reservations as to whether the reforms will bring about the change of culture which is necessary. He is entitled to have reservations. While it does lack balance, the article does not exhibit such a lack of proportion that it can be regarded as showing a blinkered approach. As to the *Wells v. Wells* article, it could be said that the decision

was rectifying a previous state of affairs which was not fair to claimants and the recorder was entitled to welcome the decision.

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79. The next article relied upon by Mr. Jay was also in *Quantum* (Issue 3, 10 August 1998). It contains a description of a case which the recorder had recently successfully conducted on behalf of a claimant. It is highly critical of the conduct of the defendant's insurers in that case. It refers to them in trenchant terms as not doing anything to assist the claimant in her plight. The article describes the defendant's "team" as apparently lacking compassion and perception and their conduct as reminding him "just how badly these cases can be managed." The final article appeared in *Personal and Medical Injuries Law Letter*, vol. 15, No. 7, July 1999. This time the article is a report on a case in which the recorder was not personally involved. The case concerned a claim by a tetraplegic. It suggests that the defence team had targeted the case "intending to create a precedent to discourage plaintiffs generally, and apparently set out to attack both the plaintiff and his experts" when the particular plaintiff had an excellent record. The recorder indicates that the case has lessons for plaintiffs' lawyers: "First, we should not allow ourselves to be deterred by intimidatory tactics by defendants. Second, if a plaintiff's claim is carefully researched and properly presented, it ought to succeed." It is not possible for us to say whether the recorder's criticisms are or are not justified. However, we note that the plaintiff was successful in obtaining judgment for a very substantial sum. It was a much larger sum than the defendant's insurers were prepared to pay.

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80. When considering the weight which should be attached to these articles, it is necessary to bear in mind that they are only a small selection of the recorder's extensive writing on the subject of personal injuries. They have been perfectly properly selected because it is thought they support the defendant's contention that the recorder is a committed advocate of the cause of claimants generally.

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81. Mr. Jay makes no specific complaints about the manner in which the case was conducted by the recorder.

82. In relation to the conduct of the trial, Mr. Edis, on behalf of the claimant, has the advantage that the recorder very properly gave full disclosure of information which might have resulted in the defendant asking for the case to be tried by another judge. He did not choose to do so. The recorder disclosed that he was a member of the Association of Personal Injury Lawyers (APIL). He also disclosed that he was aware that there had been a payment into court and the amount of that payment, and finally that he had previously cross-examined the defendant's expert in a manner which had caused offence to that expert. The defendant was only informed of these matters shortly before the hearing when the case was transferred to the recorder. This disclosure by the recorder is properly relied on as showing that he was aware of his responsibilities to the defendant. If objection had been taken the case would probably have had to be adjourned. But the defendant was not then aware of the articles now said to show a real danger of bias, and cannot be said to have waived any objection to which they may give rise.

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A 83. Mr. Jay disclaims any reliance on the fact that the recorder is a member of APIL, an organisation which normally represents claimants rather than defendants.

B 84. Although the judgment of the recorder was from the claimant's point of view in very favourable terms, having heard Mr. Edis's submissions we do not consider that the judgment in itself provides any direct support of the allegation of apparent bias. The findings the recorder made are not so surprising that they support the allegation.

C 85. The defendant's case on bias therefore turns on the statements that the recorder made in the articles to which we have referred. It is not inappropriate for a judge to write in publications of the class to which the recorder contributed. The publications are of value to the profession and for a lawyer of the recorder's experience to contribute to those publications can further rather than hinder the administration of justice. There is a long established tradition that the writing of books and articles or the editing of legal textbooks is not incompatible with holding judicial office and the discharge of judicial functions. There is nothing improper in the recorder being engaged in his writing activities. It is the tone of the recorder's opinions and the trenchancy with which they were expressed which is challenged here. Anyone writing in an area in which he sits
D judicially has to exercise considerable care not to express himself in terms which indicate that he has preconceived views which are so firmly held that it may not be possible for him to try a case with an open mind. This is the position notwithstanding the fact that, as Mr. Edis submits, there can be very real advantages in having a judge adjudicate in the area of law in which he specialises. But if this is to happen it must be recognised that
E his opinions as to particular features of the subject will become known. The specialist judge must therefore be circumspect in the language he uses and the tone in which he expresses himself. It is always inappropriate for a judge to use intemperate language about subjects on which he has adjudicated or will have to adjudicate.

F 86. Assistance in this situation is provided by the decision of the High Court of Australia in *Vakautu v. Kelly*, 167 C.L.R. 568. In that case, in the course of a trial for personal injuries, the judge had made intemperate remarks about the medical evidence. The majority of the court came to the conclusion that the remarks would have excited in the minds of the parties a reasonable apprehension that the judge would not bring an unprejudiced mind to the resolution of the matter before him. In the judgment of the majority (Brennan, Deane and Gaudron JJ.) it was stated, at pp. 570-571:

G "It is inevitable that a judge who sits regularly to hear claims for damages for personal injury will form views about the reliability and impartiality of some medical experts who are frequently witnesses in his or her court. In some cases and notwithstanding the professional detachment of an experienced judge, it will be all but impossible to put such preconceived views entirely to one side in weighing the
H evidence of a particular medical expert. That does not, however, mean that the judge is disqualified from hearing the particular action or any other action involving that medical expert as a witness. The requirement of the reality and the appearance of impartial justice in

the administration of the law by the courts is one which must be observed in the real world of actual litigation. That requirement will not be infringed merely because a judge carries with him or her the knowledge that some medical witnesses, who are regularly called to give evidence on behalf of particular classes of plaintiffs (eg members of a particular trade union), are likely to be less sceptical of a plaintiff's claims and less optimistic in their prognosis of the extent of future recovery than are other medical witnesses who are regularly called to give evidence on behalf of particular classes of defendants (eg those whose liability is covered by a particular insurer). If it were so infringed, the administration of justice in personal injuries cases would be all but impossible . . . On the other hand, there is an ill-defined line beyond which the expression by a trial judge of preconceived views about the reliability of particular medical witnesses could threaten the appearance of impartial justice."

87. Those remarks were made in the context of a case in which comments were made during a trial. Here we are concerned with comments made in articles written in close proximity to the trial. The issue is however the same.

88. Did the recorder cross the "ill-defined" line to which that judgment refers? We have already given an indication of the nature of the articles. The only other factor to which it is necessary to draw attention is that in this particular case the insurers had not behaved in the irresponsible manner of which the recorder so vehemently complained. They had admitted liability promptly. They had made a payment into court and had only contested issues which it was reasonable for them to contest on the evidence which was available to them. The recorder had recognised that some insurers do behave responsibly. The comments which he made about the conduct of insurers would have been more justified in the past than they are today. Today, many insurers and their legal advisers, particularly those legal advisers who are members of FOIL (the Forum of Insurance Lawyers, the counterpart for defendants' representatives of APIL, which has made a significant contribution to the recent reforms) conduct litigation in accordance with the "Overriding Objectives" set out in Part 1 of the Civil Procedure Rules.

89. We have found this a difficult and anxious application to resolve. There is no suggestion of actual bias on the part of the recorder. Nor, quite rightly, is any imputation made as to his good faith. His voluntary disclosure of the matters already referred to show that he was conscious of his judicial duty. The views he expressed in the articles relied on are no doubt shared by other experienced commentators. We have, however, to ask, taking a broad common sense approach, whether a person holding the pronounced pro-claimant anti-insurer views expressed by the recorder in the articles might not unconsciously have leaned in favour of the claimant and against the defendant in resolving the factual issues between them. Not without misgiving, we conclude that there was on the facts here a real danger of such a result. We do not think a lay observer with knowledge of the facts could have excluded that possibility, and nor can we. We accordingly grant permission to appeal on this ground, allow the

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A defendant's appeal and order a retrial. We should not be thought to hold any view at all on the likely or proper outcome of any retrial.

WILLIAMS V. INSPECTOR OF TAXES AND OTHERS

B 90. Mrs. Williams, who appears in person but with the assistance of a *McKenzie* friend (see *McKenzie v. McKenzie* [1971] P. 33), seeks permission to appeal from the decision of the Employment Appeal Tribunal of 20 November 1998 dismissing her appeal from a decision of an industrial tribunal.

C 91. The background to the appeal is that on 17 January 1996 Mrs. Williams made a complaint of sexual harassment and race discrimination by various individuals at the tax office of the Inland Revenue at which she worked in Croydon. On 17 April 1996 she made a further complaint that two individuals together with the Commissioners of Inland Revenue had committed an act of race discrimination against her by failing properly to investigate a grievance she had and by submitting a report which was not consistent with her grievance. By a decision of 7 May 1996, Mr. Booth, the chairman of the industrial tribunal, sitting alone, held that it was not just and equitable to allow Mrs. Williams's application of 17 January 1996, which related to events in 1991 and 1992, to proceed. D However, in relation to her second application, he decided that there should be a preliminary hearing into the question (raised by the Inland Revenue) whether Mrs. Williams had failed to co-operate in an inquiry into her allegations of sexual harassment to such an extent that she had brought the dismissal of her complaints upon herself, with the consequence that her complaints lacked any prospect of success and were E therefore scandalous, frivolous or vexatious.

92. On 24 June 1996 an industrial tribunal chaired by Mr. Booth sitting with two other members, unanimously decided that the application should proceed.

F 93. However, the same industrial tribunal on 19 November 1996 unanimously decided to dismiss her application. The tribunal came to the conclusion that Mrs. Williams had not discharged the onus which was upon her, that her complaints had been thoroughly and impartially and fairly investigated internally and that there was no evidence from which the tribunal could draw an inference of race discrimination.

G 94. Mrs. Williams had been employed by the Inland Revenue at the tax office from 1985 until she took nine months maternity leave in March 1994. It was this period to which her complaint related. Mr. Booth had also worked for the Inland Revenue from 1958 to 1961 in a junior position. In her submissions to us, Mrs. Williams emphasised that it was because of the knowledge of the workings of the Revenue which Mr. Booth displayed at the hearings, that she and the *McKenzie* friend challenged the chairman as to whether he had been employed by the Revenue. Mr. Booth then said that he had worked for the Inland Revenue from 1958 to 1961 H in a junior position. Mr. Booth says he invited any response from Mrs. Williams but none was forthcoming.

95. Having heard Mrs. Williams's submissions which she put forward very clearly and courteously, we did not consider it necessary to call on the

employers to address us. It was for this reason that we did not invite submissions from Mrs. Williams in reply.

96. We entirely agree with the conclusion of the Employment Appeal Tribunal that no right thinking person knowing of the connection of Mr. Booth with the Inland Revenue would feel that there was any danger of bias in this case. The suggestion that there might be was fanciful. In coming to that conclusion we take into account the fact that one of the points made by Mrs. Williams in her grounds of appeal is that there was also a risk of prejudice resulting from the chairman projecting on to her case his displeasure with her "counsel" (the person who was assisting her at the hearing). It is fanciful to suggest that the chairman's employment by the Revenue over 30 years ago could have affected his view. The chairman made jocular remarks that her representative "had come to bash the Revenue" and that "my colleagues and I would always be happy to hear cases involving the Revenue" but these remarks do not suggest bias as Mrs. Williams contends, and she made no such suggestion at the time. The earlier decisions were substantially in Mrs. Williams's favour and the decision of 19 November 1996 was unanimous.

97. In Mrs. Williams's case, having considered all her grounds of appeal, we do not consider it right to grant her permission to appeal.

REGINA V. BRISTOL BETTING AND GAMING LICENSING COMMITTEE,
Ex parte O'CALLAGHAN

98. Mr. O'Callaghan contends that on 10 September 1996 he placed two £25 "correct score accumulator" bets at a betting shop operated by Coral Racing Ltd. ("Corals") in Cardiff. He expected, as a result of one of those bets, to be paid £259,200. However Corals declared that bet to be void because it had not been photographed. Since that time Mr. O'Callaghan has been conducting a campaign which is no doubt designed to place pressure on Corals to meet what Mr. O'Callaghan regards as their obligation.

99. On 22 May 1997 a hearing was due to take place before the Bristol Betting and Licensing Committee into the renewal of bookmakers' permits. Mr. O'Callaghan says that on the previous day his wife wrote to the court asking for an adjournment because he was unfit to attend for medical reasons. A medical certificate was enclosed. Despite a further letter the adjournment was refused and Corals were granted their renewed permit. An award of costs of £5,000 was made against Mr. O'Callaghan.

100. He initially tried to appeal to the Crown Court but having been informed that he had no right to appeal he made an application for judicial review. Leave was granted on 2 December 1997 to apply for judicial review by Tucker J. The application should have been entered and served on the respondents, namely the Bristol Betting and Gaming Licensing Committee and Corals, within 14 days (R.S.C., Ord. 53, r. 5(5)), that is, by 16 December 1997. This did not happen, and it was not until 9 February 1999 that Miss Jackson appeared on behalf of Mr. O'Callaghan before Dyson J. seeking to extend the period of 14 days. The reasons for the delay were connected with difficulties that Mr. O'Callaghan was having

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A in obtaining legal aid. There were further difficulties with the solicitors whom he initially instructed and subsequently he instructed another firm, his present solicitors, who still have the conduct of the case.

B 101. On 16 July 1998, prior to the hearing before Dyson J., the Bristol Betting and Gaming Licensing Committee had extended Corals' permits for three years. This was notwithstanding Mr. O'Callaghan's further application for an adjournment pending the outcome of an application for judicial review.

C 102. The fact that the permit had been extended meant, as Dyson J. pointed out in his judgment, that the reality of the judicial review proceedings was a dispute as to the lawfulness of the decision to order Mr. O'Callaghan to pay £5,000. Having expressed sympathy for Mr. O'Callaghan's personal position, Dyson J. decided that because of the modest sum of money which was then involved, it would not be right to grant an extension of time. He therefore refused the application and it is from that decision that Mr. O'Callaghan wishes to appeal.

D 103. On 28 March 1999 "The Sunday Times" published an article which stated that Dyson J. was a director of Dyson Properties Ltd., a company which owned rented properties in Yorkshire, Greater Manchester and Cheshire and that the tenants of the company included Corals. Mr. O'Callaghan, in an affidavit, says that he subsequently learnt that Corals and its associated companies are tenants of a number of properties owned by Dyson Properties Ltd. and Gown and Mantle Ltd. of which Dyson J. is also a director.

E 104. It is now contended on behalf of Mr. O'Callaghan that if Dyson J. had disclosed his connection with Corals, he would have objected to his hearing the application. It is said that either Dyson J. was disqualified from hearing the application because it is a "*Dimes* situation" or that it is a situation where there was a real danger of bias on the part of Dyson J.

F 105. In accordance with the normal procedure adopted by the Court of Appeal when allegations are made against a judge, Dyson J. was informed of what was being relied on by Mr. O'Callaghan. By letter to this court of 28 June 1999 he confirmed that he had been a non-executive director of Dyson Properties Ltd. since the late 1980's; that it is a family property investment company, which was formed by his parents many years ago; that it holds commercial properties in the North of England; that, apart from himself, the current directors are his mother and brother; that all shares are held by members of the family (which include the judge); that he is not involved in the management of the company; that his role is limited to giving occasional advice to his brother; and that Gown and Mantle Ltd. is a wholly-owned subsidiary of Dyson Properties Ltd. (This last statement may not be entirely accurate, because it appears that the judge may also hold shares in this company). The judge adds that until he read the article in "The Sunday Times" he "was not aware that Corals was one of the company's tenants" and that the rent payable by Corals for the only shop of which it is a tenant of the company represents slightly more than four per cent. of the total rent currently receivable by the company.

H 106. The Lord Chancellor gives guidance to judges on their appointment. At the time of Dyson J.'s appointment, the guidance

provided that no judge should hold a *commercial directorship*. But the guide added:

“There is, however, normally no objection to a judge holding shares in commercial companies, or taking part in the management of a family estate or farming his own land. Equally, there are some forms of non-commercial directorships which a judge may hold without objection.”

107. The current guide of October 1998 is in similar terms.

108. It cannot be said that this is a case where the strict principle of automatic disqualification laid down in *Dimes v. Proprietors of Grand Junction Canal*, 3 H.L.Cas. 759 and *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)* [2000] 1 A.C. 119 applies. Miss Jackson submitted that if the judicial review proceedings had continued they could have had a significant effect upon Corals and in consequence adversely affected that company's ability to meet its obligations to the Dyson family companies. We do not agree. The judicial review proceedings by the time they came before Dyson J. were only concerned with the issue of £5,000 costs. It would be absurd to suggest that recovery or non-recovery of this sum could affect Corals' ability to pay the rent of its shop in Leeds. It was suggested that the court in the judicial review proceedings could grant Mr. O'Callaghan a declaration which would be helpful in his dispute with Corals. However, we cannot see any basis for such a declaration. Once Corals' betting permits had been renewed, the judicial review proceedings could only have relevance with regard to costs. It cannot be said that the judge had anything more than a nominal and indirect interest because of his directorship and shares in the company. Such an interest does not establish a bar to the judge sitting.

109. If (as we hold) Mr. O'Callaghan cannot succeed under the strict rule of automatic disqualification, he certainly cannot succeed under the real danger rule. There is absolutely no reason to doubt or question the judge's statement that he was unaware that Corals were a tenant of his family company. His role was non-executive and there is no reason why he should know of the tenancy. Even if the judge did know, there could not be any real danger of bias. The interest was so minimal that no reasonable and fair minded person sitting in court and knowing the relevant facts would have considered there was a real as opposed to fanciful danger of a fair trial not being possible. The order which the judge made, having regard to the gross delay and the limited issue raised by the application, was well within his discretion, which in our view he exercised correctly.

110. We would dismiss the application for permission to appeal.

Orders accordingly.

Solicitors: Treasury Solicitor; Stephenson Harwood; More Fisher Brown; Morgan Cole, Cardiff; Bartlett & Son, Liverpool; Solicitor of Inland Revenue; Dolmans, Cardiff; Richards Butler.

D. E. C. P.

Neutral Citation Number: [2006] EWCA Civ 1573
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION,
ADMINISTRATIVE COURT
MR JUSTICE LINDSAY
[2005] EWHC 3007 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Monday 27th November 2006

Before :

LORD JUSTICE WARD
LORD JUSTICE WALL
and
LORD JUSTICE RICHARDS

Between :

National Assembly for Wales

Appellant

- and -

(1) Elizabeth Condron

- and -

(2) Miller Argent (South Wales) Limited

Respondents

(Transcript of the Handed Down Judgment of
WordWave International Ltd
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Official Shorthand Writers to the Court)

Timothy Corner QC and Philip Coppel (instructed by **the Treasury Solicitor**) for the
Appellant

Charles George QC and Alexander Booth (instructed by **Richard Buxton Solicitors**) for the
First Respondent

Keith Lindblom QC, Rhodri Price Lewis QC and James Pereira (instructed by DLA Piper
Rudnick Gray Cary LLP) for the **Second Respondent**

Judgment
As Approved by the Court

Lord Justice Richards :

1. This is an appeal by the National Assembly for Wales (“the Assembly”) from an order of Lindsay J quashing the Assembly’s grant of planning permission for the carrying out of opencast mining and related removal and reclamation operations at a site of some 400 hectares at Ffos-y-fran, near Merthyr Tydfil. The proposed development generated a great deal of local opposition. The first respondent, Mrs Condon, was one of the objectors. The second respondent, Miller Argent (South Wales) Limited (“Miller Argent”), is the developer.
2. The detailed background is set out very clearly in Lindsay J’s main judgment (see [2005] EWHC 3007 (Admin)). A brief summary will suffice at this stage. The planning application was submitted by Miller Argent in April 2003. It was “called in” under section 77 of the Town and Country Planning Act 1990 for determination by the Assembly. An inspector was appointed to conduct a public inquiry. In his report, submitted in November 2004, the inspector recommended that planning permission be granted subject to conditions. In accordance with its standing orders, the Assembly delegated its decision on the application to a Planning Decision Committee (“the PDC”) consisting of four members of the Assembly. The Chair of the PDC was Mr Carwyn Jones AM, the Minister for Environment, Planning and Countryside in the Welsh Assembly Government. At a meeting on 3 February 2005 the PDC resolved that it was minded to allow the application subject to conditions and the completion of a section 106 agreement. A “minded to grant” letter to that effect was issued on 7 February 2005. The PDC authorised the details of the formal permission, including review of the section 106 agreement and the final formulation of the conditions, to be dealt with by officials on its behalf. The formal grant of planning permission followed on 11 April 2005.
3. Mrs Condon thereupon brought a challenge under section 288 of the 1990 Act to the grant of planning permission. The matter came before Lindsay J, who considered the grounds under five headings. He dismissed the challenge under four of those headings but found in Mrs Condon’s favour under the fifth, by which it was contended that the PDC’s decision was vitiated by the appearance of bias arising out of a remark made by Carwyn Jones to an objector the day before the PDC meeting. The Assembly now appeals against the judge’s finding on that issue. The appeal is supported by Miller Argent and resisted by Mrs Condon.
4. In addition, by a respondent’s notice Mrs Condon seeks to uphold the judge’s order on the basis that he ought to have acceded to aspects of her challenge under three of the four headings on which he found against her. I shall defer any consideration of those issues until I have dealt with the issue of apparent bias.

Appearance of bias: introduction

5. The claim of apparent bias arose out a remark allegedly made by Carwyn Jones to Mrs Jennie Jones, a retired civil servant who lives in Merthyr Tydfil within sight of the proposed development and was a member of a local protest group. Jennie Jones’s evidence was that on 2 February 2005, the day before the PDC met to consider the planning application, she was involved in a demonstration outside the Assembly’s

office building in Cardiff. She was invited inside the building by an Assembly member in order to get out of the cold. As she entered the building she saw Carwyn Jones and approached him. What happened next was described in her witness statement as follows:

“When I first approached him I spoke in English and I asked him whether I could have a word about the scheme. He asked me whether I was from Merthyr Tydfil and I replied that I was. He did not appear that interested in talking to me. I asked whether he would be willing to continue the conversation in Welsh and he then became more responsive.

It was a reasonably brief conversation but during this I explained that he had two little boys and asked him whether he would be concerned about the proposal being developed close to their school. He agreed that it was a concern but concluded, in English, that he was *‘going to go with the Inspector’s Report’*.

I was disheartened about the discussion and when I returned to our group I explained my conversation to them. I was not surprised to hear that the Planning Decision Committee had approved the Scheme, in my view Mr Jones had already made up his mind. He was also the chair of the group and may have had the opportunity of having the casting vote.

...

From what Carwyn Jones told me it was absolutely clear that he was not bringing an unbiased properly directed and independent mind to the consideration of the matter. Since he was Chairman of the Planning Decision Committee this was particularly unfortunate” (my emphasis).

The point made in relation to Carwyn Jones’s position as Chair of the PDC related not only to a concern that the Chair might have an influence over the debate but also to the fact that the PDC consisted of only four members and if there was an equality of votes the Chair had a casting vote.

6. Following the encounter on 2 February, Jennie Jones’s group made a complaint to the Assembly on the ground that Carwyn Jones had breached the Code of Conduct for members of the PDC by discussing a case with an interested party. The complaint was passed on to the Assembly’s independent Commissioner for Standards, Mr Richard Penn (“the Commissioner”), who investigated the matter and set out his findings in a letter of 13 May 2005. His conclusion was that the complaint was inadmissible since it did not meet one of the criteria laid down in the complaints procedure, namely that “it appears at first sight that, if all or part of the conduct complained about is established to have been committed by the Member, it might amount to a breach of any of the matters encompassed within Standing Order 16.1(i) or (ii)”.

7. The Commissioner said that he had reached that conclusion after a preliminary investigation in the course of which he had interviewed Jennie Jones and other representatives of her group; the Clerk to the Environment, Countryside and Planning Committee (who also clerked the PDC meeting); an official of the Environment, Countryside and Planning Division who was the key adviser to the PDC; and Carwyn Jones himself. As to the relevant facts, the Commissioner stated:

“There is a considerable consensus between Jennie Jones and Carwyn Jones AM about the conversation that took place between the two of them on 2 February 2005. Both said that they met entirely by chance ... and that the discussion was brief lasting no more than 90 seconds with no witnesses to what was said. Jennie Jones told me that she could see that Carwyn Jones AM was obviously uncomfortable at talking to her and was ‘itching to get away’. Both agree that the conversation started in English but switched to Welsh soon after. Both agreed that the planning application in respect of Ffos-y-Fran was touched on and that Carwyn Jones AM referred to the Planning Inspector’s Report. However there is disagreement about exactly what Carwyn Jones AM said to Jennie Jones. Jennie Jones claimed that Carwyn Jones AM told her that he was ‘going with the Report of the Inspector’ – she took this to mean that he was going to accept the recommendations in the Report – whereas Carwyn Jones AM said that as soon as he recognised that Jennie Jones was a part of the demonstration against the Ffos-y-Fran application that was taking place outside the building he reverted to English and told her that he could not discuss the matter and that he had not yet read the Inspector’s Report. Both agree that the conversation then ended and he walked out of the Milling Area.”

8. The Commissioner then referred to certain provisions of the Code of Conduct, to which I will need to return later in this judgment. He said that he had carefully considered all the evidence he had collected. He went on:

“It is indisputable that Carwyn Jones AM neither sought nor agreed to a meeting with Jennie Jones as clearly demonstrated by the evidence of both Jennie Jones and Carwyn Jones AM. The meeting was wholly accidental and unplanned. There is disagreement about what was said in part of the conversation that resulted from this accidental meeting but Carwyn Jones AM is adamant that as soon as he realised there was a danger he would be discussing the planning application for the Ffos-y-Fran application he terminated the conversation as quickly as was politely possible. Jennie Jones herself said that Carwyn Jones AM was clearly uncomfortable and ‘itching to get away’.

The evidence from the Committee Clerk and from the Environment, Countryside and Planning Division official reinforces the claim by Carwyn Jones AM that he did not form a

final view on the application until the conclusion of the Planning Decision Committee. The meeting of the Committee was unusually prolonged as Carwyn Jones AM (who chaired the meeting) and the other Assembly Members on the Committee fully explored the many issues and representations about the scheme before coming to a final decision. Carwyn Jones AM is also adamant that any views expressed by Jennie Jones in the brief conversation on 2 February 2005 did not affect his own consideration of the matter the following day” (original emphasis).

9. The Commissioner concluded:

“I have considered whether the mere fact of a meeting and a conversation with someone protesting about an application, however brief and unplanned, could constitute a breach of the Code of Conduct for Members of the Planning Decision Panel by Carwyn Jones AM. I have concluded that it could not. In my view the key test is set out in paragraph 5 of the Code ... and I have found no evidence that Carwyn Jones AM failed ‘to act, fairly and even handedly, by bringing an unbiased, properly directed and independent mind to ... consideration of the matter’” (original emphasis).

10. It was very soon after the Commissioner’s decision letter that the challenge under section 288 of the 1990 Act was brought against the Assembly’s grant of planning permission. An allegation of bias was included in the grounds of application, though it was not expressed in the terms ultimately advanced before Lindsay J and the grounds made no reference to the conversation between Jennie Jones and Carwyn Jones on 2 February. That conversation was, however, the subject of a witness statement from Jennie Jones which was filed in early July 2005. The Assembly responded in November 2005 with a witness statement from Mr Gareth Rogers, the Deputy Clerk to the Assembly’s Committee on Standards of Conduct, who explained the framework of the complaints procedure and exhibited the Commissioner’s decision letter of 13 April 2005 (which the claimant had already put in evidence). There was no witness statement from Carwyn Jones himself.

11. That was the main evidence before Lindsay J relevant to this issue. At the start of the section of his judgment dealing with the issue, the judge recorded that there was no difference between the parties as to the legal test, which was to be found in *Porter v Magill* [2002] 2 AC 357 per Lord Hope of Craighead at para 103:

“The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”

The type of bias alleged was described by the judge as “possible predetermination”. He adopted a passage in *Georgiou v Enfield LBC* [2004] LGR 497, where I myself applied *Porter v Magill* in a planning context and said at para 31 that it was necessary to consider –

“whether, from the point of view of the fair-minded and informed observer, there was a real possibility that the planning committee or some of its members were biased in the sense of approaching the decision with a closed mind and without impartial consideration of all relevant planning issues.”

12. As to how a possible predetermination was said to have manifested itself in this case, the judge referred to the evidence of Jennie Jones. He then referred to the Commissioner’s decision letter. It will be necessary for me to come back in greater detail to the judge’s treatment of that letter, but it is helpful to note a few points at this stage.
13. First, the judge did not find in the Commissioner’s letter any evidence of a clear denial by Carwyn Jones of Jennie Jones’s account of the words spoken by him during the conversation on 2 February. As the judge put it at paras 63-64:

“I accept that the Commissioner did find that there was a ‘disagreement’ as to what was said but that, of itself, does not oblige the conclusion that Carwyn Jones A.M. had denied that he had said the words which Jennie Jones had attributed to him. So far as one can tell Carwyn Jones A.M. did not say words to the effect, for example, that he could not have said that he would go with the Inspector’s Report because he did not at the time know what its conclusion was or that he did not then know what conclusion the Inspector had arrived at or that he had not received the officers’ reports summarising the Inspector’s Report but merely said that he could not discuss the matter and that he had not read the Report, a 70 page document. Nor did he say that he could not discuss the matter as he had not read the report.

Merely to assert that he had not read the Inspector’s Report cannot, in my view, be taken to be even an oblique denial of his saying the words which Jennie Jones had attributed to him, a denial which would have been so easy to make had it been open to him. Of course, if the import of the reference to his not having read the Report was that he was going to go with the Report even though he did not know what it contained, that would in no way weaken the allegation against him of pre-determination I reiterate that there has been no evidence from Carwyn Jones A.M. in opposition to Jennie Jones’ witness statement of the 6th July, not even after the way the Claimant would put her case to me on ‘bias’ had become entirely clear, nor has there been an application for Jennie Jones’ cross-examination” (original emphasis).

14. Secondly, the judge observed at para 60, by reference to the terms of the complaint, that the question before the Commissioner was whether there had been a discussion of the case with an interested party; the Commissioner was not, strictly speaking, required to be concerned with whether there had been anything said or done that signified possible

predetermination. In relation to the Commissioner's conclusion, which he described as going outside what was strictly necessary to deal with the particular complaint, he said at para 66 that it did not deal with the question with which the judge was concerned, namely the appearance of bias.

15. Having regard to those and other matters, the judge rejected an argument advanced on behalf of the Assembly that he should accept the Commissioner's conclusion as conclusive on the issue of bias. He said that he had to come to his own decision on the evidence before him. He examined various submissions by counsel for the Assembly and counsel for Miller Argent, before reaching a conclusion expressed as follows (para 75):

“Having heard the argument I conclude that there was an unacceptable possible pre-determination in the Planning Decision Committee that authorised the grant of planning permission that finally emerged on the 11th April 2005. A fair-minded observer, hearing the words which Jennie Jones attributes to Carwyn Jones A.M., on learning that the Minister was to be Chair of the PDC dealing with the application the next day, and even recognising that the PDC could be expected to follow the Inspector's Report unless there were planning reasons not to, would, in my view, conclude that there was a real possibility that that member of the PDC was biased. He would think the member would be approaching the question of permission with a closed mind and hence also without impartial consideration of all relevant planning issues. His hearing that the Minister had not read the Inspector's Report would not serve to deny the possibility of bias that he would have concluded existed. That Miller Argent's application had excited a good deal of controversy and was far from being such that the balance of its merits and demerits could only possibly point one way made the absence of bias more than usually important.”

16. The judge's judgment had been reserved at the conclusion of the hearing before him. It was listed to be handed down on Wednesday 21 December 2005. In accordance with the usual practice, the judge made a draft of his judgment available to the parties in advance of hand-down. It was sent to the parties on the afternoon of Friday 16 December. On the afternoon of Tuesday 20 December the Assembly's solicitors faxed to the judge a witness statement of Carwyn Jones responding to Jennie Jones's allegation as to the words he used during their conversation on 2 February. In that statement he said:

“In relation to the allegation, as it is now phrased in paragraph 4 of Ms Jones' statement, I can categorically say that I did not say to her, either in English or in Welsh, that I was 'going to go with the Inspector's report' nor did I say anything of the sort which might have conveyed to Ms Jones the impression that I had already made up my mind either way in respect of the planning application which the Planning Decision Committee was due to consider the following day.

In fact, at that stage I had not even read the Inspector's report, as I stated to the Commissioner for Standards when he interviewed me in relation to the complaint ... and as is recorded in the Commissioner's decision letter"

17. On 21 December the judge was faced with an application by counsel for the Assembly that he should admit Carwyn Jones's statement into evidence rather than proceeding to hand down judgment in the form of the existing draft. Unsurprisingly, the application was supported by Miller Argent but opposed by Mrs Condron. After hearing substantial argument, the judge delivered an *ex tempore* judgment refusing the Assembly's application: that judgment, which is conveniently referred to as his "supplementary judgment" even though it was given immediately before he handed down his main judgment on the section 288 challenge, is reported at [2006] JPL 1512. The judge thereupon handed down the main judgment in materially the same form as the draft that had been made available to the parties.

Appearance of bias: grounds of appeal

18. The Assembly's case on the appeal was presented by Mr Corner QC. Neither he nor his junior appeared in the proceedings before Lindsay J. Four grounds of appeal were advanced against the judge's decision on the bias issue. Three of them (grounds 1, 3 and 4) were directed at the main judgment as handed down; one of them (ground 2) at the supplementary judgment refusing to admit the late statement of Carwyn Jones into evidence.
19. In summary, it is contended by *ground 1* that the judge failed to make an express finding whether Carwyn Jones said to Jennie Jones on 2 February 2005 that he was "going to go with the Inspector's report"; by *ground 3* that the judge erred in concluding that the Commissioner's decision letter did not disclose evidence of a clear denial by Carwyn Jones that he had said the words attributed to him; and by *ground 4* that the judge adopted a flawed approach and reached the wrong conclusion in finding that those words, if said, would lead a fair-minded and informed observer to conclude that there was a real possibility that the PDC was biased.
20. It is contended by *ground 2* that, if the judge did find that Carwyn Jones said the words attributed to him, he erred in making such a finding without admitting Carwyn Jones's witness statement into evidence; alternatively, if the judge was entitled to not to admit that statement into evidence, the Court of Appeal should nonetheless admit it now as fresh evidence.

Ground 1: lack of express finding of fact

21. Mr Corner's submission is that the alleged utterance by Carwyn Jones was at the heart of the case of apparent bias as presented to the court and it was essential to make a finding on it. Although the judgment discusses over the course of several paragraphs whether it is more likely than not that Carwyn Jones did utter the words, it does not lead to any clear finding on the issue. It is not clear that the judge confronted the necessity of making a decision as to whether the words were in fact uttered. In failing to make an express finding the judge fell into error.

22. In my judgment it is plain on a fair reading of the judgment that the judge did find on the balance of probabilities that Carwyn Jones spoke the words attributed to him by Jennie Jones. It is true that the judge did not spell out that finding in express terms, and it would have been better had he done so. But his reasoning led clearly to that finding and his conclusion on apparent bias would not make sense without it. Thus the finding is to be derived by necessary implication from the judgment.
23. I have referred already to the judge's repeated references to the absence of a clear denial by Carwyn Jones of the account given by Jennie Jones, including his rejection of a submission that such a denial was to be found in the Commissioner's decision letter. Having considered that letter, the judge stated at para 68 that he had to come to his own decision on the evidence before him and referred to "the exiguous facts" which a fair minded and informed observer would have to consider. At para 70 he rejected some extremely weak submissions by counsel for the Assembly that there was material inconsistency in Jennie Jones's account of what had been said and that there might have been a mistake in translation. At para 71, in response to a submission by the same counsel that Carwyn Jones's remark was no more than a "throw-away" remark, the judge observed that such a remark can be more revealing than a more prepared or studied one might be. At para 72 he recorded an acceptance by counsel for Miller Argent that there had been no denial by Carwyn Jones of his having said the words attributed to him, and proceeded to reject a submission that the words might amount to no more than an indication of a mere predisposition rather than a possible predetermination. Although the judge referred to the words "attributed to" Carwyn Jones rather than to the words "spoken by" him, it seems to me that the judge's reasoning throughout these passages involves an implicit acceptance that the words attributed to Carwyn Jones were in fact spoken by him.
24. The position is clearer still in the judge's conclusion at para 75, which I have already quoted. The judge concluded that a fair-minded observer, "*hearing the words which Jennie Jones attributes to Carwyn Jones A.M.*" (my emphasis), would conclude that there was a real possibility of bias. If the judge had not found that the words were spoken, his conclusion would simply not make sense. A further clear indication that such a finding had been made is to be seen in para 76, where the judge said that the grant of planning permission should be set aside even though "this is a very large consequence *for a very small remark*" (my emphasis). Again this would not make sense in the absence of a finding that the remark had been made.
25. Mr Corner referred us to *Flaherty v National Greyhound Racing Club Ltd* [2005] EWCA Civ 1117, in which Scott Baker LJ stated at para 33:
- "In my judgment it is an important exercise in an 'apparent bias' case to identify with some precision those facts on which the suggestion of bias can be based. The judge did not expressly carry out that exercise in this case. However, the basis for his finding of apparent bias appears by implication to be the material that he has set out in paragraphs 57 to 61 of his judgment."
26. In my view *Flaherty* gives no assistance to the Assembly's case on this issue. I am in full agreement as to the importance of identifying with some precision the facts on which the suggestion of bias is based. The problem in *Flaherty* was that the allegation

was based on a number of matters and the judge did not identify clearly the matter or matters on which the finding of apparent bias was based. In the present case, by contrast, the allegation was based on only one matter, namely the words allegedly spoken by Carwyn Jones, and the finding of apparent bias could be based only on that matter. Moreover, nothing that was said in *Flaherty* casts any doubt on the legitimacy of identifying a relevant finding of fact by necessary implication from a judgment even if it has not been spelled out in express terms.

27. I would therefore reject the Assembly's case on ground 1.

Ground 3: misinterpretation of Commissioner's decision letter

28. As I have already said, the judge did not accept that the Commissioner's letter contained evidence of a clear denial by Carwyn Jones that he had spoken the words attributed to him by Jennie Jones. The judge acknowledged that the Commissioner recorded a disagreement about what was said, but he pointed to the absence of any specific words of denial by Carwyn Jones and observed that Carwyn Jones's assertion that he had not read the inspector's report did not amount even to an oblique denial of his saying that he was "going with the report of the inspector".
29. Mr Corner submitted that the judge's interpretation of the Commissioner's letter on this point was erroneous. I agree with that submission. As I read the letter, Carwyn Jones must have denied saying the words attributed to him by Jennie Jones. It is worth repeating the relevant passage:

"However, there is *disagreement* about exactly what Carwyn Jones AM said to Jennie Jones. Jennie Jones claimed that Carwyn Jones AM told her that he was 'going with the Report of the Inspector' – she took this to mean that he was going to accept the recommendations in the Report – *whereas* Carwyn Jones AM said as soon as he recognised that Jennie Jones was a part of the demonstration against the Ffos-y-Fran application that was taking place outside the building he reverted to English and told her that he could not discuss the matter and that he had not yet read the Inspector's Report" (my emphasis).

30. The reference to a "disagreement", followed by two contrasting accounts linked by "whereas", indicates clearly to me that Carwyn Jones had denied Jennie Jones's account of what he said and had put forward an alternative account. This is reinforced by the further reference, on the next page of the Commissioner's letter, to "disagreement about what was said in part of the conversation that resulted from this accidental meeting". In my view the Commissioner would have dealt with this very differently if the account given to him by Carwyn Jones had left room for the possibility of the middle position identified by the judge, in which Carwyn Jones said *not only* that he had not yet read the inspector's report *but also* that he was going with the inspector's report – a position that would be inherently very strange and is not supported even by the evidence of Jennie Jones herself.

31. It is of interest, though not strictly a matter of legal relevance, that Jennie Jones understood the Commissioner's letter in the same way as I do. In her witness statement she refers to the letter and states:

“He noted that the Ffos-y-Fran scheme was discussed, although Mr Jones must have denied saying what he did to me and instead told the commissioner that his comment to me was that he had not yet read the Inspector's report.”

32. One of the submissions made by Mr George QC was that, for the purposes of his decision on the admissibility of the complaint, it was not necessary for the Commissioner to establish precisely what was said in the encounter between Jennie Jones and Carwyn Jones: the complaint was that Carwyn Jones had discussed the case with an interested party, and given the accidental nature of the encounter it was evident that that complaint had to fail irrespective of what precisely was said during the encounter. In my view that is too limited an analysis and, in so far as it seeks to downplay the significance of the Commissioner's exposition of the facts, it is mistaken. Whilst this was a preliminary investigation into a complaint and the Commissioner did not have to resolve any area of factual disagreement that he identified, he evidently considered it necessary to explore in some detail the extent to which the facts put forward in support of the complaint were accepted by Carwyn Jones and, where they were not accepted, what alternative version of the facts was given. That he did so is entirely understandable, since it was relevant both for his assessment of the complaint as formulated, i.e. breach of the requirement not to discuss a case with an interested party, and because he took it upon himself to consider whether there could have been a breach of any other principles to which members were required to adhere under the Code of Conduct.
33. Although I take the view that the judge was wrong to read the Commissioner's letter as containing no evidence of a clear denial by Carwyn Jones of having spoken the words attributed to him, it does not follow that the judge was wrong to find on the balance of probabilities that those words were indeed spoken. Mr Corner submitted that if the judge had not erred in his interpretation of the Commissioner's letter he *might* have reached a different conclusion on whether the words were spoken, since it was a fundamental part of the judge's reasoning that Carwyn Jones had *at no time* made a plain denial of having spoken the words in question. In my judgment, however, it is unrealistic to suggest that the judge's conclusion might have been different if he had read the Commissioner's letter in the way that I do.
34. The point is straightforward – so straightforward that I find it very surprising that the Assembly's legal advisers allowed this situation to arise at all. The claimant's case that Carwyn Jones had spoken the words in question was supported by a witness statement from Jennie Jones herself, complete with statement of truth. There was no application to cross-examine her and no other direct challenge to her evidence. Against that evidence had to be placed the Commissioner's letter recording, as I have interpreted it, a denial by Carwyn Jones when questioned by the Commissioner on the subject. Self-evidently, such second-hand evidence of a denial could not carry anything like the same weight as the unchallenged witness statement of Jennie Jones. If there was to be a direct challenge to her evidence the obvious course, as the judge made clear, was to file a witness statement by Carwyn Jones, as was eventually sought to be done after receipt

of the draft judgment. In the absence of such a statement it was inevitable, in my view, that a finding on the balance of probabilities had to be made in favour of the version given by Jennie Jones.

35. This is a convenient place in which to dispose of one small point concerning the version given by Jennie Jones. According to her witness statement, Carwyn Jones said that he was “going to go with the inspector’s report”. The Commissioner’s letter recorded her as saying that he had told her that he was “going with the report of the inspector”. Like the judge, I see no material difference between those formulations; but in the circumstances I shall use the formulation in her witness statement.
36. Accordingly, whilst respectfully disagreeing with that part of the judge’s reasoning that was directed to the Commissioner’s letter, I do not think that this provides a sufficient basis for interfering with his implicit finding that Carwyn Jones did say the words attributed to him. For that reason the Assembly’s partial success on ground 3 is ultimately of no help to it. The judge’s conclusion as to appearance of bias must be considered on the basis that Carwyn Jones did say to Jennie Jones that he was “going to go with the inspector’s report”.

Ground 4: whether the judge was right to find an appearance of bias

37. That brings me to what I regard as the central issue in this appeal, namely whether the judge was right to find an appearance of bias on the basis that Carwyn Jones did say the words attributed to him.
38. Neither before the judge nor before us was there any disagreement as to the correct legal test; and I have referred already to what the judge said about that test. Nevertheless I think it important to look in a little more detail at what the test involves. It is helpful to start with a passage from *Flaherty v National Greyhound Racing Club Ltd* (cited above). The court was concerned in that case with a tribunal hearing, but the principles applied were general ones. Having referred to the basic test stated by Lord Hope in *Porter v Magill* (cited above), Scott Baker LJ continued, at para 27:

“The test for apparent bias involves a two stage process. First the Court must ascertain all the circumstances which have a bearing on the suggestion that the tribunal was biased. Secondly it must ask itself whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased An allegation of apparent bias must be decided on the facts and circumstances of the individual case The relevant circumstances are those apparent to the court upon investigation; they are not restricted to the circumstances available to the hypothetical observer at the original hearing”

39. That emphasis on the circumstances as they appear to the court after investigation finds expression in various ways in the judgment of Lord Hope in *Porter v Magill*. The claim of apparent bias in that case was based on a statement in which the district auditor, during the course of his investigation into alleged misconduct, announced his provisional findings at a press conference. It was contended that this suggested that he

had a closed mind and would not act impartially in the rest of his investigation. In rejecting that contention, Lord Hope endorsed at para 105 what Schiemann LJ had said in the Court of Appeal, to the effect that whilst there was room for a casual observer to form the view after the press conference that the auditor might be biased, the conclusion to be drawn from an examination of the material before the court was that there was no real danger of bias. Similarly, Lord Hope referred in para 104 to strands in the Strasbourg jurisprudence, on the one hand giving some support for the proposition that the standpoint of the complainant was important and on the other hand emphasising that what is decisive is whether any fears expressed by the complainant are objectively justified. He said that the complainant's fears were clearly relevant at the initial stage when the court had to decide whether the complaint was one that should be investigated, but they lost their importance once the stage was reached of looking at the matter objectively.

40. Further guidance is to be found in the judgment of Lord Hope in *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2. The claim of apparent bias in that case was directed towards the medical member of a disability appeal tribunal, Dr Armstrong. Lord Hope stated at para 17:

“The critical issue is whether the fair-minded and informed observer would conclude, having considered the facts, that there was a real possibility that Dr Armstrong would not evaluate reports by other doctors who acted as [examining medical practitioners] objectively and impartially against the other evidence. The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny. It is to be assumed ... that the observer is neither complacent nor unduly sensitive or suspicious when he examines the facts that he can look at. It is to be assumed too that he is able to distinguish between what is relevant and what is irrelevant, and that he is able when exercising his judgment to decide what weight should be given to the facts that are relevant.”

41. What, then, are the relevant facts to be gleaned from the material available to the court in the present case?
42. I take as my starting-point the actual words found to have been spoken by Carwyn Jones to Jennie Jones, which were put by the judge into direct speech as “I’m going to go with the report of the inspector”. It was argued before the judge, and repeated before us, that those words go no further than a *predisposition* on the part of Carwyn Jones to follow the inspector’s report and that a predisposition is to be distinguished from a *predetermination* or closed mind. The judge rejected the argument, stating at para 72 that the words “suggest a mind made up” and “suggest that so far as the speaker was concerned a conclusion had been reached, and that, on her unchallenged evidence, is how Jennie Jones interpreted them”. I respectfully take a different view. In the light of the guidance to which I have referred, I would not place any weight on how Jennie

Jones reacted to the words spoken. And when they are viewed objectively and in their context, the words appear to me to be consistent with the speaker having a predisposition to follow the inspector's report without necessarily having a closed mind on the subject.

43. We were referred to various cases in which the distinction has been drawn between a legitimate predisposition towards a particular outcome (for example, as a result of a manifesto commitment by the ruling party or some other policy statement) and an illegitimate predetermination of the outcome (for example, because of a decision already reached or a determination to reach a particular decision). The former is consistent with a preparedness to consider and weigh relevant factors in reaching the final decision; the latter involves a mind that is closed to the consideration and weighing of relevant factors. The cases include *R v Secretary of State for the Environment, ex p Kirkstall Valley Campaign Ltd* [1996] 3 All ER 304 at 320-321, *Bovis Homes Ltd v New Forest Plc* [2002] EWHC 483 (Admin) at paras 111-113, and *R (Island Farm Development Ltd) v Bridgend County Borough Council* [2006] EWHC 2189 (Admin) at paras 25-32. I do not propose to quote from them, since I regard the general nature of the distinction as being clear enough.
44. Mr George submitted that in some of the cases the court has been influenced in its approach by a recognition that allowance needs to be made in order to reconcile the responsibilities of public authorities as decision-makers with the workings of the democratic process and the fact that declarations of policy are frequently made in the course of that process. That may be so, but in my view it does not affect the validity of the distinction between predisposition and predetermination.
45. In addition to the words themselves, it is necessary to bear in mind the context in which they were spoken. As regards immediate context, these were a few words spoken towards the end of a short and rather tense conversation, following a chance encounter and without preparation or warning. The judge observed that a "throw-away" remark can be more revealing than might have been a more prepared or studied one. For my part, I think that a remark made in circumstances such as these needs to be treated with a considerable degree of caution. It is a case where the wider picture is particularly important in assessing the significance of the words used.
46. As for that wider picture, reference should be made first to the inspector's report, which came down with a clear conclusion in favour of the proposed development. At paragraph 356 of the report, the inspector stated:

"Overall, I conclude that the scheme would be in accordance with [the] development plan and national policy and that the benefits would far outweigh the objections. Suitable planning conditions would minimise and mitigate any detrimental impacts. For the above reasons and having regard to all matters raised, I conclude that planning permission should be granted for the proposed development."
47. In the light of that report, which Carwyn Jones had received as the responsible Minister, there would be nothing surprising about his having a predisposition in favour of the grant of planning permission as recommended by the inspector.

48. More important, however, is the evidence found in the Commissioner's decision letter as to what happened at the PDC meeting the day after Carwyn Jones had his conversation with Jennie Jones. In a passage that I have already quoted in full, and based on the evidence given to him by the clerk to the PDC and the official who acted as key adviser to the PDC, the Commissioner stated that the meeting was "unusually prolonged" as Carwyn Jones and the other members "fully explored the many issues and representations about the scheme before coming to a final decision". That tells against any predetermination on the part of Carwyn Jones or the PDC as a whole.
49. Lindsay J appears to have considered that evidence to be irrelevant on the ground that it would not have been available to the fair-minded and informed observer. He stated:

"66. ... Thirdly, it is clear that in his having recourse to representations from Carwyn Jones A.M., from the Committee Clerk and from the official the Commissioner was having access to information quite outside what one could fairly postulate to be available to and to come to the mind of the hypothetical fair-minded and informed observer. Fourthly, the evidence to the Commissioner seems to have included a detailed account of what had occurred at the PDC's meeting, a thing not only likely to have been in breach of the strict confidentiality provisions of SO 17.14 but which would not have been open to the hypothetical observer and which has been denied to the objectors

67. ... [The Commissioner] had, as I have mentioned, evidence which would not have been open to the hypothetical fair-minded and informed observer. The evidence before him would seem to have included matters which should not have been before him and which not only would have been denied to the hypothetical observer but, as I have mentioned, were denied to the objectors."

50. In my judgment the judge was wrong to adopt that approach. The court must look at all the circumstances as they appear from the material before it, not just at the facts known to the objectors or available to the hypothetical observer at the time of the decision. In treating the Commissioner's account of the PDC meeting as irrelevant, the judge left out of consideration an important part of the overall circumstances.
51. Standing Order 17.4, to which the judge referred, provides that a PDC shall meet in private and its members shall be under an obligation to observe the confidentiality of any discussion by the committee. Given the nature of the Commissioner's responsibilities I would be surprised if that was to be read as precluding investigation by him of what happened at a PDC meeting; but whatever the legal position in that regard, the fact is that he did carry out such an investigation and he set out the results of it in his letter, which was sent to the very group of objectors which had made the complaint. It seems to me that the information obtained by the Commissioner about the course of the PDC meeting is not only a relevant matter but also one to which substantial weight can properly be attached even though the information is provided second-hand through the Commissioner's letter rather than at first-hand from those present at the meeting.

52. A further relevant matter, though one that may not have been advanced in this way before the judge and was therefore not addressed in this context by him, concerns the qualifications for membership of the PDC. By Standing Order 17, the members of the panel from which the PDC was drawn were those “(a) who are members of the Assembly committee having responsibility for planning matters; (b) who have completed a course of relevant training approved by the Chair of the Assembly committee having responsibility for planning matters; and (c) who have agreed to be bound by the current Code of Conduct for members of Planning Decision Committees issued by the Presiding Officer”. Even the most basic course of training in planning matters would bring home the importance of approaching decisions with an open mind and having regard to all relevant considerations. This would be reinforced by the requirements of the Code of Conduct, to which the Commissioner gave detailed consideration in his letter and which include the following:

“2. The objective is to ensure that every decision is properly taken and to avoid the risk of a successful legal challenge. *Our aim is to ensure that the parties involved in planning cases are dealt with fairly, justly and openly; that all the evidence is fully considered and that decisions are based only on material planning considerations to which all the parties have access.* The law protects these principles and decisions can be challenged in the Courts if they are not followed.

...

5. Members of a Planning Decision Committee must: *act, and be seen to act, fairly and even handedly, by bringing an unbiased, properly directed and independent mind to their consideration of the matter ...*

7. *Members of the Planning Decision Panel should avoid commenting on any planning application, or matter that might become the subject of a planning application, in case they might be considered to have pre-judged the matter if it subsequently came before the Assembly. If that were the case, the member could not take part in making the decision ...*” (original emphasis).

53. In the context of allegations of apparent bias against members of courts or tribunals, weight has been placed on the judicial oath of office and the fact that professional judges are trained to judge and to judge objectively and dispassionately: see, for example, per Ward LJ in *Jones v DAS Legal Expenses Insurance Co Ltd* [2003] EWCA Civ 1071, at para 28(vi), citing from a judgment of the Constitutional Court of South Africa. Whilst the position of members of a planning committee, even at the level of the Assembly, is of course very different from that of judicial office-holders, the fact that they have received relevant training and have agreed to be bound by a code of conduct is a consideration to which some weight can properly be attached when determining an issue of apparent bias.

54. Those are the various circumstances that seem to me to be of particular significance for the overall assessment. I was not persuaded by Mr Lindblom QC's submission that significance should also be attached to certain additional documents, in particular the officers' report to the PDC, the "minded to grant" letter of 7 February 2005 and the letter of 11 April 2005 by which planning permission was actually granted; save perhaps to the extent that the documents post-dating the PDC meeting are *consistent* in their terms with there having been prolonged discussion of the issues at the meeting as stated in the Commissioner's letter.
55. I have referred to a number of respects in which, in my view, the judge fell into error by disregarding relevant circumstances or in his assessment of their significance. He appears to have concentrated unduly on the encounter between Jennie Jones and Carwyn Jones on 2 February 2005 and how it would have appeared to an observer at the time, rather than taking into account the totality of circumstances apparent to the court upon investigation. That view is supported by two further passages in his judgment. At para 68 he stated:

"... I have to come to my own decision on the evidence before me ... as to whether a fair-minded and informed observer, having considered the exiguous facts, *would have concluded on the 2nd February* that there was a real possibility that the PDC, meeting for the first and only time the next day, had, amongst its members, one who had appeared to have pre-determined the issue with which it had to deal" (my emphasis).

A similar focus on 2 February is apparent from the way in which he expressed his conclusion at para 75:

"... A fair-minded observer, *hearing the words which Jennie Jones attributes to Carwyn Jones A.M.*, on learning that the Minister was to be Chair of the PDC dealing with the application the next day ... would, in my view, conclude that there was a real possibility that the member of the PDC was biased"

56. The question whether the PDC's decision was vitiated by an appearance of bias is essentially a question of law, requiring a correct application of the legal test to the decided facts; and to answer the question incorrectly is itself an error of law (see *Gillies v Secretary of State for Work and Pensions*, cited above, at para 6).
57. In the circumstances I feel entitled, indeed required, to reach a decision on the issue as raised in this appeal by forming a fresh assessment of my own by reference to the various circumstances that I have mentioned. The conclusion I have reached is that a fair-minded and informed observer, having considered all the facts as they are now known, would *not* conclude that there was a real possibility that Carwyn Jones himself or the PDC as a whole was biased when reaching the decision to grant planning permission. Viewed in its wider context, the brief remark by Carwyn Jones that is at the centre of the case provides an insufficient basis for the suggestion that the decision was approached with a closed mind and without impartial consideration of all relevant planning issues.

58. I would therefore accept the Assembly's case on ground 4.

Ground 2: the new evidence

59. The conclusion I have reached on ground 4 is based on the material that was before the judge and was considered by him in his main judgment. Since that conclusion is sufficient for the purposes of the Assembly's appeal, it is strictly unnecessary for me to deal with the Assembly's challenge to the judge's supplementary judgment refusing to admit the late witness statement of Carwyn Jones. I think it right, however, to cover the point.

60. It will be recalled that a witness statement by Carwyn Jones, containing a categorical denial that he had spoken the words attributed to him by Jennie Jones, was filed on the afternoon before the main judgment was due to be handed down (and four days after the draft of that judgment had been made available to the parties).

61. Carwyn Jones's witness statement did not contain any explanation of why it had not been filed earlier. In fairness to him, however, I should set out the explanation that he gave later, in a second witness statement, which was not available to Lindsay J but is sought to be adduced in support of the present appeal:

“5. The fifth ground of challenge did not refer to my conversation with Jennie Jones. Accordingly, I saw no need to produce a statement dealing with that conversation.

6. Sometime in July 2005, the Appellant's solicitors were served with a number of statements on behalf of the Claimant. One of these was a short Witness Statement from Jennie Jones, dated 6 July 2005. I was not supplied with a copy of the Witness Statements at the time and, in the ordinary course of events, I was not expecting to be provided with a copy of them. That said, having now seen the content of Jennie Jones's Witness Statement, I can see that I should have been supplied with a copy of it at the time of its service and that I should have been given the opportunity to give my account of what took place. Had that occurred, I would have stated (and I would have wanted to state) that I did not utter the words that I was 'going to go with the Inspector's report' or any words to that effect.

7. The first time I was advised that I might need to make a statement was on 19th December 2005. At this time I was returning to the United Kingdom from Dubai.

8. Upon my return to Cardiff on 20th December 2005, I met with a lawyer from the office of the Directorate of Legal Services of the National Assembly for Wales and provided my Witness Statement immediately. This was also the first time that I saw a copy of Jennie Jones's Witness Statement.”

62. Whilst that statement provides an explanation from Carwyn Jones’s personal viewpoint, it does not touch on the reasons why the Assembly’s legal advisers and officials did not supply a copy of Jennie Jones’s witness statement to Carwyn Jones, or ask him to make a witness statement in response to it, at an earlier stage of the proceedings. It must have been either a deliberate and in my view seriously ill-judged tactical decision or a serious oversight. It would be wrong to speculate further. In any event, as I have said, Lindsay J did not have before him even the explanation given in Carwyn Jones’s second witness statement.
63. In his ruling the judge referred to a number of authorities, including *Royal Brompton Hospital National Health Trust Service v Frederick Alexander Hammond & Others* [2001] EWCA Civ 778 and *Robinson v Fernsby & Another* [2003] EWCA Civ 1820. Those authorities are discussed at some length in Vol 1 of the 2006 White Book at para 40.2.1. In summary, and at the risk of over-simplification, they indicate *inter alia* that there is jurisdiction to re-open a case and to alter a judgment that has been made available in draft to the parties (or even a judgment that has been handed down, provided the order has not been perfected), but that the power should be exercised only where there are exceptional circumstances or there are at least strong reasons for doing so.
64. Mr Corner conceded that the judge directed himself correctly as to the relevant principles, but he submitted that the judge’s reasoning was unsatisfactory and that his conclusion was wrong. The justice of the case demanded that the witness statement be admitted into evidence. It went directly to the issue of fact at the root of the ground on which alone the judge allowed the claim. The judge had reached his conclusion on the basis that there had been no clear denial by Carwyn Jones, yet the witness statement contained just such a denial; and to proceed to a substantive judgment on a basis contradicted by the witness statement was at the least highly artificial. Moreover this was an important matter not only for the private parties involved but also for the public, both because of the importance of the development and because the issue went to public confidence in government and in the Minister personally. Admission of the statement would have been in accordance with the overriding objective. If the statement had been admitted, the resulting issue could have been dealt with relatively shortly (there would have had to be a further hearing for cross-examination of Carwyn Jones and probably of Jennie Jones as well). There could have been an appropriate costs order and there would have been no prejudice to the claimant. The judge himself acknowledged that there was “a powerful case for admission of the evidence” (para 16 of the supplementary judgment). His analysis of factors telling in the other direction was defective in various respects and did not establish reasons of sufficient cogency to outweigh the case for admission of the evidence.
65. I do not propose to set out the judge’s detailed reasoning or to engage in a detailed analysis of the various criticisms that Mr Corner made of it. I note that this was an *ex tempore* judgment and that the focus should be on the substance of the points addressed by the judge rather than on the precise mode of their expression. The essence of the matter was captured in the penultimate paragraph of the judgment:

“There are, therefore, a number of issues that I need to balance. Doing the best I can to take into account the factors that have been laid before me, and bearing in mind that the court normally does have a strong wish to allow evidence in if it is material, as

this evidence would undoubtedly be, nonetheless it seems to me right that using the mechanism now employed for handing down judgments is not intended to give an opportunity for issues otherwise lost to be sought to be recovered and, going back to the passages that I have cited from the *Royal Brompton* case and the *Robinson* case, it seems to me right here that one must have regard to the need for finality. Here again I note that no witness statement has been given as to exactly how this deficiency came about, but were applicants generally to feel, after seeing the draft judgment in their cases, that there is evidence that could perhaps have turned the balance one way or another and that without even a witness statement to explain its absence they could then adduce that evidence, there would be a very great demerit and finality would be put even further away.”

66. I am satisfied that the judge gave proper consideration to the various issues canvassed before him and that there is no basis for interfering with his exercise of discretion. Indeed, I would go further and express agreement with the conclusion he reached.
67. Mr Corner submitted that, even if Lindsay J was right not to admit the witness statement in evidence, this court should now admit it. He conceded that he could not satisfy the test in *Ladd v Marshall* [1954] 1 WLR 1489 for the admission of fresh evidence, since it was impossible to say that the evidence could not have been obtained with reasonable diligence at the trial; but he argued that the *Ladd v Marshall* test is not applied as a strict rule in judicial review and similar proceedings. In my judgment it is unnecessary to spend any time on the scope or detailed application of the *Ladd v Marshall* test. Once it is found that the judge was entitled, for the reasons he gave, to refuse to admit Carwyn Jones’s witness statement into evidence before him, it seems to me to be self-evidently inappropriate for this court to admit that same witness statement into evidence on the appeal. Carwyn Jones’s second witness statement does not materially affect the position and there has been no other change in circumstances. I would dismiss out of hand the application to adduce fresh evidence.
68. It follows that in my judgment the issue of apparent bias has to be determined by reference only to the evidence that was before Lindsay J. If it is considered unsatisfactory that an issue of this kind should be resolved on a factual basis that the Minister disputes but has not been able to address in evidence to the court, the blame for that lies squarely with the Assembly for the way in which it has chosen to conduct the litigation. It may, however, be of some consolation to the Minister that even on the factual basis that he disputes I am satisfied, for the reasons I have given under ground 4, that the claim of apparent bias is not made out.

Appearance of bias: conclusion

69. For the reasons given under ground 4, I would allow the Assembly’s appeal on the issue of apparent bias. That makes it necessary for me to consider Mrs Condrón’s respondent’s notice and the alternative bases on which she seeks to uphold the judge’s order.

The issues raised by the respondent's notice

70. The issues raised by Mrs Condron's respondent's notice relate to (1) an alleged failure to take proper account of certain policy guidance concerning buffer zones around mineral workings, (2) the implications of proceedings in the Assembly on 16 March 2005 concerning proposals for primary legislation that would empower the Assembly to impose buffer zones, and (3) an alleged failure to have regard to certain post-inquiry submissions.
71. Underlying all those legal issues is a matter of intense practical concern to local residents, namely the proximity of the development to some of their homes. The issue is particularly acute for the settlement of Mountain Hare on the western edge of the site and for a group of residences called Incline Side on the south western side of the site. The judge described the position as follows:

“4. The residents of Mountain Hare, as they turn their eyes towards the site, see first, a little higher than they are, the A4060(T) trunk road (two lanes width in each direction) and then, running parallel to the road, the boundary of the site, and then, almost immediately inside that boundary, a steep man-made bank to a height of about 15-17 metres above the level of the road. There is no constant distance between the edge of the site and the proposed edge of workings; that distance varies greatly from one part of the site to the other. So far as concerns Mountain Hare, the proposed workings, partly consisting of the shifting of the earth and overburden currently in place and partly, then, of opencast mining, will take place a little short of the top of that steep bank, then moving further away as works progress. At Mountain Hare the closest limit to the proposed working lies at a distance of some 40 metres or so, give or take a few metres, further back from the boundary of the site. One objector, Mr W.T. Evans, at Mountain Hare, whose house faces the trunk road, has the front wall of his house about 37 metres from the site boundary and at perhaps 60-70 metres from the nearest point of the proposed workings. Certainly there will be proposed workings which will lie well within 100 metres of the front wall of his house.

5. 14 dwellings lie in the band of being between 0-100 metres from the proposed workings on the site (12 at Mountain Hare, 2 at Incline Side), some 27 dwellings in the band between 100-200 metres, thus making 41 dwellings within 200 metres of the proposed workings on the site. The Inspector notes there to be 61 dwellings within 200 metres of the site boundary. To judge somewhat crudely from the scale on the plans, no house of the 15 or so at the Mountain Hare cluster north of the roundabout is more than about 150 metres from the proposed workings.”

72. The concerns of those living so close to the site are entirely understandable and it is clear from his judgment that the judge had them well in mind. At the same time,

however, it is right to stress that the role of the court is to examine the legality, rather than the factual merits, of the decision to grant planning permission.

Buffer zones: Minerals Planning Policy Wales

73. The first of the grounds raised by the first respondent's notice is an alleged failure of the Assembly properly to interpret and take into account existing policy in Minerals Planning Policy Wales ("MPPW"), published in December 2000. That issue is not considered in terms by the judge when dealing with the numerous submissions addressed to him under the heading of buffer zones. Mr Corner suggested that that was because it was in fact a new point. We were assured by Mr George, however, that the point was among those taken by him before the judge, and I am prepared to consider it on that basis.
74. MPPW para 40 states:
- "... Buffer zones have been used by mineral planning authorities for some time to provide areas of protection around permitted and proposed mineral workings where new development which would be sensitive to adverse impact, including residential areas, ... should be resisted The maximum extent of the buffer zone would depend on a number of factors: the size, type and location of workings; the topography of the surrounding area; existing and anticipated levels of noise and dust; current and predicted vibration from blasting operations and availability of mitigation measures. Buffer zones will of necessity vary in size depending on the mineral being extracted and the nature of the operation, but must be clearly defined and indicated in Unitary Development Plans Further guidance on the factors that should be taken into account when defining buffer zones for particular minerals will be provided in Technical Advice Notes."
75. There are really two steps in Mr George's submissions. The first is that MPPW laid down a policy that a minimum buffer zone should be provided between mineral workings and residential areas. No relevant unitary development plan and no Technical Advice Note for coal mining had been issued since the publication of MPPW, but the principle was established by MPPW itself. A letter written by Carwyn Jones as Minister for Environment, Planning and the Countryside had acknowledged that MPPW set out "[c]urrent national policy ... for buffer zones around all types of mineral development, their extent to be defined in development plans".
76. The second step in Mr George's submissions is that the Assembly, in reaching the decision to grant planning permission without imposing a buffer zone, failed to appreciate that this involved a *departure* from the policy. The inspector's report did not make that clear and failed to highlight to members of the PDC that they could impose a buffer zone. Neither the officers' report to the PDC nor the "minded to grant" letter nor the actual grant of planning permission contained any recognition of the fact that MPPW supported the principle of buffer zones or of the fact that the decision involved a departure from national policy on that issue.

77. I see no great difficulty about the first step in those submissions, provided that the effect of MPPW is not overstated. MPPW can certainly be said to favour buffer zones and even to advocate their adoption. To that extent it contains relevant policy guidance, even though, as Mr Corner submitted, its focus is on the identification of buffer zones in unitary development plans and it also envisages the adoption of more specific guidance by way of a Technical Advice Note for coal mining.
78. I cannot, however, accept the second step in Mr George's submissions. In my view the relevant policy was both properly understood and taken properly into account in the decision-making process.
79. The inspector's report contains a factual section on MPPW. One of the parts of MPPW to which reference is made is para 40, which in the inspector's words "advocates the use of buffer zones to provide areas of protection around mineral workings and says these should depend on the nature of the operation". He reverts to this in his conclusions, stating at para 319:
- "Some objectors have drawn attention to the inclusion of a 500 metre buffer zone around opencast sites proposed in the latest draft of Scottish Planning Policy 16, Opencast Coal, and suggest that Wales should follow suit. In fact, MPPW already advocates the use of buffer zones around mineral workings to avoid conflict with residential areas but advises that their size will depend on the nature of the particular operation. In the circumstances at Ffos-y-fran, where reclamation objectives for that particular area of land are also involved, the assessment of the possible impacts themselves is an acceptable approach, as relying on broad-brush guideline distances would take no account of the particular local circumstances."
80. In that passage the inspector acknowledges the MPPW policy in favour of buffer zones but gives reasons why he does not consider a buffer zone to be appropriate in this particular case. Those reasons have to be read in the light of the rest of the report and can be seen to have two elements to them. First, this was not simply a scheme for coal extraction but also one for land reclamation which, as explained elsewhere in his report, was in accordance with the aims and policies of the local plan; and if the development was to achieve the restoration of the land, the land had to be worked upon. Secondly, as also explained elsewhere in his report, the inspector looked carefully at the possible impacts that the workings would have on the health and living conditions of local residents, in particular as regards dust, noise and blasting, and felt able to conclude that the proposed mitigation measures, which would be subject to detailed control by planning conditions, would ensure that the effects were not significant or unacceptable. His reasons, though briefly stated, are adequate, intelligible and rational. They disclose no misinterpretation of MPPW or failure to take it into account or failure to make clear that the inspector was departing from what was advocated in MPPW. Accordingly I see no error of law in the inspector's approach to this issue.
81. Nothing that happened thereafter generated any error of law on the issue by the PDC. The officers' report to the PDC agreed generally with the inspector's report and recommended acceptance of his conclusion. It also drew specific attention at para 35 to

the issue of buffer zones, referring to MPPW and summarising the inspector's view. The "minded to grant" letter of 7 February 2005 stated expressly in para 5 that "[s]ubject to the comments below the Planning Decision Committee agree with the Inspector's conclusions and accept his recommendation"; in para 7, that the PDC "see no reason to disagree with the Inspector's conclusion that the general effect on the health of the community would not be significant and that, with the imposition of appropriate conditions, the effect on living conditions of nearby residents from dust, noise and blasting would not be unacceptable"; and in para 12, that subject to certain amendments the PDC "agree with the Inspector that the conditions listed in the Annex to his report would provide adequate and necessary controls over working methods aimed at minimising and mitigating impacts on the environment and local amenity and should be imposed". The letter of 11 April 2005 containing the actual grant of planning permission added nothing material. What one sees throughout is an adoption by the PDC of the inspector's approach. If, as I would hold, the inspector's approach was lawful, then so too was that of the PDC.

82. In the context of this and the next issue, Mr George made much of what was said by Alun Ffred Jones, one of the members of the PDC, in the course of an Assembly debate on 16 March 2005:

"On the buffer zone, with reference to Ffos-y-fran, which has raised the temperature this afternoon, let us make one thing clear: there is currently no guidance on this matter. However, the local authority, as the planning authority ... could have indicated that it wanted a buffer zone, but it was impossible, as far as I know, according to official guidance, for the planning decision committee to impose such a condition as it was not mentioned in the inspector's report. That is the situation as I understand it."

83. Alun Ffred Jones had also stated in a letter dated 14 February 2005 to Mr W.T. Evans that "[t]he other problem for those opposing the scheme [at Ffos-y-fran] is that the Government of Wales does not have a policy on buffer zones between open cast sites and residential areas".
84. The remarks made by Alun Ffred Jones in the course of the debate and in his letter display a regrettable degree of ignorance or confusion on his part, both as to the existence of guidance on buffer zones and as to the power to impose a condition concerning buffer zones. But in my view they do not provide a basis for challenging the PDC's decision. What the PDC did and the reasons for it are to be derived from the inspector's report and the committee's own documents accepting and giving effect to that report. All those documents, as I have indicated, display a correct understanding of the guidance and the legal position concerning buffer zones. It is that material, rather than statements made by one of the PDC members outside the PDC meeting and some time after it, which constitutes the proper basis for determining the lawfulness of the PDC's decision.

Buffer zones: the Assembly debate of 16 March 2005

85. The next ground raised in the first respondent's notice is based on a debate in the Assembly on 16 March 2005 on the issue of buffer zones. It is said that in the light of

that debate the PDC ought to have reconsidered its resolution of 3 February 2005 that it was minded to grant planning permission for the development.

86. It is common ground that it was still open to the PDC to reconsider its resolution up to the time when planning permission was actually granted by the letter of 11 April 2005. The approach to be adopted where a new consideration arises between the date of the resolution and the date of grant was discussed by the Court of Appeal in *R (Kides) v South Cambridgeshire District Council* [2002] EWCA Civ 1370, [2003] 1 P&CR 19. On its facts that was a very different case, involving a five year gap between the planning committee's resolution in principle to approve a planning application and the issue of a decision notice by the delegated officer granting planning permission; and in the interim there had been major changes in terms of national policy guidance and other circumstances. The case is nevertheless important for the principles laid down in it.
87. Jonathan Parker LJ, giving the leading judgment, referred first to the duty of an authority under section 70(2) of the 1990 Act to have regard to all material considerations when dealing with a planning application. He held that this duty extends up to the issue of the decision notice granting planning permission. He continued:

"121. In my judgment a consideration is 'material', in this context, if it is relevant to the question whether the application should be granted or refused; that is to say if it is a factor which, when placed in the decision-maker's scales, would tip the balance to some extent, one way or the other. In other words, it must be a factor which has some weight in the decision-making process, although plainly it may not be determinative. The test must, of course, be an objective one in the sense that the choice of material considerations must be a rational one, and the considerations chosen must be rationally related to land use issues.

122. In my judgment, an authority's duty to 'have regard to' material considerations is not to be elevated into a formal requirement that in every case where a new material consideration arises after the passing of a resolution (in principle) to grant planning permission but before the issue of the decision notice there has to be a specific referral of the application back to committee. In my judgment the duty is discharged if, as at the date at which the decision notice is issued, the authority has considered all material considerations affecting the application, and has done so with the application in mind – albeit that the application was not specifically placed before it for reconsideration.

...

126. In practical terms, therefore, where since the passing of the resolution some new factor has arisen of which the delegated officer is aware, and which might rationally be regarded as a 'material consideration' for the purposes of s.70(2), it must be a counsel of prudence for the delegated officer to err on the side of

caution and refer the application back to the authority for specific reconsideration in the light of that new factor. In such circumstances the delegated officer can only safely proceed to issue the decision notice if he is satisfied that (a) the authority is aware of the new factor, (b) that it has considered it with the application in mind, and (c) that on a reconsideration the authority *would* reach (not *might* reach) the same decision” (original emphasis).

88. The question in the present case is whether the Assembly debate on 16 March 2005 amounted to a new factor which might rationally be regarded as a “material consideration” and which ought to have caused the delegated officers to refer the application back to the PDC rather than proceed with the issue of the letter of 11 April 2005 granting planning permission. (In fact the PDC would have had to be formally reconstituted for the purpose, since it ceased to exist on issue of the “minded to grant” letter. But nothing turns on the procedural technicalities. Had officers considered it necessary to refer the matter back to the PDC, such a result could no doubt have been achieved.)
89. The context of the debate was that the Assembly was considering proposals to be submitted by the Welsh Assembly Government for the enactment of primary legislation by the Westminster Parliament. An amendment called for a bill enabling the Assembly “to set a 500 metre separation distance between proposed sites and residential settlements”. As Carwyn Jones, the relevant Minister, observed at the outset of the debate on that amendment, the Assembly already had the power to impose such a buffer zone, and the legislation sought by the amendment would therefore require or commit the Welsh Assembly Government to seek legislation to obtain a power that the Assembly already had. Nonetheless the amendment was passed, by a bare majority.
90. Mr George told us that the reason for the debate was that a number of members wanted to highlight the case for extensive buffer zones around opencast workings. He submitted that the outcome of the debate was the clearest possible indication that the majority view in the Assembly was that buffer zones were appropriate for opencast mining, including at sites such as Ffos-y-fran, to which specific attention was drawn in the course of the debate. There were also suggestions in the debate that, even if the powers already existed, the existence of the legislation sought by the amendment would ensure that buffer zones were applied. One of the members, Janet Davies, asked the Minister for an assurance that, if powers already existed, he would implement a 500 metre buffer zone at Ffos-y-fran. Another, Alun Ffred Jones, made the mistaken comment which I have already quoted to the effect that it was impossible for the PDC to impose a buffer zone at Ffos-y-fran as it was not mentioned in the inspector’s report. The First Minister, in replying to the debate, showed a misunderstanding of the legal position concerning the Ffos-y-fran application when he informed members that planning permission had been confirmed by the PDC and could not be reversed. It is fair to note that he also referred to the difficulty he faced in talking about the Ffos-y-fran decision itself, evidently because of the requirement to respect the confidentiality of the PDC proceedings, but he felt able to say “I do not believe that the issue of the buffer zone and the role of the planning decision committee was as it is now being painted, namely that it was not considered”. He went on to express general agreement

with buffer zones but indicated that their width should depend on the circumstances of the case.

91. Mr George submitted that the Ffos-y-fran application ought to have been referred back to the PDC for reconsideration in the light of that debate, especially given the majority view in favour of buffer zones, the First Minister's own support for the principle of buffer zones, and the fact that one of the members of the PDC had shown a misunderstanding of the existing power of the PDC to impose a buffer zone. In the real world this was a call for the Ffos-y-fran decision to be reconsidered. It was a new material consideration and indeed an important one, and there might have been a different outcome had the matter been reconsidered.
92. The judge rejected Mr George's submissions on this issue for two main reasons. First, he said that buffer zones formed only a relatively minor part of the totality of the arguments and evidence before the inspector. Secondly, he said that the new factor was one which would "very probably" have made no difference to the PDC's decision. Mr George submitted that the first reason was irrelevant because the whole point was that the importance of the issue had now become plain in the light of the Assembly debate; and that the judge had adopted the wrong test in his second reason, the correct question being whether the decision would *inevitably* have been the same (see e.g. *Smith v North East Derbyshire Primary Care Trust* [2006] EWCA Civ 1291, para 10).
93. Whilst agreeing with the judge's conclusion on the issue, I do so for somewhat different reasons. In my judgment the Assembly debate was not a new factor capable of amounting to a material consideration in relation to the Ffos-y-fran application. It was a political debate about a request for primary legislation for the conferment of powers which the Assembly already had. It touched on issues already considered by the PDC and included some strong expressions of view about those issues, but it did not lay down any new planning policy and did not give rise to any new planning considerations. As I have held in rejecting the previous ground, the PDC had already given lawful consideration to the question of buffer zones and had accepted the inspector's approach to the issue. That approach was premised on the existence of a power to impose a buffer zone and recognised the policy in MPPW in favour of buffer zones, but also had regard to the individual circumstances of Ffos-y-fran in reaching a decision that a buffer zone was not appropriate in the particular case. In relation to none of those matters did the debate change anything.
94. It is of course unfortunate that the First Minister advanced the legally erroneous argument that the Ffos-y-fran planning permission had been confirmed and could not be reversed. That error was not, however, material since responsibility for initiating a referral back to the PDC lay with the planning officers and there is nothing to show that they were under the same misapprehension as the First Minister; and in any event, as I have indicated, there was no good reason why the matter should be referred back to the PDC.
95. As to the remarks made by Alun Ffred Jones, I have explained in the context of the previous ground why in my view they do not provide a basis for challenging the PDC's decision. To apply that reasoning to the present context, it seems to me that, where the inspector's report and the PDC's own documents accepting and giving effect to that report all display a correct understanding of the guidance and the legal position concerning buffer zones, it cannot be said that erroneous statements made by one of the

members of the PDC outside the PDC meeting and some time after it amounted to a new material consideration requiring the matter to be referred back to the PDC.

96. I should mention finally that Lindsay J dealt at some length in his judgment with *Bolton Metropolitan Borough Council v Secretary of State for the Environment* (1990) 61 P&CR 343, on which Mr George had placed substantial reliance in his submissions before the judge. *Bolton* was also referred to in Mr George's skeleton argument before us, but was touched on only briefly in his oral submissions. I think it unnecessary to set out the detail of the case, for which I can rely on para 24 of the judgment below. It suffices to say that the Green Paper proposals that were at the centre of that case involved a fundamental change in the relevant powers of public authorities and therefore in the circumstances affecting the compulsory purchase order with which the case was concerned. That situation is readily distinguishable on its facts from the present case where, for the reasons I have given, the Assembly debate did not in my view give rise to any material change of circumstances.

Post-inquiry submissions

97. The third and last ground in the first respondent's notice is that the PDC failed to have regard to post-inquiry submissions made by objectors regarding (i) the existence of previously undisclosed former landfill sites on the application site and (ii) the relevance to the proposals of an epidemiological study called "the Newcastle Study".
98. These matters were dealt with at some length by Lindsay J in his judgment and it will be unnecessary for me to repeat much of the detail. Part of the argument before the judge has fallen away, in that Mr George made clear before us that he was no longer contending that there was a breach of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999. His remaining contention was simply that there was a failure to take the post-inquiry submissions into account as a material consideration. That contention faces formidable obstacles.
99. First, there was no duty to take account of post-inquiry submissions at all. Rule 17(4) of the Town and Country Planning (Inquiries Procedure) (Wales) Rules 2003 provides that "[w]hen making its decision, the National Assembly may disregard any written representations, evidence or any other document received after the close of the inquiry".
100. Secondly, the documents make clear on the face of it that, despite the absence of any duty to do so, the PDC did in fact take account of all post-inquiry submissions. A letter dated 12 January 2005 from Carwyn Jones to the Department of Trade and Industry stated that the PDC would take them into account. The officers' report to the PDC stated at para 64 that numerous letters of objection had been submitted since the inquiry, mainly on grounds of health, pollution and residential amenity, and that "[t]he matters raised were mostly dealt with at the inquiry and in our view would not materially affect the decision". The submissions relevant to this ground were listed in a schedule of post-inquiry correspondence; and whilst there is no evidence that the schedule and copies of the correspondence referred to in it were shown to, or made available for inspection by, members of the PDC, there is equally no evidence that they were not. Finally, the "minded to grant" letter of 7 February 2005 stated in terms, at para 11:

“The Planning Decision Committee have reached their decision taking account of all correspondence received after the inquiry had closed and they are satisfied that the correspondence raised no new evidence or new matter of fact which would materially affect their decision.”

101. Despite that documentary material, Mr George invited the court to infer that the PDC cannot in fact have had regard to the relevant post-inquiry submissions. In my judgment it is impossible to draw such an inference in this case. In order to explain why that is so, I turn to consider briefly the relevant post-inquiry submissions and the way the judge dealt with the issues.
102. The issue of former landfill sites is examined at paras 37-45 of Lindsay J’s judgment. At the public inquiry and in the inspector’s report a lot of attention had been directed towards the existence of former waste tips on the application site, the removal of which was part of the reclamation objective of the proposed development. Following the inquiry, Mr W.T. Evans wrote a letter dated 30 January 2005 to Carwyn Jones, drawing attention to evidence that waste had been deposited over 40 years ago at a tip that had not previously been identified. The judge rejected the contention that there had been a failure to take that letter into consideration. He pointed to the fact that the “minded to grant” letter of 7 February 2005 stated clearly that the PDC had taken into consideration correspondence received after the inquiry. He went on (at para 45):

“They thus were stating that Mr Evans’ letter had been taken into account. There is no proof that that was not so. Whereas, on a subject of real significance, it can often be right to assume that a body’s failure to mention it indicates a failure by that body to have considered it, for the reasons I have given I cannot see that the existence of a small hitherto undisclosed former tip close to a larger known one and consisting of the same type of tipped material as being so significant that it entitles one to jump from its not being *expressly* mentioned to a conclusion that it had not been taken into account at all.”

103. I agree. The inspector had heard a lot of evidence about the presence of former waste tips on the application site, the removal of which was part of the reclamation objective, and he had covered the issue in considerable detail in his report. He was satisfied that the proposed development would not give rise to significant health risks and that surface and groundwater resources would be adequately safeguarded. One of the conditions recommended by him and accepted by the PDC was a condition designed to ensure the protection of groundwater resources in the event that any contamination of a nature not previously identified was encountered during the development. In all the circumstances there was nothing about the additional material that required the PDC to deal with it expressly, and it was perfectly rational to take the view that it would not materially affect the decision.
104. The issue concerning the Newcastle Study is examined at paras 46-52 of the judgment below. This was a study carried out in north east England to examine the effects of dust on communities close to opencast coal workings. It was the subject of detailed

consideration at the inquiry and in the inspector's report. Professor Harrison, one of the expert witnesses called by Miller Argent at the inquiry, relied extensively on the study and referred in his main proof of evidence to a number of published papers describing it, including one in 2000 and another in 2003. Dr Holman, another expert witness called by Miller Argent, also referred to the 2000 paper. A copy of the 2000 paper was provided as an appendix to the proof of evidence of Dr Holman, but no copy of the 2003 paper was placed before the inquiry, and it seems that the objectors, who were not legally represented, did not think of asking for a copy at the time.

105. Following the inquiry, however, Mr W.T. Evans engaged in correspondence with one of the authors of the 2003 paper and was sent a copy of the paper. In a letter dated 25 January 2005 to the Planning Inspectorate he made further submissions based on that correspondence and the 2003 paper. First, as regards the health effects of the proposed development, it was submitted by reference to the further material that reliance on the Newcastle Study had been flawed, since the study related only to children and related to sites that were considerably further away from residential communities than at Ffos-y-fran and where the workings were of much shorter duration than was proposed for Ffos-y-fran. Secondly, reliance was placed on passages in the 2003 paper detailing complaints by residents about the environmental impact of workings, in particular as regards dust deposition.

106. In his conclusions on this issue, Lindsay J stated (at para 52):

“Mr Lindblom says, rightly in my view, that Professor Harrison had in mind the distances between workings and residences both as described in the Newcastle papers and as they would be at Ffos-y-fran. He came to a rational and informed professional conclusion which was not successfully questioned at the Inquiry and the Inspector was entitled to accept his evidence. It is not for me, says Mr Lindblom, now to question Professor Harrison's professional judgment. I accept that argument. The Newcastle Studies were not new material and had been sufficiently taken into account by Professor Harrison on whose conclusions and those of Dr Holman the Inspector was entitled to rely.”

107. Again I agree. I would add that in my view there was sufficient in the material actually available at the inquiry to make clear that the Newcastle Study related to children and to indicate the distances of the sites from the residential communities concerned, if not also the duration of the workings at those sites. Moreover the 2003 paper can hardly be described as new, given that it was referred to expressly by Professor Harrison not just in his list of references but in the body of his proof of evidence. In any event, the Newcastle Study was taken into account in the detailed consideration given by the expert witnesses at the inquiry, and by the inspector in his report, with regard to the effects of dust on health and amenity. In all the circumstances I am satisfied here too that there was nothing in the additional material that required the PDC to deal with it expressly, and that it was perfectly rational for the PDC to take the view that it would not materially affect the decision.
108. Neither in relation to former landfill sites nor in relation to the Newcastle Study, therefore, is there in my view any basis for going behind the clear indications in the PDC's documents, in particular in the “minded to grant” letter of 7 February 2005, that

the post-inquiry submissions had been taken into account. Accordingly, this final ground of challenge to the PDC's decision must also fail.

Conclusion

109. I would allow the Assembly's appeal on the issue of apparent bias and would also find in the Assembly's favour in relation to all the matters raised in the first respondent's notice. In my judgment Mrs Condron's challenge to the decision to grant planning permission for the Ffos-y-fran development must fail and the order of Lindsay J quashing the decision must be reversed.

Postscript: venue

110. A final point I should mention concerns the venue for the hearing of this case both at first instance and on appeal. Both hearings took place in London. Yet there are procedures in place to enable Welsh judicial review cases and similar statutory challenges to be heard in the Administrative Court in Wales (see Supperstone, Goudie & Walker, *Judicial Review*, 3rd ed., paras 20.19.1-20.19.2 for the relevant references); and there are sittings of the Civil Division of the Court of Appeal from time to time in Wales. In my view the present case cried out to be heard in Wales both at first instance and on appeal, and it is a matter of considerable regret that efforts were not made to have it listed for hearing accordingly. Practitioners and listing officers alike need to be alert to this issue.

Lord Justice Wall :

111. I have had the great advantage of reading in draft the judgment of Richards LJ. I find myself in complete agreement with it. I add a short judgment of my own out of courtesy to Lindsay J and to explain why, like Richards LJ, I part company with the judge on the question of apparent bias.
112. I have to acknowledge that, when I first read the papers in preparation for this appeal, I was attracted by ground 1 in the appellant's notice. It had clearly been open to the judge to say in terms that he was making a finding of fact on the balance of probabilities that Mr. Carwyn Jones had spoken the words attributed to him by Mrs. Jennie Jones. He had not done so. At first blush it seemed to me at least arguable that a critical element in the determination that there had been apparent bias was, accordingly, missing.
113. Having heard full argument, however, and having read Richards LJ's judgment, I am satisfied that it is in fact plain on a fair reading of the judgment that the judge did make such a finding, and that his conclusion on apparent bias would simply not make sense without it. Equally, I respectfully agree with Richards LJ firstly, that the proper conclusion to draw from the Commissioner's report is that Mr. Carwyn Jones had denied uttering the words attributed to him; and, secondly, that a finding that there was a denial (which the judge should have made) is in no sense inconsistent with his finding of fact that the words were spoken.
114. I respectfully agree with Richards LJ that the key to this case is to be found in ground 4 of the appellant's notice, and with respect to the judge it is clear to me that in the

passages from paragraphs 66, 67, 68 and 75 of his judgment, which Richards LJ has cited in paragraphs 49 and 55 above and which I will not set out in full again, the judge applied the wrong test. The extracts which Richards LJ has cited from *Porter v Magill*, *Flaherty v Greyhound Racing Club Ltd* and *Gillies v Secretary of State for Work and Pensions* all make it quite clear, in my judgment, that the test to be applied on the facts of this case is not what the fair-minded and informed observer would have concluded on 2 February 2005, but what the same observer would conclude having considered all the facts as they are now known.

115. In this particular instance, as it happens, and whatever the propriety of the disclosure of the material contained in the Commissioner's letter, the key facts are (1) that the material was disclosed; and (2) that it was disclosed to the protesters themselves. In my judgment, therefore, the judge was plainly wrong in paragraph 67 of his judgment when he dismissed the evidence contained in the Commissioner's letter of 13 May 2005 to Mrs. Austin with the words: -

.... He (the Commissioner) had, as I have mentioned, evidence which would not have been open to the hypothetical fair-minded and informed observer. The evidence before him would seem to have included matters which should not have been before him, and which would not only have been denied to the hypothetical observer but, as I have mentioned, were denied to the objectors.

116. If the correct test was, as the judge appears to suggest in paragraph 75 of his judgment, limited to the effect on the fair-minded observer who heard the words spoken by Mr. Carwyn Jones on 2 February and who learned that the Mr. Jones was to be the chair of the PDC dealing with the planning application on the following day, the judge's conclusions in paragraphs 67 and 68 would be correct. But plainly that is not the correct test, and even though the judge, in paragraph 68 of his judgment, imports into his consideration his own knowledge of the contents of the letter of 13 May 2005 from the Commissioner, he nonetheless appears to exclude it as relevant to the test, contained in the same sentence, that the "fair-minded and informed observer, having considered the exiguous facts, would have concluded on 2 February" that there was a real possibility of bias on the part of the Chair of the PDC.
117. I am therefore satisfied that the judge's misapprehension as to the correct test vitiates his conclusion on the apparent bias issue. It is thus open to us to reach our own conclusion on the issue, and for the reasons given by Richards LJ, I too would find that the allegation of apparent bias is not made out. Accordingly, I would allow the Assembly's appeal on this one ground.
118. That said, I would like to emphasise my particular agreement with everything Richards LJ says about ground 2 of the appellant's notice. In my judgment, it is manifestly unacceptable for a party to use the opportunity provided by the court for editorial and typographical corrections to be suggested in a draft judgment prior to hand-down as a means of re-opening an issue on which that party has lost, and which it had ample opportunity to address during the trial. I regard Lindsay's "supplemental" judgment as a tour de force. I find myself in complete agreement with it, and equally wholly out of sympathy with the predicament in which the Assembly found itself. Whatever the real reason for that predicament, the Assembly plainly had only itself to blame for it.

119. There is nothing I can add to Richards LJ's exemplary judgment on the cross-notice, save to say that I agree with it. Like him, therefore, I would allow the appeal on ground 4 only.

Lord Justice Ward :

120. I agree with my Lords that we should allow this appeal and restore the decision of the National Assembly's Planning Decision Committee granting planning permission, subject to conditions, for the carrying out of open cast mining and related removal and reclamation operations at Fos-y-fran. In deference to Lindsay J., I will state shortly my reasons for disagreeing with his finding that the PDC's decision was tainted with apparent bias.
121. This was not a case where actual bias was alleged, still less established. It was and is a case of apparent bias. The test is well settled and was indeed common ground here and below. It was stated in paragraph 103 of the speech of Lord Hope of Craighead in *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 259, and explained by Scott Baker L.J. in *Flaherty v National Greyhound Racing Club Ltd* [2005] EWCA Civ 1117 at paragraph 27 as Richards L.J. has already set out in paragraphs 11 and 38 above. The question is, therefore, whether the reasonable, fair-minded and informed observer would conclude that there was a real risk that Carwyn Jones AM was biased because his mind was closed by his predetermination to endorse the Inspector's Report. That judgment must be made looking at the matter objectively balancing his comments to Mrs Jennie Jones against any contrary evidence.
122. The starting point must be his remark that he was "going with the Inspector's Report". The meaning of those words are not certain. They are capable of meaning either that he had made up his mind with the implication that it was closed to any argument or merely that his preliminary view was in favour of the Report but that his mind was still open to argument. It does not seem to me, construing the words in the context in which they were said, that the latter meaning is so clear that the possibility of his having predetermined the issue can be described as fanciful. The words themselves must, therefore, give rise to the real possibility of bias and the judge was right so to find. That, however, is not the end of the matter and therein lay the judge's error. The informed observer would not make up his mind having regard solely to what he heard, but to all the relevant facts and circumstances of the case and as Scott Baker L.J. has said:
- "The relevant circumstances are those apparent to the court upon investigation; they are not restricted to the circumstances available to the hypothetical observer at the original hearing. ...".
123. The question then is: "What are the relevant circumstances?". Whatever my reservations expressed during the course of the argument, I am now fully satisfied that it is permissible to take account of what actually happened when the PDC made its decision. In *Porter* the Court did not confine itself to what occurred at the press conference when the provisional views of the auditor were expressed: the way he took his final decision was also relevant. As Lord Hope said in paragraph 105:

“He [the auditor] was at pains to point out to the press that his findings were provisional. There is no reason to doubt his word on this point, *as his subsequent conduct demonstrates.*” (Emphasis added by me).

124. So too in *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2, [2006] 1 WLR 781 where the possible bias of the medical member of the Disability Appeal Tribunal was in issue, the facts taken into account by the House of Lords included an analysis of the actual decision of the Tribunal.
125. Thus I am now fully satisfied that it is permissible to have regard to the unchallenged report of the Commissioner for Standards that the deliberation of the PDC was:

“... unusually prolonged as Carwyn Jones AM (who chaired the meeting) and the other Assembly Members on the Committee fully explored the many issues and representations about the scheme before coming to a final decision.”
126. One cannot read too much into that. True it is that if the meeting of the PDC had been all over in a matter of minutes, then the inference that minds had been made up in advance would be the stronger. That the deliberations lasted so long smacks much more of open minded debate than of blind, pig-headed adherence to pre-cast, set views. It militates against the possibility of bias.
127. The nature of the issue to be resolved is another relevant factor. Here there had been a full inquiry held before the Inspector. The Merthyr Tydfil County Borough Council supported the application for planning permission. No substantive objection was offered by any of the statutory consultees. The opposition case was fully presented at the inquiry. The conclusion of the Inspector’s thorough Report was to recommend the planning permission being granted. The officers of the Assembly’s Planning Division accepted that conclusion subject to conditions. Of course it was open to the members of the PDC to come to a concluded view that the recommendation should not be accepted but they would need good planning grounds to do so and it would not come as a surprise to the fair-minded informed observer that a provisional view was in favour of endorsing the recommendation. It would perhaps be surprising if it were otherwise. In those circumstances, “I am going with the Inspector” is much more likely to mean, “On all I have read and all I know at the moment, but subject to further argument, I am going with the Inspector”.
128. The observer who is neither complacent nor unduly sensitive or suspicious can, however, be taken to appreciate that, even though the members of the PDC are not judicial officers who have taken their judicial oath, nonetheless they had by the Standing Orders of the Assembly completed a course of relevant training, they had agreed to be bound by the current Code of Conduct and that required their “bringing an unbiased, properly directed and independent mind to their consideration of the matter.” It would be a total abnegation of those duties to enter the Committee Room with a mind immovably made up. This was a highly sensitive decision to take and the fair-minded observer would assume that it would be taken fairly and justly.

129. It would have been obvious to all that the developers' proposals would arouse passion in the local community. Indeed, in the conversation with which we are concerned, reference was made to its impact on the children in the locality. Lord Hope defined impartiality in *Gilles* in this way at paragraph 23:

“Impartiality consists in the absence of a predisposition to favour the interests of either side in the dispute.”

Yet there was nothing anywhere to suggest that Carwyn Jones had taken side one way or the other.

130. Carwyn Jones' words were unwise, even injudicious, and hearing them might well have caused eyebrows to rise. But the informed observer would pause and stand back, then look at all the facts objectively. He would know that professional detachment and the trained ability to exercise independent judgment lie at the heart of the exercise of his function as a decision-maker especially in a case of such importance and sensitivity for the local community that it required the PDC to decide it. Bearing all matters in mind, the fair and informed observer would not, in my judgment, find that there was a real possibility that the Chairman of this Committee had predetermined the issue. The facts do not give rise to a real possibility of bias.
131. For those short reasons and for the reasons much more fully set out by Richards L.J., with which I agree, I would allow this appeal. I wish to express particular agreement with the postscript to his judgment. If ever there were a case to be heard in Wales, this was it and I repeat my apologies expressed at the conclusion of the hearing to all of those who had needlessly to travel to London.

HELOW v SECRETARY OF STATE FOR THE HOME DEPARTMENT

No 1
22 October 2008
[2008] UKHL 62

Lord Hope of Craighead,
Lord Rodger of Earlsferry,
Lord Walker of Gestingthorpe,
Lord Cullen of Whitekirk and
Lord Mance

FATIMA HELOW, Appellant—*Bovey QC, Blair*
SECRETARY OF STATE FOR THE HOME DEPARTMENT, First Respondent—
Advocate General (Davidson of Glen Clova QC), Tyre QC, Carmichael
LORD ADVOCATE, Second Respondent—*Moynihan QC*

Administration of justice – Statutory review by Lord Ordinary of Palestinian claim for asylum – Lord Ordinary a member of International Association of Jewish Lawyers and Jurists – Whether real possibility of bias

The appellant was a Palestinian by birth. She averred that her family were supporters of the Palestinian Liberation Organisation (“PLO”), and that she was actively involved in the preparation of a lawsuit brought in Belgium, alleging that the then Prime Minister of Israel, Mr Sharon, was personally responsible for the massacre in the Sabra and Shatila camps in Lebanon in September 1982. She averred that, in consequence, she was at risk of harm not only from Israeli agents, but also from Lebanese agents and, because of her links with the PLO, from Syrian agents. She claimed asylum, but her application was refused by the Secretary of State for the Home Department and, on appeal, by an adjudicator. She was refused leave to appeal by the Immigration Appeal Tribunal. She lodged a petition in the Court of Session seeking a review of that refusal. The petition was considered by Lady Cosgrove, who dismissed it. The appellant presented a petition to the *nobile officium* craving the court to set aside Lady Cosgrove’s interlocutor on the ground that it was vitiated for apparent bias and want of objective impartiality. The appellant contended that by virtue of her membership of the International Association of Jewish Lawyers and Jurists, Lady Cosgrove gave the appearance of being the kind of supporter of Israel who could not be expected to take an impartial view of a petition for review concerning a claim for asylum based on the appellant’s support for the PLO and involvement in the legal proceedings against Mr Sharon. The association produced a quarterly publication, *Justice*, which included some articles that were fervently pro-Israeli and some that were markedly antipathetic to the PLO. An Extra Division refused the prayer of the petition. The appellant appealed to the House of Lords. She argued that a fair-minded observer would conclude that Lady Cosgrove’s membership of the association gave rise to a real possibility of bias because the fair-minded observer would think that the views put forward by the association represented views which Lady Cosgrove shared as a member, or that the fair-minded observer would think that Lady Cosgrove may have been influenced by the views expressed by the association of which she was a member.

Held that: (1) there was no basis for fixing Lady Cosgrove with the views of the president of the association or other contributors to *Justice*; Lady Cosgrove was an intelligent and educated individual whose reactions to the articles, supposing that she had read them, was quite unknown; moreover, those who were conducting the affairs of the association during the relevant period were well aware that members held widely differing views; and the fair-minded and informed observer would not impute to Lady Cosgrove the published views of other members, by reason only of her membership of the association (paras 6–9, 18–20, 27, 29, 53–55); (2) the hypothetical observer would have to consider whether there was a real risk that the articles, read at perhaps quarterly intervals, over a period of years would have so affected Lady Cosgrove as to make it impossible for her to judge the petition impartially; the observer would take into account the fact that Lady Cosgrove was a professional judge,

having the advantage of years of relevant training and experience and having sworn an oath to decide impartially; while these factors did not guarantee impartiality, they were undoubtedly relevant when considering whether there was a real possibility that the decision of a professional judge was biased; and taking all these matters into account, the fair-minded observer would not consider that there had been any real possibility of bias in Lady Cosgrove's case (paras 6–9, 22, 23, 27, 30, 56–58); and appeal dismissed.

Porter v Magill [2002] 2 AC 357 and *Johnson v Johnson* (2000) 201 CLR 488 applied.

FATIMA HELOW applied for asylum in the United Kingdom. On 11 September 2003 the Secretary of State for the Home Department refused her application. The appellant appealed to an adjudicator. The appeal was heard before the adjudicator (KR Forbes) on 22 March, 13 April and 17 May 2004. The adjudicator refused the appeal in a determination promulgated on 27 May 2004. On 11 June 2004 the appellant lodged an application for leave to appeal to the Immigration Appeal Tribunal. On 29 September 2004 the vice-president of the Immigration Appeal Tribunal (A Mackey) refused the appellant permission to appeal. The decision was notified to the appellant by letter dated 13 October 2004. The appellant presented a petition to the Court of Session for statutory review under sec 101 of the Nationality, Immigration and Asylum Act 2002 (cap 41). On 24 November 2004 the Lord Ordinary (Lady Cosgrove) dismissed the petition.

The appellant presented a petition to the *nobile officium* of the Court of Session seeking to set aside the interlocutor of the Lord Ordinary dated 24 November 2004. On 18 October 2005 first orders were granted. The Advocate General for Scotland, as representing the Secretary of State for the Home Department, and the Lord Advocate, as a Scottish Minister with responsibility for the administration of the courts in Scotland and also as representing the public interest, lodged answers. The cause called before an Extra Division, comprising Lord Nimmo Smith, Lord Kingarth and Lord Kirkwood, for a hearing on the summer roll, on 15 and 16 June 2006. At advising, on 16 January 2007, the court refused the prayer of the petition ([2007] CSIH 5; 2007 SC 303).

The appellant appealed to the House of Lords.

Cases referred to:

Davidson v Scottish Ministers (No 2) [2004] UKHL 34; 2005 1 SC (HL) 7; 2004 SLT 895; 2004 SCLR 991

Gillies v Secretary of State for Work and Pensions [2006] UKHL 2; 2006 SC (HL) 71; 2006 SLT 77; 2006 SCLR 276; [2006] 1 WLR 781; [2006] 1 All ER 731

Johnson v Johnson [2000] HCA 48; (2000) 201 CLR 488; 174 ALR 655; 74 ALJR 1380

Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451; [2000] 2 WLR 870; [2000] 1 All ER 65; [2000] IRLR 96

Meerabux v Attorney-General of Belize [2005] UKPC 12; [2005] 2 AC 513; [2005] 2 WLR 1307

Porter v Magill [2001] UKHL 67; [2002] 2 AC 357; [2002] 2 WLR 37; [2002] 1 All ER 465

R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2) [2000] 1 AC 119; [1999] 2 WLR 272; [1999] 1 All ER 577

R v RDS [1997] 3 SCR 484; 1997 SCC 86

Textbooks etc referred to:

Baker, A, 'Anti-Israel Bias in the International Arena: Politicisation of international criminal law' (Justice, International Association of Jewish Lawyers and Jurists, Tel Aviv, Winter 2001), vol 30, pp 16–21

Ben-Itto, H, 'President's Message' (Justice, International Association of Jewish Lawyers and Jurists, Tel Aviv, Winter 2001), vol 30, pp 2–7

Gelber, Y, 'The Lawsuit Submitted Against Ariel Sharon in Belgium: Historical background' (Justice, International Association of Jewish Lawyers and Jurists, Tel Aviv, Spring 2003), vol 35, pp 25–28

Levy, Y, 'Geneva: Israel being singled out and discriminated against, fighting back, with few but very important allies' (Justice, International Association of Jewish Lawyers and Jurists, Tel Aviv, Winter 2001), vol 30, pp 26–28

President of the International Association of Jewish Lawyers and Jurists (Justice, International Association of Jewish Lawyers and Jurists, Tel Aviv, 1994–2004), vols 1–40

Reisner, D, *'The Current Conflict: Legal aspects'* (Justice, International Association of Jewish Lawyers and Jurists, Tel Aviv, Winter 2001), vol 30, pp 22–25

Sharon, A, et al, *'Israeli Leaders Greet the Conference'* (Justice, International Association of Jewish Lawyers and Jurists, Tel Aviv, Winter 2001), vol 30, pp 8–10

The appeal was heard in the House of Lords before Lord Hope of Craighead, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe, Lord Cullen of Whitekirk and Lord Mance, on 16 and 17 June 2008.

At delivering judgment, on 22 October 2008—

LORD HOPE OF CRAIGHEAD— My Lords,

[1] The fair-minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively. Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair-minded observer is a creature of fiction. Gender-neutral (as this is a case where the complainer and the person complained about are both women, I shall avoid using the word 'he'), she has attributes which many of us might struggle to attain to.

[2] The observer who is fair minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in *Johnson v Johnson* (p 509, para 53). Her approach must not be confused with that of the person who has brought the complaint. The 'real possibility' test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.

[3] Then there is the attribute that the observer is 'informed'. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.

[4] The context is crucially important in a case such as this. As my noble and learned friend Lord Mance whose speech I have had the advantage of reading in draft has explained, the appellant's argument depends entirely on the judgment that the observer would make of the fact that Lady Cosgrove was, at all relevant times, a member of the International Association of Jewish Lawyers and Jurists. As a member of the association, she must be assumed to have received its quarterly publication, *Justice*, all of whose editions are readily accessible on the association's website. She was present at a meeting held in Edinburgh on 30 November 1997 when, in the presence of a number of other distinguished Jewish members of the

legal profession, a Scottish branch of the association was inaugurated. There is no suggestion that she either did or said anything after that date which associated her either one way or the other with views that were being expressed on behalf of the association. It was on the some of the contents of some of the more recent issues of *Justice*, and those contents only, that senior counsel for the appellant concentrated in presenting his argument. The question is to what extent, if at all, the picture presented by this material would indicate to the observer, taking everything else into account, that there was a real possibility that Lady Cosgrove was biased.

[5] There is no doubt that some of the articles that have been published in *Justice*, including messages by the association's president, Judge Hadassa Ben-Itto, are fervently pro-Israeli. Inevitably, given the conflicts that have been taking place in the region, such a partisan stance carries with it sentiments that are hostile to those that people in Israel feel are ranged against them. It is not difficult to find publicity being given in *Justice* to views that are markedly antipathetic to the Palestinian Liberation Organisation with whom the appellant, who is an ethnic Palestinian, has connections. Had there been anything to indicate that Lady Cosgrove had by word or deed associated herself with these views so as to indicate that they were her views too, I would have had no difficulty in concluding that the test of apparent bias set out in *Porter v Magill* (para 103) was satisfied.

[6] But the fair-minded and informed observer would, as I have said, put the material published in *Justice* on which senior counsel for the appellant relied into its context. The first point is that the material on which he relied was a one-sided selection of what has been published. It is incomplete. If one is looking for a balanced and fair-minded presentation of what is available to the reader one would need to see the other side. It is clear from the contents listed at the front of each edition that some of the material that was published was of genuine interest to a lawyer. From time to time, for example, articles were published about judgments issued by the courts in Israel including its Supreme Court. Other aspects of Jewish and Israeli law were also sometimes dealt with. This is important, as it provides an explanation of why, leaving aside all the highly charged political material, the publication might be thought to be of interest to a Jewish lawyer living outside Israel. It is not only Jewish lawyers in this country who value information about judgments issued by the Supreme Court. But Jewish lawyers in particular might be thought to have a particular interest in keeping themselves informed about its activities.

[7] The second point relates to the nature of the Jewish diaspora. There is an affinity between Jewish people everywhere that expresses itself in participation in bodies such as the association's UK and Scottish branches out of sympathy with Jews who live in Israel. But, as Judge Ben-Itto herself recognised in one of her policy statements, it is well known that not all Jews agree with the views as to how Israel's problems should be solved that have been expressed by the Israel government. The editorial board of *Justice* is located in Israel and the journal itself is published in Tel Aviv. Its members live every day in the cauldron of public opinion which has been generated by the circumstances to which people on all sides are exposed in that country. A Jewish reader living abroad would be expected to recognise the partisan nature of some of the material that appeared in it. Statements by Ariel Sharon, for example, contain exactly the kind of sentiments about the problems that Israel faces that he would have been expected to express in his capacity as Prime Minister. The greater the geographic separation, the more likely it is that the educated reader will

feel detached from the pressures that give rise to them. No fair-minded person would think that a judge who regularly takes one of the leading national newspapers circulating in this country was, simply by doing so, associating himself or herself with everything that was printed in it. In principle, this case is no different.

[8] The Extra Division referred in its discussion section of its opinion to the fact that the judge had taken the judicial oath (para 44). This is, of course, a factor to be taken into account along with all the other facts. In this case, however, where the issue is whether a judge having access to this material is to be associated with its contents, I would attach more weight to the other factor that the Division mentioned. The judge can be assumed, by virtue of the office for which she has been selected, to be intelligent and well able to form her own views about anything that she reads. She can be assumed to be capable of detaching her own mind from things that they contain which she does not agree with. This is why the complete absence of anything said or done by her to associate herself with the published material that the appellant complains of is so crucial to what the observer would make of this case. In the absence of anything of that kind there is no basis on which the observer would conclude that there was a reasonable possibility that the judge was biased.

[9] For these reasons, and for those given by my noble and learned friends Lord Rodger of Earlsferry and Lord Mance with which I agree, I would dismiss the appeal and affirm the Extra Division's interlocutors.

LORD RODGER OF EARLSFERRY— My Lords,

[10] I have had the advantage of considering the speeches of my noble and learned friends, Lord Hope of Craighead and Lord Mance, in draft. I agree with them. I add some remarks of my own, only because the challenge in the case is to the integrity of the justice system in Scotland. This is a matter of general concern, as was indeed indicated by the presence at the hearing of senior counsel representing the Lord Advocate, not only as a Scottish Minister with responsibility for the courts but also acting in the public interest.

[11] The appellant is a Palestinian by birth. She avers that her family were supporters of the Palestinian Liberation Organisation. More particularly, she was actively involved in the preparation of a lawsuit brought in Belgium, alleging that the then Prime Minister of Israel, Mr Sharon, was personally responsible for the massacre in the Sabra and Shatila camps in Lebanon in September 1982. She avers that, in consequence, she is at risk of harm not only from Israeli agents, but also from Lebanese agents and, because of her links with the Palestinian Liberation Organisation, from Syrian agents. On that basis she claimed asylum in this country, but her application was refused by the Home Secretary and, on appeal, by an adjudicator. The appellant was refused leave to appeal by the Immigration Appeal Tribunal. She then lodged a petition in the Court of Session seeking a review of that refusal under sec 101 of the Nationality, Immigration and Asylum Act 2002. The petition was considered by Lady Cosgrove who dismissed it.

[12] The appellant makes no criticism of Lady Cosgrove's reasons for dismissing her petition. Instead, in a petition to the *nobile officium*, she craved the court to set aside Lady Cosgrove's interlocutor on the ground that it was vitiated for 'apparent bias and want of objective impartiality'.

[13] The appellant does not suggest that the judge could not be impartial merely because she is Jewish. Rather, the contention is that, by virtue of her membership of the International Association of Jewish Lawyers and Jurists, Lady Cosgrove gave

the appearance of being the kind of supporter of Israel who could not be expected to take an impartial view of a petition for review concerning a claim for asylum based on the petitioner's support for the Palestinian Liberation Organisation and involvement in the legal proceedings against Mr Sharon.

[14] The legal test to be applied in cases of apparent bias is to be found in the speech of my noble and learned friend, Lord Hope of Craighead, in *Porter v Magill* (p 494H):

'The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.'

It is equally well established that the fair-minded observer is not unduly sensitive or suspicious (*Johnson v Johnson*, per Kirby J, p 509, para 53).

[15] If all that the appellant could have pointed to was the aims of the association, her petition could not possibly have got off the ground, since they are unexceptionable. The association's website at the relevant period explained that:

'The Association strives to promote Human Rights goals such as the prevention of war crimes, the punishment of war criminals, the prohibition of weapons of mass destruction, and international co-operation based on the rule of law and the fair implementation of international covenants and conventions.

The Association particularly addresses issues that are on the agenda of the Jewish people everywhere, and is particularly committed to combat racism, xenophobia, anti-semitism and denial of the Holocaust.'

The same web page records that among the founders of the association were a justice of the Supreme Court of Israel and Justice Goldberg of the United States Supreme Court. Lord Woolf is an honorary deputy president of the association.

[16] Counsel for the appellant submitted that it was necessary to look below the surface, however. He pointed to various articles in the association's journal, *Justice*, referred to by Lord Mance. These included criticisms of the Belgian case against Mr Sharon. Understandably, counsel drew particular attention to the messages and addresses of the president of the association, Judge Hadassa Ben-Itto. As a member of the association, Lady Cosgrove would have received its journal and, counsel argued, there was nothing to show that she had ever dissociated herself from the views expressed by the president. So *noscitur a sociis*: the observer would identify Lady Cosgrove's views from the company that she kept in an association whose president expressed extreme pro-Israeli sentiments.

[17] In particular, at a conference held by the association in December 2001, about three months after 9/11, the president said: 'As a matter of personal choice I define myself as a Jew, a Zionist, an Israeli and a member of the legal community, in that order.' This appeared in the winter 2001 issue of *Justice*. In my view, a judge who defined herself in that way would indeed be unable to deal with the appellant's petition: a fair-minded and informed observer would readily conclude that there was more than a real possibility that such a judge was biased. The Advocate General accepted that.

[18] But it is not suggested that Lady Cosgrove has ever said anything remotely comparable. Nor is it suggested that she has ever expressed support for the more extreme views expressed by the president of the association or in any of the articles in *Justice*. In that situation there is, as a matter of general principle, no basis for fixing her with the views of the president or other contributors. She is, quite simply, an

intelligent and educated individual whose reaction to the articles — supposing that she had read them — is unknown.

[19] Moreover, those who were conducting the affairs of the association during the relevant period were well aware that, in actual fact, members of the association held widely differing views. The journal specifically says that the views of individuals and organisations published in it are their own and that inclusion in it does not necessarily imply endorsement by the association. Even when referring to the issues confronting Israel, in her address to the international conference in December 2001, the president acknowledged that 'We know for a fact that the members of this Association are as divided on these issues as are Israelis and Jews everywhere.'

[20] I am accordingly satisfied that the fair-minded and informed observer would not impute to Lady Cosgrove the published views of other members, by reason only of her membership of the association.

[21] Senior counsel for the appellant had a second line of attack. He suggested that the observer would think that, by reading *Justice*, Lady Cosgrove might well have absorbed the more extreme views expressed in its pages by a process of osmosis. So there would be a real possibility that, as a result, she would be biased in dealing with the appellant's petition.

[22] I accept that much of the material from the journal, which the House was shown, could be described as highly partisan. But the selection was, naturally, skewed in the direction of contributions of that character. Reading this selection all at once is an artificial exercise. The lists of contents of the issues show that, as would be expected in a journal of an organisation with the aims set out above, many articles are of quite a different character. Even the issue for winter 2001, containing the text of the polemical address by the president in December 2001 and other partisan material, included a scholarly article on 'Integrity as a Value' in Jewish law and a factual account of a judgment of the Supreme Court of Israel about the broadcasting of a particular programme on the Sabbath. So, for purposes of considering their impact, the selected articles have to be seen as simply part of the contents of the relevant issues. Moreover, the journal appears quarterly: anyone reading an article would be unlikely to retain any clear recollection of a similar article in an earlier issue. This would greatly reduce the chances of the articles having a cumulative effect on the reader.

[23] So the hypothetical observer would have to consider whether there was a real risk that these articles, read at perhaps quarterly intervals, over a period of years would have so affected Lady Cosgrove as to make it impossible for her to judge the petition impartially. In assessing the position, the observer would take into account the fact that Lady Cosgrove was a professional judge. Even lay people acting as jurors are expected to be able to put aside any prejudices they may have. Judges have the advantage of years of relevant training and experience. Like jurors, they swear an oath to decide impartially. While these factors do not, of course, guarantee impartiality, they are undoubtedly relevant when considering whether there is a real possibility that the decision of a professional judge was biased. Taking all these matters into account, I am satisfied that the fair-minded observer would not consider that there had been any real possibility of bias in Lady Cosgrove's case.

[24] In my view the decision of the Extra Division was correct and the appeal should be dismissed.

LORD WALKER OF GESTINGTHORPE— My Lords,

[25] I agree that this appeal should be dismissed, for reasons set out in the opinions of all your Lordships. But I have reached that conclusion rather less readily, I think, than some of your Lordships.

[26] Those who take on the responsibility of judicial office have to exercise a measure of restraint in associating themselves publicly with controversial causes. I agree with my noble and learned friend Lord Mance that a judge who expressed or endorsed the views put forward in December 2001 by an Israeli judge, speaking publicly and formally as president of the International Association of Jewish Lawyers and Jurists ('IAJLJ'), would not be a fit person to adjudicate on a case to which Ms Helow was a party, and to which the Sabra and Shatila massacres were relevant.

[27] It is said that there is insufficient evidence that Lady Cosgrove did endorse those views. I accept that, and for that reason I would dismiss this appeal. But I do not accept that membership of an association such as the IAJLJ can be equated with subscribing to a daily or weekly newspaper, or that there is any room for conjecture that Lady Cosgrove may simply have omitted to cancel her annual subscription to the IAJLJ. She had been a high-profile member of the Scottish branch at its inaugural meeting. Moreover the fair-minded and informed observer would be tending towards complacency if he treated the fact of having taken the judicial oath as a panacea.

LORD CULLEN OF WHITEKIRK— My Lords,

[28] The primary argument for the appellant was that the informed and fair-minded observer, having considered the relevant facts, would conclude that, by reason of her being a member of the International Association of Jewish Lawyers and Jurists, there was a real possibility of bias on the part of Lady Cosgrove. It was asserted the association had, or had acquired, a 'strong commitment to causes and beliefs at odds with the causes and beliefs espoused by the appellant'. That assertion gained no support from the stated aims and objects of the association, as published on its website. However, the appellant's counsel relied on the views expressed in articles and pronouncements by the association's representatives and officials which appeared in its quarterly journals. I am indebted to the noble and learned Lord Mance for his survey of them. While these views were without doubt strongly partisan in tone, they were drawn from a small selection of the total material appearing in the journal over a period of years. An informed and fair-minded observer who took account of what appeared in the issues of the journal would no doubt take an overall view and not simply concentrate on parts. Examination of the lists of contents shows that the journals also included articles on matters of legal interest, the type of articles which one would expect to find in a periodical for lawyers and judges.

[29] Critical to the appellant's argument was the assumption that by reason of her membership Lady Cosgrove shared the views expressed in these articles and pronouncements. However, beyond the bare facts that she was a member throughout the relevant period and had helped to found the Scottish branch of the association in 1997, there is nothing to indicate what part, if any, she had taken in the activities of association. The informed and fair-minded observer would proceed on an assumption only if it had an objective basis. While he or she would no

doubt assume that as a member of the association Lady Cosgrove regularly received copies of the journal, there is nothing to suggest that she endorsed or was interested in, let alone read, the articles and pronouncements founded on by the appellant's counsel, as opposed to articles on matters of legal interest. Furthermore, as the president of the association recognised, it could not be assumed that the members of the association, who lived in a wide range of countries, were all of one mind in regard to the controversies in which Israel was embroiled. Thus there was not, in my opinion, an objective basis for the assumption on which the appellant's argument depended.

[30] The alternative argument for the appellant was that there was a real possibility of bias by reason of Lady Cosgrove having been influenced by the views expressed in the articles and pronouncements founded on by the appellant's counsel. This argument runs into the same difficulty in the lack of an objective basis for the assumption that Lady Cosgrove would have read and been receptive to these views. That assumption also involves the inherent unlikelihood that Lady Cosgrove, despite her training and experience as a judge, would not have been able to put aside what she had read.

[31] For these reasons and those given by my noble and learned friends, Lord Hope of Craighead, Lord Rodger of Earlsferry and Lord Mance, with which I agree, I would dismiss the appeal and affirm the Extra Division's interlocutors.

LORD MANCE— My Lords,

[32] The appellant, Ms Fatima Helow, appeals against an interlocutor of 16 January 2007 whereby the Extra Division of the Inner House of the Court of Session refused the prayer in her petition seeking to hold vitiated for apparent bias and want of objective impartiality an interlocutor of the Lord Ordinary, Lady Cosgrove, of 24 November 2004 which had refused her petition under sec 101(2) of the Nationality, Immigration and Asylum Act 2002.

[33] The appellant is a Palestinian who arrived in the United Kingdom in August 2001 and claimed asylum here on 4 September 2001. After refusal of that claim, notice of decision to remove her to Lebanon was given on 16 December 2003. Her appeal against that notice was dismissed by the adjudicator, Mr KR Forbes, on 27 May 2004. She sought permission to appeal against such dismissal by lengthy grounds of appeal, supplemented by letters dated 11 June and 22 July 2004. Permission was refused by the vice-president, Mr Allan Mackey, of the Immigration Appeal Tribunal ('IAT') on 29 September 2004 with short nine-line reasons. The appellant filed further lengthy grounds (covering 25 pages) seeking review of that refusal by the Court of Session. The matter was in the ordinary course allocated to Lady Cosgrove to deal with on the papers. After seeking and obtaining from the parties a copy of the letter of 11 June 2004, she affirmed the decision to refuse permission to appeal in reasons extending to just over four pages.

[34] The appellant's case, in seeking asylum and resisting removal, was and is that she and her family were involved politically with the PLO, that she was in September 1982 living with other family members in the Sabra/Shatila refugee camp when it was attacked, that numbers of her relatives were killed in the attack, that she had maintained publicly that Mr Ariel Sharon, later Prime Minister of Israel, was implicated in the massacre through the Israeli Defence Force, that in August 2001 she had assisted Belgian lawyers investigating the massacre and was involved in a criminal complaint brought in Belgium against Mr Sharon by

survivors, that she was regarded as holding political opinions which were anti-Israeli, anti-Lebanese and anti-Syrian, and would be risk from Israeli, Lebanese and Syrian authorities as well as anti-Arafat and pro-Syrian and pro-Lebanese factions, were she to be required to return to Lebanon.

[35] The adjudicator did not accept the credibility of the appellant's account in a number of respects. One related to her late statement that she had taken part in a television programme with one Elie Hobeika or Hubeika, leader of the Lebanese Phalange special security troops allegedly involved in the massacre and later killed in a bomb blast on 24 January 2002, whose denial of involvement in the massacre she said that she had challenged in the interview. The adjudicator regarded this as a late assertion regarding a 'crucial' connection, which would if true have been mentioned earlier, and did not believe that there had been any such television appearance, although adding that 'Even if she had appeared her concerns were directed solely at Hobeika. She does not claim that she put forward her own views or widened her list of targets'. Another point on credibility made by the adjudicator related to a lack of contemporary medical evidence to show that she was suffering from or being treated for post-traumatic stress syndrome at the time of the hearing as she had maintained.

[36] The letter dated 22 July 2004 with which the appellant supplemented her application to the IAT contained material, including a videotape and transcript, confirming that she had indeed taken part as she had stated in a television interview broadcast on 8 August 2001, and a statement from her explaining why the video had not previously been produced and commenting on the transcript. This statement explained that the transcript showed not only that she was present in the Shatila camp in 1982 and outspoken in blaming both the Lebanese and the Israelis for the massacre, but also that Mr Hobeika has been prepared to give evidence to convict Israelis in relation to the massacre, and repeated the suspicion which she had uttered before the adjudicator that Mr Hobeika had been killed by Israelis for this reason. The statement also took issue with the adjudicator's statements that she had directed her claims solely at Mr Hobeika, and had not widened her targets. On the contrary, it maintained, she had in the broadcast held Israelis assisted by Lebanese soldiers to be responsible for the massacre. The letter dated 22 July 2004 also contained a doctor's letter dated 19 August 2002 regarding her medical condition and an explanation as to why it had not previously been produced.

[37] The matters mentioned in the preceding three paragraphs were referred to in the grounds put before Lady Cosgrove. It was submitted that, since the IAT had only mentioned the letter of 11 June 2004, it cannot have considered the further evidence, lodged with the letter of 22 July 2004, confirming the appellant's account regarding the television interview, and cannot have conducted the requisite balancing exercise in deciding whether or not to admit the fresh evidence. The IAT's decision was further challenged on the grounds of inadequate reasoning, and error of law in failing to apply the proper test of a 'real prospect of success'. Lady Cosgrove analysed the new evidence, and considered that the material regarding the television broadcast gave no reason to think that the adjudicator's conclusions regarding the safety of return to Lebanon were not sustainable generally or that the petitioner was suffering from a medical condition at the time of the hearing before the adjudicator. In her decision dated 24 November 2004, she found herself quite unable to hold that the IAT had erred in the exercise of its discretion or in law in refusing to give permission to appeal and considered that

its reasons were sufficient and adequate. No criticism is made of and no point is made on Lady Cosgrove's reasoning or decision as such.

[38] The submission regarding apparent bias and want of objective impartiality on the part of Lady Cosgrove arises from research on the web undertaken by the appellant's legal advisers after Lady Cosgrove's refusal of the petition under sec 101(2). This revealed on 30 November 2004 that Lady Cosgrove is a member of the International Association of Jewish Lawyers and Jurists ('the association'), and later that she as a member of the Outer House together with Lord Caplan of the Inner House was a founder member of a Scottish branch of the association, welcoming participants to an inaugural meeting in Parliament House, the Court of Session's home, on 30 November 1997. The fact that Lady Cosgrove is Jewish is, of itself, rightly not relied upon. But it is submitted that the association 'has a strong commitment to causes and beliefs at odds with the causes and beliefs espoused by the appellant', this on the basis that the association is 'anti-Palestinian ... , anti-Moslem ... , anti-pathetic to the PLO ... , supportive of Israel ... , supportive of Ariel Sharon ... , critical of the legal action against Mr Sharon ... , a campaigning organisation ... , [using] immoderate expression ... , one-sided ... , and recruiting members as activists'. These epithets are alleged to be justified by the contents of various policy statements, presidential messages and contributors' articles published or reproduced in the association's quarterly publication *Justice* in years ranging from 1994 to 2004.

[39] The basic legal test applicable is not in issue. The question is whether a fair-minded and informed observer, having considered the relevant facts, would conclude that there existed a real possibility that the judge was biased, by reason in this case of her membership of the association (*Porter v Magill*). The question is one of law, to be answered in the light of the relevant facts, which may include a statement from the judge as to what he or she knew at the time, although the court is not necessarily bound to accept any such statement at face value, there can be no question of cross-examining the judge on it, and no attention will be paid to any statement by the judge as to the impact of any knowledge on his or her mind (*Locabail (UK) Ltd v Bayfield Properties Ltd*, para 19 per Lord Bingham of Cornhill CJ, Lord Woolf MR and Sir Richard Scott V-C). The fair-minded and informed observer is 'neither complacent nor unduly sensitive or suspicious', to adopt Kirby J's neat phrase in *Johnson v Johnson* (para 53), which was approved by my noble and learned friends Lord Hope of Craighead and Baroness Hale of Richmond in *Gillies v Secretary of State for Work and Pensions* (paras 17, 39).

[40] The appellant also invokes or seeks assistance from the principle of automatic disqualification applied in *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte* (No 2). It was there held that a judge was automatically disqualified not merely if he or she had a pecuniary interest in the outcome of the case, but also if his or her decision would lead to the promotion of a cause in which he or she was involved together with one of the parties. In that case the judge's involvement was as the chairman and a director of Amnesty International Charity Ltd, a charity wholly controlled by Amnesty International which had intervened in the case as a party to support the prosecution's application for the extradition of Senator Pinochet to Spain. However, in my opinion the present case is a long way away from *ex p Pinochet Ugarte*, since the association was not a party to or in any way concerned with (or so far as appears even aware of) the proceedings involving Ms Helow. Even where proceedings are brought by, for example, a bar association, mere membership of the association, as opposed to active involvement in its affairs or in

the institution of the proceedings, may not bring the principle in *ex p Pinochet Ugarte* into play (*Meerabux v Attorney-General of Belize*, esp per Lord Hope of Craighead, para 24). I consider, therefore, that it is the principles mentioned in the previous paragraph that govern the present appeal.

[41] There has, in this case, been no statement obtained, or so far as appears sought, from the judge. The petition seeking to vitiate Lady Cosgrove's decision of 24 November 2004 is based exclusively on material taken from the internet and from the association's quarterly publication *Justice*. No material or information has been put forward to show or suggest that Lady Cosgrove had any involvement with the association other than her membership and her welcoming appearance at the opening of its Scottish branch in 1997. A fair-minded observer would assume that, had she been an active member, some trace of this would have appeared.

[42] The basis upon which it is suggested that a fair-minded observer would conclude that Lady Cosgrove's membership of the association gave rise to a real possibility of bias has fluctuated between two poles: one, that the fair-minded observer would think that the views put forward by the association represented views which she shared as a member, the other, that, if the fair-minded observer did distinguish between the association and its members, he or she would think that Lady Cosgrove may have been 'influenced' by the views expressed by the association of which she was a member.

[43] If the epithets quoted in para 38 represented an accurate characterisation of the association and its aims, then the basis on which bias was alleged would not much matter. It would not be appropriate for a judge to join a one-sided, anti-Palestinian and anti-Moslem Jewish campaigning organisation using immoderate expression, and still less so for such a judge to decide a case involving an activist Palestinian Muslim who had engaged in criticism and pursuit of alleged illegal conduct by Israelis. The express aims and objects of the association, as published on the association's website, are however very different from those suggested by the stated epithets. They appear under the heading 'Pursuing human rights' as follows:

'The International Association of Jewish Lawyers and Jurists strives to advance human rights everywhere, including the prevention of war crimes, the punishment of war criminals, the prohibition of weapons of mass destruction, and international co-operation based on the rule of law and the fair implementation of international covenants and conventions.

The Association is especially committed to issues that are on the agenda of the Jewish people, and works to combat racism, xenophobia, anti-Semitism, Holocaust denial and negation of the State of Israel.

IAJLJ was founded in 1969. Among its founders were Supreme Court Justices Haim Cohn of Israel, Arthur Goldberg of the United States and Nobel Prize laureate René Cassin of France. Our membership comprises lawyers, judges, judicial officers and academic jurists in more than 50 countries who are active locally and internationally as the need arises. Membership is open to lawyers and jurists of all creeds who share our aims.

The Association has Category II Status as a non-governmental organization (NGO) at the United Nations, enabling it to participate in the deliberations of various UN bodies. In this capacity, the representative of the Association has been actively involved in the work of the Commission on Human Rights in Geneva and of related bodies, and will now be engaged with the work of the United Nations Human Rights Council, which has replaced the Commission on Human Rights.

The Association also publishes **Justice** ... which examines a variety of relevant issues and current topics and is mailed to thousands of lawyers and jurists throughout the world'.

[44] Membership was invited on the website in the following terms:

'Membership in the International Association of Jewish Lawyers and Jurists is by direct individual membership. Lawyers and Jurists who share the aims of the Association as described on this site, are invited to join the IAJLJ by filling out the enclosed membership form and mailing it to us together with the annual membership fee for the current year.'

The relevant form contained this declaration:

'I hereby apply to become a member of The International Association of Jewish Lawyers and Jurists. I declare that I approve the aims and objects of the Association and undertake to comply with the Articles and Rules of the Association.'

[45] Clearly, there is nothing objectionable about the aims and objects of the association as stated on its website and to which its members had expressly to subscribe. The appellant's case is that the association had in practice acquired a different and unbalanced character as shown, it is said, by the material exhibited and relied upon in support of the petition. I would observe at once, however, that the material exhibited and relied upon is selective rather than representative. It consists of those statements and articles which in the appellant's or her advisers' submission advance the case made regarding the character and purposes of the association. Accordingly, it is necessary to be cautious about drawing general conclusions from it about the association's character or about the significance of such material as regards any individual member. It is clear from those indexes to issues of *Justice* which have been exhibited that there are many other articles not exhibited on subjects likely to have been of legal interest and of a character which any legal journal would be expected to contain. The second point is that any approach which assumes that a member of the association would have read all or even most of the selected material is highly suspect, particularly when one is without any overview of the other material not selected. It is common experience for a member of an organisation receiving its regular publication to do little more than glance at its contents table or page, reading only the occasional item appearing to be of particular interest.

[46] It is, nevertheless, necessary to look at the material which has been selected and exhibited. This falls into three main categories: speeches made and reproduced or articles written by third-party contributors; 'policy statements' by the association's United Nations' representative (in most cases Mr D Lack); and speeches or messages by the association's president (in most cases Judge Hadassa Ben-Itto, an Israeli judge). Starting with speeches and articles by third parties, each contents page of *Justice* carries the unsurprising disclaimer 'Views of individuals and organisations published in JUSTICE are their own, and inclusion in this publication does not necessarily imply endorsement by the Association'. Individual phrases from speeches and articles must be read in this light. Apart from this, the presentations and articles published in *Justice* do not anyway appear to go generally beyond legitimate expression of reasoned views; and they certainly do not appear objectionable in a way which justifies any criticism of the association for publishing them or justifies any conclusion that the association must implicitly have agreed with or endorsed them. An example is the article cited in support of the proposition that the association is anti-Palestinian: 'The Current Conflict: Legal aspects', by Colonel Daniel Reisner, Head of the International Law Department ('ILD') of the Israeli army, published in edition no 30 of *Justice*. The article was the text of a

presentation made by Colonel Reisner to an international conference on Standing by Israel in Time of Emergency organised by the association and the Jewish Agency in Jerusalem in December 2001. In it he said at one point that 'The Palestinians believe that while we are constrained by rules of morality and legality, they are not'. Colonel Reisner went on to say that 'As a lawyer, it is my job to make sure that the Army will fight lawfully and morally', and he also welcomed the supervision of the Israeli Supreme Court. Although the first passage is a generalisation which, taken literally, must be far too broad, no other passage is suggested to be objectionable and the article appears generally to be a useful account of the ILD's activities and approach.

[47] The winter 2001 edition of *Justice* (no 30, evidently published early in 2002) reproduces the text of five other presentations at the December 2001 conference, on three of which reliance is placed in various respects, one entitled 'Anti-Israel Bias in the International Arena: Politicisation of international criminal law' by Alan Baker, Legal Adviser of Israel's Foreign Ministry, another 'Geneva: Israel being singled out and discriminated against, fighting back, with few but very important allies' by Israel's Ambassador to the United Nations, Mr Yaakov Levy. The senior Israeli officials who gave these presentations clearly felt strongly that Israel was receiving a raw deal in international fora, particularly the United Nations, but such expressions of view, backed by specific instances, are legitimate. They would not justify a description of such officials as 'anti-Moslem', a phrase which suggests general prejudice against anything Muslim. Still less can they support a case that the association is anti-Moslem.

[48] Reliance is also placed on presentations and articles by third parties which contain references to Mr Sharon and to the Belgian legal proceedings against him. A warm greeting by Mr Sharon to the December 2001 conference was reproduced in edition no 30 of *Justice* and is relied upon for the assertion that the association is supportive of Mr Sharon. But this greeting was made in the context of the December 2001 international conference in Jerusalem at a time when Mr Sharon was Prime Minister of Israel and is on any view unsurprising in such a context. Criticisms directed — by Mr Alan Baker in the presentation already mentioned and by others in the later spring 2003 and summer 2004 editions of *Justice* — at the Belgian prosecution instituted against Mr Sharon as a politically motivated abuse are covered by the disclaimer and are again in terms which, however forceful, remain within the bounds of legitimate expression of view. The material exhibited from the spring 2003 edition includes well-informed articles by an academic and two Belgian lawyers. They went to the legal aspects of what Mr Alan Baker had in his article described as the 'extremely wide and liberal system of universal jurisdiction' in relation to international crimes which the Belgian legislator had, as Mr Baker put it, introduced as 'a well intentioned if perhaps a somewhat naïve action'.

[49] The spring 2003 edition also included a powerfully expressed article, to which considerable attention appears to have been given below, by Prof Yoav Gelber, Head of the School of History at Haifa University. In it he described the background to the Sabra/Shatila massacre and his personal frustration at the Israeli government's initial refusal to investigate the massacre and said that 'The evasive answers given by Begin and his ministers to the media and the public made me feel cheated'. He went on to record that he had as a result resigned his membership of another commission of inquiry, that within a week the government had given in to pressure to appoint a judicially chaired commission to investigate the massacre, and that its report, although not finding any office holder directly responsible, criticised several

including Mr Begin, and led to Mr Sharon being required to resign from his post. Finally, he described how the Phalange had come to terms with the Syrians and how Mr Hobeika had served them to his last day. He concluded that 'The lawsuit submitted in Belgium is no more than a propagandist attempt — using a very peculiar situation that Belgian law has created — to blame Israel for a domestic Lebanese act of revenge and to remind a forgetful world of [the Palestinian refugees'] continued existence in their camps'. As is evident, this is an article which was by no means one-sided in its attitude to Israel's past conduct. In the summer 2004 edition Israel's Minister of Justice described how the prosecution of Mr Sharon had finally ended when Belgian law was changed at the instance of the United States (faced with suits against President Bush, Secretary of State Powell and others). Forcefully expressed though both these contributions once again are, I find it difficult to see what relevance or influence a fair-minded observer would think they had or might have for or on a professional judge in the United Kingdom, charged with the resolution of an issue such as that put before Lady Cosgrove, even if she happened to read them. It would be a very poor judge whose decision on the question whether the IAT erred in law in refusing permission to appeal was affected by descriptions by Israeli contributors of the Belgian proceedings as propagandist or political, and this is so even if she happened herself to share the same view.

[50] The president's speeches or messages and the policy statements give rise to different considerations, in so far as they are not subject to any disclaimer and came from the association's leading figure or were made on the association's behalf. It may be true, as the Inner House observed, that one underlying theme is a demand for fair treatment for Israel, not so much on the basis that Israel had never done any wrong, as on the basis that Israel was being made the only target of blame for any wrong. But it is also true that the speeches, messages and statements take a very strong, verging on the strident, stance, pro-Israeli and highly critical of the Palestinian Authority and PLO, they are not confined to legal issues and they include what may be described as political or campaigning material of a nature and in terms unfamiliar in a legal journal. The majority of the policy statements on the association's website relate to the association's activity as a non-governmental organisation with Category II Status at the United Nations enabling it to participate in the deliberations of various United Nations' bodies, particularly the Commission on Human Rights in Geneva. Thus, from 2000 through to 2004, the association's representative with the Commission issued a number of policy statements very critical of the Arab League, Islamic extremist groups and the Palestinian Authority for lies about Israel, for denial of Israel's right of existence, for racist or anti-Semitic statements towards Israel, for rejection of Israel's offer to accept virtually all their reasonable demands, and for the support of terror or a terror campaign against Israel. (Two such policy statements were made jointly with the World Jewish Congress, the banner of which organisation's website evidently bears the slogan 'All Jews are responsible for one another'. However, to seek to deduce from this association by the association with the World Jewish Congress some conclusion relevant to Lady Cosgrove's suitability to adjudicate upon Ms Helow's application seems to me to go on any view too far into remote considerations.)

[51] The president in statements in *Justice* and elsewhere extended her early criticism of Moslem fundamentalism in September 1994 to later, more general criticism of the Palestinian leadership. She said in spring 2001 that such leadership had done nothing to curb and had even promoted incitement against Israel, in

autumn 2001 that it had chosen a path of violence, and in spring 2004 that she was 'sometimes told not to blame Moslems, only the radical fundamentalist elements', but that 'at the expense of not being politically correct, the truth must be told. Today, it is not only radical groups like Hamas which are using the Protocols [the alleged 'Protocols of the Elders of Zion'] as a means to de-legitimize both the Jews and the Jewish State'. Her address to the December 2001 conference (reproduced in edition no 30 of *Justice*) was in even less commonplace terms and represents perhaps the highpoint of the appellant's case. She opened in this unusual way: 'Let me be very personal. Let me speak not as a public figure, not as President of this Association, but as a person who constantly needs to define her own priorities, her own commitments. As a matter of personal choice I define myself as a Jew, a Zionist, an Israeli and a member of the legal community, in that order'. Later she spoke of the welcome given by Jews and Israelis to the United Nations as the focal point for enforcing human rights, but of the bitter disillusion which had followed, because 'We are still being discriminated against both as Jews and as the Jewish State'. She criticised the Belgian prosecution of Mr Sharon, saying 'absent on the Belgian dock are those who actually committed the murders in Sabra and Shatila. The only one they propose to place in the dock is the Israeli Prime Minister. One group of Arabs killed another group of Arabs in a most brutal massacre, and I did not hear of the Lebanese government setting up a public committee of inquiry, as did Israel, or being censured in the United Nations, let alone being accused in a criminal court'.

[52] President Hadassa Ben-Itto ended her address to the December 2001 conference by recognising the existence of differences of view, but with a general call for solidarity, for support for Israel and the United States in a fight against terror and for support for the association and the Israeli security forces, in these terms:

'We have carefully organized this Jerusalem conference to supply you with relevant information, to expose you to the views of experts on important relevant subjects. Each one must decide for himself how to use this information; you will each define to yourself the extent of your commitment. Each one will decide how to deal with the enormous dilemmas that face us, and on which we must take a stand if we wish to sound credible.

You may say: this conference is about solidarity, about standing together, and of course it is. By coming here you have made a statement: you have said that terror will not bring us down, you have said that Israel is not alone.

So, why then am I burdening you with all these controversial issues? Why do I speak on this occasion of internal conflicts that are part of the political agenda in Israel? I do so because if you wish to do more than make a statement, if you are ready to be our emissaries abroad, if you are willing to confront the elements that are constantly at work creating a hostile world opinion against us, often using not only distorted facts but also sophisticated arguments, you must be well armed, not only with facts but also with ready answers to questions aired daily in the international media.

I hope I have succeeded in posing this partial list of questions as objectively as possible. I myself do not have a ready answer to all of them, so, obviously, I have no answers for you. We know for a fact that the members of this Association are as divided on these issues as are Israelis and Jews everywhere. Our contribution is therefore limited to offering you as many facts as possible. The speakers you will hear were not chosen for their views but rather for their expertise. We shall continue to be as informative as possible both in our international meetings, through our publication *JUSTICE*, and through our site on the Internet.

We urge those who have not yet formally joined our Association, to do so. When we speak out in public, including at the UN bodies, we need to speak in a

strong voice representing large numbers of Jewish lawyers. By coming here to stand with us at this Jerusalem conference, I hope you are expressing not only your solidarity with Israel, but also your support for the aims of our Association, what we stand for and what we do.

Bless you all for being here today. In these difficult times having convened in Jerusalem in such impressive numbers is no mean achievement in itself.

May I conclude by sending a message of support to the Israeli security forces, both army and police, who are out there defending us daily, at great risk. We send our condolences to the bereaved families who lost their beloved ones in heinous acts of terror, and best wishes for a speedy recovery to all those wounded in these attacks.

We also send our condolences to the American people who have suffered such a tremendous loss in a barbaric attack on September 11. We who have been exposed to ongoing terror for so long, feel their anguish and share their anger. We congratulate the American President and his government for their firm commitment to fight terror all the way to victory, and we wish them and all those who support them success in this unique endeavour to save civilization.'

[53] In my opinion a judge who had expressed, or was president of an association which had expressed, views of the nature summarised and set out above could not sit on an application such as that which Lady Cosgrove determined. A fair-minded observer would regard such a judge as too closely and overtly committed to supporting the cause of Israel generally and of Mr Sharon in relation to the Sabra/Shatila massacre. It would not be appropriate for her to decide a case in which the appellant was relying on her past conduct and condemnation regarding Israel's and Mr Sharon's involvement in the Sabra/Shatila massacre as a main basis for her fear of reprisals if she was returned to Lebanon. But the president — when she said that she was speaking personally, when she invited solidarity and support and when she recognised the existence of internal conflicts and divisions of opinion within Israel — was, correctly, acknowledging that she could not either determine or reflect the views of any individual member. There is nothing save membership of the association to link Lady Cosgrove and the president. There is no suggestion that Lady Cosgrove was in Jerusalem in December 2001 to hear the president's greeting. There is no question of Lady Cosgrove having committed herself expressly to any such views as the president or any other spokesperson for the association expressed. There is nothing to show that she was even aware that they were being expressed. Lady Cosgrove is in these respects, and apart from her membership, in no different position to any judge, who may or may not have private views about issues which come before the court, but who is expected to put them aside and decide the case according to the law.

[54] Would Lady Cosgrove by virtue of her membership alone be taken to subscribe to or approve all that the association's president or spokesperson may publish or communicate to organs such as the United Nations Human Rights Commission? In my opinion, the answer is a clear negative. Membership of such an association — for a subscription most unlikely to be regarded as in any way burdensome — connotes no form of approval or endorsement of that which is said or done by the association's representatives or officers. In the case of Lady Cosgrove, membership may connote an interest in the content of legal articles none of which may be included in the material exhibited. Or it may be or have become effectively formal — connoting little if anything more than a failure to review and cancel the annual subscription or a general willingness to subscribe to an organisation believed to stand simply for the unobjectionable aims and objects to which every member had to subscribe.

[55] It is no doubt possible to conceive of circumstances involving words or conduct so extreme that members might be expected to become aware of them and disassociate themselves by resignation if they did not approve or wish to be thought to approve of them. But the present material falls far short of involving such circumstances. Lord Nimmo Smith giving the opinion of the Inner House said (para 44):

‘[W]e do not accept that it could reasonably be assumed by any fair-minded and informed observer that every member of this apparently very large and widely-based international organisation (with wide and generally-expressed aims which are beyond criticism) would necessarily share all the views apparently expressed by its representatives in the ways, and on the occasions, referred to. . . . It must not be forgotten that, although the concentration in the hearing before us was necessarily on certain views apparently expressed on particular matters (especially on what was said to be the “material aspect of the case”, the question of Israeli responsibility in respect of the Sabra/Shatila massacre), these represented only a very small proportion of the many views expressed on diverse and varying issues over many years’.

My only comment would be that the relevant question is not whether it can be concluded that a member would ‘necessarily’ share the views of the association’s representatives. But I cannot think that a fair-minded and informed observer would in the light of Lady Cosgrove’s continuing membership alone conclude that there was a real possibility that the association’s president was in substance speaking on Lady Cosgrove’s behalf or that Lady Cosgrove was in any way endorsing or associating herself with statements of the character presently in issue made by the president or Mr Lack or anyone else speaking on the association’s behalf in public or to bodies such as the United Nations Commission on Human Rights.

[56] The other basis on which the case is put involves the submission that, by virtue of her membership and receipt of *Justice*, Lady Cosgrove may have been influenced, albeit subconsciously, by the content and general attitude of some of the material, particularly once again the policy statements and president’s speeches or messages. In my view, that submission must be categorically rejected, even if one assumes that Lady Cosgrove ever read and digested such material. Judges read a great deal of material which is designed to influence them, but which they are trained to analyse and to accept, reject or use as appropriate. A person may well subscribe to or read publications in order to inform him or herself about views different to his or hers. The suggestion that mere membership gives rise in the eyes of a fair-minded observer to a real possibility of unconscious influence, through some form of osmosis, by materials in the relevant association’s periodical which would be available to be read by the member is a blanket proposition of great potential width that I reject without hesitation.

[57] It remains to mention two considerations to which attention was paid during submissions. The first is the oath that Lady Cosgrove will as a judge have taken, in familiar terms: ‘I, . . . , do swear that I will well and truly serve our Sovereign . . . in the office of Judge of the Court of Session, and I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or illwill. So help me God.’ In *R v RDS, L’Heureux-Dubé and McLachlin JJ* identified the taking of the judicial oath as often the most significant occasion in the career of a judge (para 116), and said (para 117) that:

‘Courts have rightly recognised that there is a presumption that judges will carry out their oath of office. . . . This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this

high threshold, the presumption can be displaced with “cogent evidence” that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias.’

At para 119, they went on to say that:

‘The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes. It has been observed that the duty to be impartial “does not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognise, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave. True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind”’.

So viewed, the judicial oath appears to me more a symbol than of itself a guarantee of the impartiality that any professional judge is by training and experience expected to practise and display. But on no view can it or a judge’s professional status and experience be more than one factor which a fair-minded observer would have in mind when forming his or her objective judgment as to the risk of bias.

[58] The other consideration is that Lady Cosgrove did not volunteer a reference to her membership of the association. Had she disclosed this, the very fact of disclosure could have been seen by a fair-minded observer as a ‘badge of impartiality’, as showing that ‘she ha[d] nothing to hide and [was] fully conscious of the factors which might be apprehended to influence ... her judgment’ (*Davidson v Scottish Ministers* (No 2), per Lord Bingham of Cornhill, para 19, Lord Hope of Craighead, para 54). Again, however, this can only be one factor, and a marginal one at best. Thus, to take two opposite extremes, disclosure could not avoid an objection to a judge who in the light of the matter disclosed clearly ought not to hear the case; and non-disclosure could not be relevant, if a fair-minded and informed observer would not have thought that there was anything even to consider disclosing. In the present case, I do not consider Lady Cosgrove’s failure to disclose her membership of the association to be a factor which would carry any great weight in the balancing of factors which a fair-minded and informed observer must be assumed to undertake. A fair-minded and informed observer would I think be much more likely to conclude that it never crossed her mind that her membership involved anything which it was relevant for her to disclose.

[59] For these reasons, I would dismiss this appeal and affirm the decision of the Extra Division of the Inner House refusing the prayer of the appellant’s petition.

THE COURT dismissed the appeal.

*Drummond Miller LLP – Office of the Solicitor to the Advocate General –
Office of the Solicitor to the Scottish Executive*

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION ADMINISTRATIVE COURT
PERMISSION TO APPLY FOR JUDICIAL REVIEW

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/01/2012

Before:
LORD JUSTICE TOULSON
MR JUSTICE SWEENEY and
MRS JUSTICE SHARP

Between:

**THE QUEEN ON THE APPLICATION OF
ASSOCIATED NEWSPAPERS LIMITED**

Claimant

- and -

**THE RT HON LORD JUSTICE LEVESON
(AS CHAIRMAN OF THE LEVESON INQUIRY)**

Defendant

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

**Mark Warby QC and Gerard Clarke (instructed by Reynolds Porter Chamberlain) for the
Claimant**

Robert Jay QC and Cathryn McGahey instructed for the Defendant
John Hendy QC and Lance Harris instructed for the National Union of Journalists
David Sherborne and Louise Jones instructed for the Core Participant Victims
Christina Michalos instructed for The Commissioner of Police for the Metropolis

Hearing date: 13 January 2012

Judgment
As Approved by the Court

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Lord Justice Toulson:

Introduction

1. The claimant is a major newspaper organisation. Its titles include the Daily Mail and The Mail on Sunday. It applies for judicial review of a decision of The Rt Hon Lord Justice Leveson in his capacity as Chairman of the Leveson Inquiry (“the Chairman”). Its application is supported by the Daily Telegraph, whose editorial legal director has written a letter to the court stating that it shares the concerns of the claimant but it has not taken an active part in the hearing.
2. The decision complained of is a decision in principle (or “a gateway determination” as it has been described) that the Chairman will admit evidence, subject to certain conditions, from journalists who wish to remain anonymous on the ground that they fear career blight if they identify themselves.

The Leveson Inquiry

3. The Inquiry was set up under the Inquiries Act 2005 because of public concern about the practices and ethics of national newspaper organisations. For many years there have been known instances of phone hacking and other illegal or dubious practices but for a long time the position of most newspaper organisations was that the problem was limited to a single paper and to certain rogue reporters acting without the knowledge of their superiors. A wider picture emerged as a result of lawsuits brought by a number of celebrities against the publishers of the News of the World (News International), but the event which particularly triggered the establishment of the tribunal was the disclosure that the News of the World had hacked into the mobile phone of a murdered school girl shortly after her disappearance. This discovery caused widespread revulsion. Alongside concerns about phone hacking at News International - and questions of who in the organisation knew about it, how much did they know and when did they know it - there were, and are, concerns about other illegal or unethical practices and how widespread within the newspaper industry they may be. This all led to the Inquiry being established with wide Terms of Reference.
4. The Terms of Reference are divided into two parts because a number of police investigations are under way which make it inappropriate for the Inquiry to seek to explore certain matters while they are the subject of those investigations. Part 1 has been divided into four modules. The inquiry is currently engaged with Module 1 of Part 1.
5. The Terms of Reference of Part 1 are:
 - “1. To enquire into the culture, practices and ethics of the press including:
...
c. the extent to which the current policy and regulatory framework has failed including in relation to data protection; and

- d. the extent to which there was a failure to act on previous warnings about media misconduct.
- 2. To make recommendations:
 - a. for a new more effective policy and regulatory regime which supports the integrity and freedom of the press, the plurality of the media, and its independence, including from Government, while encouraging the highest ethical and professional standards;
 - b. for how future concerns about press behaviour, media policy, regulation and cross-media ownership should be dealt with by all the relevant authorities, including Parliament, Government, the prosecuting authorities and the police.”
- 6. Module 1 is “the relationship between the press and the public” and looks at phone hacking and other potentially illegal behaviour.
- 7. The Chairman has given core participant status to a number of bodies or groups. These include News International, various other newspaper organisations, the Metropolitan Police Commissioner (“the Commissioner”), the National Union of Journalists (“NUJ”) and a core participants victims group.

Inquiries Act 2005

- 8. Sections 17 to 19 contain provisions designed to ensure that inquiry proceedings are fair and are open to the public, subject to any restrictions required by law or considered by the minister appointing the inquiry or by the inquiry chairman to be conducive to fulfilling the purpose of the inquiry or necessary in the public interest.
- 9. Section 17 provides:
 - “1. Subject to any provision of this Act or of rules under section 41, the procedure and conduct of an inquiry are to be such as the chairman of the inquiry may direct.
 - ...
 - 3. In making any decision as to the procedure or conduct of an inquiry, the chairman must act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others).”
- 10. Section 18(1) provides:
 - “Subject to any restrictions imposed by a notice or order under section 19, the chairman must take such steps as he considers

reasonable to secure that members of the public (including reporters) are able –

...

- b. to obtain or to view a record of evidence and documents given, produced or provided to the inquiry or inquiry panel.”

11. Section 19 permits the inquiry chairman to impose a restriction on the disclosure or publication of evidence or documents given, produced or provided to an inquiry, but subsection (3) provides that such a notice must specify only such restrictions as are required by law or as he:

“considers to be conducive to the inquiry fulfilling its terms of reference or to be necessary in the public interest, having regard in particular to the matters mentioned in subsection (4).”

12. The matters mentioned in section 19(4) include the extent to which not imposing any particular restriction would be likely to impair the efficiency or effectiveness of the inquiry.
13. Section 2 provides that an inquiry panel is not to rule on, and has no power to determine, any person’s civil or criminal liability, but that it is not to be inhibited in the discharge of its functions by any likelihood of liability being inferred from the facts that it determines or recommendations that it makes.

The ruling

14. At a preliminary hearing on 26 October 2011 the Chairman said that a number of people had expressed an interest in providing evidence to the Inquiry but only under conditions of anonymity. Counsel to the Inquiry, Mr Jay QC, confirmed that this was so and described the witnesses as “saying that they will not give their evidence without protection of anonymity, which is the fear presumably of losing their employment and/or their professional reputations”. There was a general discussion and the Chairman said that he would hear further submissions on the subject on 31 October.
15. Counsel for the claimant, Mr Caplan QC, provided the Inquiry with written submissions and a draft protocol for dealing with applications for anonymity. Under the suggested protocol any application for anonymity would be in three parts – a statement of the protective measures requested; open submissions and evidence; and closed submissions and evidence. The second part would contain as much information as the witness could give without undermining the purpose of the application. The third part would contain information relating to the personal and professional circumstances of the applicant which could not be disclosed to other participants without undermining the purpose of the application.
16. At the hearing on 31 October there were short oral submissions on the subject of anonymity from, among others, counsel for the Inquiry, the claimant and the

Commissioner. At the same hearing the Chairman announced that the NUJ had applied for and been granted core participant status.

17. On 9 November the Chairman handed down a four page document headed “Ruling on Anonymous Witnesses”. In it he said:

“1. The Inquiry has been approached by a number of individuals all of whom describe themselves as journalists working for a newspaper or newspapers either on a casual or full time basis and who wish to provide evidence to the Inquiry on the subject of the culture, practices and ethics of the press. Each has asked to provide this evidence anonymously and with such other protection that the newspaper or newspapers for which they work or have worked cannot identify them. It is clear that the picture which they wish to paint is not entirely consistent with the picture that editors and proprietors have painted of their papers and they fear for their employment if what they say can be attributed to them.

2. It goes without saying that the best evidence is that which emanates from an identified witness that can be tested by questions and, if appropriate, considered in the light of any contrary evidence. Evidence from a witness who is anonymous could not properly be tested because the chapter and verse necessary to exemplify the evidence might identify both the newspaper and, ultimately, the source. Although counsel to the Inquiry could probe, no contrary case would be advanced. As a result, the weight that could be attributed to such evidence would be substantially diminished. But that is not the same as saying that it has no weight, particularly if it is to be considered along side similar evidence (if such there be) from sources who are prepared to be identified and who do provide chapter and verse.

...

5. Before embarking upon an analysis of the submissions that I have received in relation to anonymous evidence, it is worth reiterating that the purpose of Part 1 of the Inquiry which, as far as the press is concerned, is to consider the culture, practices and ethics of the press as part of the general background and which also requires me to look at specific relationships (with the politicians and the police). The facts (or narrative) provide only the starting point for the thrust of Part 1 which is to determine whether the current policy and

regulatory framework has failed and, if so, what recommendations to make...

6. Reverting to the general background, it is also important to put the evidence that I hear about culture and practices into context. It is obvious that specific illegal or clearly unethical conduct could, indeed, exemplify culture, practices and ethics either in a particular newsroom or more widely and it is an extremely important part of the picture. It is not, however, the only evidence that may be relevant to the background...
7. Further, although I must inevitably consider the specific in order to reach conclusions about the general, it is of critical importance that everyone understands the way in which I will approach Part I of the Inquiry. In the same way that it is not part of my function to rule upon whether or not the rights of any of those complaining about the conduct of the press have been infringed, I do not consider it my role, in this Part of the Inquiry, to make any findings of fact about the behaviour of any newspaper or editor in any individual case...The approach to evidence of witnesses who wish to remain anonymous, must, therefore, be considered in that context.

...

9. Mr Jonathan Caplan QC for Associated Newspapers Limited has provided helpful submissions reminding me of the importance of open justice and the role that the media has in giving effect to that principle through accurate reporting. He argues that s19 of the Inquiries Act 2005 provides for the circumstances in which the principle of public access to inquiries can lead to privacy and, in the context of my duty pursuant to s17(3) to act fairly, submits that the conflict arises between the Article 8 rights of the anonymous witness on the one hand and those potentially subject to criticism on the other, along with the Article 10 rights of the press. I recognise the principle of open justice, but it is not the only consideration. Context is of critical importance and I am not proposing that the Inquiry should receive and be able to act upon evidence which is the subject of a restriction order so that neither the core participants nor the public know what the evidence is. I will only receive and act upon evidence which is given in public and which may be fully reported. What will be missing is the identity of the witness but that information will simply not be part

of the evidence or form any part of my assessment of that evidence...

10. One of the consequences of allowing a journalist to give evidence anonymously may very well be that it would not be fair to allow the name of the title or titles about which the journalist speaks to be identified if only because fairness could then require the facility to challenge the evidence (as opposed to testing it which would be the responsibility of counsel to the Inquiry). Further, given that I do not wish to prejudice on-going police investigations and will not be seeking to make findings of fact against any current specific title or individual editors, I am presently minded to the view that the name of the title about which the evidence relates (and, obviously, the identity of any manager who is criticised) should also be anonymous, save only where the allegations are already the public domain. The only exception will relate to the News of the World...
11. I agree with Mr Caplan's further submission that in any application for anonymity must receive intense scrutiny...
12. Although I would encourage all those who can contribute to this Inquiry to do so on an open basis, I understand the concerns expressed by journalists who fear for their continued employment if they do not follow the line being taken by their employers...In the circumstances, given the broad remit of this Part of the Inquiry into culture, practices and ethics at a general, rather than a specific, level, subject to the controls which I have referred, I will be prepared to receive anonymous evidence. Anyone who provides it will have to provide sufficient detail to demonstrate that he or she is speaking with firsthand knowledge and must also recognise that the weight that can be attached to it will be significantly less than that from a witness who is identified.
- ...
14. A draft protocol will be circulated: short written submissions can be made by core participants before it is promulgated."
18. On 15 November counsel to the Inquiry circulated a draft anonymity protocol. This largely followed Mr Caplan's suggested protocol but included some extra paragraphs.

19. On 16 November representatives of the victims group, the Guardian and the NUJ made opening statements. The NUJ's General Secretary, Ms Stanistreet, said in her opening statement:

"It's vital that in an Inquiry reflecting on the problems and issues within our industry, that the concerns, the experiences and insights of ordinary working journalists are heard and I know you're very much alive to this. They are the workers at the sharp end who deal with the reality of life in a pressured, busy newsroom every single day...

The NUJ is currently making a good deal of effort to identify journalists to give evidence and to share their experiences with the Inquiry. However the stark reality is that in many workplaces there's a genuine climate of fear about speaking out. In order that it's not simply those who have retired or who have been made redundant and left the industry who feel able to make a contribution, we're working with the Inquiry team to ensure that journalists who wish to contribute to the Inquiry can give their testimony in confidence to afford them protection from retribution.

The fear is not necessarily just of immediate punishment but of finding that a few months after your Inquiry ends a journalist who has spoken out may find herself on a list of redundancies. We support your draft protocol on anonymity and will discuss specific measures in relation to particular witnesses with the Inquiry team.

Of course, predictably some of the newspaper owners are unhappy about this, but the reality is that putting your head above the parapet and speaking out publicly is simply not an option for many journalists who would fear losing their job or making themselves unemployable in the future. In our experience, that fear has been a significant factor inhibiting journalists from defending the principles of ethical journalism in the workplace, and in media organisations hostile to the concept of trade unions there's a particular problem."

20. The editor of the Guardian, Mr Rusbridger, said in his opening statement:

"On the point of anonymous evidence, I think that is clearly a difficult one. The reason that Nick Davies and the New York Times and later Panorama and Dispatches, i.e. journalists, were able to get at this story in a way that the police and the PCC weren't was because they spoke to journalists off the record. So when the New York Times turned up in town we said to them, "if you find and speak to enough people on the News of the World, they will tell you the same thing that they told Nick Davies", which was that this stuff was going on, that it was known about, it was rife and it was ingrained in the paper.

The New York Times managed to get two journalists to speak on the record, and the third police inquiry immediately announced that they would interview these witnesses as suspects under caution, and of course that got nowhere.

So there was a contrast between the people who were trying to get public evidence and didn't get to the truth, and the people who took off the record evidence and did get to the truth.

[The Chairman: That makes an assumption, actually, but I take the point.]

...

I think it's inevitable, and I hear what the General Secretary of the NUJ said about the fear of people – I mean there are two factors that are going to be at the back of people's mind. One is the retribution factor, which Michelle Stanistreet talked about, which is you're going to be unemployable if you say bad things about the industry in front of this committee, and the other obviously is that if people were frank the police are going to come along and arrest them.

So those are two difficult factors which you're going to have to think about and I know you've given a lot of thought to already."

21. On 17 November Mr Caplan provided further written submissions on behalf of the claimant in relation to anonymity and the anonymity protocol, in which he expressed the claimant's concerns:

"7. The concern of ANL, and it is anticipated other C P [core participants] publishers, is that ...any evidence concerning allegations of journalistic behaviour which is improper, unethical or even illegal should be given as openly and fully as possible in order that it can be challenged if necessary and also tested against the evidence already provided to the Inquiry by management and editors. Such evidence, and the Inquiry's impression of it, is clearly fundamental to any findings about the culture, ethics and practices of the press...Even if the weight to be attached to anonymous evidence is "significantly less" than that which is given to a witness who is identified (Ruling of 9th November paragraph 12), the fact remains that some weight may/will be given to it and that this is a very important area of the Inquiry. Some of those who approach the Inquiry might be journalists who are disaffected with a particular employer or senior editor or who even have a grudge to bear: or they could simply be honestly mistaken. If granted anonymity

then their evidence cannot be tested. Such an approach will inevitably impact on the Inquiry's findings and recommendations. It will also be unfair, firstly, because the unspecified allegations will besmirch the press as a whole (or sections of it) and individual allegations will have been taken into account which cannot be counted.

8. This is not the kind of Inquiry in which any potential witness risks personal danger. The apprehension appears to be retribution in the workplace by damage to promotion prospects or even loss of present or future employment. There must, however, be objective support for such a fear and, even then, a careful examination of alternative options. ...Anonymity is patently not the only solution "possible" as in the Bloody Sunday case."
22. The submissions went on to propose that an undertaking might be given by core participant publishers that nothing said by any journalist to the Inquiry should be used in any subsequent disciplinary proceedings by their employer except in relation to proceedings for gross misconduct or in relation to a person charged with misleading the Inquiry.
23. On 23 November the Chairman said that a ruling on the draft protocol would have to be deferred because he was still receiving submissions from core participants but that, despite submissions inviting him to reconsider his ruling of 9 November, he was not prepared to do so. He added that if there had been a challenge to the principle, he would have expected it to be made.
24. On 28 November 2011 the Chairman handed down a supplementary ruling on anonymity and a finalised protocol for anonymity applications. In the ruling he said:
 - "1. On 9 November 2011, I ruled that I would accept evidence provided anonymously. Such evidence can take three forms. First, it can involve individuals who have approached the Inquiry anxious to assist but only on condition that they remain anonymous. Secondly, it can relate to others who, specifically for the purposes of the Inquiry, are prepared to provide evidence to third parties (such as the NUJ) who will then make a statement incorporating the evidence in the form of hearsay but without attributing it save only for validating the credentials of the witness as a journalist. Third, it may come from witnesses such as Mr Nick Davies. This last mentioned material has not specifically been prepared for the Inquiry but, in his case, it is recounted in his book *Flat Earth News*, parts of which he has exhibited to his statement. A draft protocol covering the first of these forms of evidence was circulated to core participants and, over the

ensuing two weeks, a number of submissions have been received about it. I am grateful for them all.

2. A number of submissions seek to raise issues of principle and invite me to reconsider my ruling of 9 November; I am not prepared to do so. The underlying circumstances arising in this case are different from those in cases such as *R v Lord Saville of Newdigate* *Ex parte A* [2001] 1 WLR 1855, *Bennett v A* and others [2004] EWCA 1439 and the more recent *Re Officer L* [2007] 1WLR 2135. Those involved in these inquiries knew the names of the witnesses who would give direct evidence that might impact specifically on them. In this case, nobody would know the identity of the anonymous witnesses (or indeed the identity of those who were sources for the NUJ or Mr Davies)...and, as I have recognised, limited or very limited weight could be attached to such evidence as a result.”

25. The Chairman referred to Mr Caplan’s suggestion that witnesses should be sufficiently protected by an undertaking from core participant publishers. The Chairman said:

- “5. It is, of course, open to ANL (or any other newspaper) to publish this undertaking to their staff and I am happy that they should but, with great respect, it seems to me to miss the point. First, the position of ANL is entirely to deny that any illegal or unethical practices are condoned at their titles. For the converse to be asserted as accurate by a journalist, it might be suggested that such a claim either involved gross misconduct or itself constituted gross misconduct. Secondly, and more important, the concern expressed by journalists (and I make it clear that I have absolutely no idea whether any journalist who has approached the Inquiry is employed by ANL and I make no suggestion to that effect) is not limited to dismissal or disciplinary proceedings but understandably extends to career prospects generally in what is, after all, a very difficult economic environment.”

26. The Chairman continued:

- “6. As I have repeatedly made clear, the press performs a vital role in our society and the overwhelming majority of the work carried out by journalists is undertaken in accordance with the highest ethical standards and entirely in the public interest. The Inquiry, however, must be seen to be doing all that it can to hear the other side of the story and to ensure that it is not covered up.

I fully understand the reputational concerns that have been expressed by ANL and others and I am conscious of the need to ensure, to such extent as is possible, that the investigations of customs, practices and ethics is general. ...”

27. The Chairman then turned to the details of the protocol and commented on various submissions which had been made to him about it. He concluded:

“15. I add one footnote to this ruling. Mr Caplan, on behalf of ANL, was anxious to see the protocol in its final form before deciding whether to challenge my ruling of 9 November and was conscious that the time for doing so expired on 23 November. Over the last two weeks, I have twice been prepared to provide ex tempore judgment on the arguments that had been advanced; on each occasion, a further submission from a different core participant was then received which I had to consider...As for this protocol, the final version is attached to this ruling.”

28. The protocol was an expanded version of that originally suggested by Mr Caplan. I attach the protocol as an appendix to this judgment.
29. It is common ground that the rulings of 9 and 28 November and the protocol are to be read together, but there was some argument about their effect, which it is convenient to address at this stage.

The effect of the ruling

30. Mr Warby QC submitted that the ruling may be summarised as follows:

“The Inquiry shall admit and may rely in making its findings and recommendations upon evidence from witnesses who are anonymised (that is, whose identities are concealed not only from the public but also from Core Participants) and the admission and reliance on such evidence shall be considered fair and lawful provided that the following three conditions are satisfied:

- (a) the evidence is direct evidence of unethical or unlawful conduct on the part of one or more newspapers or goes to some other important issue in the Inquiry
- (b) there are redacted from the evidence all details which could reveal the identity of the newspaper title or group or individual to which it relates
- (c) there is evidence before the Inquiry – even if not disclosed to those affected – which suggests an understandable, that is not fanciful, risk that the

witness might, if identified, be subject to detriment in relation to their career.”

31. Mr Jay submitted that the Chairman has done no more than to determine in principle that his Inquiry is prepared to receive anonymous evidence, as opposed to ruling in advance that it will not do so, but that he has not given any indication of the principles which he will apply when considering an application for anonymity. He submitted that the present application is therefore premature because it has been brought in advance of “(i) the relevant principles being determined by the Chairman following detailed submissions, and (ii) any particular factual matrix being placed before the Chairman for evaluation.”
32. I do not entirely accept either of those submissions. The rulings of 9 and 28 November are not to be approached as if they were commercial contracts, but as an exercise in case management in a swiftly moving Inquiry. As I see it, the Chairman has made a decision in principle which goes beyond merely declining to rule out in advance an application for anonymity, but he has not put himself into the strait jacket of Mr Warby’s formulation. He has made a positive decision in principle to receive anonymous evidence from journalists who wish to conceal their identity because of fear of career blight, but that is a general ruling. When he comes to deal with individual applications for anonymity, he will scrutinise carefully what the witness says about his personal and professional circumstances and how far he thinks that the evidence will advance the purposes of the Inquiry.

Grounds of challenge

33. The written grounds of challenge in the application for judicial review are:
 1. That allowing employees or former employees of press organisations to give evidence against those organisations anonymously would be unfair and so would contravene the principles of natural justice;
 2. that the decision complained of fails to give effect to the principle of open justice;
 3. that the decision complained of infringes the rights of the claimant and of others under article 10;
 4. that the decision complained of fails to identify a public interest sufficient to justify a restriction order under section 19 of the Act, and fails adequately to balance any alleged public or private interest favouring anonymity against the countervailing public interest in open justice and free expression.
34. In short, the written grounds are lack of fairness, lack of openness and breach of Convention rights. In his oral submissions Mr Warby accepted rightly that it is the first which is critical. The duty of fairness expressed in statutory form in section 17(3) requires the Chairman to act with fairness towards those who have an interest in the outcome. In this case that includes the newspaper organisations, i.e. the owners

and managers; journalists, employed or freelance; victims of alleged malpractice; and the general public.

35. A duty of fairness does not exist in a vacuum. In that respect a duty to be fair is like a duty of care. In a case of a professional retainer, the professional person's duty of care is inexorably tied up with what he is retained to do. This point was eloquently made by Oliver J in *Midland Bank v Hett Stubbs and Kemp* [1979] 1 Ch 384, 434. So in the present case, the starting point for any consideration of the Chairman's duty of fairness is the task which he was appointed to perform under his Terms of Reference.
36. As to the European Convention, some of the factors relevant to conducting the Inquiry fairly are also the subject of articles of the Convention, particularly articles 8 and 10, but they do not add anything to his statutory duty. Applying those articles involves the self same exercise of acting fairly towards the different groups to which I have referred. Article 10, for example, might be seen differently when viewed from the perspective of the journalists who wish to be free to tell their experiences without fear of the risk of career blight, by the alleged victims and members of the public who wish to hear what the journalists have to say, and by the newspaper organisations who wish to receive information about the identity of the journalists so that they can respond fully and freely.
37. As to open justice, if permitting anonymity would further the purposes of the Inquiry without breaching section 17(3), a restriction under section 19 on disclosure of the witnesses' statements in unredacted form would ex hypothesi be permissible under section 19(3) and (4). It is for those reasons that I have said that the critical challenge is the challenge to the fairness of the Chairman's ruling.

The alleged unfairness

38. Mr Warby submitted that the Chairman failed to give any or adequate attention to the reputational or "class libel" risk to the claimant and other newspaper organisations, when he ruled in advance that he would in principle accept anonymous evidence from journalists if it were sufficiently relevant and if satisfied that the journalist would not give it otherwise than anonymously for fear of career blight. As more fully developed, the submission was two-pronged. Mere fear of career blight could not in Mr Warby's submission be a sufficient reason for exposing the media organisations to the risk of anonymous class libel. He relied, in particular, on *Re Officer L*, where the House of Lords held that anonymity should not be given to police officers in a Northern Ireland inquiry who claimed to be in fear for their personal safety in the absence of objective evidence to persuade the inquiry that they would in fact suffer an enhanced risk to their personal safety. A mere subjective claim of fear of career blight could not in his submission lawfully justify the granting of anonymity. Secondly, he submitted that even if there might be an exceptional case where the risk of career blight, objectively analysed, was such as to make it lawful to grant anonymity to the witness, the Chairman had not carried out such an inquiry but had prejudged the matter by indicating that he would accept such evidence, subject to relevance and subject to the journalist professing an "understandable" fear of career blight.

Prematurity

39. As I have indicated, Mr Warby argued that the ruling was wrong in principle and/or premature. Mr Jay argued that the application for judicial review was premature. Both anticipated that there would be a likelihood of a further judicial review application, or applications, when the court would address the issue of anonymity after rulings had been given on specific anonymity applications. That would be highly regrettable if it can be properly avoided. The last thing that would serve the purposes of the Inquiry would be for it to be punctuated by successive judicial review applications. The capacity for a public inquiry to be derailed by repeated visits to the courts has been demonstrated in the past. Where there is an issue of principle which requires to be considered by the court, it is generally speaking best done at the earliest opportunity.
40. I will come to Mr Warby's argument that the ruling was premature when considering his challenge to it, but I am not persuaded that his application for judicial review is premature. Whether an application is premature depends on the subject matter and the nature of the challenge. The claimant's challenge goes to the root of the ruling and now is the right time to address it.

Discussion

41. I have said that the starting point for considering the Chairman's duty of fairness is the task which he was appointed to perform under his terms of reference, i.e. the purpose of the Inquiry. It is also important to understand in outline the situation which gave rise to the ruling.
42. The Inquiry has heard evidence from more than 20 alleged victims. Many are celebrities but some are not. They have given evidence of instances of illegal accessing of voicemails, other invasions of privacy and alleged victimisation for criticising the press. For the most part they have named the news organisations, which include a large section but not all of the tabloids. I should make it clear that much of this evidence has been challenged and rebuttal evidence has been given. The Inquiry has also heard or will hear evidence from former journalists about alleged malpractices, and it has heard hearsay evidence based on "off the record" statements made by journalists. Mr Rusbridger referred in his opening statement to reports by Mr Nick Davies (a Guardian journalist), the New York Times, Panorama and Dispatches based on such conversations. The Chairman referred in paragraph 1 of his ruling dated 28 November to Mr Davies and his book *Flat Earth News*. That is the context in which some journalists have approached the Inquiry wishing to give evidence anonymously. Direct evidence from such journalists is at the moment a missing piece of the jigsaw.
43. As the Chairman observed in paragraph 2 of his ruling dated 28 November, the circumstances are significantly different from those of the soldier or police officer cases such as the Bloody Sunday Inquiry and *Re Officer L*. In those cases the inquiry knew the identities of the witnesses concerned and intended to call them. They were compellable, but the question was whether they should be allowed anonymity for their own safety. In this Inquiry the Chairman is not in a position to call the witnesses who are asking for anonymity unless they come forward, which they say that they are fearful of doing unless they have an expectation of anonymity.

44. In the nature of things the Chairman had to address the issue of how he should respond in general to such requests before knowing the details of the evidence which such witnesses would give. As I see it, the issue gave rise to the following questions:
1. Was there a credible basis for thinking that there were witnesses who had relevant evidence to give but who would not do so unless they had a prospect of anonymity because of real fear of career blight?
 2. If so, was it likely to be better for the purposes of the Inquiry, i.e. in the public interest, to admit such evidence (subject to relevance), with its obvious and unavoidable limitations, than not to have it?
 3. If so, would its admission be likely to cause such prejudice to the claimant, and other newspaper organisations, that it would be unfair to admit it notwithstanding the detrimental effect from the viewpoint of the purposes of the Inquiry and from the viewpoint of other interested parties?
45. We were referred to various authorities on the standard of review, including *R v Panel on Takeovers and Mergers ex parte Guinness plc* [1990] 1 QB 146 and *R v Lord Saville of Newdigate ex parte A* [2000] 1 WLR 1855.
46. Question 1 is a question of fact. Question 2 involves an evaluation of what would be best in the interests of the Inquiry. On those questions a court ought not to hold that the Chairman was wrong unless his decision was incapable of rational justification (or in lawyers' language "Wednesbury unreasonable"). Subject to the statutory duties of fairness and openness, it is for the Chairman under the Act to make all decisions about how the Inquiry should proceed.
47. Question 3 is rather different because it involves the question whether the procedure proposed would be fair. It is ultimately for the court to decide whether it would be unjust, but in doing so the court must recognise that the Chairman is in a far better position to assess and balance the degree of prejudice which may be caused to different parties because of his infinitely greater knowledge of the details and his feel for where justice lies. The court would therefore only interfere if satisfied, notwithstanding the Chairman's considerable advantage, that he was wrong.
48. In stating the matter as I have in the particular context of the facts in this case, I have sought to distil and apply the principles derived from the authorities, particularly the judgment of the Court of Appeal in *R v Lord Saville of Newdigate*, paragraphs 31, 38–39 and 67–69.
49. The Chairman was plainly entitled to regard it as credible that journalists who could give relevant evidence were unwilling to do so without anonymity for fear of career blight, for he had representations to that effect from a number of sources.
50. He was similarly entitled to conclude that it was in the interests of the Inquiry to hear evidence from those working in newsrooms about the culture, practices and ethics of

their workplaces. This was at the heart of what he was appointed to investigate (as he observed in paragraph 5 of his ruling dated 9 November) and he was entitled to regard evidence about what went on in the newsroom as “an extremely important part of the picture” (paragraph 6 of the same ruling).

51. As to the third question, nobody doubts that the admission of anonymous evidence gives rise to a risk of prejudice to the claimant and other newspaper organisations for the reasons set out by Mr Caplan in his submissions dated 17 November. A disaffected journalist with a grudge may choose a time when the public mood is seen as very hostile towards tabloid papers to tell malicious stories, which, in a toxic atmosphere and without means of cross-examination, may pass for true when they are false. The specific allegations made by alleged victims have in a number of instances received specific rebuttals, but newspaper organisations would not be able to respond in the same way to anonymous allegations. They would not know at which newspaper they were aimed, but the effect in the minds of the public could be to tar them all with the same brush. These are legitimate concerns.
52. That is one side of the picture, but there are other relevant considerations. In addition to those which I have already mentioned (such as the legitimate interest of alleged victims in hearing what the journalists have to say), it should not be overlooked that although an allegation by an unnamed person against an unnamed paper cannot be rebutted in the same way as an allegation by a named person against a named paper, if journalists come forward to give a picture of the culture and practices in major news organisations which most journalists working in such organisations would simply not recognise as anywhere near to the truth, there is nothing to prevent other journalists who are prepared to be identified from coming forward and saying that they do not recognise the picture being presented.
53. Above all, it is of the greatest importance that the Inquiry should be, and seen by the public to be, as thorough and balanced as is practically possible. If the Chairman is prohibited from admitting the evidence of journalists wanting to give evidence anonymously, there will be a gap in the Inquiry’s work, although the material (or similar material) is already in a real sense in the public domain. There is a point of detail about whether and at what stage Nick Davies’s book came to be received by the Inquiry, but that is a point of secondary importance. If the court ruled that the Chairman could not lawfully admit evidence of the kind under consideration, and his report reflected that fact, the result would be that the Inquiry would not have examined a raft of available material. There would be cause for concern that in those circumstances the Inquiry would have failed in a significant regard to achieve its terms of reference, and the credibility of its findings and recommendations would be lessened. It would be open to the criticism of not having heard the full story.
54. It has to be stressed that this is an inquiry; it is not the same as a criminal trial or a disciplinary proceeding. Mr Warby said that the newspaper organisations are “in the dock” and in a metaphorical sense that is true; but it is true because an inquiry has been set up to try to explore as fully as it can the culture and the practices of the newspaper industry in the light of things which have given rise to public concern.
55. In determining where fairness lies in a public inquiry, there is always a balance to be struck. I am not persuaded that there is in principle something wrong in allowing a witness to give evidence anonymously through fear of career blight, rather than fear

of something worse. Fear for a person's future livelihood can be a powerful gag. Nor am I persuaded that the Chairman acted unfairly and therefore erred in law in deciding that on balance he should admit such evidence, subject to his considering it of sufficient relevance and being satisfied that the journalist would not give it otherwise than anonymously.

56. The public interest in the Chairman being able to pursue his terms of reference as widely and deeply as he considers necessary is of the utmost importance. Although the names that have featured most prominently in newspaper coverage of the Inquiry have been largely the names of celebrities, newspaper magnates and politicians, any follower of the Inquiry will be aware that the Chairman has throughout been particularly concerned about the interests of ordinary members of the public, who do not have ready access to media lawyers. I say that in order to emphasise that the issues being investigated by the Inquiry affect the population as a whole. I would be very reluctant to place any fetter on the Chairman pursuing his terms of reference as widely and deeply as he considers necessary. I recognise that his ruling may cause damage to the claimant and other newspaper proprietors. However, such risk of damage will be mitigated to some extent (although not entirely, as I readily accept) by the fact that he will not use anonymous evidence to make specific findings against particular organisations. It is also important to recognise that the evidence in question will be part of a much wider tapestry and that it is open to the claimant and others to present balancing non-anonymous evidence.
57. I am not persuaded that the Chairman has reached an impermissible pre-judgment. He has reached a decision on a point of general principle, and he has kept open more detailed scrutiny of individual cases.

The Commissioner

58. The Commissioner is concerned about the possibility that the Chairman may receive anonymous material which is exculpatory of a possible future defendant in criminal proceedings. It was submitted on his behalf that the protocol issued by the Chairman should be amended to include the following paragraph:

“The Chairman will only grant protective measures to an applicant whose evidence is exculpatory of any individual or company in exceptional circumstances and only after having invited representations on the matter from the core participants.”

59. The Chairman declined to include express provision of that kind in the protocol. He said:

“Given the circumstances in which witnesses have sought anonymity, I consider the likelihood that statements prepared by such witnesses will indeed be exculpatory of any specific individual to be low but it is sufficient if I express myself mindful of the point and, in the interests of fairness, will approach a consideration of any material with that concern in mind”.

60. Judicial review is a means of correcting unlawfulness. It is not for the court to micromanage the conduct of the Inquiry by the Chairman, least of all in relation to hypothetical situations the likelihood of which appears to the Chairman to be remote. Such matters are properly matters for the Chairman.

Conclusion

61. I would refuse this application for judicial review. For the future, how the Chairman deals with individual anonymity requests in the context of his general ruling and protocol will be matters of detailed consideration for him, which should not foreseeably give rise to further requests for judicial interference.

Mr Justice Sweeney:

62. I agree.

Mrs Justice Sharp:

63. I also agree.



Neutral Citation Number: [2013] EWCA civ 1515

Case No: A3/2013/3031

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CHANCERY DIVISION
Mr Justice Arnold

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 November 2013

Before :

THE CHANCELLOR OF THE HIGH COURT
LADY JUSTICE HALLETT
and
LADY JUSTICE SHARP

Between :

Resolution Chemicals Limited

**Claimant/
Respondent**

- and -

H Lundbeck A/S

**Defendant/
Appellant**

Richard Gordon QC, Miles Copeland and Emily MacKenzie (instructed by **Wragge & Co**)
for the **Defendant/Appellant**
Hugh Tomlinson QC (instructed by **Olswang LLP**) for the **Claimant/Respondent**

Hearing dates : 31st October 2013

Approved Judgment

The Chancellor Sir Terence Etherton :

1. In these proceedings the claimant, Resolution Chemicals Limited (“Resolution”), seeks revocation of the Supplementary Protection Certificate SPC/GB02/049 (“the SPC”) for escitalopram in the name of the defendant, H. Lundbeck A/S (“Lundbeck”), on the grounds of the alleged invalidity of the basic patent on which the SPC is based, namely, European Patent (UK) No. 0 347 066 (“the Patent”).
2. This is an appeal against an order dated 22 October 2013 of Mr Justice Arnold, the effect of which in substance was to refuse an application by Lundbeck that he recuse himself from hearing the trial of the action which was due to commence in a window commencing on 11 November 2013.
3. The essence of Lundbeck’s recusal application is that a fair-minded and informed observer would conclude that there is a real possibility that Arnold J would be subconsciously biased in his assessment of the evidence of Professor Sir Jack Baldwin FRS, formerly Waynflete Professor of Chemistry at Oxford University, who is to act as one of Resolution’s expert witnesses addressing the issue of the validity of the Patent. Lundbeck maintains that the appearance of bias arises out of the association between the Judge and Professor Baldwin when Professor Baldwin became the Judge’s research supervisor in Part II of the Judge’s undergraduate degree studies in Natural Sciences (Chemistry) at Oxford University between October 1982 and May 1983.
4. In view of the proximity of the trial date, we announced our decision to dismiss Lundbeck’s appeal immediately following the oral submissions of Mr Richard Gordon QC, for Lundbeck, and Mr Hugh Tomlinson QC, for Resolution, on 31 October 2013. We said that our reasoned judgments would follow in due course.

Background

The attack on the Patent

5. The general background to the current proceedings is set out in an earlier judgment of Arnold J on various applications in these proceedings given on 12 April 2013 ([2013] EWHC 739 (Pat)) (an appeal from part of which was dismissed by the Court of Appeal on 29 July 2013: [2013] EWCA Civ 924) and in a judgment of Kitchin J in another set of proceedings for revocation of the Patent - *Generics (UK) Ltd v H. Lundbeck* [2007] EWHC 1040 (Pat), [2007] RPC 32.
6. In short, Resolution attacks the validity of the Patent on two grounds. The first ground is obviousness in the light of United States Patent No. 4,650,884. The second ground is obviousness in the light of an article entitled “Quantitative structure–activity in a series of selective 5-HT uptake inhibitors” by Allan J. Bigler *et al* published in the May-June 1977 edition of the European Journal of Medicinal Chemistry.
7. In determining those issues the court will have to consider whether certain steps were obvious to the notional “skilled person”. The “man skilled in the art” is a hypothetical skilled technician who has a very good background technical knowledge – the so-called common general knowledge - but he or she is uninventive: see generally the

description by Jacob LJ in *Technip France SA's Patent* [2004] EWCA Civ 381, [2004] RPC 46, especially at [6] to [15]. Expert evidence is adduced in cases on the validity of a patent to educate the court in the technology but also to assist the court on whether or not the relevant step would have been obvious to the notional skilled person having regard to the state of the art: *Mölnlycke AB v Proctor & Gamble Ltd* (No. 5) [1994] RPC 49 at 113 (Sir Donald Nicholls VC).

8. One of the matters in issue in the present case is what the skilled person would have thought about the applicability of “Baldwin’s Rules”. These are named after two papers written by Professor Baldwin. There is disagreement between the experts on that issue.

The procedural background

9. The present proceedings were commenced on 7 November 2012. On 24 January 2013 Roth J made an order which, among other things, gave directions for the trial of the claim. Paragraph 30 of his order provided as follows:

“30. The trial of this action shall be listed on an expedited basis before Mr Justice Arnold if available on the earliest possible date after 11 November 2013, with a time estimate of 8 days and pre-reading estimate of 2 days with a technical complexity rating of 4”.

10. Patent actions are listed for trial in accordance with their technical complexity rated on a scale from 1 (simplest) to 5 (most complex). Cases with a technical complexity rating of 4 or 5 are listed before one of the two judges of the Patents Court who have science degrees and have specialised in intellectual property law throughout their career. Cases with a technical complexity rating of 1 – 3 may be listed before one of the other judges of the Chancery Division who have been assigned to the Patents Court who do not have that academic and professional background. At the time of Roth J’s order there were two specialist patent judges, Floyd J and Arnold J. Floyd J was precluded from hearing the case because, when in practice at the Bar, he had represented one of the parties at the trial of the previous claim for revocation of the Patent which was heard by Kitchin J. It was for that reason that Roth J’s order provided for the trial to be listed before Arnold J. Birss J was subsequently appointed a High Court Judge of the Chancery Division and is qualified to try patent actions with a technical rating of 4 or 5. He is, however, unable to hear the case due to a conflict of interests.

The Recusal Application

11. During the course of the hearing before Arnold J of certain applications on 14 March 2013 Resolution’s counsel stated that Resolution had an expert opinion of Professor Baldwin. Arnold J commented that Professor Baldwin was his Part II supervisor. Counsel for Resolution stated that, at that stage, he could not say whether Resolution would be calling for Professor Baldwin, adding: “but I have no reason to think that he would not be prepared to give evidence”. There was correspondence between the solicitors for the parties in July 2013, in which Resolution’s solicitors stated that Resolution had been assisted by two experts, one of whom was Professor Baldwin, and that Resolution proposed to call a third expert to give evidence. On 19 July 2013

Resolution made an application for permission to call a third expert. That application was supported by a witness statement in which Resolution's solicitor referred to experimental protocols which Resolution had obtained from Professor Baldwin and Professor Gerard Coquerel and stating that it would be necessary to call both those experts to give evidence at the trial and that Resolution needed to call a further expert. On 30 July 2013 Norris J made an order by consent giving Resolution permission to call a third expert.

12. On 6 September 2013, pursuant to the directions order of Roth J dated 24 January 2013, Resolution formally notified Lundbeck of the names of its expert witnesses, one of whom was Professor Baldwin.
13. On 11 September 2013 Lundbeck's solicitors wrote to Arnold J requesting that he recuse himself from hearing the trial of the claim on the ground that his past connection with Professor Baldwin gave rise to a real possibility of apparent bias. That request was opposed by Resolution both on the merits and on the ground of waiver.
14. Accordingly, Lundbeck issued an application notice dated 30 September 2013 for a direction that the order of Roth J of 24 January 2013 be varied so as to provide that the trial of the action shall not be listed before Arnold J.
15. The principal evidence relied upon by Lundbeck in support of its application comprised (a) the Judge's disclosure at the hearing on 14 November 2013 that Professor Baldwin had been his Part II supervisor, (b) some publicly available information about the curriculum vitae of Arnold J, (c) some general information concerning Oxford University's chemistry course, explaining that Part II of the course consists of an academic year of research leading to an examined thesis, (d) a copy of the published Paper co-authored by Professor Baldwin and the Judge referred to below and (e) a copy of the rules for the appointment of DPhil examiners at Oxford University. Resolution's evidence in reply included a letter from Professor Baldwin stating that he had no specific recollection of Arnold J and setting out his general practices with regard to the Part II students he supervised and his comments on the Paper.

The Hearing of the Recusal Application

16. In advance of the hearing of the recusal application the Judge noted the following observations of Patten LJ in *Re L-B (Children)* [2010] EWCA Civ 1118:

“22. Where a judge is faced with an application that he should recuse himself on the ground of apparent [bias] it is in my judgment incumbent on him to explain in sufficient detail the scale and content of the professional or other relationship which is challenged on the application. The parties are not in the position of being able to cross-examine the judge about it and he is likely to be the only source of the relevant information. Without this, it becomes difficult if not impossible properly to apply the informed bystander test set out by Lord Hope in his speech in *Helow v Home Secretary* [2008] 1 WLR 2416.”

17. That caused the Judge to produce a note of his recollections, which he supplied to the parties shortly before the hearing. He reproduced the contents of the note in paragraphs [23] – [32] of his judgment. They are as follows:

“23. It is difficult accurately to remember the events of more than 30 years ago, and my recollection has already been proved inaccurate in one respect. With the assistance of the evidence filed by the parties, however, I have done my best to recall the nature and extent of my contact with Professor Jack Baldwin FRS (he was knighted subsequently) when I was a student.

24. I studied Natural Sciences (Chemistry) at Magdalen College, Oxford from 1979 to 1983. At that time, Prof Baldwin was the Waynflete Professor of Chemistry, a professorship endowed by Magdalen. I had no contact with Prof Baldwin through the college, since he did not teach there. My first and only contact with Prof Baldwin during Part I of the degree (the first three years) was when I attended a course of lectures on synthetic organic chemistry which he gave in the third year. As I recall it, the main focus of the lectures was upon “retrosynthetic analysis”, that is to say, analysing routes of synthesis by working backwards from the target compound. I found the content of the lectures interesting even though they were poorly delivered, and therefore asked Prof Baldwin to be my Part II supervisor (to the amusement of several of my contemporaries).

25. The research project to which Prof Baldwin assigned me was a project to synthesise a cyclopentanoid isonitrile called ‘270’ which was a metabolite of *Trichoderma* fungi. This was a project on which two post-doctoral workers in Prof Baldwin’s research group, Dr David Kelly and Dr Carl Ziegler, were already engaged. It was a challenging project because of the presence of the sensitive isonitrile group in the target compound. As I recall it, Dr Kelly was pursuing one main route to the synthesis, while Dr Ziegler was pursuing another. Prof Baldwin assigned me to explore some variants of the route Dr Ziegler was pursuing.

26. My research was undertaken during the period from early October 1982 to early May 1983. At that time, Prof Baldwin had a large research group. My recollection is that, including two other Part II students and myself, there were between 45 and 50 people in the group that year. There were periodic meetings of the whole group to discuss current research, but I do not recollect my research being discussed in that forum. My recollection is that I saw Prof Baldwin about once every four weeks for about half an hour. I think that Dr Ziegler was also present at most of these meetings. During the meetings, I updated Prof Baldwin on what I had done since our last meeting, and he gave me ideas for what to do next. On a day-

to-day basis, I was supervised by Dr Ziegler and to a lesser extent by Dr Kelly. This recollection is supported by the fact that, in the acknowledgements to my thesis, I thanked Prof Baldwin for “his stimulating supervision” and Drs Ziegler and Kelly for “endless advice”. (I note with sadness that I have discovered from the internet that both Dr Ziegler and Dr Kelly have since passed away, Dr Kelly in 2008 and Dr Ziegler in 2012.)

27. My abiding recollection of that period was that I found it quite demoralising. I did not find the laboratory environment congenial and I was frustrated by the fact that most of my experiments failed. By contrast, I found writing my thesis, which I presented in June 1983, more enjoyable. I have no recollection of asking for Prof Baldwin’s comments on a draft of my thesis, or even Dr Ziegler’s, but I think that I must have asked for Dr Ziegler’s comments.

28. One of the ideas which Prof Baldwin suggested at one point was to try to make an intermediate with a chloro-[3]-cumulene group by a particular method. This was one of the few experiments I undertook which was successful. After I had demonstrated the principle, Dr Ziegler did a series of further experiments to explore the utility of the method. This work was subsequently published as a short paper, “A facile preparation of chloro-[3]-cumulenes”, *J. Chem. Soc., Chem. Comm.*, 152-153, 1984. Although the named authors of the paper were myself, Prof Baldwin and Dr Ziegler, so far as I recall, I was not involved in writing or submitting the paper, which I note was received by the journal on 3 November 1983. I presume it was written by Dr Ziegler.

29. My last contact with Prof Baldwin while at Oxford was a short interview to mark the conclusion of my Part II work at around the time I presented my thesis. Prof Baldwin offered me a place as a DPhil student despite the fact that I was predicted to receive (and did receive) a Second Class degree, but I declined this offer. After leaving Oxford in June 1983, I pursued a career in the law.

30. While I was at Oxford, I also attended a course of lectures given by the then Dr Steve Davies, later Prof Baldwin’s successor as Waynflete Professor. My recollection is not very clear, but I think that this was in my first year and that the lectures were relatively introductory lectures in organic chemistry. I also believe that at some point during the four years I had some contact with Dr Davies outside the context of those lectures. When the present application was first intimated in mid September, I thought Dr Davies must also have been a member of Prof Baldwin’s research group at the time. This has since been corrected by Prof Davies, and I now realise that it

could not have been the case. I am unable now to recollect in what context I had contact with Dr Davies (if indeed this memory is accurate at all).

31. It has recently occurred to me that I may have met Prof Baldwin once since leaving Oxford. In September 2005 Magdalen College held a dinner for alumni chemists to celebrate the retirement of Prof Baldwin and of two of the college tutors who had taught me during Part I. I attended the dinner. I am not sure whether I spoke to Prof Baldwin on that occasion, but if I did, it was only briefly during pre-dinner drinks.

32. I am aware that Prof Baldwin has given expert evidence in at least two cases in the Patents Court (*Monsanto Co v Merck & Co Inc* [2000] RPC 709 and *SmithKline Beecham plc's Patent (No 2)* [2002] EWHC 2573 (Pat), [2003] RPC 33), but I was not involved in those cases in any capacity. “

The Judgment of Arnold J

18. In his judgment under appeal the Judge, having set out the background and described the role of expert witnesses in patent actions and the applicable principles for recusal on the basis of apparent bias, turned to the merits of Lundbeck's application. He said (at [54]) that he was entirely satisfied in his own mind that his past connection with Professor Baldwin would not affect his assessment of Professor Baldwin's evidence. He said that what matters, however, is not what he thought, but what the fair-minded informed observer would think. He then turned to consider the factors which such an observer would take into account. He addressed those in paragraphs [56] – [68] of his judgment under the following headings: “the overall context”, “Professor Baldwin's status as an expert witness”, “the importance of Professor Baldwin's evidence”, “the nature and extent of [the Judge's] past connection with Professor Baldwin”, “the passage of time and [the Judge's] change in status”, “the nature and extent of [the Judge's] connection with Professor Davies”, “Professor Davies' status as an expert”, “specific aspects of the present case”, “the judicial approach”, “analogies”, and “conclusion”.
19. I do not propose to lengthen this judgment unduly by quoting all of those paragraphs. The following is a brief summary of the principal elements of the Judge's reasoning. The Judge observed that Professor Baldwin will be subject to the obligation of an expert witness, under CPR Part 35, Practice Direction 35 – Experts and Assessors – and the Protocol for the Instruction of Experts to Give Evidence in Civil Claims, to provide objective, unbiased opinions on matters within his expertise, and that the question for the court to assess will be the extent to which Professor Baldwin's opinions reflect the common general knowledge and perceptions of the notional skilled person, not whether they are genuinely held or scientifically correct. He said that Professor Baldwin supervised, but not closely, a research project lasting less than a year which the Judge had conducted as part of his degree course. That research had led to the publication of a short Paper in the joint names of Professor Baldwin, Dr

Ziegler and himself but the Judge was not involved in writing or submitting the Paper and most of the work it reported was carried out by Dr Ziegler. The Judge said that the fair-minded and informed observer would note that a little over 30 years have passed since his association with Professor Baldwin and that in that time he had become successively a barrister, Queen's Counsel and a High Court judge. The Judge said, that as a judge assessing a witness, he would have a considerable measure of authority over Professor Baldwin. He observed that he had also been educated as a student by Professor Steve Davies, who is to be called as an expert witness by Lundbeck on the same issue as is to be addressed by Dr Baldwin, and who is Professor Baldwin's successor as the Waynflete Professor of Chemistry at Oxford University. He said that this is not a case in which there is a disparity in the authority of the respective experts.

20. The Judge said that the fair-minded and informed observer would appreciate that the general training and experience of English judges in the practice of the law and in acting judicially equips them to identify and combat their own cognitive biases. He said that a judge of five years' standing like himself has considerable expertise in objectively assessing the evidence of the witnesses and, specifically, the assessment of evidence of expert witnesses in patent actions. The Judge concluded that, taking into account those and other factors he mentioned in his judgment, he was in no real doubt that a fair-minded and informed observer would not conclude that there was a real possibility of the Judge being subconsciously biased in his assessment of Professor Baldwin's evidence by reason of the Judge's past association with him.
21. Finally, the Judge rejected Resolution's further contention that Lundbeck had, in any event, waived any objection of apparent bias on the part of the Judge by Resolution's conduct between 14 March and 11 September 2013. He said that, although Lundbeck had all the information it needed by 2 July 2013 and did not raise any objection to the Judge hearing the trial until 11 September 2013, in the end he was not persuaded that Lundbeck's actions were sufficiently unequivocal to amount to a waiver. Resolution has not challenged that part of the Judge's judgment on this appeal.

The Appeal

22. Mr Gordon began his submissions with an acknowledgement that the test of apparent bias is well established, namely whether the fair-minded and informed observer would conclude that there is a real possibility of bias. He submitted that the following four concepts have a particular resonance in the present case: (1) justice must not only be done but be seen to be done; (2) that principle trumps any practical difficulties arising from, for example, lack of judicial resources; (3) if there is any doubt about the appearance of bias, the court must err on the side of caution, particularly where the trial has not yet begun; (4) apparent bias can take many forms, but the most insidious is subconscious bias.
23. Mr Gordon submitted that in the present case the critical issue is the link between that precautionary principle and subconscious bias. He submitted that, in examining that link, the important questions are whether there are material factors to suggest to the independent observer that Professor Baldwin exercised influence at any time in the past and, if so, whether other factors will have removed a real possibility of that influence leading to subconscious bias.

24. Mr Gordon laid considerable weight on the reasoning and decision in *Lawal v Northern Spirit Limited* [2003] UKHL 35, [2003] ICR 856. The issue in the House of Lords in that case was whether there was a real possibility of the two lay members of the Employment Appeal Tribunal (“the EAT”) being subconsciously biased in favour of the submissions of a barrister, representing the employers, who was also a Recorder and in that capacity had sat as a part-time judge in the EAT with one of the two lay members. The House of Lords, concluded that there was a real possibility of subconscious bias and that the practice permitting such appearance by counsel in such circumstances should be discontinued.
25. Mr Gordon submitted that *Lawal* is in the same territory as the present appeal, namely as illustrative of the proposition that past “additional authority” exerted by one person over another can raise a real possibility of subconscious bias. More specifically, Mr Gordon contended that *Lawal* is analogous to the present case because both cases concern the possibility of a tribunal being subconsciously biased by virtue of a former relationship with a person to whom the tribunal would be looking for guidance in the subject in question – in *Lawal* the law, and in the present case organic chemistry – such that there is a perception of a risk that the arguments of that person might be preferred over the arguments of others.
26. Mr Gordon also relied upon the use made of analogies by the House of Lords in *Lawal* [15] to [18] (Lord Steyn giving the judgment of the Appellate Committee). He said there is a useful analogy in the present case, which the Judge had been wrong to reject, namely that Oxford University’s Regulations would have prohibited Professor Baldwin from assessing a doctoral thesis of the Judge due to his role as supervisor and their co-authorship of the Paper. Lundbeck’s case is that the Regulations suggest that a relationship such as that which existed between the Judge (as a student) and Professor Baldwin would mean that there was insufficient objectivity and apparent fairness for the latter to evaluate the former’s work.
27. Mr Gordon submitted that the present case is stronger than *Lawal* because that was a case concerning the relationship between the members of a tribunal and an advocate whereas the present case concerns the Judge’s assessment of the evidence of a witness. Mr Gordon emphasised that such an assessment is not merely related to the Judge’s evaluation of the truthfulness of a witness but in the present case also to the cogency of an expert’s opinion.
28. Mr Gordon emphasised that the disqualification of a judge for apparent bias is not a discretionary matter for the judge, but depends on an assessment which an appellate court is well able to conduct for itself. He cited, in that connection, *AWG Group Limited v Morrison* [2006] EWCA 6, [2006] 1 WLR 1163, at [20] (Mummery LJ).
29. Mr Gordon said that Baldwin’s Rules are central to the issues in this case; and the genuine concern of Lundbeck is that the Judge’s view of them may be influenced by his historic relationship with Professor Baldwin. In that connection, Mr Gordon emphasised the following factors. He acknowledged that the attendance of the Judge at lectures delivered by Professor Baldwin was not exceptional. On the other hand, he laid importance on the fact that the Judge made a positive decision to have Professor Baldwin as his Part II supervisor, and so effectively joined Professor Baldwin’s research team, just five years after the publication of Baldwin’s Rules. Mr Gordon also laid emphasis on the fact that the Judge, as a Part II student, had conducted a

successful experiment that was in due course the subject of the published Paper which I have mentioned and for which his contribution was acknowledged by Professor Baldwin by being named as a co-author. Mr Gordon considered that it was significant that Professor Baldwin offered the Judge a place as a DPhil student and that the Judge had been invited to attend, and did attend, a retirement dinner for Professor Baldwin and two other tutors organised by Magdalen College, Oxford University, in September 2005.

30. As an indication of the continuing influence of those student years and the possibility of subconscious bias, Mr Gordon pointed to the following comments by the Judge doing the hearing on 15 October 2013, as recorded in the transcript:

“MR JUSTICE ARNOLD: It is a more particularised way of putting what one might label the mentor point because going back to what I was saying earlier, the Baldwin rules are about stereoselectivity in SN2 reactions and one of the key areas of differences in the case is whether – I do not think it is in dispute that the skilled person in the art would have been aware of the Baldwin rules in 1988. They were famous. Everybody knew about them. But the question is, what the notional person skilled in the art, armed with the Baldwin rules and the problem at hand would conclude.”

31. Mr Gordon focused on the Judge’s statement that Baldwin’s Rules were “famous”. Mr Gordon said that was likely to be in dispute. Mr Gordon also submitted that the Judge’s observation that Baldwin’s Rules were “famous”, coupled with his words “armed with Baldwin’s Rules”, suggested a conclusion that Baldwin’s Rules were indeed a basis for some further positive action on the part of the notional skilled person.

32. Mr Gordon referred to the expert evidence of Professor Davies on this aspect, and specifically the following passages in his report:

“86. While I believe that the average skilled person would know that stereoelectronics mattered in this reaction ..., in the context of an experimental project, such as the synthesis of the enantiomers of citalopram, the average skilled person is unlikely to have spent time considering this. Baldwin’s Rules and the papers from which they derive are not the sort of information that the average person skilled in 1988 would have in their head – they would not have a recollection of the individual rules themselves, nor would they have thought them worthwhile to review in the context of such a project. In practice, the way the skilled person would work would be to look for analogous reactions reported in the literature and, for reasons set out below in paragraphs 98 to 103 in the Annex to this report, they would find none.

87. In any event, had the skilled person considered them in the context of the project in hand, they would see that Baldwin’s Rules do not even apply to this ring closure. The ring closure

in the diol system involves an S_N2 nucleophilic substitution reaction at a tetrahedral carbon atom. Only Baldwin's Rule 1 addresses tetrahedral systems, and is therefore the only one of the rules that could apply to S_N2 nucleophilic substitution reactions. Baldwin's Rule 1 is clearly intended to apply to saturated systems and not unsaturated systems. If the skilled person was aware of Baldwin's paper, they would know this and not take anything of use to this system from them."

33. Mr Gordon submitted that there were no factors negating the persistence of Professor Baldwin's influence over the Judge or, rather, such as to leave no real doubt as to the possibility of such persistent subconscious influence. In that connection, he addressed and countered the Judge's reliance on such matters as the significance of the passage of time, the reversal of the positions of authority of the Judge and Professor Baldwin, Professor Baldwin's personal experience as an expert witness, the specialist nature of patent disputes, the fact that in the field of disputed patent revocation many of the participants are known to each other, the Judge's general training and experience as a judge, and the rules surrounding the giving of expert evidence. Mr Gordon submitted that the fair-minded observer would not be swayed by the first three of those matters and would regard the last four as irrelevant.
34. Mr Gordon also emphasised that in the present case the Patent stands or falls by the expert evidence as to the situation in 1988, not long after the Judge ceased to be an undergraduate.

Discussion

35. The following principles relevant to this application are clear. First, the test of apparent bias is whether the fair-minded and informed observer, having considered the facts, would conclude that there is a real possibility that the tribunal was biased: *Porter v Magill* [2001] UKHL 67, [2002] AC 357 at [103] (Lord Hope). There is no difference between the common law test of bias and the requirements of an independent and impartial tribunal under Article 6(1) of the European Convention of Human Rights ("the Convention"): *Lawal* at [14] (Lord Steyn). Secondly, underlying both Article 6 of the Convention and the common law principles is the fundamental consideration that justice should not only be done but should manifestly and undoubtedly be seen to be done: *R (McCarthy) v Sussex Justices* [1924] 1 KB 256, 259. Thirdly, the fair-minded and informed observer is not unduly sensitive or suspicious, but neither is he or she complacent: *Helow v Secretary of State for the Home Department* [2008] UKHL 62, [2008] 1 WLR 2416, at [2] (Lord Hope). Fourthly, the facts and context are critical. Each case turns on an intense focus on the essential facts of the case: *Man O' War Station Ltd v Auckland City Council* [2002] UKPC 28 at [11] (Lord Steyn). Fifthly, if the fair-minded and informed observer would conclude that there is a real possibility that the tribunal will be biased, the judge is automatically disqualified from hearing the case. The decision to recuse in those circumstances is not a discretionary case management decision reached by weighing various relevant factors in the balance. Considerations of inconvenience, cost and delay are irrelevant: *AWG Group Ltd* at [6] (Mummery LJ).
36. In addition to those well established points of principle, I would add the following observations. The test is "a real possibility" of bias, whether subconscious or

otherwise. Lundbeck's skeleton argument describes that test as "a necessarily low threshold". While the test is certainly less rigorous than one of probability, it is a test which is founded on reality. The test is not one of "any possibility" but of a "real" possibility of bias.

37. As Lord Steyn observed in *Lawal* at [15], analogies may sometimes be of assistance. On the other hand, they must be viewed with care and caution. Cases of subconscious bias ultimately turn on the particular facts of the case. An analogy will only have value if the factual situation is sufficiently comparable to enable a compelling link to be made with the case in hand.
38. Mummery LJ in *AWG Group Ltd* at [9] has pointed to the practical difference between an objection to the judge based on facts discovered during the course of, or only at the end of, the hearing and a situation, such as the present one, where the objection is taken before the hearing has begun. In the latter situation, as Mummery LJ observed, there is scope for the sensible application of the precautionary principle, that is to say prudence naturally leans on the side of being safe rather than sorry. Indeed, as was observed in *Locabail (UK) v Bayfield Properties* [2000] 1 All ER 65 at [16], judges routinely take care to disqualify themselves in advance of any hearing in any case where a personal interest could be thought to arise. The Judge himself said at [50] of his judgment that he has a strong inclination to accede to an application to recuse himself without further ado. The test, however, remains the same whether the objection of bias or apparent bias is made before or after a trial.
39. The precautionary principle is a sensible one in view of the obvious practical complications if there is an appeal from a refusal to recuse or if there is a challenge made on the basis of apparent or actual bias at the end of the case. The overriding objective that justice should be seen to be done and of the need to maintain the confidence of society in general, and of the parties in particular, in the administration of justice also promote a disposition of a judge to accede to a recusal application when it is made by a party's legal advisors.
40. It is important, nonetheless, to distinguish between a pragmatic precautionary approach and the application of the test itself. If a fair-minded and informed observer, having considered the facts, would not conclude that there is a real possibility that the tribunal will be biased, then the objection to the judge must fail even if that leaves the applicant dissatisfied and bearing a sense that justice will not or may not be done. The increasing pressure on limited judicial resources, aptly reflected in the present case in the shortage of judges suited to try this complex patent action, may mean that the easy option of voluntary recusal, irrespective of the strict application of the legal test, may from time to time have limited scope.
41. The decision made by a judge as to whether or not to accede to an objection based on apparent bias is a multi-factorial decision. It is well established that an appellate court will normally be slow to interfere with a multi-factorial decision made by a judge: *Assicurazioni Generali SpA v Arab Insurance Group*, Practice Note [2002] EWCA Civ 1542, [2003] 1 WLR 577, at [16] ff. The same considerations do not apply, however, in the case of a refusal by a judge to disqualify himself or herself for apparent bias. I agree with the comments of Mummery LJ in *AWG Group Ltd* at [20] that, on the issue of disqualification, an appellate court is well able to assume the vantage point of a fair-minded and informed observer with knowledge of the relevant

circumstances, and that the appellate court must itself make an assessment of all relevant circumstances and then decide whether there is a real possibility of bias. That approach is entirely appropriate since it is conventional for applications for recusal on the basis of apparent bias to be heard by the very judge in question. Neither side before us commented on the appropriateness of that convention.

42. As the judge noted, Patten LJ said in *Re L-B (Children)* at [22] that a judge faced with a recusal application on the ground of apparent bias should “explain in sufficient detail the scale and content of the professional and other relationship which is challenged on the application”. It is plainly consistent with the policy underlying Article 6(1) of the Convention and common law principles that, on such an application, the judge should provide to the parties relevant information. Such information, however, should not go beyond what is strictly necessary for a fair adjudication of the recusal application. I consider that the Judge in the present case went well beyond what was necessary. The consequence of an excessively wide factual disclosure is to enlarge the opportunity for speculative arguments about the inferences to be drawn and the consequences that follow from the facts disclosed. That observation must be borne in mind when I address Mr Gordon’s submissions about the factual context of the present case in the following paragraphs.
43. Against the background of those principles and matters, I turn to the facts of the present case. The first and most obviously striking feature is that the relationship between the Judge and Professor Baldwin was formed when the Judge was a university student and it came to an end when his undergraduate studies were completed some 30 years ago. Mr Gordon’s submissions were advanced on the basis that Professor Baldwin was in a position of authority and influence over the Judge in those student days and that such influence should be presumed to continue unless there were factors negating that inference. That seems to me to be an entirely artificial approach in the present case where the circumstances of the original relationship arose in a specific and limited context so very long ago and which bears no comparison whatever with the situation in which the Judge will be trying a High Court action in which Professor Baldwin will be giving expert evidence.
44. The factual context is critical. Lundbeck accepts that it is irrelevant that the Judge attended lectures given by Professor Baldwin. In conducting his Part II research project the Judge was part of a large research group of 45 to 50 people. He sought advice and guidance primarily from two post-doctoral researchers in that group, Dr Kelly and Dr Ziegler. Although the Judge was named as co-author of the Paper mentioned above, he does not recall being involved in writing or submitting the Paper. In the intervening 30 years there has been no personal or professional contact between the Judge and Professor Baldwin other than the Judge’s attendance in September 2005 at a retirement dinner for Professor Baldwin and two other college tutors who had taught the Judge during his undergraduate years. The Judge is not even sure whether he spoke to Professor Baldwin on that occasion. Further, the Judge, while an undergraduate, also attended lectures given by Professor Davies, Lundbeck’s expert, who succeeded Professor Baldwin as Waynflete Professor and whose eminence the Judge acknowledges.
45. Mr Gordon relied heavily upon the decision and reasoning in *Lawal* as an analogous example of a situation where there was a real possibility of subconscious bias arising out of a former and different relationship. I do not agree that *Lawal* provides a useful

analogy. That case was concerned with the continuing possible influence over the lay members of a tribunal of an advocate who had previously sat with those lay members as a part-time judge. In the first place, the original relationship of influence in that case was very recent (viz. within the previous 12 months). That bears no relationship whatever to the 30 years gap in the present case. Secondly, the persistent potential influence in *Lawal* was of a part-time judge over lay members. In the present case, the real possibility of subconscious bias is said to apply to a High Court judge of five years' standing, who previously sat as a deputy High Court judge and for many years before that was in private practice as a barrister. Mr Gordon submitted that the difference between those situations is irrelevant. I do not agree.

46. I entirely accept that neither the judicial oath to "do right by all manner of people, after the law and usages of this realm, without fear or favour, affection or ill-will" nor judicial experience and training, including the pervasive and persistent ethos of the independence of the judiciary, can wholly insulate even the most rigorous and fair-minded judge from subconscious bias. The fair-minded observer would be aware of that possibility: *Helow* at [2] (Lord Hope). That is not to say, however, that the fair-minded and informed observer would wholly discount the matters of judicial training, experience and ethos. Taken to their logical conclusion, Mr Gordon's submission and reliance on *Lawal* would preclude a judge from hearing a case in which his former pupil master or regular instructing solicitors were acting for one of the parties, or a deputy High Court judge from ever hearing a case in which a more senior member of his or her chambers was acting for one of the parties.
47. The present case might be different if there was some specific continuing link between the Judge's studies under Professor Baldwin at university and the science involved in the present case, but there is none. There is nothing to indicate that the present dispute will turn on the subject matter of Professor Baldwin's lectures attended by the Judge or the Paper co-authored by the Judge mentioned above.
48. As I have said, Mr Gordon drew attention to the passage in the transcript of the hearing on 15 October 2013, in which the Judge is recorded as saying that it is not in dispute that the notional skilled person would have been aware of Baldwin's Rules in 1988 and that they were famous, and that the question is what the notional person skilled in the art "armed with Baldwin's Rules" and the problem at hand would have concluded. I have also set out the passage in the expert evidence of Professor Davies, for Lundbeck, in relation to that aspect. I pressed Mr Gordon in his reply submissions as to precisely what Lundbeck's point is on this aspect. He said that there is a crucial difference between knowing about Baldwin's Rules and using the Rules for further action and that is the issue which is in contention and on which there is a real possibility of subconscious bias on the part of the Judge.
49. It is to be noted that there was absolutely no reaction by Lundbeck's counsel in response to the statement of the Judge at the hearing of 15 October 2013 now relied upon. Mr Gordon submitted that what the Judge said on that occasion would give rise to "a non fanciful concern on the part of the informed observer". I do not consider that to be the same as the test of "real possibility of bias". Whether or not it is, I do not consider that the Judge's comments could possibly give rise to any concern on the part of the fair-minded and informed observer.

50. It is common ground that Baldwin's Rules were well known at the relevant time. In *Generics (UK) Ltd v H. Lundbeck AS* [2007] EWHC, which I have mentioned earlier, and in which Professor Davies again acted as the expert witness for Lundbeck, Kitchin J said at [85]:

“Finally, the existence of what had become known as Baldwin's rules were well known to organic chemists in 1988. How the skilled person would apply those rules was, however, hotly disputed.”

That seems to me to be no different from what the Judge said on 15 October 2013. I do not regard the word “famous” as being anything other than an appropriate substitute for “well-known”. Nor do I agree that the words “armed with Baldwin's Rules” shows a subconscious disposition to give an answer to the question proposed by the Judge favourable to Resolution. It is relevant to note that at [57] of his judgment the Judge emphasises that the question for the court to assess “will be the extent to which Prof Baldwin's opinions reflect the common general knowledge and the perceptions of the notional skilled person, not whether they are genuinely held or even scientifically correct”. In the course of his oral submissions Mr Gordon confirmed that was indeed a correct statement of the relevance of Professor Baldwin's evidence. All this is consistent with there having been no immediate reaction by Lundbeck's counsel to what the Judge said on 15 October 2013.

51. Once those matters are out of the way, there is simply nothing left that could give rise to any real concern on the part of the fair-minded and informed observer. I do not consider in the circumstances of the present case that the Oxford University Regulation which would have precluded Professor Baldwin from assessing a doctoral thesis of the Judge, in view of their relationship as supervisor/supervisee or their co-authorship of the academic Paper, is of any relevance whatever to the interaction between the Judge and Professor Baldwin as an expert witness some thirty years later.
52. The Judge has given entirely cogent and persuasive reasons why the fair-minded and informed observer would not consider it significant that the priority date of the Patent, 14 June 1988, was only five years after the Judge presented his Part II thesis, or that Baldwin's Rules were formulated by Professor Baldwin in papers published about five years before the Judge started his Part II project, or that stereo chemistry was mentioned in the Paper published jointly by the Judge, Professor Baldwin and Dr Ziegler to which I have referred above: see paras [63], [64] and [65] in the Judge's judgment.

Conclusion

53. For all those reasons, I would refuse the appeal.

Lady Justice Hallett

54. I agree.

Lady Justice Sharp

55. I also agree.

AL-SKEINI v UNITED KINGDOM

BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

Application No.55721/07

The President, Judge Costa; Judges Rozakis, Bratza, Tulkens, Casadevall, Spielmann, Bonello, Steiner, Garlicki, Mijović, Björgvinsson, Berro-Lefèvre, Nicolaou, López Guerra, Bianku, Power and Poalelungi: July 7, 2011

(2011) 53 E.H.R.R. 18

☞ Armed forces; Civilians; Duty to undertake effective investigation; Extraterritoriality; Iraq; Jurisdiction; Military occupation; Right to life

- H1 The applicants were the relatives of Iraqi citizens who had been killed in Iraq in the period following the invasion of the country by the United Kingdom, the United States and their coalition partners on March 20, 2003, and prior to the passing of authority to the Interim Iraqi Government on May 28, 2004. The relatives of the first, second and fourth applicants had been shot and killed by British soldiers. The third applicant's wife had been killed in the context of exchanges of fire between British soldiers and insurgents, it not being possible to determine by whom the lethal shot had been fired. The fifth applicant alleged that his son had been arrested by British troops, who had then forced him into a river where he had drowned. The son of the sixth applicant had been arrested and detained by British troops and had subsequently died in custody. In the case of the relatives of the first three applicants, following summary investigation, the deaths were determined to have fallen within the Rules of Engagement, with the result that there was no further investigation. As regards the death of the brother of the fourth applicant, it was eventually likewise concluded, following the closing and then reopening of the investigation, that the use of force had fallen within the Rules of Engagement, and no prosecution was justified. In the case of the son of the fifth applicant, following an investigation, a prosecution was mounted against four soldiers, but they were acquitted following the collapse of the prosecution case. The fifth applicant subsequently brought a civil claim against the Ministry of Defence, as a result of which he was paid a substantial sum and received a formal apology. As regards the death of the sixth applicant's son, an investigation took place. The sixth applicant brought a civil claim, as a result of which he was paid a substantial sum by way of compensation and received a formal apology. The first to fourth and sixth applicants had been party to proceedings before the UK courts challenging decisions of the Secretary of State not to conduct independent investigations into the death of their relatives. On June 13, 2007, the House of Lords concluded that the United Kingdom had not had jurisdiction within the meaning of art.1 of the Convention

over the relatives of the first to fourth applicants at the relevant times, such that there was no obligation to conduct an investigation. The Government had conceded during the course of the proceedings that it had had jurisdiction over the son of the sixth applicant. In May 2008, the Secretary of State for Defence announced that there would be a public inquiry into the death of the sixth applicant's son, although the inquiry had still to deliver its report. Relying on art.2, all six applicants complained of the failure to carry out a full and independent investigation into the circumstances of the deaths of their relatives. They claimed just satisfaction under art.41.

H2 **Held** unanimously:

- (1) that the Government's preliminary objections regarding attribution and non-exhaustion of domestic remedies were to be rejected;
- (2) that the questions whether the applicants fell within the jurisdiction of the respondent State and whether the fifth and sixth applicants retained victim status were to be joined to the merits;
- (3) that the application was admissible;
- (4) that the applicants' deceased relatives had fallen within the jurisdiction of the respondent State and that the Government's preliminary objection as to jurisdiction was to be dismissed;
- (5) that the sixth applicant could no longer claim to be a victim of a violation of the procedural obligation under art.2;
- (6) that there had been a breach of the procedural obligation under art.2 to carry out an adequate and effective investigation into the deaths of the relatives of the first to fifth applicants and that the Government's preliminary objection as regards the victim status of the fifth applicant was to be dismissed;
- (7) that the respondent State was to pay each of the first to fifth applicants compensation in respect of non-pecuniary damage, plus a sum for costs and expenses;
- (8) that the remainder of the applicants' claim for just satisfaction was to be dismissed.

1. Preliminary objections: attribution; "within the jurisdiction"; status of victim; exhaustion of domestic remedies (articles 1 and 35)

H3 (a) The Government's argument that the deaths of the relatives of the second and third applicants were not attributable to the United Kingdom as they had occurred during operations conducted pursuant to a binding decision of the United Nations Security Council (UNSC) had not been raised before the domestic courts. In light of the Court's subsidiary role, it was not open to a government to put forward before the Court arguments which were inconsistent with the position it had adopted before the national courts. The Government was therefore estopped from raising the objection concerning attribution of the conduct at issue to the UN. [99]–[100]

H4 (b) As for the Government's objection of non-exhaustion of domestic remedies in relation to the complaint of the fifth applicant, it was true that the House of Lords had not considered any case in which the facts were similar to that of the fifth applicant's son. However, given that the majority of the House of Lords had

accepted that jurisdiction arose in respect of the sixth applicant's son only because he had died while detained in a British military prison, it appeared that the fifth applicant would have had no prospects of success had he sought to pursue his application for judicial review before the domestic courts. In those circumstances, he could not be criticised for failing to pursue the remedy suggested by the Government and the preliminary objection in that regard was to be rejected. [105]

- H5 (c) The questions of whether the cases of the first to fifth applicants had fallen within the jurisdiction of the respondent State, and the question whether the fifth and sixth applicants could still claim to be victims of any violations of their rights under art.2 were closely linked with, and were therefore to be joined to, the merits. [102]; [107]

2. Right to life: “within the jurisdiction”; military operations in Iraq; occupation; killings by members of the armed forces (article 1)

- H6 (a) Under art.1, the exercise of “jurisdiction” was a necessary condition for a state to be held responsible for acts or omissions imputable to it which gave rise to an alleged infringement of Convention rights. As a state's jurisdictional competence under art.1 was primarily territorial, it was only in exceptional cases that acts of the contracting states performed, or producing effects, outside their territories could constitute an exercise of jurisdiction for the purposes of art.1. [130]–[131]

- H7 (b) Such exceptional circumstances had been found to exist where the acts of the state authorities produced effects outside the state's own territory. In particular, the acts of diplomatic and consular agents present on foreign territory could amount to an exercise of jurisdiction when these agents exerted authority and control over others. Further, the exercise of extra-territorial jurisdiction by a contracting state had been recognised when, through the consent, invitation or acquiescence of the territorial state, it had exercised all or some of the public powers normally to be exercised by government of that state, provided the acts in question were attributable to it rather than to the territorial state. In addition, in certain circumstances, the use of force by a state's agents operating outside its territory could bring an individual within the state's jurisdiction. In the latter cases, what was decisive for jurisdiction to arise was the exercise of physical power and control by state agents over the person in question. Whenever the state through its agents exercised control and authority over an individual, it was under an obligation under art.1 to secure to that individual the Convention rights which were relevant to his situation; in that sense, the Convention rights could be “divided and tailored”. [132]–[137]

- H8 (c) A further exception to the principle of territoriality existed where, as a consequence of lawful or unlawful military action, a contracting state exercised, either directly or through a subordinate local administration, effective control of an area outside that national territory. Where such domination over the territory was established, it was not necessary to determine whether the contracting state exercised detailed control over the policies and actions of the subordinate local administration, as the fact that that administration survived as a result of the contracting state's support entailed that state's responsibility for its policies and actions. Under art.1, the controlling state was under an obligation to secure, within the controlled area, the entire range of Convention rights and was liable for any violations of those rights. The question whether a contracting state exercised

effective control over an area was a factual determination. The primary factor to be taken into account was the strength of the state's military presence in the area. Other relevant indicators included the extent to which the state's military, economic and political support for the local subordinate administration provided it with influence and control over the region. [138]–[139]

- H9 (d) The existence of the mechanism under art.56 could not be interpreted as limiting the scope of the term “jurisdiction” in art.1. [140]
- H10 (e) In the past it had been recognised that, in order to avoid a “vacuum” of protection within the “legal space” of the Convention, in cases of military occupation of the territory of one Convention state by another Convention state, the occupying state was in principle to be held accountable for breaches of the Convention within the occupied territory. However, that did not imply, a contrario, that jurisdiction under art.1 could never exist outside the “legal space” of Council of Europe Member States. [141]–[142]
- H11 (f) Following the removal from power of the previous regime on May 1, 2003 and until the transfer of authority to the Interim Government on June 28, 2004, the United Kingdom and the United States had been the occupying powers in Iraq and had assumed the exercise of some of the public powers normally exercised by a sovereign government. The United Kingdom in particular had assumed authority and responsibility for maintaining security and supporting the civil administration in the province in South-East Iraq. [143], [147]
- H12 (g) In those exceptional circumstances the United Kingdom, through its soldiers engaged in security operations in that area during the relevant period, had exercised authority and control over individuals killed in the course of those security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of art.1. In particular, it was undisputed that the deaths of the relatives of the first, second and fourth to sixth applicants had been caused by the acts of British soldiers during the course of security operations. It followed that in all those cases there had existed a jurisdictional link between the United Kingdom and the deceased for the purposes of art.1. The third applicant's wife had been killed during an exchange of fire between a patrol of British soldiers and unidentified gunmen and it was not known which side had fired the fatal bullet. However, since the death had occurred in the course of a UK security operation, during which British soldiers had taken part in the fatal exchange of fire, there had likewise existed a jurisdictional link between the United Kingdom and the wife of the third applicant. [149]–[150]

3. Right to life: killing by state agents; procedural obligation; prompt and effective investigation; independence of investigating authorities; securing of evidence (article 2)

- H13 (a) The complaints of the applicants did not relate to any substantive breach of the right to life under art.2, but rather to alleged breaches of the procedural duty under art.2 to carry out an effective investigation into the killings of their relatives. [151]
- H14 (b) Although the security situation in South-East Iraq at the relevant time had been difficult, art.2 was one of the most fundamental provisions in the Convention, and no derogation from it was permitted under art.15 except in respect of deaths resulting from lawful acts of war. In particular, the procedural obligation under

art.2 to carry out an effective official investigation into the killing of individuals, including by state agents, applied also in difficult security conditions. Although in such circumstances, concrete constraints could compel the use of less effective measures of investigation or result in delays in the investigation, the authorities were nevertheless required to take all reasonable steps in order to ensure that an effective, independent investigation was conducted into alleged breaches of the right to life. [161]–[162], [164]

H15 (c) Although the form of investigation could vary depending on the circumstances, once the authorities had become aware of a matter, they were required to act of their own motion, in a prompt and reasonably expedited manner. For the investigation to be effective, it had to be capable of leading to a determination of whether the force used had been justified and to the identification and punishment of those responsible; in particular, the authorities had to take the reasonable steps available to them to secure the evidence concerning an incident. Further, when the investigation concerned killings by state agents, those responsible for and carrying out the investigation had to be independent from those implicated in the events, both from a hierarchical and a practical point of view. There had also to be a sufficient element of public scrutiny of the investigation or its results; although the degree of public scrutiny required could vary from case to case, the victim's next-of-kin had in any case to be involved in the procedure to the extent necessary to safeguard their interests. Finally, the investigation had to be broad enough to assess not only the actions of the state agents who had directly used lethal force but also all the surrounding circumstances, including such matters as the planning and control of the operations in question. [163], [165]–[167]

H16 (d) It was necessary to bear in mind the practical problems caused by the fact that the United Kingdom was an occupying power in a foreign and hostile region in the immediate aftermath of invasion and war, including the breakdown of the civil infrastructure. In such circumstances, the procedural duty under art.2 had to be applied realistically, taking account of the specific problems faced by investigators. However, the situation also entailed that, if any investigation into acts allegedly committed by British soldiers was to be effective, it was particularly important that the investigation was, and was seen to be, operationally independent of the military chain of command. [168]–[169]

H17 (e) The relatives of the first, second and fourth applicants had been shot by British soldiers, the identity of whom were known. The question to be investigated was whether in each case the soldier had fired in conformity with the Rules of Engagement. As regards the third applicant's wife, art.2 had required an investigation to determine the circumstances of the shooting, including whether appropriate steps had been taken to safeguard civilians in the vicinity. As regards the son of the fifth applicant, it appeared that he had drowned and it was necessary to determine whether, as alleged, British soldiers had forced him into the water. In each of those cases, the testimony of eye-witnesses had been crucial and it had therefore been essential that, as quickly as possible after the event, both the military and the Iraqi witnesses should have been questioned by an expert and fully independent investigator. [170]

H18 (f) It was clear, and had not been disputed by the Government, that the investigations into the shooting of the relatives of the first to third applicants had fallen short of the requirements of art.2, as the investigation had remained entirely

within the military chain of command and had gone no further than taking statements from the soldiers involved. [171]

H19 (g) With regard to the investigation into the deaths of the relatives of the fourth and fifth applicants, the investigating authorities had been under a separate chain of command from the soldiers who had been under investigation. However, the investigating authorities had not been operationally independent from the military chain of command, given that they had not been free to decide for themselves when to start or terminate an investigation, and did not report in the first instance to the prosecuting authority. Accordingly, the investigators had not been sufficiently independent from the soldiers implicated in the events to satisfy the requirements of art.2. [172]

H20 (h) In addition, the initial phase of the investigation into the shooting of the brother of the fourth applicant had suffered from other flaws, including that the soldier who had shot the applicant's brother had not initially been questioned. Further, although Iraqi witnesses who had allegedly witnessed the shooting had apparently been questioned, no statements had been taken. In any case, due to the lack of independence, the investigation had initially been terminated before it was completed. The investigation was reopened nine months later, and the case was referred to the prosecuting authority by the commanding officer. Although the prosecutors had then taken depositions from the military witnesses, the long period of time which had been permitted to pass before the soldier who had fired had been questioned, combined with the delay before a fully-independent investigator had interviewed the other military witnesses, had entailed a high risk that the evidence had been contaminated and become unreliable. Further, it did not appear that any fully independent investigator had ever taken evidence from the Iraqi witnesses. [173]

H21 (i) Although there was no indication that the military chain of command had sought to intervene in the investigation of the death of the son of the fifth applicant, the investigators had nevertheless lacked independence. Further, the unexplained long delay between the death and the court-martial had seriously undermined the effectiveness of the investigation, not least because some of the soldiers allegedly involved had become untraceable. Further, the narrow focus of the investigation had been inadequate to satisfy the requirements of art.2. Given the evidence which appeared to show that the fifth applicant's son had been taken into custody by British soldiers who were assisting Iraqi police, and that, as a result of mistreatment, he had drowned, art.2 had required an independent examination, accessible to the victim's family and the public, of the broader issues of state responsibility for the death, which should have included the instructions, training and supervision given to soldiers. Although the fifth applicant had received a substantial sum in settlement of his civil claim, accompanied by an admission of liability, there had never been a full and independent investigation into the circumstances of the death of his son. Accordingly the fifth applicant could still claim to be a victim within the meaning of art.34 and the Government's preliminary objection in that regard was to be rejected. [174]–[175]

H22 (j) A full, public inquiry was nearing completion into the circumstances of the death of the son of the sixth applicant. Given that inquiry, the sixth applicant accepted that he was no longer a victim of any breach of the procedural obligation under art.2 and Government's objection in respect of the sixth applicant was to be upheld. [176]

- H23 (k) In conclusion, there had been a violation of the procedural duty under art.2 in respect of the first to fifth applicants. [177]

4. Just satisfaction: non-pecuniary damage; costs and expenses; default interest (article 41)

- H24 (a) A respondent State was in principle free to choose the means by which it will discharge its legal obligation under art.46. Accordingly, with regard to the applicants' request that the Court order the Government to conduct a Convention-compliant investigation into their relatives' deaths, it was for the Committee of Ministers to address the issues as to what may be required in practical terms by way of compliance. [181]
- H25 (b) The guiding principle under art.41 was equity, and it was not the role of the Court to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. In that regard awards on account of non-pecuniary damage served to give recognition to the fact that moral damage had occurred as a result of a breach of a fundamental human right. In the light of all the circumstances, it was just and equitable to award the first five applicants the full amount claim in relation to non-pecuniary damage. The applicants were also awarded a sum for costs and expenses. Provision was made for interest in default of payment. [182], [185]–[186]

H26 The following cases are referred to in the Court's judgment:

A v United Kingdom (2009) 49 E.H.R.R. 29
Al-Saadoon v United Kingdom (2009) 49 E.H.R.R. SE11
Assanidze v Georgia (2004) 39 E.H.R.R. 32
Banković v Belgium (2007) 44 E.H.R.R. SE5
Bazorkina v Russia (2008) 46 E.H.R.R. 15
Cooper v United Kingdom (2004) 39 E.H.R.R. 8
Cyprus v Turkey (1982) 4 E.H.R.R. 482
Cyprus v Turkey (2002) 35 E.H.R.R. 30
Drozd v France (1992) 14 E.H.R.R. 745
Edwards v United Kingdom (2002) 35 E.H.R.R. 19
Ergi v Turkey (2001) 32 E.H.R.R. 18
Finucane v United Kingdom (2003) 37 E.H.R.R. 29
Gül v Turkey (2002) 34 E.H.R.R. 28
Güleç v Turkey (1999) 28 E.H.R.R. 121
Ilaşcu v Moldova (2005) 40 E.H.R.R. 46
Isayeva v Russia (2005) 41 E.H.R.R. 38
Issa v Turkey (2005) 41 E.H.R.R. 27
Jordan v United Kingdom (2003) 37 E.H.R.R. 2
Kaya v Turkey (1999) 28 E.H.R.R. 1
Khashiyev v Russia (2006) 42 E.H.R.R. 20
Loizidou v Turkey (1997) 23 E.H.R.R. 513
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McCann v United Kingdom (1996) 21 E.H.R.R. 97
McKerr v United Kingdom (2002) 34 E.H.R.R. 20
Medvedyev v France (2010) 51 E.H.R.R. 39
Nachova v Bulgaria (2006) 42 E.H.R.R. 43
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Varnava v Turkey (2010) 50 E.H.R.R. 21
X v Federal Republic of Germany (1611/62) September 25, 1965
Cyprus v Turkey (6780/74 & 6950/75) May 26, 1975
X v Switzerland (7289/75 & 7349/76) July 14, 1977
X v United Kingdom (7547/76) December 15, 1977
Freda v Italy (8916/80) October 7, 1980
WM v Denmark (17392/90) October 14, 1993
Özkan v Turkey (21689/93) April 6, 2004
Ülkü Ekinci v Turkey (27602/95) July 16, 2002
Sánchez Ramirez v France (28780/95) June 24, 1996
Kanlibaş v Turkey (32444/96) December 8, 2005
Solomou v Turkey (36832/97) June 24, 2008
Shanaghan v United Kingdom (37715/97) May 4, 2001
Tzekov v Bulgaria (45500/99) February 23, 2006
Andreou v Turkey (45653/99) June 2, 2008
Gentilhomme v France (48205/99, 48207/99 & 48209/99) May 14, 2002
Musayev v Russia (57941/00, 58699/00 & 60403/00) July 26, 2007

H27 The following domestic cases are referred to in the Court's judgment:

R. (on the application of Al-Jedda) v Secretary of State for Defence [2007] UKHL 58; [2008] 1 A.C. 332
R. (on the application of Al-Skeini) v Secretary of State for Defence [2004] EWHC 2911 (Admin); [2005] 2 W.L.R. 1401
R. (on the application of Al-Skeini) v Secretary of State for Defence [2005] EWCA Civ 1609; [2007] Q.B. 140
R. (on the application of Al-Skeini) v Secretary of State for Defence [2007] UKHL 26; [2008] 1 A.C. 153

H28 The following international cases are referred to in the Court's judgment:

Armed Activities on the Territory of the Congo (*Democratic Republic of Congo (DRC) v Uganda*) Unreported December 19, 2005 International Court of Justice
 Case of the *Mapiripán Massacre v Colombia* Unreported September 15, 2005 Inter-American Court of Human Rights

H29 The following cases are referred to in the concurring Opinion of Judge Bonello:

Banković v Belgium (2007) 44 E.H.R.R. SE5
Behrami v France (2007) 45 E.H.R.R. SE10
Berić v Bosnia and Herzegovina (2008) 46 E.H.R.R. SE6
Issa v Turkey (2005) 41 E.H.R.R. 27
Medvedyev v France (2010) 51 E.H.R.R. 39

H30 The following domestic case are referred to in the concurring Opinion of Judge Bonello:

R. (on the application of Al-Skeini) v Secretary of State for Defence [2007] UKHL 26; [2008] 1 A.C. 153

THE FACTS

I. The circumstances of the case

8 The facts of the case may be summarised as follows.

A. The occupation of Iraq May 1, 2003 to June 28, 2004

1. Background: United Nations Security Council Resolution 1441

9 On November 8, 2002 the United Nations Security Council, acting under Ch.VII of the United Nations Charter, adopted Resolution 1441. The Resolution decided, *inter alia*, that Iraq had been and remained in material breach of its obligations under previous United Nations Security Council Resolutions to disarm and to co-operate with United Nations and International Atomic Energy Agency weapons inspectors. Resolution 1441 decided to afford Iraq a final opportunity to comply with its disarmament obligations and set up an enhanced inspection regime. It requested the Secretary General immediately to notify Iraq of the resolution and demanded that Iraq co-operate immediately, unconditionally, and actively with the inspectors. Resolution 1441 concluded by recalling that the Security Council had “repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations”. The Security Council decided to remain seized of the matter.

2. Major combat operations: March 20–May 1, 2003

10 On March 20, 2003 a coalition of armed forces under unified command, led by the United States with a large force from the United Kingdom and small contingents from Australia, Denmark and Poland, commenced the invasion of Iraq. By April 5, 2003 the British had captured Basrah and by April 9, 2003 US troops had gained control of Baghdad. Major combat operations in Iraq were declared complete on May 1, 2003. Thereafter, other states sent personnel to help with the reconstruction effort.

3. Legal and political developments in May 2003

11 On May 8, 2003 the Permanent Representatives of the United Kingdom and the United States at the United Nations addressed a joint letter to the President of the United Nations Security Council, which read as follows:

“The United States of America, the United Kingdom of Great Britain and Northern Ireland and Coalition partners continue to act together to ensure the complete disarmament of Iraq of weapons of mass destruction and means of delivery in accordance with United Nations Security Council resolutions. The States participating in the Coalition will strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq. We will act to ensure that Iraq’s oil is protected and used for the benefit of the Iraqi people.

In order to meet these objectives and obligations in the post-conflict period in Iraq, the United States, the United Kingdom and Coalition partners, acting under existing command and control arrangements through the Commander

of Coalition Forces, have created the Coalition Provisional Authority, which includes the Office of Reconstruction and Humanitarian Assistance, to exercise powers of government temporarily, and, as necessary, especially to provide security, to allow the delivery of humanitarian aid, and to eliminate weapons of mass destruction.

The United States, the United Kingdom and Coalition partners, working through the Coalition Provisional Authority, shall inter alia, provide for security in and for the provisional administration of Iraq, including by: deterring hostilities; maintaining the territorial integrity of Iraq and securing Iraq's borders; securing, and removing, disabling, rendering harmless, eliminating or destroying (a) all of Iraq's weapons of mass destruction, ballistic missiles, unmanned aerial vehicles and all other chemical, biological and nuclear delivery systems and (b) all elements of Iraq's programme to research, develop, design, manufacture, produce, support, assemble and employ such weapons and delivery systems and subsystems and components thereof, including but not limited to stocks of chemical and biological agents, nuclear-weapon-usable material, and other related materials, technology, equipment, facilities and intellectual property that have been used in or can materially contribute to these programmes; in consultation with relevant international organizations, facilitating the orderly and voluntary return of refugees and displaced persons; maintaining civil law and order, including through encouraging international efforts to rebuild the capacity of the Iraqi civilian police force; eliminating all terrorist infrastructure and resources within Iraq and working to ensure that terrorists and terrorist groups are denied safe haven; supporting and coordinating demining and related activities; promoting accountability for crimes and atrocities committed by the previous Iraqi regime; and assuming immediate control of Iraqi institutions responsible for military and security matters and providing, as appropriate, for the demilitarization, demobilization, control, command, reformation, disestablishment, or reorganization of those institutions so that they no longer pose a threat to the Iraqi people or international peace and security but will be capable of defending Iraq's sovereignty and territorial integrity.

The United States, the United Kingdom and Coalition partners recognize the urgent need to create an environment in which the Iraqi people may freely determine their own political future. To this end, the United States, the United Kingdom and Coalition partners are facilitating the efforts of the Iraqi people to take the first steps towards forming a representative government, based on the rule of law, that affords fundamental freedoms and equal protection and justice under law to the people of Iraq without regard to ethnicity, religion or gender. The United States, the United Kingdom and Coalition partners are facilitating the establishment of representative institutions of government, and providing for the responsible administration of the Iraqi financial sector, for humanitarian relief, for economic reconstruction, for the transparent operation and repair of Iraq's infrastructure and natural resources, and for the progressive transfer of administrative responsibilities to such representative institutions of government, as appropriate. Our goal is to transfer responsibility for administration to representative Iraqi authorities as early as possible.

The United Nations has a vital role to play in providing humanitarian relief, in supporting the reconstruction of Iraq, and in helping in the formation of an

Iraqi interim authority. The United States, the United Kingdom and Coalition partners are ready to work closely with representatives of the United Nations and its specialized agencies and look forward to the appointment of a special coordinator by the Secretary-General. We also welcome the support and contributions of Member States, international and regional organizations, and other entities, under appropriate coordination arrangements with the Coalition Provisional Authority.

We would be grateful if you could arrange for the present letter to be circulated as a document of the Security Council.

(Signed) Jeremy Greenstock

Permanent Representative of the United Kingdom

(Signed) John D. Negroponte

Permanent Representative of the United States.”

- 12 As mentioned in the above letter, the occupying states, acting through the Commander of Coalition Forces, created the Coalition Provisional Authority to act as a “caretaker administration” until an Iraqi government could be established. It had power, inter alia, to issue legislation. On May 13, 2003 the US Secretary for Defence, Donald Rumsfeld, issued a memorandum formally appointing Ambassador Paul Bremer as Administrator of the Coalition Provisional Authority with responsibility for the temporary governance of Iraq. In CPA Regulation 1, dated May 16, 2003, Ambassador Bremer provided as follows:

“Pursuant to my authority as Administrator of the Coalition Provisional Authority (CPA), relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war, I hereby promulgate the following:

Section 1 The Coalition Provisional Authority

1) The CPA shall exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration, to restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political future, including by advancing efforts to restore and establish national and local institutions for representative governance and facilitating economic recovery and sustainable reconstruction and development.

2) The CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives, to be exercised under relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war. This authority shall be exercised by the CPA Administrator.

3) As the Commander of Coalition Forces, the Commander of U.S. Central Command shall directly support the CPA by deterring hostilities; maintaining Iraq’s territorial integrity and security; searching for, securing and destroying weapons of mass destruction; and assisting in carrying out Coalition policy generally.

Section 2 The Applicable Law

Unless suspended or replaced by the CPA or superseded by legislation issued by democratic institutions of Iraq, laws in force in Iraq as of April 16, 2003 shall continue to apply in Iraq insofar as the laws do not prevent the CPA from exercising its rights and fulfilling its obligations, or conflict with the present or any other Regulation or Order issued by the CPA.”

- 13 The Coalition Provisional Authority administration was divided into regional areas. CPA South was placed under UK responsibility and control, with a UK regional co-ordinator. It covered the southernmost four of Iraq's 18 provinces, each having a governorate co-ordinator. UK troops were deployed in the same area. The United Kingdom was represented at Coalition Provisional Authority headquarters through the office of the UK Special Representative. According to the Government, although the UK Special Representative and his office sought to influence Coalition Provisional Authority policy and decisions, UK personnel had no formal decision-making power within the Authority. All the Coalition Provisional Authority's administrative and legislative decisions were taken by Ambassador Bremer.
- 14 The United Nations Security Council Resolution 1483 referred to by Ambassador Bremer in Coalition Provisional Authority Regulation 1 was actually adopted six days later, on May 22, 2003. It provided as follows:

"The Security Council,
Recalling all its previous relevant resolutions,
Reaffirming the sovereignty and territorial integrity of Iraq,
Reaffirming also the importance of the disarmament of Iraqi weapons of mass destruction and of eventual confirmation of the disarmament of Iraq,
Stressing the right of the Iraqi people freely to determine their own political future and control their own natural resources, welcoming the commitment of all parties concerned to support the creation of an environment in which they may do so as soon as possible, and expressing resolve that the day when Iraqis govern themselves must come quickly,
Encouraging efforts by the people of Iraq to form a representative government based on the rule of law that affords equal rights and justice to all Iraqi citizens without regard to ethnicity, religion, or gender, and, in this connection, recalls resolution 1325 (2000) of 31 October 2000,

...

Welcoming the first steps of the Iraqi people in this regard, and noting in this connection the 15 April 2003 Nasiriyah statement and the 28 April 2003 Baghdad statement,

Resolved that the United Nations should play a vital role in humanitarian relief, the reconstruction of Iraq, and the restoration and establishment of national and local institutions for representative governance,

...

Noting the letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council (S/2003/538) and recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (the 'Authority'),

Noting further that other States that are not occupying powers are working now or in the future may work under the Authority,

Welcoming further the willingness of Member States to contribute to stability and security in Iraq by contributing personnel, equipment, and other resources under the Authority,

Concerned that many Kuwaitis and Third -State Nationals still are not accounted for since 2 August 1990,

Determining that the situation in Iraq, although improved, continues to constitute a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations,

1. *Appeals* to Member States and concerned organizations to assist the people of Iraq in their efforts to reform their institutions and rebuild their country, and to contribute to conditions of stability and security in Iraq in accordance with this resolution;
2. *Calls upon* all Member States in a position to do so to respond immediately to the humanitarian appeals of the United Nations and other international organizations for Iraq and to help meet the humanitarian and other needs of the Iraqi people by providing food, medical supplies, and resources necessary for reconstruction and rehabilitation of Iraq's economic infrastructure;
3. *Appeals* to Member States to deny safe haven to those members of the previous Iraqi regime who are alleged to be responsible for crimes and atrocities and to support actions to bring them to justice;
4. *Calls upon* the Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future;
5. *Calls upon* all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907;
- ...
8. *Requests* the Secretary-General to appoint a Special Representative for Iraq whose independent responsibilities shall involve reporting regularly to the Council on his activities under this resolution, coordinating activities of the United Nations in post-conflict processes in Iraq, coordinating among United Nations and international agencies engaged in humanitarian assistance and reconstruction activities in Iraq, and, in coordination with the Authority, assisting the people of Iraq through:
 - (a) coordinating humanitarian and reconstruction assistance by United Nations agencies and between United Nations agencies and non-governmental organizations;
 - (b) promoting the safe, orderly, and voluntary return of refugees and displaced persons;
 - (c) working intensively with the Authority, the people of Iraq, and others concerned to advance efforts to restore and establish national and local institutions for representative governance, including by working together to facilitate a process leading to an internationally recognized, representative government of Iraq;
 - (d) facilitating the reconstruction of key infrastructure, in cooperation with other international organizations;

- (e) promoting economic reconstruction and the conditions for sustainable development, including through coordination with national and regional organizations, as appropriate, civil society, donors, and the international financial institutions;
 - (f) encouraging international efforts to contribute to basic civilian administration functions;
 - (g) promoting the protection of human rights;
 - (h) encouraging international efforts to rebuild the capacity of the Iraqi civilian police force; and
 - (i) encouraging international efforts to promote legal and judicial reform;
9. *Supports* the formation, by the people of Iraq with the help of the Authority and working with the Special Representative, of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognized, representative government is established by the people of Iraq and assumes the responsibilities of the Authority;
- ...
24. *Requests* the Secretary-General to report to the Council at regular intervals on the work of the Special Representative with respect to the implementation of this resolution and on the work of the International Advisory and Monitoring Board and *encourages* the United Kingdom of Great Britain and Northern Ireland and the United States of America to inform the Council at regular intervals of their efforts under this resolution;
25. *Decides* to review the implementation of this resolution within twelve months of adoption and to consider further steps that might be necessary.
26. *Calls upon* Member States and international and regional organizations to contribute to the implementation of this resolution;
27. *Decides* to remain seized of this matter.”

4. Developments between July 2003 and June 2004

- 15 In July 2003 the Governing Council of Iraq was established. The Coalition Provisional Authority was required to consult with it on all matters concerning the temporary governance of Iraq.
- 16 On October 16, 2003 the United Nations Security Council passed a further resolution, Resolution 1511, which provided *inter alia* as follows:

“The Security Council

...

Underscoring that the sovereignty of Iraq resides in the State of Iraq, reaffirming the right of the Iraqi people freely to determine their own political future and control their own natural resources, reiterating its resolve that the day when Iraqis govern themselves must come quickly, and recognizing the importance of international support, particularly that of countries in the region, Iraq’s neighbours, and regional organizations, in taking forward this process expeditiously,

Recognizing that international support for restoration of conditions of stability and security is essential to the well-being of the people of Iraq as well as to the ability of all concerned to carry out their work on behalf of the people of Iraq, and welcoming Member State contributions in this regard under resolution 1483 (2003),

Welcoming the decision of the Governing Council of Iraq to form a preparatory constitutional committee to prepare for a constitutional conference that will draft a constitution to embody the aspirations of the Iraqi people, and urging it to complete this process quickly,

...

Determining that the situation in Iraq, although improved, continues to constitute a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations,

1. *Reaffirms* the sovereignty and territorial integrity of Iraq, and underscores, in that context, the temporary nature of the exercise by the Coalition Provisional Authority (Authority) of the specific responsibilities, authorities, and obligations under applicable international law recognized and set forth in resolution 1483 (2003), which will cease when an internationally recognized, representative government established by the people of Iraq is sworn in and assumes the responsibilities of the Authority, *inter alia* through steps envisaged in paragraphs 4 through 7 and 10 below;

...

4. *Determines* that the Governing Council and its ministers are the principal bodies of the Iraqi interim administration, which, without prejudice to its further evolution, embodies the sovereignty of the State of Iraq during the transitional period until an internationally recognized, representative government is established and assumes the responsibilities of the Authority;
5. *Affirms* that the administration of Iraq will be progressively undertaken by the evolving structures of the Iraqi interim administration;
6. *Calls* upon the Authority, in this context, to return governing responsibilities and authorities to the people of Iraq as soon as practicable and requests the Authority, in cooperation as appropriate with the Governing Council and the Secretary-General, to report to the Council on the progress being made;
7. *Invites* the Governing Council to provide to the Security Council, for its review, no later than 15 December 2003, in cooperation with the Authority and, as circumstances permit, the Special Representative of the Secretary-General, a timetable and a programme for the drafting of a new constitution for Iraq and for the holding of democratic elections under that constitution;
8. *Resolves* that the United Nations, acting through the Secretary-General, his Special Representative, and the United Nations Assistance Mission in Iraq, should strengthen its vital role in Iraq, including by providing humanitarian relief, promoting the economic reconstruction of and conditions for sustainable development in Iraq, and advancing efforts to restore and establish national and local institutions for representative government;

- ...
13. *Determines* that the provision of security and stability is essential to the successful completion of the political process as outlined in paragraph 7 above and to the ability of the United Nations to contribute effectively to that process and the implementation of resolution 1483 (2003), and *authorizes* a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq, including for the purpose of ensuring necessary conditions for the implementation of the timetable and programme as well as to contribute to the security of the United Nations Assistance Mission for Iraq, the Governing Council of Iraq and other institutions of the Iraqi interim administration, and key humanitarian and economic infrastructure;
 14. *Urges* Member States to contribute assistance under this United Nations mandate, including military forces, to the multinational force referred to in paragraph 13 above;
 15. *Decides* that the Council shall review the requirements and mission of the multinational force referred to in paragraph 13 above not later than one year from the date of this resolution, and that in any case the mandate of the force shall expire upon the completion of the political process as described in paragraphs 4 through 7 and 10 above, and expresses readiness to consider on that occasion any future need for the continuation of the multinational force, taking into account the views of an internationally recognized, representative government of Iraq;
- ...
25. *Requests* that the United States, on behalf of the multinational force as outlined in paragraph 13 above, report to the Security Council on the efforts and progress of this force as appropriate and not less than every six months;
 26. *Decides* to remain seized of the matter.”
- 17 On March 8, 2004 the Governing Council of Iraq promulgated the Law of Administration for the State of Iraq for the Transitional Period (known as the “Transitional Administrative Law”). This provided a temporary legal framework for the administration of Iraq for the transitional period which was due to commence by June 30, 2004 with the establishment of an interim Iraqi Government (the Interim Government) and the dissolution of the Coalition Provisional Authority.
- 18 Provision for the new regime was made in United Nations Security Council Resolution 1546, adopted on June 8, 2004, which provided inter alia, that the Security Council, acting under Ch.VII of the United Nations Charter:
- “1. *Endorses* the formation of a sovereign Interim Government of Iraq, as presented on 1 June 2004, which will assume full responsibility and authority by 30 June 2004 for governing Iraq while refraining from taking any actions affecting Iraq’s destiny beyond the limited interim period until an elected Transitional Government of Iraq assumes office as envisaged in paragraph four below;

2. *Welcomes* that, also by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty;

...

8. *Welcomes* ongoing efforts by the incoming Interim Government of Iraq to develop Iraqi security forces including the Iraqi armed forces (hereinafter referred to as 'Iraqi security forces'), operating under the authority of the Interim Government of Iraq and its successors, which will progressively play a greater role and ultimately assume full responsibility for the maintenance of security and stability in Iraq;

9. *Notes* that the presence of the multinational force in Iraq is at the request of the incoming Interim Government of Iraq and therefore *reaffirms* the authorization for the multinational force under unified command established under resolution 1511 (2003), having regard to the letters annexed to this resolution;

10. *Decides* that the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution expressing, inter alia, the Iraqi request for the continued presence of the multinational force and setting out its tasks, including by preventing and deterring terrorism, so that, inter alia, the United Nations can fulfil its role in assisting the Iraqi people as outlined in paragraph seven above and the Iraqi people can implement freely and without intimidation the timetable and programme for the political process and benefit from reconstruction and rehabilitation activities."

5. The transfer of authority to the Interim Government

- 19 On June 28, 2004 full authority was transferred from the Coalition Provisional Authority to the Interim Government and the Coalition Provisional Authority ceased to exist. Subsequently the Multi-National Force, including the British forces forming part of it, remained in Iraq pursuant to requests by the Iraqi Government and authorisations from the United Nations Security Council.

B. UK armed forces in Iraq May 2003 to June 2004

- 20 During this period the Coalition Forces consisted of six divisions that were under the overall command of US generals. Four were US divisions and two were multinational. Each division was given responsibility for a particular geographical area in Iraq. The United Kingdom was given command of the Multinational Division (South East), which comprised the provinces of Al-Basrah, Maysan, Thi Qar and Al-Muthanna, an area of 96,000sq km with a population of 4.6 million. There were 14,500 coalition troops, including 8,150 UK troops, stationed in Multinational Division (South East). The main theatre for operations by UK forces in Multinational Division (South East) were the Al-Basrah and Maysan provinces, with a total population of about 2.75 million people. Just over 8,000 British troops were deployed there, of whom just over 5,000 had operational responsibilities.
- 21 From May 1, 2003 onwards British forces in Iraq carried out two main functions. The first was to maintain security in the Multinational Division (South East) area,

in particular in Al-Basrah and Maysan provinces. The principal security task was the effort to re-establish the Iraqi security forces, including the Iraqi police. Other tasks included patrols, arrests, anti-terrorist operations, policing of civil demonstrations, protection of essential utilities and infrastructure and protecting police stations. The second main function of British troops was the support of the civil administration in Iraq in a variety of ways, from liaison with the Coalition Provisional Authority and Governing Council of Iraq and local government, to assisting with the rebuilding of the infrastructure.

- 22 In the *Aitken Report*,¹ prepared on behalf of the Army Chief of General Staff, the post-conflict situation in Iraq was described as follows:

“The context in which operations have been conducted in Iraq has been exceptionally complex. It is not for this report to comment on the *jus ad bellum* aspects of the operation, nor of the public’s opinions of the invasion. It is, however, important to note that the Alliance’s post-invasion plans concentrated more on the relief of a humanitarian disaster (which did not, in the event, occur on anything like the scale that had been anticipated), and less on the criminal activity and subsequent insurgency that actually took place. One consequence of that was that we had insufficient troops in theatre to deal effectively with the situation in which we found ourselves. Peace support operations require significantly larger numbers of troops to impose law and order than are required for prosecuting a war: ours were very thinly spread on the ground. In his investigation (in April 2005) of the Breadbasket incident [alleged abuse of Iraqis detained on suspicion of looting humanitarian aid stores], Brigadier Carter described conditions in Iraq thus:

‘... May 2003, some 4 weeks or so after British Forces had started to begin the transition from offensive operations to stabilisation. The situation was fluid. Battlegroups had been given geographic areas of responsibility based generally around their initial tactical objectives. Combat operations had officially ended, and rules of engagement had changed to reflect this, but there was a rising trend of shooting incidents. Although these were principally between Iraqis, seeking to settle old scores or involved in criminal activity, there were early indications that the threat to British soldiers was developing ... The structure of the British Forces was changing. Many of the heavier capabilities that had been required for the invasion were now being sent home. Some Force elements were required for operations elsewhere, and there was pressure from the UK to downsize quickly to more sustainable numbers ... Local attitudes were also changing. Initially ecstatic with happiness, the formerly downtrodden Shia population in and around Basra had become suspicious, and by the middle of May people were frustrated. Aspirations and expectations were not being met. There was no Iraqi administration or governance. Fuel and potable water were in short supply, electricity was intermittent, and the hospitals were full of wounded from the combat operations phase. Bridges and key routes had been destroyed by Coalition bombing. Law and order had completely collapsed. The Iraqi Police Service had melted away; the few security guards who remained were

¹ *Aitken Report* (January 25, 2008). See [69] below.

old and incapable; and the Iraqi Armed Forces had been captured, disbanded or deserted. Criminals had been turned out onto the streets and the prisons had been stripped. The judiciary were in hiding. Every government facility had been raided and all loose items had been removed. Insecure buildings had been occupied by squatters. Crime was endemic and in parts of Basra a state of virtual anarchy prevailed. Hijackings, child kidnappings, revenge killings, car theft and burglary were rife. In a very short space of time wealth was being comprehensively redistributed.’

In this environment, the British Army was the sole agent of law and order within its area of operations. When the Association of Chief Police Officers’ lead for international affairs, Mr Paul Kernaghan, visited Iraq in May 2003, he said that he would not recommend the deployment of civilian police officers to the theatre of operations due to the poor security situation. The last time the Army had exercised the powers of an Army of Occupation was in 1945 – and it had spent many months preparing for that role; in May 2003, the same soldiers who had just fought a high-intensity, conventional war were expected to convert, almost overnight, into the only people capable of providing the agencies of government and humanitarian relief for the people of Southern Iraq. Battlegroups (comprising a Lieutenant Colonel and about 500 soldiers) were allocated areas of responsibilities comprising hundreds of square miles; companies (a Major with about 100 men under command) were given whole towns to run. The British invasion plans had wisely limited damaging as much of the physical infrastructure as possible; but with only military personnel available to run that infrastructure, and very limited local staff support, the task placed huge strains on the Army.

One of the effects of this lack of civil infrastructure was the conundrum British soldiers faced when dealing with routine crime. Our experience in Northern Ireland, and in peace support operations around the world, has inculcated the clear principle of police primacy when dealing with criminals in operational environments. Soldiers accept that they will encounter crime, and that they will occasionally be required to arrest those criminals; but (despite some experience of this syndrome in Kosovo in 1999) our doctrine and practice had not prepared us for dealing with those criminals when there was no civil police force, no judicial system to deal with offenders, and no prisons to detain them in. Even when a nascent Iraqi police force was re-established in 2003, troops on the ground had little confidence in its ability to deal fairly or reasonably with any criminals handed over to it. In hindsight, we now know that some soldiers acted outside the law in the way they dealt with local criminals. However diligent they were, commanders were unable to be everywhere, and so were physically unable to supervise their troops to the extent that they should; as a result, when those instances did occur, they were less likely to be spotted and prevented.”

- 23 UK military records show that, as at June 30, 2004, there had been approximately 178 demonstrations and 1,050 violent attacks against coalition forces in Multinational Division (South East) since May 1, 2003. The violent attacks consisted of five anti-aircraft attacks, 12 grenade attacks, 101 attacks using improvised explosive devices, 52 attempted attacks using improvised explosive devices, 145

mortar attacks, 147 rocket propelled grenade attacks, 535 shootings and 53 others. The same records show that, between May 2003 and March 2004, 49 Iraqis were known to have been killed in incidents in which British troops used force.

C. The Rules of Engagement

- 24 The use of force by British troops during operations is covered by the appropriate Rules of Engagement. The Rules of Engagement governing the use of lethal force by British troops in Iraq during the relevant period was the subject of guidance contained in a card issued to every soldier, known as “Card Alpha”. Card Alpha set out the Rules of Engagement in the following terms:

“CARD A – GUIDANCE FOR OPENING FIRE FOR SERVICE PERSONNEL

AUTHORISED TO CARRY ARMS AND AMMUNITION ON DUTY

GENERAL GUIDANCE

1. This guidance does not affect your inherent right to self-defence. However, in all situations you are to use no more force than absolutely necessary.

FIREARMS MUST ONLY BE USED AS A LAST RESORT

2. When guarding property, you must not use lethal force other than for the **protection of human life**.

PROTECTION OF HUMAN LIFE

3. You may only open fire against a person if he/she is committing or about to commit an act **likely to endanger life and there is no other way to prevent the danger**.

CHALLENGING

4. A challenge **MUST** be given before opening fire unless:
 - a. To do this would be to increase the risk of death or grave injury to you or any other persons other than the attacker(s),
 - OR**
 - b. You or others in the immediate vicinity are under armed attack.
5. You are to challenge by shouting:

‘NAVY, ARMY, AIR FORCE, STOP OR I FIRE.’

Or words to that effect.

OPENING FIRE

6. If you have to open fire you are to:
 - a. Fire only aimed shots,
 - AND**
 - b. Fire no more rounds than are necessary,
 - AND**
 - c. Take all reasonable precautions not to injure anyone other than your target.”

*D. Investigations into Iraqi civilian deaths involving British soldiers***1. The decision to refer an incident for investigation by the Royal Military Police**

- 25 On June 21, 2003 Brigadier Moore (Commander of the 19 Mechanised Brigade in Iraq from June to November 2003) issued a formal policy on the investigation of shooting incidents. This policy provided that all shooting incidents were to be reported and the Divisional Provost Marshall was to be informed. Non-commissioned officers from the Royal Military Police were then to evaluate the incident and decide whether it fell within the Rules of Engagement. If it was decided that the incident did come within the Rules of Engagement, statements were to be recorded and a completed bulletin submitted through the chain of command. If the incident appeared to fall outside the Rules of Engagement and involved death or serious injury, the investigation was to be handed to the Royal Military Police, Special Investigation Branch² by the Divisional Provost Marshall at the earliest opportunity.
- 26 However, Brigadier Moore decided that from July 28, 2003 this policy should be revised. The new policy required that all such incidents should be reported immediately by the soldier involved to Multinational Division (South East) by means of a serious-incident report. There would then be an investigation into the incident by the Company Commander or the soldier's Commanding Officer. In his evidence to the domestic courts Brigadier Moore explained that:

"The form of an investigation into an incident would vary according to the security situation on the ground and the circumstances of the individual case. Generally, it would involve the Company Commander or Commanding Officer taking statements from the members of the patrol involved, and reviewing radio logs. It might also include taking photographs of the scene. Sometimes there would be further investigation through a meeting with the family/tribe of the person killed. Investigations at unit level, however, would not include a full forensic examination. Within the Brigade, we had no forensic capability."

If the Commanding Officer was satisfied, on the basis of the information available to him, that the soldier had acted lawfully and within the Rules of Engagement, there was no requirement to initiate an investigation by the Special Investigation Branch. The Commanding Officer would record his decision in writing to Brigadier Moore. If the Commanding Officer was not so satisfied, or if he had insufficient information to arrive at a decision, he was required to initiate a Special Investigation Branch investigation.

- 27 Between January and April 2004 there was a further reconsideration of this policy, prompted by the fact that the environment had become less hostile and also by the considerable media and Parliamentary interest in incidents involving UK forces in which Iraqis had died. On April 24, 2004 a new policy was adopted by the Commander of Multinational Division (South East), requiring all shooting incidents involving UK forces which resulted in a civilian being killed or injured to be investigated by the Special Investigation Branch. In exceptional cases the Brigade Commander could decide that an investigation was not necessary. Any

² See [28] below.

such decision had to be notified to the Commander of Multinational Division (South East) in writing.

2. Investigation by the Royal Military Police (Special Investigations Branch)

- 28 The Royal Military Police form part of the Army and deploy with the Army on operations abroad, but have a separate chain of command. Military police officers report to the Provost Marshall, who reports to the Adjutant General. Within the Royal Military Police, the Special Investigation Branch is responsible for the investigation of serious crimes committed by members of the British forces while on service, incidents involving contact between the military and civilians and any special investigations tasked to it, including incidents involving civilian deaths caused by British soldiers. To secure their practical independence on operations, the Special Investigation Branch deploy as entirely discrete units and are subject to their own chain of command, headed by provost officers who are deployed on operations for this purpose.
- 29 Investigations into Iraqi civilian deaths involving British soldiers were triggered either by the Special Investigation Branch being asked to investigate by the Commanding Officer of the units concerned or by the Special Investigation Branch on its own initiative, when it became aware of an incident by other means. However, the latter type of investigation could be terminated if the Special Investigation Branch was instructed to stop by the Provost Marshall or the Commanding Officer of the unit involved.
- 30 Special Investigation Branch investigations in Iraq were hampered by a number of difficulties such as security problems, lack of interpreters, cultural considerations (for example, the Islamic practice requiring a body to be buried within 24 hours and left undisturbed for 40 days), the lack of pathologists and post-mortem facilities, the lack of records, problems with logistics, the climate and general working conditions. The *Aitken Report*³ summarised the position as follows:

“It was not only the combat troops who were overstretched in these circumstances. The current military criminal justice system is relevant, independent, and fit for purpose; but even the most effective criminal justice system will struggle to investigate, advise on and prosecute cases where the civil infrastructure is effectively absent. And so, in the immediate aftermath of the ground war, the Service Police faced particular challenges in gathering evidence of a quality that would meet the very high standards required under English law. National records – usually an integral reference point for criminal investigations – were largely absent; a different understanding of the law between Iraqi people and British police added to an atmosphere of hostility and suspicion; and the Army was facing an increasingly dangerous operational environment – indeed, on 24 June 2003, six members of the Royal Military Police were killed in Al Amarah. Local customs similarly hampered the execution of British standards of justice: in the case of Nadhem Abdullah, for instance, the family of the deceased refused to hand over the body for forensic examination – significantly reducing the quality of evidence surrounding his death.”

³ See [69] below.

The *Aitken Report* also referred to the problems caused to the Special Investigation Branch, when attempting to investigate serious allegations of abuse, by the sense of loyalty to fellow soldiers which could lead to a lack of co-operation from Army personnel and to what the judge in the court-martial concerning the killing of the sixth applicant's son had described as a "wall of silence" from some of the military witnesses called to give evidence.

- 31 On conclusion of a Special Investigation Branch investigation, the Special Investigation Branch officer would report in writing to the Commanding Officer of the unit involved. Such a report would include a covering letter and a summary of the evidence, together with copies of any documentary evidence relevant to the investigation in the form of statements from witnesses and investigators. The report would not contain any decision as to the facts or conclusions as to what had happened. It was then for the Commanding Officer to decide whether or not to refer the case to the prosecuting authority for possible trial by court-martial.
- 32 The *Aitken Report*⁴ commented on the prosecution of armed-forces personnel in connection with the death of Iraqi civilians, as follows:

"Four cases involving Iraqi deaths as a result of deliberate abuse have been investigated, and subsequently referred to the Army Prosecuting Authority (APA) on the basis there was a *prima facie* case that the victims had been killed unlawfully by British troops. The APA preferred charges on three of these cases on the basis that it considered there was a realistic prospect of conviction, and that trial was in the public and service interest; and yet not one conviction for murder or manslaughter has been recorded.

The Army's position is straightforward on the issue of prosecution. Legal advice is available for commanding officers and higher authorities to assist with decisions on referring appropriate cases to the APA. The Director Army Legal Services (DALs), who is responsible to the Adjutant General for the provision of legal services to the Army, is additionally appointed by The Queen as the APA. In that capacity, he has responsibility for decisions on whether to direct trial for all cases referred by the military chain of command, and for the prosecution of all cases tried before courts-martial, the Standing Civilian Court and the Summary Appeal Court and for appeals before the Courts-Martial Appeal Court and the House of Lords. DALs delegates these functions to ALS officers appointed as prosecutors in the APA, and Brigadier Prosecutions has day to day responsibility for the APA. The APA is under the general superintendence of the Attorney-General and is, rightly, independent of the Army chain of command: the APA alone decides whether to direct court-martial trial and the appropriate charges, and neither the Army chain of command, nor Ministers, officials nor anyone else can make those decisions. However complex the situation in which it finds itself, the Army must operate within the law at all times; once the APA has made its decision (based on the evidence and the law), the Army has to accept that the consequences of prosecuting particular individuals or of particular charges may have a negative impact on its reputation.

The absence of a single conviction for murder or manslaughter as a result of deliberate abuse in Iraq may appear worrying, but it is explicable. Evidence

⁴ *Aitken Report*, 2008: see [69] below.

has to be gathered (and, as already mentioned, this was not an easy process); that evidence has to be presented in court; and defendants are presumed innocent unless the prosecution can prove its case beyond reasonable doubt. That is a stiff test – no different to the one that applies in our civilian courts. In the broader context, the outcome from prosecutions brought to court martial by the APA is almost exactly comparable with the equivalent civilian courts: for example, as at the end of 2006, the conviction rates after trial in the court martial system stood at 12per cent as compared with 13per cent in the Crown Courts. It is inevitable that some prosecutions will fail; but this does not mean that they should not have been brought in the first place. It is the courts, after all, that determine guilt, not the prosecutors. Indeed, the fact that only a small number of all the 200-odd cases investigated by Service Police in Iraq resulted in prosecution could be interpreted as both a positive and a negative indicator: positive, in that the evidence and the context did not support the preferring of criminal charges; but negative, in that we know that the Service Police were hugely hampered, in some cases, in their ability to collect evidence of a high enough standard for charges to be preferred or for cases to be successfully prosecuted.

It is important to note that none of this implies any fundamental flaws in the effectiveness of the key elements of the Military Criminal Justice System. Both the Special Investigation Branch of the Royal Military Police (RMP(SIB)) and the APA were independently inspected during 2007. The Police inspection reported that ‘... Her Majesty’s Inspectorate of Constabulary assess the RMP(SIB) as having the capability and capacity to run a competent level 36 (serious criminal) reactive investigation’; and the inspection of the APA in February and March 2007 by Her Majesty’s Crown Prosecution Service Inspectorate concluded that: ‘... the APA undertakes its responsibilities in a thorough and professional manner, often in difficult circumstances’, adding that 95.7per cent of decisions to proceed to trial were correct on evidential grounds, and 100per cent of decisions to proceed to trial were properly based on public or Service interest grounds.”

E. The deaths of the applicants’ relatives

- 33 The following accounts are based on the witness statements of the applicants and the British soldiers involved in each incident. These statements were also submitted to the domestic courts and, as regards all but the fifth applicant, summarised in their judgments (particularly the judgment of the Divisional Court).

1. The first applicant

- 34 The first applicant is the brother of Hazim Jum’aa Gatteh Al-Skeini (Hazim Al-Skeini), who was 23 at the time of his death. Hazim Al-Skeini was one of two Iraqis from the Beini Skein tribe who were shot dead in the Al-Majidiyah area of Basrah just before midnight on August 4, 2003 by Sergeant A, the commander of a British patrol.
- 35 In his witness statement, the first applicant explained that, during the evening in question, various members of his family had been gathering at a house in Al-Majidiyah for a funeral ceremony. In Iraq it is customary for guns to be

discharged at a funeral. The first applicant stated that he was engaged in receiving guests at the house, as they arrived for the ceremony, and saw his brother fired upon by British soldiers as he was walking along the street towards the house. According to the first applicant, his brother was unarmed and only about 10m away from the soldiers when he was shot and killed. Another man with him was also killed. He had no idea why the soldiers opened fire.

- 36 According to the British account of the incident, the patrol, approaching on foot and on a very dark night, heard heavy gunfire from a number of different points in Al-Majidiyah. As the patrol got deeper into the village they came upon two Iraqi men in the street. One was about 5m from Sergeant A, who was leading the patrol. Sergeant A saw that he was armed and pointing the gun in his direction. In the dark, it was impossible to tell the position of the second man. Believing that his life and those of the other soldiers in the patrol were at immediate risk, Sergeant A opened fire on the two men without giving any verbal warning.
- 37 The following day, Sergeant A produced a written statement describing the incident. This was passed to the Commanding Officer of his battalion, Colonel G, who took the view that the incident fell within the Rules of Engagement and duly wrote a report to that effect. Colonel G sent the report to Brigade, where it was considered by Brigadier Moore. Brigadier Moore queried whether the other man had been pointing his gun at the patrol. Colonel G wrote a further report that dealt with this query to Brigadier Moore's satisfaction. The original report was not retained in Brigade records. Having considered Colonel G's further report, as did his deputy chief of staff and his legal adviser, Brigadier Moore was satisfied that the actions of Sergeant A fell within the Rules of Engagement and so he did not order any further investigation.
- 38 On August 11, 13 and 16, 2003 Colonel G met with members of the dead men's tribe. He explained why Sergeant A had opened fire and gave the tribe a charitable donation of US \$2,500 from the British Army Goodwill Payment Committee, together with a letter explaining the circumstances of the deaths and acknowledging that the deceased had not intended to attack anyone.

2. The second applicant

- 39 The second applicant is the widow of Muhammad Salim, who was shot and fatally wounded by Sergeant C shortly after midnight on November 6, 2003.
- 40 The second applicant was not present when her husband was shot and her evidence was based on what she was told by those who were present. She stated that on November 5, 2003, during Ramadan, Muhammad Salim went to visit his brother-in-law at his home in Basrah. At about 11.30. British soldiers raided the house. They broke down the front door. One of the British soldiers came face-to-face with the second applicant's husband in the hall of the house and fired a shot at him, hitting him in the stomach. The British soldiers took him to the Czech military hospital, where he died on November 7, 2003.
- 41 According to the British account of the incident, the patrol had received information from an acquaintance of one of their interpreters that a group of men armed with long-barrelled weapons, grenades and rocket-propelled grenades had been seen entering the house. The order was given for a quick search-and-arrest operation. After the patrol failed to gain entry by knocking, the door was broken down. Sergeant C entered the house through the front door with two other soldiers

and cleared the first room. As he entered the second room he heard automatic gunfire from within the house. When Sergeant C moved forward into the next room by the bottom of the stairs, two men armed with long barrelled weapons rushed down the stairs towards him. There was no time to give a verbal warning. Sergeant C believed that his life was in immediate danger. He fired one shot at the leading man, the second applicant's husband, and hit him in the stomach. He then trained his weapon on the second man who dropped his gun. The applicant's family subsequently informed the patrol that they were lawyers and were in dispute with another family of lawyers over the ownership of office premises, which had led to their being subjected to two armed attacks which they had reported to the police, one three days before and one only 30 minutes before the patrol's forced entry.

- 42 On November 6, 2003 the Company Commander produced a report of the incident. He concluded that the patrol had deliberately been provided with false intelligence by the other side in the feud. Having considered the report and spoken to the Company Commander, Colonel G came to the conclusion that the incident fell within the Rules of Engagement and did not require any further Special Investigation Branch investigation. He therefore produced a report to that effect the same day and forwarded it to Brigade, where it was considered by Brigadier General Jones. Brigadier Jones discussed the matter with his deputy chief of staff and his legal adviser. He also discussed the case with his political adviser. As a result, Brigadier Jones also concluded that it was a straightforward case that fell within the Rules of Engagement and duly issued a report to that effect. The applicant, who had three young children and an elderly mother-in-law to support, received US \$2,000 from the British Army Goodwill Payment Committee, together with a letter setting out the circumstances of the killing.

3. The third applicant

- 43 The third applicant is the widower of Hannan Mahaibas Sadde Shmailawi, who was shot and fatally wounded on November 10, 2003 at the Institute of Education in the Al-Maaqal area of Basrah, where the third applicant worked as a night porter and lived with his wife and family.
- 44 According to the third applicant's witness statement, at about 20.00 on the evening in question, he and his family were sitting round the dinner table when there was a sudden burst of machine-gunfire from outside the building. Bullets struck his wife in the head and ankles and one of his children on the arm. The applicant's wife and child were taken to hospital, where his child recovered but his wife died.
- 45 According to the British account of the incident, the third applicant's wife was shot during a fire-fight between a British patrol and a number of unknown gunmen. When the area was illuminated by parachute flares, at least three men with long-barrelled weapons were seen in open ground, two of whom were firing directly at the British soldiers. One of the gunmen was shot dead during this exchange of fire with the patrol. After about seven to 10 minutes the firing ceased and armed people were seen running away. A woman (the third applicant's wife) with a head injury and a child with an arm injury were found when the buildings were searched. Both were taken to hospital.
- 46 The following morning, the Company Commander produced a report concerning the incident, together with statements from the soldiers involved. After he had

considered the report and statements, Colonel G came to the conclusion that the incident fell within the Rules of Engagement and did not require any further Special Investigation Branch investigation. He duly produced a report to that effect, which he then forwarded to Brigade. The report was considered by Brigadier Jones, who also discussed the matter with his deputy chief of staff, his legal adviser and Colonel G. As a result, Brigadier Jones came to the conclusion that the incident fell within the Rules of Engagement and required no further investigation.

4. The fourth applicant

- 47 The fourth applicant is the brother of Waleed Sayay Muzban, aged 43, who was shot and fatally injured on the night of August 24, 2003 by Lance Corporal S in the Al-Maqaal area of Basrah.
- 48 The fourth applicant was not present when his brother was shot, but he claims that the incident was witnessed by his neighbours. In his witness statement he stated that his understanding was that his brother was returning home from work at about 20.30 on the evening in question. He was driving a minibus along a street called Souq Hitteen, near where he and the fourth applicant lived. For no apparent reason, according to the applicant's statement, the minibus "came under a barrage of bullets", as a result of which Waleed was mortally wounded in the chest and stomach.
- 49 Lance Corporal S was a member of a patrol carrying out a check around the perimeter of a coalition military base (Fort Apache), where three Royal Military Police officers had been killed by gunfire from a vehicle the previous day. According to the British soldier's account of the incident, Lance Corporal S became suspicious of a minibus, with curtains over its windows, that was being driven towards the patrol at a slow speed with its headlights dipped. When the vehicle was signalled to stop, it appeared to be trying to evade the soldiers so Lance Corporal S pointed his weapon at the driver and ordered him to stop. The vehicle then stopped and Lance Corporal S approached the driver's door and greeted the driver (the fourth applicant's brother). The driver reacted in an aggressive manner and appeared to be shouting over his shoulder to people in the curtained-off area in the back of the vehicle. When Lance Corporal S tried to look into the back of the vehicle, the driver pushed him away by punching him in the chest. The driver then shouted into the back of the vehicle and made a grab for Lance Corporal S's weapon. Lance Corporal S had to use force to pull himself free. The driver then accelerated away, swerving in the direction of various other members of the patrol as he did so. Lance Corporal S fired at the vehicle's tyres and it came to a halt about 100m from the patrol. The driver turned and again shouted into the rear of the vehicle. He appeared to be reaching for a weapon. Lance Corporal S believed that his team was about to be fired on by the driver and others in the vehicle. He therefore fired about five aimed shots. As the vehicle sped off, Lance Corporal S fired another two shots at the rear of the vehicle. After a short interval, the vehicle screeched to a halt. The driver got out and shouted at the British soldiers. He was ordered to lie on the ground. The patrol then approached the vehicle to check for other armed men. The vehicle proved to be empty. The driver was found to have three bullet wounds in his back and hip. He was given first aid and then taken to the Czech military hospital where he died later that day or the following day.

- 50 The Special Investigation Branch commenced an investigation on August 29, 2003. The investigators recovered fragments of bullets, empty bullet cases and took digital photographs of the scene. The vehicle was recovered and transported to the United Kingdom. The deceased's body had been returned to the family for burial and no post mortem had been carried out, so the Special Investigation Branch took statements from the two Iraqi surgeons who had operated on him. A meeting was arranged with the family to seek their consent for an exhumation and post mortem, but this was delayed. Nine military witnesses involved in the incident were interviewed and had statements taken and a further four individuals were interviewed but found to have no evidence to offer. Lance Corporal S was not, however, questioned. Since he was suspected by the Special Investigation Branch of having acted contrary to the Rules of Engagement, it was Special Investigation Branch practice not to interview him until there was enough evidence to charge him. A forensic examination was carried out at the scene on September 6, 2003.
- 51 On August 29, 2003 Colonel G sent his initial report concerning the incident to Brigadier Moore. In it he stated that he was satisfied that Lance Corporal S believed that he was acting lawfully within the Rules of Engagement. However, Colonel G went on to express the view that it was a complex case that would benefit from a Special Investigation Branch investigation. After Brigadier Moore had considered Colonel G's report, discussed the matter with his Deputy Chief of Staff and taken legal advice, it was decided that the matter could be resolved with a unit-level investigation, subject to a number of queries being satisfactorily answered. As a result, Colonel G produced a further report dated September 12, 2003, in which he dealt with the various queries and concluded that a Special Investigation Branch investigation was no longer required. After discussing the matter again with his Deputy Chief of Staff and having taken further legal advice, Brigadier Moore concluded that the case fell within the Rules of Engagement.
- 52 By this stage, Brigadier Moore had been informed that the Special Investigation Branch had commenced an investigation into the incident. On September 17, 2003 Colonel G wrote to the Special Investigation Branch asking them to terminate the investigation. The same request was made by Brigadier Moore through his Chief of Staff during a meeting with the Senior Investigating Officer from the Special Investigation Branch. The Special Investigation Branch investigation was terminated on September 23, 2003. The deceased's family received US \$1,400 from the British Army Goodwill Payment Committee and a further US \$3,000 in compensation for the minibus.
- 53 Following the fourth applicant's application for judicial review,⁵ the case was reviewed by senior investigation officers in the Special Investigation Branch and the decision was taken to re-open the investigation. The investigation was recommenced on June 7, 2004 and completed on December 3, 2004, despite difficulties caused by the very dangerous conditions in Iraq at that time.
- 54 On completing the investigation the Special Investigation Branch reported to the soldier's Commanding Officer, who referred the case to the Army Prosecuting Authority in February 2005. The Army Prosecuting Authority decided that a formal preliminary examination of the witnesses should be held, in order to clarify any uncertainties and ambiguities in the evidence. Depositions were taken by the Army Prosecuting Authority from the soldiers who had witnessed the shooting, and who

⁵ See [73] below.

were the only known witnesses. Advice was obtained from an independent senior counsel, who advised that there was no realistic prospect of conviction, since there was no realistic prospect of establishing that Lance Corporal S had not fired in self-defence. The file was sent to the Attorney General, who decided not to exercise his jurisdiction to order a criminal prosecution.

5. The fifth applicant

- 55 The fifth applicant is the father of Ahmed Jabbar Kareem Ali, who died on May 8, 2003, aged 15.
- 56 According to the statements made by the fifth applicant for the purpose of United Kingdom court proceedings, on May 8, 2003 his son did not return home at 13.30 as expected. The fifth applicant went to look for him at Al-Saad Square, where he was told that British soldiers had arrested some Iraqi youths earlier in the day. The applicant continued to search for his son and was contacted the following morning by A, another young Iraqi, who told that applicant that he, the applicant's son and two others had been arrested by British soldiers the previous day, beaten up and forced into the waters of the Shatt Al-Arab. Later on May 9, 2003 the applicant's brother informed "the British police" about the incident and was requested to surrender Ahmed's identity card. Having spent several days waiting and searching, the applicant found his son's body in the water on May 10, 2003.
- 57 The applicant immediately took his son's body to "the British police station", where he was told to take the body to the local hospital. The Iraqi doctor on duty told the applicant that he was not qualified to carry out a post mortem and that there were no pathologists available. The applicant decided to bury his son, since in accordance with Islamic practice burial should take place within 24 hours of death.
- 58 About 10–15 days after his son's funeral, the applicant returned to "the British police station" to ask for an investigation, but he was informed that it was not the business of "the British police" to deal with such matters. He returned to the "police station" some days later, and was informed that the Royal Military Police wished to contact him and that he should go to the Presidential Palace. The following day the applicant met with Special Investigation Branch officers at the Presidential Palace and was informed that an investigation would be commenced.
- 59 The Special Investigation Branch interviewed A and took a statement from him. They took statements from the applicant and other family members. At least a month after the incident, the investigators went to Al-Saad Square and retrieved clothing belonging to the applicant's son and to the other young men who had been arrested at the same time. At the end of the 40-day mourning period, the applicant consented to his son's body being exhumed for post-mortem examination, but it was not possible at that point to establish either whether Ahmed had been beaten prior to death or what had been the cause of death. The applicant contends that he was never given an explanation as to the post-mortem findings and that he was not kept fully informed of the progress of the investigation in general, since many of the documents he was given were in English or had been badly translated into Arabic.
- 60 The applicant claims that 18 months elapsed after the exhumation of his son's body during which time he had no contact with the investigators. In August 2005 he was informed that four soldiers had been charged with manslaughter and that

a trial would take place in England. The court martial was held between September 2005 and May 2006. By that time, three of the seven soldiers who had been accused of his homicide had left the Army, and a further two were absent without leave. It was the prosecution case that the soldiers had assisted Iraqi police officers to arrest the four youths on suspicion of looting and that they had driven them to the river and forced them in at gunpoint “to teach them a lesson”. The applicant and A gave evidence to the court-martial in April 2006. The applicant found the trial process confusing and intimidating and he was left with the impression that the court was biased in favour of the accused. A gave evidence that the applicant’s son had appeared to be in distress in the water, but that the soldiers had driven away without helping him. However, he was not able to identify the defendants as the soldiers involved. The defendants denied any responsibility for the death and were acquitted because A’s evidence was found to be inconsistent and unreliable.

- 61 The applicant’s son’s case was one of the six cases investigated in the *Aitken Report*.⁶ Under the heading “Learning Lessons from Discipline Cases” the report stated:

“[W]e know that two Initial Police Reports were produced in May 2003 relating to allegations that, on two separate occasions but within the space of just over a fortnight, Iraqis had drowned in the Shat’ al-Arab at the hands of British soldiers. That one of those cases did not subsequently proceed to trial is irrelevant: at the time, an ostensibly unusual event was alleged to have occurred twice in a short space of time. With all their other duties, the commanders on the ground cannot reasonably be blamed for failing to identify what may or may not have been a trend; but a more immediate, effective system for referring that sort of information to others with the capacity to analyse it might have identified such a trend. In fact, the evidence suggests that these were two isolated incidents; but had they been a symptom of a more fundamental failing, they might have been overlooked. By comparison, if there had been two reports of a new weapon being used by insurgents to attack British armoured vehicles within a fortnight, it is certain that the Lessons Learned process would have identified its significance, determined the counter-measures needed to combat it, and quickly disseminated new procedures to mitigate the risk. The fact that this process does not apply to disciplinary matters is only partly explained by the need for confidentiality and the preservation of evidence; but it is a failure in the process that could be fairly easily rectified without compromising the fundamental principle of innocence until proven guilty.”

The report continued, under the heading “Delay”;

“The amount of time taken to resolve some of the cases with which this report is concerned has been unacceptable. ... the court martial in connection with the death of Ahmed Jabber Kareem did not convene until September 2005, 28 months after he died; by that time, three of the seven soldiers who had been accused of his murder had left the Army, and a further two were absent without leave.

⁶ See [69] below.

In most cases, it is inappropriate for the Army to take administrative action against any officer or soldier until the disciplinary process has been completed, because of the risk of prejudicing the trial. When that disciplinary process takes as long as it has taken in most of these cases, then the impact of any subsequent administrative sanctions is significantly reduced – indeed, such sanctions are likely to be counterproductive. Moreover, the longer the disciplinary process takes, the less likely it is that the chain of command will take proactive measures to rectify the matters that contributed to the commission of the crimes in the first place.”

- 62 The fifth applicant brought civil proceedings against the Ministry of Defence for damages in respect of his son’s death. The claim was settled without going to hearing, by the payment of £115,000 on December 15, 2008. In addition, on February 20, 2009 Major General Cubbitt wrote to the fifth applicant and formally apologised on behalf of the British Army for its role in his son’s death.

6. The sixth applicant

- 63 The sixth applicant is a Colonel in the Basrah police force. His son, Baha Mousa, was aged 26 when he died whilst in the custody of the British Army, three days after having been arrested by soldiers on September 14, 2003.
- 64 According to the sixth applicant, on the night of September 13/14, 2003 his son had been working as a receptionist at the Ibn Al-Haitham Hotel in Basrah. Early in the morning of September 14, the applicant went to the hotel to pick his son up from work. On his arrival he noticed that a British unit had surrounded the hotel. The applicant’s son and six other hotel employees were lying on the floor of the hotel lobby with their hands behind their heads. The applicant expressed his concern to the lieutenant in charge of the operation, who reassured him that it was a routine investigation that would be over in a couple of hours. On the third day after his son had been detained, the sixth applicant was visited by a Royal Military Police unit. He was told that his son had been killed in custody at a British military base in Basrah. He was asked to identify the corpse. The applicant’s son’s body and face were covered in blood and bruises; his nose was broken and part of the skin of his face had been torn away.
- 65 One of the other hotel employees who were arrested on September 14, 2003 stated in a witness statement prepared for the UK domestic court proceedings that, once the prisoners had arrived at the base, the Iraqi detainees were hooded, forced to maintain stress positions, denied food and water and kicked and beaten. During the detention, Baha Mousa was taken into another room, where he could be heard screaming and moaning.
- 66 Late on September 15, 2003 Brigadier Moore, who had taken part in the operation in which the hotel employees had been arrested, was informed that Baha Mousa was dead and that other detainees had been ill-treated. The Special Investigation Branch was immediately called in to investigate the death. Since local hospitals were on strike, a pathologist was flown in from the United Kingdom. Baha Mousa was found to have 93 identifiable injuries on his body and to have died of asphyxiation. Eight other Iraqis had also been inhumanely treated, with two requiring hospital treatment. The investigation was concluded in early April 2004 and the report distributed to the unit’s chain of command.

- 67 On December 14, 2004 the Divisional Court held that the inquiry into the applicant's son's death had not been effective.⁷ On December 21, 2005 the Court of Appeal decided to remit the question to the Divisional Court since there had been further developments.⁸
- 68 On July 19, 2005 seven British soldiers were charged with criminal offences in connection with Baha Mousa's death. On September 19, 2006, at the start of the court-martial, one of the soldiers pleaded guilty to the war crime of inhumane treatment but not guilty to manslaughter. On February 14, 2007 charges were dropped against four of the seven soldiers and on March 13, 2007 the other two soldiers were acquitted. On April 30, 2007 the soldier convicted of inhumane treatment was sentenced to a year's imprisonment and dismissal from the Army.
- 69 On January 25, 2008 the Ministry of Defence published a report written by Brigadier Robert Aitken concerning six cases of alleged deliberate abuse and killing of Iraqi civilians, including the deaths of the fifth and sixth applicants' sons ("the *Aitken Report*").
- 70 The applicant brought civil proceedings against the Ministry of Defence, which concluded in July 2008 by the formal and public acknowledgement of liability and the payment of £575,000 in compensation.
- 71 In a written statement given in Parliament on May 14, 2008 the Secretary of State for Defence announced that there would be a public inquiry into the death of Baha Mousa. The Inquiry is chaired by a retired Court of Appeal judge, with the following terms of reference:

"To investigate and report on the circumstances surrounding the death of Baha Mousa and the treatment of those detained with him, taking account of the investigations which have already taken place, in particular where responsibility lay for approving the practice of conditioning detainees by any members of the 1st Battalion, The Queen's Lancashire Regiment in Iraq in 2003, and to make recommendations."

At the time of adoption of the present judgment, the Inquiry had concluded the oral hearings but had not yet delivered its report.

F. The domestic proceedings under the Human Rights Act

1. The Divisional Court

- 72 On March 26, 2004, the Secretary of State for Defence decided, in connection with the deaths of 13 Iraqi civilians including the relatives of the six applicants: (1) not to conduct independent inquiries into the deaths; (2) not to accept liability for the deaths; (3) not to pay just satisfaction.
- 73 The 13 claimants applied for judicial review of these decisions, seeking declarations that both the procedural and the substantive obligations of art.2 (and, in the case of the sixth applicant, art.3) of the Convention had been violated as a result of the deaths and the Secretary of State's refusal to order any investigation. On May 11, 2004 a judge of the Divisional Court directed that six test cases would proceed to hearing (including the cases of the first, second, third, fourth and sixth

⁷ See [77] below.

⁸ See [81] below.

applicants) and that the other seven cases (including that of the fifth applicant) would be stayed pending the resolution of the preliminary issues.

- 74 On December 14, 2004 the Divisional Court rejected the claims of the first four applicants but accepted the claim of the sixth applicant.⁹ Having reviewed this Court's case law, in particular *Banković v Belgium* (2007) 44 E.H.R.R. SE5, it held that, essentially, jurisdiction under art.1 of the Convention was territorial, although there were exceptions. One exception applied where a state party had effective control of an area outside its own territory. This basis of jurisdiction applied only where the territory of one contracting state was controlled by another contracting state, since the Convention operated essentially within its own regional sphere and permitted no vacuum within that space. This basis of jurisdiction could not, therefore, apply in Iraq.
- 75 There was an additional exception, which arose from the exercise of authority by a contracting state's agents anywhere in the world, but this was limited to specific cases recognised by international law and identified piece-meal in the Court's case law. No general rationale in respect of this group of exceptions was discernable from the Court's case law. However, the instances recognised so far arose out of the exercise of state authority in or from a location which had a discrete quasi-territorial quality, or where the state agent's presence in the foreign state was consented to by that state and protected by international law, such as embassies, consulates, vessels and aircraft registered in the respondent State. A British military prison, operating in Iraq with the consent of the Iraqi sovereign authorities and containing arrested suspects, could be covered by this narrow exception. It was arguable that *Öcalan v Turkey* (2003) 37 E.H.R.R. 10, also fell into this category, since the applicant was arrested in a Turkish aircraft and taken immediately to Turkey. However, the Divisional Court did not consider that the Chamber judgment in *Öcalan* should be treated as "illuminating", since Turkey had not raised any objection based on lack of jurisdiction at the admissibility stage.
- 76 It followed that the deaths as a result of military operations in the field, such as those complained of by the first four applicants, did not fall within the United Kingdom's jurisdiction under art.1 of the Convention, but that the death of the sixth applicant's son, in a British military prison, did. The Divisional Court further held that the scope of the Human Rights Act 1998 was identical to that of the Convention for these purposes.
- 77 The court found that there had been a breach of the investigative duty under arts 2 and 3 of the Convention in respect of the sixth applicant's son since, by July 2004, some 10 months after the killing, the results of the investigation were unknown and inconclusive. The judge commented that:

"329. ... Although there has been evidence of a rather general nature about the difficulties of conducting investigations in Iraq at that time – about basic security problems involved in going to Iraqi homes to interview people, about lack of interpreters, cultural differences, logistic problems, lack of records, and so forth – without any further understanding of the outcome of the [Special Investigation Branch's] report, it is impossible to understand what, if any,

⁹ *R. (on the application of Al-Skeini) v Secretary of State for Defence* [2004] EWHC 2911 (Admin); [2005] 2 W.L.R. 1401.

relevance any of this has to a death which occurred not in the highways or byways of Iraq, but in a military prison under the control of British forces.

...

330. Although Captain Logan says that identity parades were logistically very difficult, detainees were moved to a different location, and some military witnesses had returned to the UK, she also says that these problems only delayed the process but did not prevent it taking place ‘satisfactorily’ There is nothing else before us to explain the dilatoriness of the investigative process: which might possibly be compared with the progress, and open public scrutiny, which we have noted seems to have been achieved with other investigations arising out of possible offences in prisons under the control of US forces. As for the [Special Investigation Branch’s] report itself, on the evidence before us ... that would not contain any decision as to the facts or any conclusions as to what has or might have happened.

331. In these circumstances we cannot accept [counsel for the Government’s] submission that the investigation has been adequate in terms of the procedural obligation arising out of article 2 of the Convention. Even if an investigation solely in the hands of the [Special Investigation Branch] might be said to be independent, on the grounds that the [Special Investigation Branch] are hierarchically and practically independent of the military units under investigation, as to which we have doubts in part because the report of the [Special Investigation Branch] is to the unit chain of command itself, it is difficult to say that the investigation which has occurred has been timely, open or effective.”

In respect of the other five deaths, the judge considered that, if he were wrong on the jurisdiction issue and the claims did fall within the scope of the Convention, the investigative duty under art.2 had not been met, for the following reasons:

“337. ... [I]n all these cases, as in the case of Mr Mousa, the United Kingdom authorities were proceeding on the basis that the Convention did not apply. Thus the immediate investigations were in each case conducted, as a matter of policy, by the unit involved: only in case 4, that concerning Mr Waleed Muzban, was there any involvement of the [Special Investigation Branch], and that was stood down, at any rate before being re-opened (at some uncertain time) upon a review of the file back in the UK. The investigations were therefore not independent. Nor were they effective, for they essentially consisted only in a comparatively superficial exercise, based on the evidence of the soldiers involved themselves, and even then on a paucity of interviews or witness statements, an exercise which was one-sided and omitted the assistance of forensic evidence such as might have become available from ballistic or medical expertise.

...

339. In connection with these cases, [counsel for the Government’s] main submission was that, in extremely difficult situations, both in operational terms in the field and in terms of post event investigations, the army and the authorities had done their best. He particularly emphasised the following aspects of the evidence. There was no rule of law in Iraq; at the start of the occupation there was no police force at all, and at best the force was totally inadequate, as well as being under constant attack; although the Iraqi courts

were functioning, they were subject to intimidation; there was no local civil inquest system or capability; the local communications systems were not functioning; there were no mortuaries, no post mortem system, no reliable pathologists; the security situation was the worst ever experienced by seasoned soldiers; there was daily fighting between tribal and criminal gangs; the number of troops available were small; and cultural differences exacerbated all these difficulties.

340. We would not discount these difficulties, which cumulatively must have amounted to grave impediments for anyone concerned to conduct investigations as they might have liked to have carried them out. However, irrespective of [counsel for the applicants'] submission, in reliance on the Turkish cases, that security problems provide no excuse for a failure in the article 2 investigative duty, we would conclude that, on the hypothesis stated, the investigations would still not pass muster. They were not independent; they were one-sided; and the commanders concerned were not trying to do their best according to the dictates of article 2.

341. That is not to say, however, that, in other circumstances, we would ignore the strategic difficulties of the situation. The Turkish cases are all concerned with deaths within the state party's own territory. In that context, the Court was entitled to be highly sceptical about the state's own professions of difficulties in an investigative path which it in any event may hardly have chosen to follow. It seems to us that this scepticism cannot be so easily transplanted in the extra-territorial setting."

2. The Court of Appeal

78 The first four applicants appealed against the Divisional Court's finding that their relatives did not fall within the United Kingdom's jurisdiction. The Secretary of State also cross-appealed against the finding in relation to the sixth applicant's son; although he accepted before the Court of Appeal that an Iraqi in the actual custody of British soldiers in a military detention centre in Iraq was within the United Kingdom's jurisdiction under art.1 of the Convention, he contended that the Human Rights Act had no extra-territorial effect and that the sixth applicant's claim was not, therefore, enforceable in the national courts.

79 On December 21, 2005 the Court of Appeal dismissed the appeals and the cross-appeal.¹⁰ Having reviewed the Court's case law on jurisdiction under art.1 of the Convention, Brooke L.J., who gave the leading judgment, held that a state could exercise extra-territorial jurisdiction when it applied control and authority over a complainant (which he termed "State agent authority", abbreviated to "SAA") and when it held effective control of an area outside its borders ("effective control of an area" or "ECA"), observing at [80]:

"80. I would therefore be more cautious than the Divisional Court in my approach to the *Bankovic* judgment. It seems to me that it left open both the ECA and SAA approaches to extra-territorial jurisdiction, while at the same time emphasizing (in para 60) that because a SAA approach might constitute a violation of another state's sovereignty (for example, when someone is

¹⁰ *R. (on the application of Al-Skeini) v Secretary of State for Defence* [2005] EWCA Civ 1609; [2007] Q.B. 140.

kidnapped by the agents of a state on the territory of another state without that state's invitation or consent), this route to any recognition that extra-territorial jurisdiction has been exercised within the meaning of an international treaty should be approached with caution."

He considered, *inter alia*, the cases of *Öcalan v Turkey* (2005) 41 E.H.R.R. 45; *Freda v Italy* (8916/80) October 7, 1980; and *Sánchez Ramírez v France* (28780/95) June 24, 1996; and observed that these cases had nothing to do with the principle of public international law relating to activities within aircraft registered with a state flying over the territory of another state. Instead, the findings of jurisdiction in these cases were examples of the "State agent authority" doctrine applying when someone was within the control and authority of agents of a contracting state, even outside the *espace juridique* of the Council of Europe, and whether or not the host state consented to the exercise of control and authority on its soil. Applying the relevant principles to the facts of the case he concluded that the sixth applicant's son came within the control and authority of the United Kingdom, and therefore its jurisdiction, from the time he was arrested at the hotel. The relatives of the other claimants had not been under the control and authority of British troops at the time when they were killed, and were not therefore within the United Kingdom's jurisdiction. He concluded in this connection that:

"110. ... It is essential, in my judgment, to set rules which are readily intelligible. If troops deliberately and effectively restrict someone's liberty he is under their control. This did not happen in any of these five cases."

- 80 He then examined whether, on the facts, it could be said that British troops were in effective control of Basrah City during the period in question, such as to fix the United Kingdom with jurisdiction under the "effective control of an area" doctrine. On this point, Brooke L.J. concluded as follows:

"119. Basrah City was in the [Coalition Provisional Authority] regional area called 'CPA South'. During the period of military occupation there was a significant degree of British responsibility and authority in CPA South, although its staff were drawn from five different countries and until the end of July 2003 the regional co-ordinator was a Dane. Indeed, only one of the four governorate teams in CPA South was headed by a British co-ordinator. However, although the chain of command for the British military presence in Iraq led ultimately to a US general, the Al Basrah and Maysan provinces were an area of direct British military responsibility. As I have already said ..., the Secretary of State accepts that the UK was an occupying power within the meaning of Article 42 of the Hague Regulations ..., at least in those areas of southern Iraq, and particularly Basrah City, where British troops exercised sufficient authority for this purpose.

120. But whatever may have been the position under the Hague Regulations, the question this court has to address is whether British troops were in effective control of Basrah City for ECA purposes. The situation in August - November 2003 contrasts starkly with the situations in northern Cyprus and in the Russian-occupied part of Moldova which feature in Strasbourg case-law. In each of those cases part of the territory of a contracting state was occupied by another contracting state which had every intention of exercising its control

on a long term basis. The civilian administration of those territories was under the control of the occupying state, and it deployed sufficient troops to ensure that its control of the area was effective.

121. [The statement of Brigadier Moore, whose command included the British forces in the Basrah area between May and November 2003] tells a very different story. He was not provided with nearly enough troops and other resources to enable his brigade to exercise effective control of Basrah City. ... [H]e described how the local police would not uphold the law. If British troops arrested somebody and gave them to the Iraqi police, the police would hand them over to the judiciary, who were themselves intimidated by the local tribes, and the suspected criminals were back on the streets within a day or two. This state of affairs gave the British no confidence in the local criminal justice system. It also diluted their credibility with local people. Although British troops arranged local protection for the judges, this made little difference. The prisons, for their part, were barely functioning.

122. After describing other aspects of the highly volatile situation in which a relatively small number of British military personnel were trying to police a large city as best they could, Brig[adier] Moore said ...:

‘The combination of terrorist activity, the volatile situation and the ineffectiveness of Iraqi security forces meant that the security situation remained on a knife-edge for much of our tour. Despite our high work rate and best efforts, I felt that at the end of August 2003 we were standing on the edge of an abyss. It was only when subsequent reinforcements arrived ... and we started to receive intelligence from some of the Islamic parties that I started to regain the initiative.’

123. Unlike the Turkish army in northern Cyprus, the British military forces had no control over the civil administration of Iraq. ...

124. In my judgment it is quite impossible to hold that the UK, although an occupying power for the purposes of the Hague Regulations and Geneva IV, was in effective control of Basrah City for the purposes of ECHR jurisprudence at the material time. If it had been, it would have been obliged, pursuant to the *Bankovic* judgment, to secure to everyone in Basrah City the rights and freedoms guaranteed by the ECHR. One only has to state that proposition to see how utterly unreal it is. The UK possessed no executive, legislative or judicial authority in Basrah City, other than the limited authority given to its military forces, and as an occupying power it was bound to respect the laws in force in Iraq unless absolutely prevented (see Article 43 of the Hague Regulations ...). It could not be equated with a civil power: it was simply there to maintain security, and to support the civil administration in Iraq in a number of different ways.”

Sedley L.J. observed, in connection with this issue:

“194. On the one hand, it sits ill in the mouth of a state which has helped to displace and dismantle by force another nation’s civil authority to plead that, as an occupying power, it has so little control that it cannot be responsible for securing the population’s basic rights. ... [However] the fact is that it cannot: the invasion brought in its wake a vacuum of civil authority which British

forces were and still are unable to fill. On the evidence before the Court they were, at least between mid-2003 and mid-2004, holding a fragile line against anarchy.”

81 The Court of Appeal unanimously concluded that, save for the death of the sixth applicant’s son, which fell within the “State agent authority” exception, the United Kingdom did not have jurisdiction under art. 1 of the Convention. The court decided that the sixth applicant’s claim also fell within the scope of the Human Rights Act 1998. Since the Divisional Court’s examination of the case more information had emerged about the investigation into the death of the sixth applicant’s son, including that court-martial proceedings were pending against a number of soldiers. The Court of Appeal therefore remitted the question whether there had been an adequate investigation to the Divisional Court for reconsideration following the completion of the court-martial proceedings.

82 Despite his conclusion on jurisdiction, Brooke L.J., at the express invitation of the Government, commented on the adequacy of the investigations carried out into the deaths, as follows:

“139. After all, the first two Articles of the [Convention] merely articulate the contemporary concern of the entire European community about the importance that must always be attached to every human life. ... needless to say, the obligation to comply with these well-established international human rights standards would require, among other things, a far greater investment in the resources available to the Royal Military Police than was available to them in Iraq, and a complete severance of their investigations from the military chain of command.

140. In other words, if international standards are to be observed, the task of investigating incidents in which a human life is taken by British forces must be completely taken away from the military chain of command and vested in the [Royal Military Police]. It contains the requisite independence so long as it is free to decide for itself when to start and when to cease an investigation, and so long as it reports in the first instance to the [Army Prosecuting Authority] and not to the military chain of command. It must then conduct an effective investigation, and it will be helped in this regard by the passages from ECHR case-law I have quoted. Many of the deficiencies highlighted by the evidence in this case will be remedied if the [Royal Military Police] perform this role, and if they are also properly trained and properly resourced to conduct their investigations with the requisite degree of thoroughness.”

3. The House of Lords

83 The first four applicants appealed and the Secretary of State cross-appealed to the House of Lords, which gave judgment on June 13, 2007.¹¹ The majority of the House of Lords (Lord Rodger of Earlsferry, Baroness Hale of Richmond, Lord Carswell and Lord Brown of Eaton-under-Heywood) held that the general purpose of the Human Rights Act 1998 was to provide a remedial structure in domestic law for the rights guaranteed by the Convention, and that the 1998 Act should therefore be interpreted as applying wherever the United Kingdom had

¹¹ *R. (on the application of Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26; [2008] 1 A.C. 153.

jurisdiction under art.1 of the Convention. Lord Bingham of Cornhill, dissenting, held that the Human Rights Act had no extra-territorial application.

84 In relation to the first four applicants' complaints, the majority of the House of Lords found that the United Kingdom did not have jurisdiction over the deaths. Because of his opinion that the Human Rights Act had no extra-territorial application, Lord Bingham did not consider it useful to express a view as whether the United Kingdom exercised jurisdiction within the meaning of art.1 of the Convention.

85 Lord Brown, with whom the majority agreed, began by observing that ultimately the decision about how art.1 of the Convention should be interpreted and applied was for the European Court of Human Rights, since the duty of the national court was only to keep pace with the Court's case law; there was a danger in a national court construing the Convention too generously in favour of an applicant, since the respondent State had no means of referring such a case to the Court. Lord Brown took as his starting point the decision of the Grand Chamber in *Banković*,¹² which he described as "a watershed authority in the light of which the Strasbourg jurisprudence as a whole has to be re-evaluated". He considered that the following propositions could be derived from the decision in *Banković*¹³:

"(1) Article 1 reflects an 'essentially territorial notion of jurisdiction' (a phrase repeated several times in the Court's judgment), 'other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case' (para 61). The Convention operates, subject to article 56, 'in an essentially regional context and notably in the legal space (*espace juridique*) of the contracting states' (para 80) (ie within the area of the Council of Europe countries).

(2) The Court recognises article 1 jurisdiction to avoid a 'vacuum in human rights' protection' when the territory 'would normally be covered by the Convention' (para 80) (ie in a Council of Europe country) where otherwise (as in Northern Cyprus) the inhabitants 'would have found themselves excluded from the benefits of the Convention safeguards and system which they had previously enjoyed' (para 80).

(3) The rights and freedoms defined in the Convention cannot be 'divided and tailored' (para 75).

(4) The circumstances in which the Court has exceptionally recognised the extra-territorial exercise of jurisdiction by a state include:

- (i) Where the state 'through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by [the government of that territory]' (para 71) (ie when otherwise there would be a vacuum within a Council of Europe country, the government of that country itself being unable 'to fulfil the obligations it had undertaken under the Convention' (para 80) (as in Northern Cyprus).

¹² *Banković* (2007) 44 E.H.R.R. SE5.

¹³ *Al-Skeini* [2007] UKHL 26; [2008] 1 A.C. 153 at [109].

- (ii) ‘Cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that state [where] customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction’ (para 73).
- (iii) Certain other cases where a state’s responsibility ‘could, in principle, be engaged because of acts ... which produced effects or were performed outside their own territory’ (para 69). *Drozd v France* (1992) 14 EHRR 745 (at para 91) is the only authority specifically referred to in *Bankovic* as exemplifying this class of exception to the general rule. *Drozd*, however, contemplated no more than that, if a French judge exercised jurisdiction extra-territorially in Andorra in his capacity as a French judge, then anyone complaining of a violation of his Convention rights by that judge would be regarded as being within France’s jurisdiction.
- (iv) The *Soering v United Kingdom* (1989) 11 EHRR 439 line of cases, the Court pointed out, involves action by the state whilst the person concerned is ‘on its territory, clearly within its jurisdiction’ (para 68) and not, therefore, the exercise of the state’s jurisdiction abroad.”

Lord Brown referred to the *Öcalan*, *Freda* and *Sánchez Ramirez* line of cases,¹⁴ in each of which the applicant was forcibly removed from a country outside the Council of Europe, with the full co-operation of the foreign authorities, to stand trial in the respondent State. He observed that this line of cases concerning “irregular extraditions” constituted one category of “exceptional” cases expressly contemplated by *Banković* as having “special justification” for extraterritorial jurisdiction under art.1. He did not consider that the first four applicants’ cases fell into any of the exceptions to the territorial principle so far recognised by the Court.

86 Lord Brown next considered the Court’s judgment in *Issa v Turkey* (2005) 41 E.H.R.R. 27 at [71], on which the applicants relied, and held as follows:

“127. If and insofar as *Issa* is said to support the altogether wider notions of article 1 jurisdiction contended for by the appellants on this appeal, I cannot accept it. In the first place, the statements relied upon must be regarded as *obiter dicta*. Secondly, as just explained, such wider assertions of jurisdiction are not supported by the authorities cited (at any rate, those authorities accepted as relevant by the Grand Chamber in *Bankovic*). Thirdly, such wider view of jurisdiction would clearly be inconsistent both with the reasoning in *Bankovic* and, indeed, with its result. Either it would extend the effective control principle beyond the Council of Europe area (where alone it had previously been applied, as has been seen, to Northern Cyprus, to the Ajarian Autonomous Republic in Georgia and to Transnistria) to Iraq, an area (like the FRY considered in *Bankovic*) outside the Council of Europe—and, indeed, would do so contrary to the inescapable logic of the Court’s case law on article 56. Alternatively it would stretch to breaking point the concept of jurisdiction extending extra-territorially to those subject to a state’s ‘authority and control’. It is one thing to recognise as exceptional the specific narrow categories of cases I have sought to summarise above; it would be quite another to accept that whenever a contracting state acts (militarily or otherwise) through its

¹⁴ *Öcalan* (2003) 37 E.H.R.R. 10; *Freda* (8916/80) October 7, 1980; and *Sánchez Ramirez* (28780/95) June 24, 1996.

agents abroad, those affected by such activities fall within its article 1 jurisdiction. Such a contention would prove altogether too much. It would make a nonsense of much that was said in *Bankovic*, not least as to the Convention being ‘a constitutional instrument of European public order’, operating ‘in an essentially regional context’, ‘not designed to be applied throughout the world, even in respect of the conduct of contracting states’ (para 80). It would, indeed, make redundant the principle of effective control of an area: what need for that if jurisdiction arises in any event under a general principle of ‘authority and control’ irrespective of whether the area is (a) effectively controlled or (b) within the Council of Europe?

128. There is one other central objection to the creation of the wide basis of jurisdiction here contended for by the appellants under the rubric ‘control and authority’, going beyond that arising in any of the narrowly recognised categories already discussed and yet short of that arising from the effective control of territory within the Council of Europe area. *Bankovic* (and later *Assanidze*) stands, as stated, for the indivisible nature of article 1 jurisdiction: it cannot be ‘divided and tailored’. As *Bankovic* had earlier pointed out (at para 40) ‘the applicant’s interpretation of jurisdiction would invert and divide the positive obligation on contracting states to secure the substantive rights in a manner never contemplated by article 1 of the Convention.’ When, moreover, the Convention applies, it operates as ‘a living instrument.’ *Öcalan* provides an example of this, a recognition that the interpretation of article 2 has been modified consequent on ‘the territories encompassed by the member states of the Council of Europe [having] become a zone free of capital punishment’ (para 163). (Paragraphs 64 and 65 of *Bankovic*, I may note, contrast on the one hand ‘the Convention’s substantive provisions’ and ‘the competence of the Convention organs’, to both of which the ‘living instrument’ approach applies and, on the other hand, the scope of article 1—‘the scope and reach of the entire Convention’—to which it does not.) Bear in mind too the rigour with which the Court applies the Convention, well exemplified by the series of cases from the conflict zone of south eastern Turkey in which, the state’s difficulties notwithstanding, no dilution has been permitted of the investigative obligations arising under articles 2 and 3.

129. The point is this: except where a state really does have effective control of territory, it cannot hope to secure Convention rights within that territory and, unless it is within the area of the Council of Europe, it is unlikely in any event to find certain of the Convention rights it is bound to secure reconcilable with the customs of the resident population. Indeed it goes further than that. During the period in question here it is common ground that the UK was an occupying power in Southern Iraq and bound as such by Geneva IV and by the Hague Regulations. Article 43 of the Hague Regulations provides that the occupant ‘shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.’ The appellants argue that occupation within the meaning of the Hague Regulations necessarily involves the occupant having effective control of the area and so being responsible for securing there all Convention rights and freedoms. So far as this being the case, however, the occupants’ obligation is to respect ‘the laws in force’, not to introduce laws and the means to enforce them (for example, courts and a

justice system) such as to satisfy the requirements of the Convention. Often (for example where Sharia law is in force) Convention rights would clearly be incompatible with the laws of the territory occupied.”

87 Lord Rodger,¹⁵ with whom Baroness Hale agreed, and Lord Carswell¹⁶ expressly held that the United Kingdom was not in effective control of Basrah City and the surrounding area for purposes of jurisdiction under art.1 of the Convention at the relevant time.

88 The Secretary of State accepted that the facts of the sixth applicant’s case fell within the United Kingdom’s jurisdiction under art.1 of the Convention. The parties therefore agreed that if (as the majority held) the jurisdictional scope of the Human Rights Act was the same as that of the Convention, the sixth applicant’s case should be remitted to the Divisional Court, as the Court of Appeal had ordered. In consequence, it was unnecessary for the House of Lords to examine the jurisdictional issue in relation to the death of the sixth applicant’s son. However, Lord Brown, with whom the majority agreed, concluded:

“132. ... As for the sixth case, I for my part would recognise the UK’s jurisdiction over Mr Mousa only on the narrow basis found established by the Divisional Court, essentially by analogy with the extra-territorial exception made for embassies (an analogy recognised too in *Hess v United Kingdom* (1975) 2 DR 72, a Commission decision in the context of a foreign prison which had itself referred to the embassy case of *X v Federal Republic of Germany*).”

II. Relevant international law materials

A. International humanitarian law on belligerent occupation

89 The duties of an Occupying Power can be found primarily in arts 42 to 56 of the Regulations concerning the Laws and Customs of War on Land¹⁷ (hereafter, “the Hague Regulations”) and arts 27–34 and 47–78 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War¹⁸ (hereafter, “the Fourth Geneva Convention”), as well as in certain provisions of the Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977 (hereafter, “Additional Protocol I”).

Articles 42 and 43 of the Hague Regulations provide as follows:

“42. Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power

¹⁵ *Al-Skeini* [2007] UKHL 26; [2008] 1 A.C. 153 at [83].

¹⁶ *Al-Skeini* [2007] UKHL 26; [2008] 1 A.C. 153 at [97].

¹⁷ Regulations concerning the Laws and Customs of War on Land (The Hague: October 18, 1907).

¹⁸ Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva: August 12, 1949).

to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”

Article 64 of the Fourth Geneva Convention provides that penal laws may be repealed or suspended by the occupying power only where they constitute a threat to the security or an obstacle to the application of the Fourth Geneva Convention. It also details the situations in which the Occupying Power is entitled to introduce legislative measures. These are specifically:

“[P]rovisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.”

Agreements concluded between the occupying power and the local authorities cannot deprive the population of occupied territory of the protection afforded by international humanitarian law and protected persons themselves can in no circumstances renounce their rights.¹⁹ Occupation does not create any change in the status of the territory,²⁰ which can only be effected by a peace treaty or by annexation followed by recognition. The former sovereign remains sovereign and there is no change in the nationality of the inhabitants.

B. Case law of the International Court of Justice concerning the inter-relationship between international humanitarian law and international human-rights law and the extra-territorial obligations of states under international human-rights law

- 90 In the proceedings concerning the International Court of Justice’s Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,²¹ Israel denied that the human-rights instruments to which it was a party, including the International Covenant on Civil and Political Rights, were applicable to the Occupied Palestinian Territory and asserted that²²:

“[H]umanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace.”

In order to determine whether the instruments were applicable in the Occupied Palestinian Territory, the International Court of Justice first addressed the issue of the relationship between international humanitarian law and international human-rights law, holding as follows:

“106. ... [T]he Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the

¹⁹ Fourth Geneva Convention arts 8 and 47.

²⁰ See art.4 of Additional Protocol I.

²¹ International Court of Justice’s Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Unreported July 9, 2004.

²² International Court of Justice’s Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Unreported July 9, 2004 para.102.

[International Covenant on Civil and Political Rights]. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.”

The International Court of Justice next considered the question whether the International Covenant on Civil and Political Rights was capable of applying outside the state’s national territory and whether it applied in the Occupied Palestinian Territory. It held as follows (references and citations omitted):

“108. The scope of application of the [International Covenant on Civil and Political Rights] is defined by Article 2, paragraph 1, thereof, which provides:

‘Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’

This provision can be interpreted as covering only individuals who are both present within a State’s territory and subject to that State’s jurisdiction. It can also be construed as covering both individuals present within a State’s territory and those outside that territory but subject to that State’s jurisdiction. The Court will thus seek to determine the meaning to be given to this text.

109. The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the [International Covenant on Civil and Political Rights], it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions. The constant practice of the Human Rights Committee is consistent with this. Thus, the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory. It has ruled on the legality of acts by Uruguay in cases of arrests carried out by Uruguayan agents in Brazil or Argentina ... It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany ...

...

110. The Court takes note in this connection of the position taken by Israel, in relation to the applicability of the Covenant, in its communications to the Human Rights Committee, and of the view of the Committee. In 1998, Israel stated that, when preparing its report to the Committee, it had had to face the question ‘whether individuals resident in the occupied territories were indeed subject to Israel’s jurisdiction’ for purposes of the application of the Covenant ... Israel took the position that ‘the Covenant and similar instruments did not apply directly to the current situation in the occupied territories’ ... The Committee, in its concluding observations after examination of the report, expressed concern at Israel’s attitude and pointed ‘to the long-standing presence of Israel in [the occupied] territories, Israel’s ambiguous attitude

towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein' In 2003 in face of Israel's consistent position, to the effect that 'the Covenant does not apply beyond its own territory, notably in the West Bank and Gaza ...', the Committee reached the following conclusion:

'in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law'

111. In conclusion, the Court considers that the [International Covenant on Civil and Political Rights] is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory."

In addition, the International Court of Justice appeared to assume that, even in respect of extra-territorial acts, it would in principle be possible for a state to derogate from its obligations under the International Covenant on Civil and Political Rights, art.4(1) of which provides:

"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

Thus, at para.136 of the opinion, having considered whether the acts in question were justified under international humanitarian law on grounds of military exigency, the International Court of Justice held:

"136. The Court would further observe that some human rights conventions, and in particular the International Covenant on Civil and Political Rights, contain provisions which States parties may invoke in order to derogate, under various conditions, from certain of their conventional obligations. In this respect, the Court would however recall that the communication notified by Israel to the Secretary-General of the United Nations under Article 4 of the International Covenant on Civil and Political Rights concerns only Article 9 of the Covenant, relating to the right to freedom and security of person (see paragraph 127 above); Israel is accordingly bound to respect all the other provisions of that instrument."

- 91 In its judgment *Armed Activities on the Territory of the Congo (Democratic Republic of Congo (DRC) v Uganda)*,²³ the International Court of Justice considered whether, during the relevant period, Uganda was an "Occupying Power" of any part of the territory of the Democratic Republic of Congo, within the meaning of

²³ *Armed Activities on the Territory of the Congo (Democratic Republic of Congo (DRC) v Uganda)* Unreported December 19, 2005 International Court of Justice.

customary international law, as reflected in art.42 of the Hague Regulations.²⁴ The International Court of Justice found that Ugandan forces were stationed in the province of Ituri and exercised authority there, in the sense that they had substituted their own authority for that of the Congolese Government.²⁵ The International Court of Justice continued:

“178. The Court thus concludes that Uganda was the occupying Power in Ituri at the relevant time. As such it was under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.

179. The Court, having concluded that Uganda was an occupying Power in Ituri at the relevant time, finds that Uganda’s responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account.

180. The Court notes that Uganda at all times has responsibility for all actions and omissions of its own military forces in the territory of the DRC in breach of its obligations under the rules of international human rights law and international humanitarian law which are relevant and applicable in the specific situation.”

The International Court of Justice established the facts relating to the serious breaches of human rights allegedly attributable to Uganda, in the occupied Ituri region and elsewhere.²⁶ In order to determine whether the conduct in question constituted a breach of Uganda’s international obligations, the International Court of Justice recalled its finding in the above *Construction of a Wall* Advisory Opinion that both international humanitarian law and international human-rights law would have to be taken into consideration and that international human-rights instruments were capable of having an extra-territorial application, “particularly in occupied territories”.²⁷ The International Court of Justice next determined which were “the applicable rules of international human rights law and international humanitarian law”, by listing the international humanitarian and international human-rights treaties to which both Uganda and the Democratic Republic of Congo were party, together with the relevant principles of customary international law.²⁸

²⁴ *DRC v Uganda* Unreported December 19, 2005 International Court of Justice at [172]–[173].

²⁵ *DRC v Uganda* Unreported December 19, 2005 International Court of Justice at [174]–[176].

²⁶ *DRC v Uganda* Unreported December 19, 2005 International Court of Justice at [205]–[212].

²⁷ *DRC v Uganda* Unreported December 19, 2005 International Court of Justice at [216].

²⁸ *DRC v Uganda* Unreported December 19, 2005 International Court of Justice at [217]–[219].

C. The duty to investigate alleged violations of the right to life in situations of armed conflict and occupation under international humanitarian law and international human-rights law

- 92 Article 121 of the Third Geneva Convention provides that an official enquiry must be held by the detaining power following the suspected homicide of a prisoner of war. Article 131 of the Fourth Geneva Convention provides:

“Every death or serious injury of an internee, caused or suspected to have been caused by a sentry, another internee or any other person, as well as any death the cause of which is unknown, shall be immediately followed by an official enquiry by the Detaining Power. A communication on this subject shall be sent immediately to the Protection Power. The evidence of any witnesses shall be taken, and a report including such evidence shall be prepared and forwarded to the said Protection Power. If the enquiry indicates the guilt of one or more persons, the Detaining Power shall take all necessary steps to ensure the prosecution of the person or persons responsible.”

The Geneva Conventions also place an obligation on each high contracting party to investigate and prosecute alleged grave breaches of the Conventions, including the wilful killing of protected persons.²⁹

- 93 In *Report E/CN.4/2006/53 on Extrajudicial, Summary or Arbitrary Executions*,³⁰ the United Nations Special Rapporteur, Philip Alston, observed in connection with the right to life under art.6 of the International Covenant on Civil and Political Rights in situations of armed conflict and occupation (footnotes omitted):

“36. Armed conflict and occupation do not discharge the State’s duty to investigate and prosecute human rights abuses. The right to life is non-derogable regardless of circumstance. This prohibits any practice of not investigating alleged violations during armed conflict or occupation. As the Human Rights Committee has held, ‘It is inherent in the protection of rights explicitly recognized as non-derogable ... that they must be secured by procedural guarantees ... The provisions of the [International Covenant on Civil and Political Rights] relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights.’ It is undeniable that during armed conflicts circumstances will sometimes impede investigation. Such circumstances will never discharge the obligation to investigate - this would eviscerate the non-derogable character of the right to life - but they may affect the modalities or particulars of the investigation. In addition to being fully responsible for the conduct of their agents, in relation to the acts of private actors States are also held to a standard of due diligence in armed conflicts as well as peace. On a case-by-case basis a State might utilize less effective measures of investigation in response to concrete constraints. For example, when hostile forces control the scene of a shooting, conducting an autopsy may prove impossible. Regardless of the circumstances, however, investigations must always be conducted as effectively as possible and never be reduced to mere formality.”

²⁹ First Geneva Convention arts 49 and 50; arts 50–51 of the Second Geneva Convention; arts 129 and 130 of the Third Geneva Convention; arts 146 and 147 of the Fourth Geneva Convention.

³⁰ *Report E/CN.4/2006/53 on Extrajudicial, Summary or Arbitrary Executions* (March 8, 2006).

- 94 In its judgment in the Case of the *Mapiripán Massacre v Colombia* Unreported September 15, 2005, the Inter-American Court of Human Rights held, inter alia, in connection with the respondent State's failure fully to investigate the massacre of civilians carried out by a para-military group with the alleged assistance of the state authorities:

"238. In this regard, the Court recognizes the difficult circumstances of Colombia, where its population and its institutions strive to attain peace; However, the country's conditions, no matter how difficult, do not release a State Party to the American Convention of its obligation set forth in this treaty, which specifically continue in cases such as the instant one. The Court has argued that when the State conducts or tolerates actions leading to extra-legal executions, not investigating them adequately and not punishing those responsible, as appropriate, it breaches the duties to respect rights set forth in the Convention and to ensure their free and full exercise, both by the alleged victim and by his or her next of kin, it does not allow society to learn what happened, and it reproduces the conditions of impunity for this type of facts to happen once again."

JUDGMENT

I. Alleged violation of article 2 of the Convention

- 95 The applicants contended that their relatives were within the jurisdiction of the United Kingdom under art.1 of the Convention at the moment of death and that, except in relation to the sixth applicant, the United Kingdom had not complied with its investigative duty under art.2.
- 96 The Government accepted that the sixth applicant's son had been within UK jurisdiction but denied that the United Kingdom had jurisdiction over any of the other deceased. It contended that, since the second and third applicants' relatives had been killed after the adoption of United Nations Security Council Resolution 1511,³¹ the acts which led to their deaths were attributable to the United Nations and not to the United Kingdom. In addition, the Government contended that the fifth applicant's case should be declared inadmissible for non-exhaustion of domestic remedies and that the fifth and sixth applicants no longer had victim status.

A. Admissibility

1. Attribution

- 97 The Government pointed out that the operations that led to the deaths of the second and third applicants' relatives occurred after October 16, 2003, when the United Nations Security Council adopted Resolution 1511. Paragraph 13 of that resolution authorised a multi-national force to take "all necessary measures to contribute to the maintenance of security and stability in Iraq".³² It followed that, in conducting the relevant operations in which the second and third applicants'

³¹ See [16] above.

³² See [16] above.

relatives were shot, UK troops were not exercising the sovereign authority of the United Kingdom but the international authority of the Multi-National Force acting pursuant to the binding decision of the United Nations Security Council.

98 The applicants stressed that the Government had not raised this argument at any stage during the domestic proceedings. Moreover, an identical argument had been advanced by the Government and rejected by the House of Lords in *R. (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58; [2008] 1 A.C. 332.

99 The Court recalls that it is intended to be subsidiary to the national systems safeguarding human rights. It is, therefore, appropriate that the national courts should initially have the opportunity to determine questions of the compatibility of domestic law with the Convention and that, if an application is nonetheless subsequently brought before the Court, it should have the benefit of the views of the national courts, as being in direct and continuous contact with the forces of their countries. It is thus of importance that the arguments put by the Government before the national courts should be on the same lines as those put before this Court. In particular, it is not open to a government to put to the Court arguments which are inconsistent with the position it adopted before the national courts.³³

100 The Government did not contend before the national courts that any of the killings of the applicants' relatives were not attributable to UK armed forces. The Court considers, therefore, that the Government is estopped from raising this objection in the present proceedings.

2. Jurisdiction

101 The Government further contended that the acts in question took place in southern Iraq and outside the United Kingdom's jurisdiction under art.1 of the Convention. The sole exception was the killing of the sixth applicant's son, which occurred in a British military prison over which the United Kingdom did have jurisdiction.

102 The Court considers that the question whether the applicants' cases fall within the jurisdiction of the respondent State is closely linked to the merits of their complaints. It therefore joins this preliminary question to the merits.

3. Exhaustion of domestic remedies

103 The Government contended that the fifth applicant's case should be declared inadmissible for non-exhaustion of domestic remedies. It pointed out that although he brought judicial review proceedings alleging breaches of his substantive and procedural rights under arts 2 and 3, his claim was stayed pending resolution of the six test cases.³⁴ After those claims had been resolved, it would have been open to the applicant to apply to the Divisional Court to lift the stay, but he did not do so. His case was not a shooting incident, and the domestic courts had not had the opportunity to consider the facts relevant to his claims that his son was within the jurisdiction of the United Kingdom and that there had been a breach of the procedural obligation.

104 The applicants invited the Court to reject this submission. A judicial review claim had been lodged by the fifth applicant on May 5, 2004. It was, by agreement,

³³ *A v United Kingdom* (2009) 49 E.H.R.R. 29 at [154].

³⁴ See [73] above.

stayed pending the outcome of the six test cases.³⁵ The fifth applicant would have had no reasonable prospects of success if, after the House of Lords gave judgment in *Al-Skeini*, he had sought to revive and pursue his stayed judicial review claim. The lower courts would have been bound by the House of Lords' interpretation of art.1 and would have applied it so as to find that the applicant's deceased son had not been within UK jurisdiction.

- 105 The Court observes that, according to the fifth applicant, his son died when, having been arrested by UK soldiers on suspicion of looting, he was driven in an army vehicle to the river and forced to jump in. His case is, therefore, distinguishable on its alleged facts from those of the first, second and fourth applicants, whose relatives were shot by British soldiers; the third applicant, whose wife was shot during exchange of fire between British troops and unknown gunmen; and the sixth applicant, whose son was killed while detained in a British military detention facility. It is true that the House of Lords in the *Al-Skeini* proceedings did not have before it a case similar to the fifth applicant's, where an Iraqi civilian met his death having been taken into British military custody, but without being detained in a military prison. Nonetheless, the Court considers that the applicants are correct in their assessment that the fifth applicant would have had no prospects of success had he subsequently sought to pursue his judicial review application in the domestic courts. Lord Brown, with whom the majority of the House of Lords agreed, made it clear that he preferred the approach to jurisdiction in the sixth applicant's case taken by the Divisional Court, namely that jurisdiction arose in respect of Baha Mousa only because he died while detained in a British military prison.³⁶ In these circumstances, the Court does not consider that the fifth applicant can be criticised for failing to attempt to revive his claim before the Divisional Court. It follows that the Government's preliminary objection based on non-exhaustion of domestic remedies must be rejected.

4. Victim status

- 106 The Government submitted that the fifth and sixth applicants could no longer claim to be victims of any violations of their rights under art.2, since the death of each of their sons had been fully investigated by the national authorities and compensation paid to the applicants.
- 107 The Court considers that this question also is closely linked and should be joined to the merits of the complaint under art.2.

5. Conclusion on admissibility

- 108 The Court considers that the application raises serious questions of fact and law which are of such complexity that their determination should depend on an examination on the merits. It cannot, therefore, be considered manifestly ill-founded within the meaning of art.35(3) of the Convention, and no other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

³⁵ See [73] above.

³⁶ See [88] above.

*B. The merits***1. Jurisdiction***(a) The parties' arguments**(i) The Government*

- 109 The Government submitted that the leading authority on the concept of “jurisdiction” in art.1 of the Convention was the Court’s decision in *Banković v Belgium*. *Banković* established that the fact that an individual had been affected by an act committed by a contracting state or its agents was not sufficient to establish that he was within that state’s jurisdiction. Jurisdiction under art.1 was “primarily” or “essentially” territorial and any extension of jurisdiction outside the territory of the contracting state was “exceptional” and required “special justification in the particular circumstances of each case”. The Court had held in *Banković* that the Convention rights could not be “divided and tailored”. Within its jurisdiction, a contracting state was under an obligation to secure all the Convention rights and freedoms. The Court also held in *Banković* that the Convention was “an instrument of European public order” and:

“[A] multi-lateral treaty operating, subject to Article 56 of the Convention, in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States.”

The essentially territorial basis of jurisdiction reflected principles of international law and took account of the practical and legal difficulties faced by a state operating on another state’s territory, particularly in regions which did not share the values of the Council of Europe Member States.

- 110 In the Government’s submission, the Grand Chamber in *Banković*, having conducted a comprehensive review of the case law, identified a limited number of exceptions to the territorial principle. The principal exception derived from the case law on northern Cyprus and applied when a state, as a consequence of military action, exercised effective control of an area outside its national territory. Where the Court had found this exceptional basis of jurisdiction to apply, it had stressed that the state exercising effective control was thereby responsible for securing the entire range of substantive Convention rights in the territory in question.³⁷ Moreover, despite dicta to the contrary in the subsequent Chamber judgment in *Issa v Turkey*, the Grand Chamber in *Banković* made it clear that the “effective control of an area” basis of jurisdiction could apply only within the Convention legal space. In addition to the control exercised by Turkey in northern Cyprus, the Court had applied this exception in relation to only one other area, Transdniestria, which also fell within the territory of another contracting state. Any other approach would risk requiring the state to impose culturally alien standards, in breach of the principle of sovereign self-determination.
- 111 According to the Government, the Court’s case law on art.56 of the Convention further indicated that a state would not be held to exercise art.1 jurisdiction over an overseas territory merely by virtue of exercising effective control there: see *Quark Fishing Ltd v United Kingdom* (2007) 44 E.H.R.R. SE4. If the effective

³⁷ See *Loizidou v Turkey* (1995) 20 E.H.R.R. 99 at [62]; *Cyprus v Turkey* (2002) 35 E.H.R.R. 30 at [75]–[80]; *Banković* (2007) 44 E.H.R.R. SE5 at [70]–[71]; *Ilaşcu v Moldova* (2005) 40 E.H.R.R. 46 at [314]–[316].

control of territory exception were held to apply outside the territories of the contracting states, this would lead to the conclusion that a state was free to choose whether or not to extend the Convention and its Protocols to a non-metropolitan territory outside the Convention “*espace juridique*” over which it might in fact have exercised control for decades, but was not free to choose whether to extend the Convention to territories outside that space over which it exercised effective control as a result of military action only temporarily, for example only until peace and security could be restored.

- 112 The Government submitted that, since Iraq fell outside the Convention legal space, the “effective control of an area” exceptional basis of jurisdiction could not apply. In any event, the United Kingdom did not have “effective control” over any part of Iraq during the relevant time. This was the conclusion of the domestic courts, which had all the available evidence before them. The number of coalition forces, including UK forces, was small: in South-East Iraq, an area of 96,000sq km and a population of 4.6 million, there were 14,500 coalition troops, including 8,150 UK troops. UK troops operated in Al-Basrah and Maysan provinces, which had a population of 2.76 million for 8,119 troops. UK forces in Iraq were faced with real practical difficulties in restoring conditions of security and stability so as to enable the Iraqi people freely to determine their political future. The principal reason for this was that at the start of the occupation there was no competent system of local law-enforcement in place, whilst at the same time there was widespread violent crime, terrorism and tribal fighting involving the use of light and heavy weapons.
- 113 Governing authority in Iraq during the occupation was exercised by the Coalition Provisional Authority, which was governed by the US Ambassador Paul Bremer and which was not a subordinate authority of the United Kingdom. In addition, from July 2003 there was a central Iraqi Governing Council and a number of local Iraqi councils. The status of the Coalition Provisional Authority and Iraqi administration was wholly different from that of the “TRNC” in Cyprus or the “MRT” in Transdnistria, which were both characterised by the Court as “self-proclaimed authorities which are not recognised by the international community”. The authority of the Coalition Provisional Authority and the Iraqi administration was recognised by the international community, through the United Nations Security Council. Moreover, the purpose of the United Kingdom’s joint occupation of Iraq was to transfer authority as soon as possible to a representative Iraqi administration. In keeping with this purpose, the occupation lasted for only just over a year.
- 114 In the Government’s submission, the fact that between May 2003 and June 2004 the United Kingdom was an occupying power within the meaning of the Hague Regulations³⁸ did not, in itself, give rise to an obligation to secure the Convention rights and freedoms to the inhabitants of South-East Iraq. As an occupying power the United Kingdom did not have sovereignty over Iraq and was not entitled to treat the area under its occupation as its own territory or as a colony subject to its complete power and authority. The Hague Regulations did not confer on the United Kingdom the power to amend the laws and constitution of Iraq so as to conform to the United Kingdom’s own domestic law or regional multi-lateral international obligations such as the Convention. On the contrary, the Hague Regulations set

³⁸ See [89] above.

limits on the United Kingdom's powers, notably the obligation to respect the laws in force in Iraq unless "absolutely prevented". Moreover, the resolutions passed by the United Nations Security Council recognised that governing authority in Iraq during the occupation was to be exercised by the Coalition Provisional Authority and that the aim of the occupation was to transfer authority as soon as possible to a representative Iraqi administration. It followed that the international legal framework, far from establishing that the United Kingdom was obliged to secure Convention rights in Iraq, established instead that the United Kingdom would have been acting contrary to its international obligations if it had sought to modify the constitution of Iraq so as to comply with the Convention. In any event, the Court's case law demonstrated that it approached the question whether a state exercised jurisdiction extra-territorially as one of fact, informed by the particular nature and history of the Convention. The obligations imposed by the Fourth Geneva Convention and the Hague Regulations were carefully tailored to the circumstances of occupation and could not in themselves have consequences for the very different issue of jurisdiction under the Convention.

- 115 The Government accepted that it was possible to identify from the case law a number of other exceptional categories where jurisdiction could be exercised by a state outside its territory and outside the Convention region. In *Banković*³⁹ the Grand Chamber referred to other cases involving the activities of diplomatic or consular agents abroad and on board craft and vessel registered in or flying the flag of the state. In *Banković* the Court also cited as an example *Droz v France* (1992) 14 E.H.R.R. 745, which demonstrated that jurisdiction could be exercised by a state if it brought an individual before its own court, sitting outside its territory, to apply its own criminal law. In *Öcalan v Turkey* (2005) 41 E.H.R.R. 45 the Grand Chamber held that Turkey had exercised jurisdiction over the applicant when he was "arrested by members of the Turkish security forces outside an aircraft registered in Turkey in the international zone of Nairobi airport" and:

"[P]hysically forced to return to Turkey by Turkish officials and was under their authority and control following his arrest and return to Turkey."

In the Government's submission, none of these exceptions applied in the first, second, third and fourth applicants' cases.

- 116 The Government contended that the applicants' submission that, in shooting their relatives, the UK soldiers exercised "authority and control" over the deceased, so as to bring them within the United Kingdom's jurisdiction, was directly contrary to the decision in *Banković*.⁴⁰ In *Banković* the Grand Chamber considered the applicability of the Convention to extra-territorial military operations generally, having regard inter alia to state practice and art.15 of the Convention, and concluded that the Convention did not apply to the military action of the respondent states which resulted in those applicants' relatives' deaths. Equally, in the present case, the military action of UK soldiers in shooting the applicants' relatives whilst carrying out military security operations in Iraq did not constitute an exercise of jurisdiction over them. No distinction could be drawn in this respect between a death resulting from a bombing and one resulting from a shooting in the course of a ground operation.

³⁹ *Banković* (2007) 44 E.H.R.R. SE5.

⁴⁰ *Banković* (2007) 44 E.H.R.R. SE5.

- 117 The Government rejected the applicants' argument that a jurisdictional link existed because the UK soldiers were exercising "legal authority" over the deceased, derived from the obligation under the Hague Regulations to ensure "public order and safety" in the occupied territory. The meaning of art.1 of the Convention was autonomous and could not be determined by reference to wholly distinct provisions of international humanitarian law. Moreover, the duty relied on was owed to every Iraqi citizen within the occupied territory and, if the applicants were correct, the United Kingdom would have been required to secure Convention rights to them all. Nor could it be said that UK troops at the relevant time were exercising "public functions" pursuant to treaty arrangements.⁴¹ In fact, UK troops were exercising military power in an effort to create a situation in which governmental functions could be exercised and the rule of law could properly operate. No sensible distinction could be drawn between the different types of military operation undertaken by them. There was no basis for concluding that the applicability of the Convention should turn upon the particular activity that a soldier was engaged in at the time of the alleged violation, whether street patrol, ground offensive or aerial bombardment.
- 118 In conclusion, the Government submitted that the domestic courts were correct that the United Kingdom did not exercise any art.1 jurisdiction over the relatives of the first to fourth applicants at the time of their deaths. The cases could not be distinguished from that of the deceased in *Banković*.⁴² Nor were the facts of the fifth applicant's case sufficient to distinguish it in this respect from those of the first to fourth applicants. The fifth applicant's son was not arrested in circumstances similar to those which founded jurisdiction in *Öcalan*.⁴³ As a suspected looter, in the situation of extreme public disorder in the immediate aftermath of the cessation of major combat activities, he was physically required by UK soldiers to move from the place of looting to another location. The acts of the UK soldiers involved an assertion of military power over the fifth applicant's son, but no more. The Government accepted that the sixth applicant's son was within UK jurisdiction when he died, but only on the basis found by the Divisional Court and subsequently by Lord Brown, with whom Lords Rodger and Carswell and Baroness Hale agreed, namely that jurisdiction was established when the deceased was detained in a UK-run military detention facility located in a UK base, essentially by analogy with the extra-territorial exception made for embassies. At the hearing before the Court, counsel for the Government confirmed that it was the Government's position that, for example, an individual being taken to a British detention facility on foreign soil in a British military vehicle would not fall within the United Kingdom's jurisdiction until the moment the vehicle and individual passed within the perimeter of the facility.
- 119 This did not mean that UK troops were free to act with impunity in Iraq. As Lord Bingham observed in his opinion in the House of Lords, the acts of the UK forces were subject to and regulated by international humanitarian law. UK soldiers in Iraq were also subject to UK domestic criminal law and could be prosecuted in the national courts. The International Criminal Court had jurisdiction to prosecute war crimes where the state was unwilling or unable to prosecute. Civil claims in

⁴¹ See *Banković* (2007) 44 E.H.R.R. SE5 at [73].

⁴² *Banković* (2007) 44 E.H.R.R. SE5.

⁴³ *Öcalan* (2005) 41 E.H.R.R. 45.

tort could also be brought in the UK courts against UK agents and authorities alleged to have caused injury to individuals in Iraq.

(ii) The applicants

120 The applicants accepted that jurisdiction under art.1 was essentially territorial. However, they underlined that it was not exclusively so and that it was possible for a contracting state to exercise jurisdiction extra-territorially. The procedure under art.56 allowed states to extend the reach of the Convention to other territories, with due regard to local requirements, by means of a notified declaration. However, it was clear from the case law that art.56 was not an exclusive mechanism for extra-territorial applicability.

121 The applicants submitted that the case law of the Court and Commission recognised the exercise by states of jurisdiction extra-territorially through the principles of both “State agent authority” and “effective control of an area”. The first reference to “State agent authority” jurisdiction was in the Commission’s admissibility decision in *Cyprus v Turkey* (6780/74 & 6950/75) May 26, 1975, when the Commission observed that:

“[A]uthorised agents of the State ... not only remain under its jurisdiction when abroad but bring any other persons or property ‘within the jurisdiction’ of that State, to the extent that they exercise authority over such persons or property.”

This principle was subsequently applied in *Cyprus v Turkey* (1982) 4 E.H.R.R. 482, when the Commission found the actions of Turkish soldiers in Cyprus involved the exercise of Turkish jurisdiction. These actions comprised the killing of civilians, including individuals subject to the order of an officer and others shot while attempting to recover possessions from property under Turkish control; the rape of women in empty houses and on the street; the arbitrary detention of civilians; cruelty to detainees; displacement of civilians; and military confiscation of property. Since Turkey did not accept the Court’s jurisdiction until 1990, the case was never examined by the Court. The Commission’s report, however, did not support the suggestion that military custodial authority alone constituted a relationship of sufficient authority and control.

122 The applicants pointed out that in the later cases against Turkey concerning northern Cyprus which were examined by the Commission and the Court during the 1990s, Turkey accepted that its jurisdiction under art.1 would be engaged in respect of the direct acts of Turkish military personnel. However, the Turkish Government shifted ground and argued that it did not have jurisdiction because the acts in question were not committed by Turkish agents but were instead attributable to an autonomous local administration installed in 1983, the “TRNC”. The Court in *Loizidou v Turkey*⁴⁴ and in *Cyprus v Turkey* (1982) 4 E.H.R.R. 482, countered this argument by elaborating the principle of “effective control of an area”, which applied⁴⁵:

“[W]hen as a consequence of military action - whether lawful or unlawful – [a contracting state] exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms

⁴⁴ *Loizidou v Turkey* (1995) 20 E.H.R.R. 99.

⁴⁵ See *Loizidou* (1995) 20 E.H.R.R. 99 at [62].

set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.”

In these cases the Court did not give any indication that the “State agent authority” principle had been supplanted. In fact, in *Loizidou v Turkey* (1995) 20 E.H.R.R. 99,⁴⁶ before setting out the principle of “effective control of an area” jurisdiction, the Court observed,⁴⁷ that:

“In addition, the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory (see the *Drozđ and Janousek v. France and Spain* judgment of 26 June 1992, Series A no. 240, p. 29, para. 91).”

Furthermore, its conclusion on the question whether the alleged violation was capable of falling within Turkish jurisdiction relied on both grounds equally⁴⁸:

“In this connection the respondent Government have acknowledged that the applicant’s loss of control of her property stems from the occupation of the northern part of Cyprus by Turkish troops and the establishment there of the ‘TRNC’. Furthermore, it has not been disputed that the applicant was prevented by Turkish troops from gaining access to her property.”

In the Court’s subsequent case law, the two principles had continued to be placed side-by-side.⁴⁹ There was no precedent of the Court to suggest that “State agent authority” jurisdiction was inapt as a means of analysing direct actions by military state agents exercising authority.

- 123 The applicants argued that their dead family members fell within the United Kingdom’s jurisdiction under the “State agent authority” principle. The Government had accepted, in respect of the sixth applicant’s son, that the exercise of authority and control by British military personnel in Iraq was capable of engaging the United Kingdom’s extra-territorial jurisdiction. However, jurisdiction in extra-territorial detention cases did not rest on the idea of a military prison as a quasi-territorial enclave. Jurisdiction in respect of the sixth applicant’s son would equally have arisen had he been tortured and killed while under arrest at the hotel where he worked or in a locked army vehicle parked outside. Moreover, the authority and control exercised by military personnel was not limited in principle to actions as custodians, even if the arrest and detention of persons outside state territory could be seen as a classic instance of state agent authority.⁵⁰

- 124 The applicants submitted that the deceased relatives of all six applicants fell within UK jurisdiction by virtue of the authority and control exercised over them by UK state agents. They emphasised that British armed forces had responsibility for public order in Iraq, maintaining the safety and security of local civilians and supporting the civil administration. In performing these functions, the British armed forces were operating within the wider context of the United Kingdom’s occupation

⁴⁶ *Loizidou v Turkey* (1995) 20 E.H.R.R. 99.

⁴⁷ *Loizidou v Turkey* (1995) 20 E.H.R.R. 99 at [62].

⁴⁸ *Loizidou v Turkey* (1995) 20 E.H.R.R. 99 at [63].

⁴⁹ See *Banković* (2007) 44 E.H.R.R. SE5 at [69]–[73]; *Issa* (2005) 41 E.H.R.R. 27 at [69]–[71]; *Andreou v Turkey* (45653/99) June 2, 2008; *Solomou v Turkey* (36832/97) June 24, 2008 at [44]–[45].

⁵⁰ As was argued by the respondent governments in *Banković* (2007) 44 E.H.R.R. SE5 at [37].

of South-East Iraq. The control and authority was also exercised through CPA South Regional Office, which was staffed primarily by British personnel. The individuals killed were civilians to whom the British armed forces owed the duty of safety and security. There was thus a particular relationship of authority and control between the soldiers and the civilians killed. To find that these individuals fell within the authority of the UK armed forces would not require the acceptance of the impact-based approach to jurisdiction which was rejected in *Banković*,⁵¹ but would instead rest on a particular relationship of authority and control. In the alternative, the applicants argued that, at least in respect of the deceased relatives of the second, fourth, fifth and sixth applicants, the British soldiers exercised sufficient authority and control to bring the victims within the United Kingdom's jurisdiction.

125 The applicants further contended that their dead relatives fell within UK jurisdiction because, at the relevant time, the United Kingdom was in effective control of South-East Iraq. It was their case that where, as a matter of international law, territory was occupied by a state as an occupying power, because that territory was actually placed under the authority of that state's hostile army,⁵² that was sufficient to constitute extra-territorial jurisdiction under art.1 of the Convention. This consequence of belligerent occupation reflected the approach in international law, both as regards extra-territorial jurisdiction and extra-territorial application of human rights based on "jurisdiction".

126 They rejected the idea that the "effective control of an area" basis of jurisdiction could apply only within the Convention legal space. Furthermore, they reasoned that to require a state to exert complete control, similar to that exercised within its own territory, would lead to the perverse position whereby facts disclosing a violation of the Convention would, instead of entitling the victim to a remedy, form the evidential basis for a finding that the state did not exercise jurisdiction. Similarly, defining the existence of control over an area by reference to troop numbers alone would be uncertain, allow evasion of responsibility and promote arbitrariness. The application of the Convention should influence the actions of the contracting states, prompting careful consideration of military intervention and ensuring sufficient troop numbers to meet its international obligations. The applicants endorsed the approach suggested by Sedley L.J. in the Court of Appeal,⁵³ that a contracting state in military occupation was under a duty to do everything possible to keep order and protect essential civil rights. While the Court's case law⁵⁴ included details of numbers of military personnel deployed, this was relevant to establishing whether a territory had actually been placed under the authority of a hostile army, in cases where the respondent states (Turkey and Russia) denied being in occupation. Where, as in the present case, the respondent State accepted that it was in occupation of the territory, such an assessment was unnecessary.

127 The applicants argued that the duty on an occupying state under international humanitarian law to apply the domestic law of the territorial state and not to impose its own law could not be used to evade jurisdiction under the Convention, since the "effective control of an area" basis of jurisdiction applied also to unlawful occupation. They referred to the judgment of the International Court of Justice in

⁵¹ *Banković* (2007) 44 E.H.R.R. SE5.

⁵² See art.42 of the Hague Regulations: [89] above.

⁵³ See [80] above.

⁵⁴ The northern Cyprus cases and *Ilaşcu* (2005) 40 E.H.R.R. 46.

Armed Activities on the Territory of the Congo and its Advisory Opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,⁵⁵ where the International Court of Justice found that the occupying State was under a duty to apply international human-rights law. The clear principle emerging from these cases was that belligerent occupation in international law was a basis for the recognition of extra-territorial human-rights jurisdiction.

(iii) The third parties

128 The interveners⁵⁶ emphasised that the Convention was adopted in the aftermath of the events in Europe of the 1930s and 1940s, when appalling human-rights abuses were carried out by military forces in occupied territories. It was inconceivable that the drafters of the Convention should have considered that the prospective responsibilities of states should be confined to violations perpetrated on their own territories. Moreover, public international law required that the concept of “jurisdiction” be interpreted in the light of the object and purpose of the particular treaty. The Court had repeatedly had regard to the Convention’s special character as an instrument for human-rights protection. It was relevant that one of the guiding principles under international human-rights law, which had been applied by the United Nations Human Rights Committee and the International Court of Justice when considering the conduct of states outside their territory, was the need to avoid unconscionable double standards, by allowing a state to perpetrate violations on foreign territory which would not be permitted on its own territory.

129 The interveners further emphasised that it was a common ground between the international and regional courts and human-rights bodies that, when determining whether the acts or omissions of a state’s agents abroad fall within its “jurisdiction”, regard must be had to the existence of control, authority or power of that state over the individual in question. When the agents of the state exercised such control, authority or power over an individual outside its territory, that state’s obligation to respect human rights continued. This was a factual test, to be determined with regard to the circumstances of the particular act or omission of the state agents. Certain situations, such as military occupations, created a strong presumption that individuals were under the control, authority or power of the occupying state. Indeed, one principle which emerged from the case law of the International Court of Justice *inter alia*,⁵⁷ was that once a situation was qualified as an occupation within the meaning of international humanitarian law, there was a strong presumption of “jurisdiction” for the purposes of the application of human-rights law.

(b) *The Court’s assessment*

(i) General principles relevant to jurisdiction under article 1 of the Convention

130 Article 1 of the Convention reads as follows:

“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention.”

As provided by this article, the engagement undertaken by a contracting state is confined to “securing” (*reconnaître* in the French text) the listed rights and

⁵⁵ See [90]–[91] above.

⁵⁶ See [6] above.

⁵⁷ See [90]–[91] above.

freedoms to persons within its own “jurisdiction”.⁵⁸ “Jurisdiction” under art.1 is a threshold criterion. The exercise of jurisdiction is a necessary condition for a contracting state to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention.⁵⁹

(ia) General principles relevant to jurisdiction under article 1 of the Convention: the territorial principle

131 A state’s jurisdictional competence under art.1 is primarily territorial.⁶⁰ Jurisdiction is presumed to be exercised normally throughout the state’s territory.⁶¹ Conversely, acts of the contracting states performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of art.1 only in exceptional cases.⁶²

132 To date, the Court in its case law has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a contracting state outside its own territorial boundaries. In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the state was exercising jurisdiction extra-territorially must be determined with reference to the particular facts.

(ib) General principles relevant to jurisdiction under article 1 of the Convention: state agent authority and control

133 The Court has recognised in its case law that, as an exception to the principle of territoriality, a contracting state’s jurisdiction under art.1 may extend to acts of its authorities which produce effects outside its own territory.⁶³ The statement of principle, as it appears in *Droz* and the other cases just cited, is very broad: the Court states merely that the contracting party’s responsibility “can be involved” in these circumstances. It is necessary to examine the Court’s case law to identify the defining principles.

134 First, it is clear that the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others.⁶⁴

135 Secondly, the Court has recognised the exercise of extra-territorial jurisdiction by a contracting state when, through the consent, invitation or acquiescence of the government of that territory, it exercises all or some of the public powers normally to be exercised by that government.⁶⁵ Thus where, in accordance with custom, treaty or other agreement, authorities of the contracting state carry out executive or judicial functions on the territory of another state, the contracting state may be

⁵⁸ See *Soering v United Kingdom* (1989) 11 E.H.R.R. 439 at [86]; and *Banković v Belgium* (2007) 44 E.H.R.R. SE5 at [66].

⁵⁹ See *Ilaşcu v Moldova* (2005) 40 E.H.R.R. 46 at [311].

⁶⁰ See *Soering* (1989) 11 E.H.R.R. 439 at [86]; *Banković* (2007) 44 E.H.R.R. SE5 at [61] and [67]; *Ilaşcu* (2005) 40 E.H.R.R. 46 at [312].

⁶¹ *Ilaşcu* (2005) 40 E.H.R.R. 46 at [312]; and *Assanidze v Georgia* (2004) 39 E.H.R.R. 32 at [139].

⁶² *Banković* (2007) 44 E.H.R.R. SE5 at [67].

⁶³ See *Droz v France* (1992) 14 E.H.R.R. 745 at [91]; *Loizidou v Turkey* (1995) 20 E.H.R.R. 99 at [62]; *Loizidou v Turkey* (1997) 23 E.H.R.R. 513 at [52]; and *Banković* (2007) 44 E.H.R.R. SE5 at [69].

⁶⁴ *Banković* (2007) 44 E.H.R.R. SE5 at [73]; see also *X v Federal Republic of Germany* (1611/62) September 25, 1965; *X v United Kingdom* (7547/76) December 15, 1977; *WM v Denmark* (17392/90) October 14, 1993.

⁶⁵ *Banković* (2007) 44 E.H.R.R. SE5 at [71].

responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial state.⁶⁶

- 136 In addition, the Court's case law demonstrates that, in certain circumstances, the use of force by a state's agents operating outside its territory may bring the individual thereby brought under the control of the state's authorities into the state's art.1 jurisdiction. This principle has been applied where an individual is taken into the custody of state agents abroad. For example, in *Öcalan v Turkey* (2005) 41 E.H.R.R. 45 at [91], the Court held that:

“[D]irectly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the ‘jurisdiction’ of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory.”

In *Issa v Turkey*, the Court indicated that, had it been established that Turkish soldiers had taken the applicants' relatives into custody in Northern Iraq, taken them to a nearby cave and executed them, the deceased would have been within Turkish jurisdiction by virtue of the soldiers' authority and control over them. In *Al-Saadoon v United Kingdom* (2009) 49 E.H.R.R. SE11 at [86]–[89], the Court held that two Iraqi nationals detained in British-controlled military prisons in Iraq fell within the jurisdiction of the United Kingdom, since the United Kingdom exercised total and exclusive control over the prisons and the individuals detained in them. Finally, in *Medvedev v France* (2010) 51 E.H.R.R. 39, the Court held that the applicants were within French jurisdiction by virtue of the exercise by French agents of full and exclusive control over a ship and its crew from the time of its interception in international waters. The Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the contracting state over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question.

- 137 It is clear that, whenever the state through its agents exercises control and authority over an individual, and thus jurisdiction, the state is under an obligation under art.1 to secure to that individual the rights and freedoms under s.1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be “divided and tailored”.⁶⁷

(ic) General principles relevant to jurisdiction under article 1 of the Convention: effective control over an area

- 138 Another exception to the principle that jurisdiction under art.1 is limited to a state's own territory occurs when, as a consequence of lawful or unlawful military action, a contracting state exercises effective control of an area outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting state's own armed forces, or through a subordinate local administration.⁶⁸ Where the fact of such domination over the territory is

⁶⁶ See *Drozd* (1992) 14 E.H.R.R. 745; *Gentilhomme v France* (48205/99, 48207/99 & 48209/99) May 14, 2002; and also *X v Switzerland* (7289/75 & 7349/76) July 14, 1977.

⁶⁷ Compare *Banković* (2007) 44 E.H.R.R. SE5 at [75].

⁶⁸ *Loizidou* (1995) 20 E.H.R.R. 99 at [62]; *Cyprus v Turkey* (2002) 35 E.H.R.R. 30 at [76]; *Banković* (2007) 44 E.H.R.R. SE5 at [70]; *Ilaşcu* (2005) 40 E.H.R.R. 46 at [314]–[316]; *Loizidou* (1997) 23 E.H.R.R. 513 at [52].

established, it is not necessary to determine whether the contracting state exercises detailed control over the policies and actions of the subordinate local administration. The fact that the local administration survives as a result of the contracting state's military and other support entails that state's responsibility for its policies and actions. The controlling state has the responsibility under art.1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights.⁶⁹

- 139 It is a question of fact whether a contracting state exercises effective control over an area outside its own territory. In determining whether effective control exists, the Court will primarily have reference to the strength of the state's military presence in the area.⁷⁰ Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region.⁷¹
- 140 The "effective control" principle of jurisdiction set out above does not replace the system of declarations under art.56 of the Convention (formerly art.63) which the states decided, when drafting the Convention, to apply to territories overseas for whose international relations they were responsible. Article 56(1) provides a mechanism whereby any state may decide to extend the application of the Convention, "with due regard ... to local requirements", to all or any of the territories for whose international relations it is responsible. The existence of this mechanism, which was included in the Convention for historical reasons, cannot be interpreted in present conditions as limiting the scope of the term "jurisdiction" in art.1. The situations covered by the "effective control" principle are clearly separate and distinct from circumstances where a contracting state has not, through a declaration under art.56, extended the Convention or any of its Protocols to an overseas territory for whose international relations it is responsible.⁷²

(id) General principles relevant to jurisdiction under article 1 of the Convention: the Convention legal space *espace juridique*)

- 141 The Convention is a constitutional instrument of European public order.⁷³ It does not govern the actions of states not parties to it, nor does it purport to be a means of requiring the contracting states to impose Convention standards on other states.⁷⁴
- 142 The Court has emphasised that, where the territory of one Convention state is occupied by the armed forces of another, the occupying state should in principle be held accountable under the Convention for breaches of human rights within the occupied territory, because to hold otherwise would be to deprive the population of that territory of the rights and freedoms hitherto enjoyed and would result in a "vacuum" of protection within the "Convention legal space".⁷⁵ However, the importance of establishing the occupying state's jurisdiction in such cases does not imply, *a contrario*, that jurisdiction under art.1 of the Convention can never

⁶⁹ *Cyprus v Turkey* (2002) 35 E.H.R.R. 30 at [76]–[77].

⁷⁰ See *Loizidou* (1997) 23 E.H.R.R. 513 at [16] and [56]; *Ilaşcu* (2005) 40 E.H.R.R. 46 at [387].

⁷¹ See *Ilaşcu* (2005) 40 E.H.R.R. 46 at [388]–[394].

⁷² See *Loizidou* (1995) 20 E.H.R.R. 99 at [86]–[89]; and *Quark Fishing Ltd v United Kingdom* (2007) 44 E.H.R.R. SE4.

⁷³ See *Loizidou v Turkey* (1995) 20 E.H.R.R. 99 at [75].

⁷⁴ See *Soering* (1989) 11 E.H.R.R. 439 at [86].

⁷⁵ See *Loizidou* (1997) 23 E.H.R.R. 513 at [78]; and *Banković* (2007) 44 E.H.R.R. SE5 at [80].

exist outside the territory covered by the Council of Europe Member States. The Court has not in its case law applied any such restriction.⁷⁶

(ii) Application of these principles to the facts of the case

143 In determining whether the United Kingdom had jurisdiction over any of the applicants' relatives when they died, the Court takes as its starting point that, on March 20, 2003, the United Kingdom together with the United States and their coalition partners, through their armed forces, entered Iraq with the aim of displacing the Ba'ath regime then in power. This aim was achieved by May 1, 2003, when major combat operations were declared to be complete and the United States and the United Kingdom became occupying powers within the meaning of art.42 of the Hague Regulations.⁷⁷

144 As explained in the letter dated May 8, 2003 sent jointly by the permanent representatives of the United Kingdom and the United States to the President of the United Nations Security Council,⁷⁸ the United States and the United Kingdom, having displaced the previous regime, created the Coalition Provisional Authority "to exercise powers of government temporarily". One of the powers of government specifically referred to in the letter of May 8, 2003 to be exercised by the United States and the United Kingdom through the Coalition Provisional Authority was the provision of security in Iraq, including the maintenance of civil law and order. The letter further stated that:

"The United States, the United Kingdom and Coalition partners, working through the Coalition Provisional Authority, shall *inter alia*, provide for security in and for the provisional administration of Iraq, including by ... assuming immediate control of Iraqi institutions responsible for military and security matters."

145 In its first legislative act, CPA Regulation 1 of May 16, 2003, the Coalition Provisional Authority declared that it would:

"[E]xercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration, to restore conditions of security and stability."⁷⁹

146 The contents of the letter of May 8, 2003 were noted by the Security Council in Resolution 1483, adopted on May 22, 2003. This Resolution gave further recognition to the security role which had been assumed by the United States and the United Kingdom when, in para.4, it called upon the occupying powers:

"[T]o promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability."⁸⁰

147 During this period the United Kingdom had command of the military division Multinational Division (South East), which included the province of Al-Basrah, where the applicants' relatives died. From May 1, 2003 onwards the British forces

⁷⁶ See amongst other examples *Öcalan* (2005) 41 E.H.R.R. 45; *Issa* (2005) 41 E.H.R.R. 27; *Al-Saadoon* (2009) 49 E.H.R.R. SE11; *Medvedyev* (2010) 51 E.H.R.R. 39.

⁷⁷ See [89] above.

⁷⁸ See [11] above.

⁷⁹ See [12] above.

⁸⁰ See [14] above.

in Al-Basrah took responsibility for maintaining security and supporting the civil administration. Among the United Kingdom's security tasks were patrols, arrests, anti-terrorist operations, policing of civil demonstrations, protection of essential utilities and infrastructure and protecting police stations.⁸¹

- 148 In July 2003 the Governing Council of Iraq was established. The Coalition Provisional Authority remained in power, although it was required to consult with the Governing Council.⁸² In Resolution 1511, adopted on October 16, 2003, the United Nations Security Council underscored the temporary nature of the exercise by the Coalition Provisional Authority of the authorities and responsibilities set out in Resolution 1483. It also authorised "a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq".⁸³ United Nations Security Council Resolution 1546, adopted on June 8, 2004, endorsed:

"[T]he formation of a sovereign Interim Government of Iraq ... which will assume full responsibility and authority by 30 June 2004 for governing Iraq."⁸⁴

In the event, the occupation came to an end on June 28, 2004, when full authority for governing Iraq passed to the Interim Iraqi Government from the Coalition Provisional Authority, which then ceased to exist.⁸⁵

(iii) Conclusion as regards jurisdiction

- 149 It can be seen, therefore, that following the removal from power of the Ba'ath regime and until the accession of the Interim Government, the United Kingdom (together with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South-East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of art.1 of the Convention.

- 150 Against this background, the Court recalls that the deaths at issue in the present case occurred during the relevant period: the fifth applicant's son died on May 8, 2003; the first and fourth applicants' brothers died in August 2003; the sixth applicant's son died in September 2003; and the spouses of the second and third applicants died in November 2003. It is not disputed that the deaths of the first, second, fourth, fifth and sixth applicants' relatives were caused by the acts of British soldiers during the course of or contiguous to security operations carried out by British forces in various parts of Basrah City. It follows that in all these cases there was a jurisdictional link for the purposes of art.1 of the Convention between the United Kingdom and the deceased. The third applicant's wife was killed during an exchange of fire between a patrol of British soldiers and unidentified gunmen and it is not known which side fired the fatal bullet. The Court considers that, since the death occurred in the course of a UK security operation,

⁸¹ See [21] above.

⁸² See [15] above.

⁸³ See [16] above.

⁸⁴ See [18] above.

⁸⁵ See [19] above.

when British soldiers carried out a patrol in the vicinity of the applicant's home and joined in the fatal exchange of fire, there was a jurisdictional link between the United Kingdom and this deceased also.

2. Alleged breach of the investigative duty under article 2

- 151 The applicants did not complain before the Court of any substantive breach of the right to life under art.2. Instead they complained that the Government had not fulfilled its procedural duty to carry out an effective investigation into the killings.

Article 2 of the Convention provides as follows:

- “1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

(a) *The parties' arguments*

(i) The Government

- 152 The Government reasoned that the procedural duty under art.2 had to be interpreted in harmony with the relevant principles of international law. Moreover, any implied duty should not be interpreted in such a way as to place an impossible or disproportionate burden on a contracting state. The United Kingdom did not have full control over the territory of Iraq and, in particular, did not have legislative, administrative or judicial competence. If the investigative duty were to apply extra-territorially, it had to take account of these circumstances, and also of the very difficult security conditions in which British personnel were operating.

- 153 The Government accepted that the investigations into the deaths of the first, second and third applicants' relatives were not sufficiently independent for the purposes of art.2, since in each case the investigation was carried out solely by the commanding officers of the soldiers alleged to be responsible. However, it submitted that the investigations carried out in respect of the fourth and fifth applicants complied with art.2. Nor had there been any violation of the investigative duty in respect of the sixth applicant; indeed, he did not allege that the investigation in his case had failed to comply with art.2.

- 154 The Government emphasised, generally, that the Royal Military Police investigators were institutionally independent of the armed forces. It submitted that the Court of Appeal had been correct in concluding that the Special Investigation Branch of the Royal Military Police was capable of conducting independent investigations,⁸⁶ although Brooke L.J. had also commented that the

⁸⁶ See [82] above.

task of investigating loss of life “must be completely taken away from the military chain of command and vested in the [Royal Military Police]”. The role of the military chain of command in notifying the Special Investigations Branch of an incident requiring investigation, and its subsequent role in referring cases investigated by Special Investigation Branch to the Army Prosecuting Authority did not, however, mean that those investigations lacked independence as required by arts 2 or 3.⁸⁷ The Army Prosecuting Authority was staffed by legally qualified officers. It was wholly independent from the military chain of command in relation to its prosecuting function. Its independence had been recognised by the Court in *Cooper*.⁸⁸

155 The Government pointed out that an investigation into the fourth applicant’s brother’s death was commenced by the Special Investigation Branch on August 29, 2003, five days after the shooting on August 14. The Special Investigation Branch recovered fragments of bullets, empty bullet-cases, the vehicle and digital photographs of the scene. They interviewed the doctors who treated the deceased and took statements. Nine military witnesses involved in the incident were interviewed and had statements taken and four further witnesses were interviewed but had no evidence to offer. The investigation was discontinued on September 17, 2003 after the Brigade Commander expressed the view that the shooting fell within the Rules of Engagement and was lawful. However, the decision to discontinue was taken by a Special Investigation Branch senior investigating officer, who was independent of the military chain of command. The investigation was reopened on June 7, 2004 and completed on December 3, 2004, despite the difficult security conditions in Iraq at that time. The case was then referred to the Army Prosecuting Authority, which decided not to bring criminal charges as there was no realistic prospect of proving that the soldier who shot the fourth applicant’s brother had not been acting in self-defence. The Attorney General was notified and he decided not to exercise his jurisdiction to order a prosecution. In the Government’s submission, the investigation was effective, in that it identified the person responsible for the death and established that the laws governing the use of force had been followed. The investigation was reasonably prompt, in particular when regard was had to the extreme difficulty of investigating in the extra-territorial context. If the halting of the initial investigation gave rise to any lack of independence, this was cured by the subsequent investigation and the involvement of the Army Prosecuting Authority and the Attorney General.⁸⁹

156 The Government submitted that there was no evidence, in the fifth applicant’s case, that the military chain of command interfered with the Special Investigations Branch investigation so as to compromise its independence. On the contrary, after receiving the investigation report the military chain of command referred the case to the Army Prosecuting Authority who in turn referred it for independent criminal trial. There was no undue delay in the investigation, in particular having regard to the difficulties faced by UK investigators investigating an incident which took place in Iraq eight days after the cessation of major combat operations. The fifth applicant was fully and sufficiently involved in the investigation. His participation

⁸⁷ See *Cooper v United Kingdom* (2004) 39 E.H.R.R. 8 at [108]–[115]; *McKerr v United Kingdom* (2002) 34 E.H.R.R. 20; *Edwards v United Kingdom* (2002) 35 E.H.R.R. 19.

⁸⁸ *Cooper* (2004) 39 E.H.R.R. 8.

⁸⁹ See *Gül v Turkey* (2002) 34 E.H.R.R. 28 at [92]–[95]; see also *McCann v United Kingdom* (1996) 21 E.H.R.R. 97 at [157] and [162]–[164].

culminated in the UK authorities flying him to England so that he could attend the court-martial and give evidence. In addition to the Special Investigation Branch investigation and the criminal proceedings against the four soldiers, the fifth applicant brought civil proceedings in the UK domestic courts, claiming damages for battery and assault, negligence and misfeasance in public office. In those proceedings he gave an account of his son's death and the investigation which followed it. The proceedings were settled when the Ministry of Defence admitted liability and agreed to pay £115,000 by way of compensation. Moreover, on February 20, 2009 Major General Cubitt wrote to the fifth applicant and formally apologised on behalf of the British Army for its role in the death of his son. In these circumstances, the fifth applicant could no longer claim to be a victim of a violation of the Convention within the meaning of art.34. Further, or in the alternative, it was no longer justified to continue the examination of the application.⁹⁰

- 157 The Government further emphasised that the sixth applicant had expressly confirmed that he did not claim before the Court that the Government had violated his Convention rights. This reflected the fact that, in relation to his son's death, there had been: (1) a full investigation by the Special Investigation Branch, leading to the bringing of criminal charges against six soldiers, one of whom was convicted; (2) civil proceedings brought by the applicant, which were settled when the Government admitted liability for the mistreatment and death of the applicant's son and paid damages of £575,000; (3) a formal public acknowledgement by the Government of the breach of the applicant's son's rights under arts 2 and 3; (4) the judicial review proceedings, in which the applicant complained of a breach of his procedural rights under arts 2 and 3 and in which it was agreed by the parties and ordered by the House of Lords that the question whether there had been a breach of the procedural obligation should be remitted to the Divisional Court; (5) a public inquiry, which was ongoing. In these circumstances, the applicant could no longer claim to be a victim for the purposes of art.34 of the Convention.

(ii) The applicants

- 158 The applicants emphasised that the Court's case law regarding south-eastern Turkey demonstrated that the procedural duty under art.2 was not modified by reference to security problems in a conflict zone. The same principle had to apply in relation to any attempt by the Government to rely on either the security situation or the lack of infrastructure and facilities in Iraq. The United Kingdom was aware, or should have been aware, prior to the invasion and during the subsequent occupation, of the difficulties it would encounter. Its shortcomings in making provision for those difficulties could not exonerate it from the failure to comply with the investigative duty.
- 159 They submitted that the United Kingdom had failed in its procedural duty as regards the first, second, third, fourth and fifth applicants. The Royal Military Police was an element of the British Army and was not, in either institutional or practical terms, independent from the military chain of command. The Army units exercised control over it in matters relating to safety and logistical support whilst in theatre. Its involvement in incidents was wholly dependent on a request from the military unit in question, as was illustrated by the fourth applicant's case, where the Special Investigation Branch response was stood down upon the instruction of

⁹⁰ Convention art.37(1)(c).

the Commanding Officer. The Royal Military Police appeared to have been wholly dependent on the military chain of command for information about incidents. If it produced a report, this was given to the military chain of command, which decided whether to forward it to the Army Prosecuting Authority. The inadequacies within the Royal Military Police, regarding both lack of resources and independence, were noted by the Court of Appeal and by the *Aitken Report*.

- 160 The applicants pointed out that the Special Investigation Branch investigation into the fourth applicant's case had been discontinued at the request of the military chain of command. The further investigatory phase, re-opened as a result of litigation in the domestic courts, was similarly deficient, given the lack of independence of the Special Investigation Branch and the extreme delay in interviewing the firer and securing other key evidence. In the fifth applicant's case, the investigation was initiated at the repeated urging of the family, after considerable obstruction and delay on the part of the British authorities. The investigators were not independent from the military chain of command and the victim's family were not sufficiently involved. The applicants contended that the Government's objection that the fifth applicant lacked victim status should be rejected. The court-martial proceedings and the compensation he had received in settlement of the civil proceedings were inadequate to satisfy the procedural requirement under art.2. In contrast, the sixth applicant did not claim still to be a victim of the violation of his procedural rights under arts 2 and 3.

(b) *The Court's assessment*

(i) General principles

- 161 The Court is conscious that the deaths in the present case occurred in Basrah City in South-East Iraq in the aftermath of the invasion, during a period when crime and violence were endemic. Although major combat operations had ceased on May 1, 2003, the coalition forces in South-East Iraq, including British soldiers and military police, were the target of over a thousand violent attacks in the subsequent 13 months. In tandem with the security problems, there were serious breakdowns in the civilian infrastructure, including the law enforcement and criminal justice systems.⁹¹
- 162 While remaining fully aware of this context, the Court's approach must be guided by the knowledge that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective. Article 2, which protects the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention. No derogation from it is permitted under art.15, "except in respect of deaths resulting from lawful acts of war". Article 2 covers both intentional killing and also the situations in which it is permitted to use force which may result, as an unintended outcome, in the deprivation of life. Any use of force must be no more than "absolutely necessary" for the achievement of one or more of the purposes set out in subparas (a)–(c).⁹²
- 163 The general legal prohibition of arbitrary killing by agents of the state would be ineffective in practice if there existed no procedure for reviewing the lawfulness

⁹¹ See [22]–[23] above; see also the findings of the Court of Appeal at [80] above.

⁹² See *McCann v United Kingdom* (1996) 21 E.H.R.R. 97 at [146]–[148].

of the use of lethal force by state authorities. The obligation to protect the right to life under this provision, read in conjunction with the state's general duty under art.1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the state.⁹³ The essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility.⁹⁴ However, the investigation should also be broad enough to permit the investigating authorities to take into consideration not only the actions of the state agents who directly used lethal force but also all the surrounding circumstances, including such matters as the planning and control of the operations in question, where this is necessary in order to determine whether the state complied with its obligation under art.2 to protect life.⁹⁵

164 The Court has held that the procedural obligation under art.2 continues to apply in difficult security conditions, including in a context of armed conflict.⁹⁶ It is clear that where the death to be investigated under art.2 occurs in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators and, as the United Nations Special Rapporteur has also observed,⁹⁷ concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed.⁹⁸ Nonetheless, the obligation under art.2 to safeguard life entails that, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life.⁹⁹

165 What form of investigation will achieve the purposes of art.2 may vary depending on the circumstances. However, whatever mode is employed, the authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.¹⁰⁰ Civil proceedings, which are undertaken on the initiative of the next-of-kin, not the authorities, and which do not involve the identification or punishment of any alleged perpetrator, cannot be taken into account in the assessment of the state's compliance with its procedural obligations under art.2 of the Convention.¹⁰¹ Moreover, the

⁹³ See *McCann* (1996) 21 E.H.R.R. 97 at [161].

⁹⁴ See *Nachova v Bulgaria* (2006) 42 E.H.R.R. 43 at [110].

⁹⁵ See, by implication, *McCann* (1996) 21 E.H.R.R. 97 at [150] and [162]; *Jordan v United Kingdom* (2003) 37 E.H.R.R. 2 at [128] (extracts); *McKerr* (2002) 34 E.H.R.R. 20 at [143] and [151]; *Shanaghan v United Kingdom* (37715/97) May 4, 2001 at [100]–[125]; *Finucane v United Kingdom* (2003) 37 E.H.R.R. 29 at [77]–[78]; *Nachova* (2006) 42 E.H.R.R. 43 at [114]–[115]; and also, *mutatis mutandis*, *Tzakov v Bulgaria* (45500/99) February 23, 2006 at [71].

⁹⁶ See, amongst other examples, *Güleç v Turkey* (1999) 28 E.H.R.R. 121 at [81]; *Ergi v Turkey* (2001) 32 E.H.R.R. 18 at [79] and [82]; *Özkan v Turkey* (21689/93) April 6, 2004 at [85]–[90] and [309]–[320] and [326]–[330]; *Isayeva v Russia* (2005) 41 E.H.R.R. 38 at [180] and [210]; *Kanlibaş v Turkey* (32444/96) December 8, 2005 at [39]–[51].

⁹⁷ See [93] above.

⁹⁸ See, for example, *Bazorkina v Russia* (2008) 46 E.H.R.R. 15 at [121].

⁹⁹ See, amongst many other examples, *Kaya v Turkey* (1999) 28 E.H.R.R. 1 at [86]–[92]; *Ergi* (2001) 32 E.H.R.R. 18 at [82]–[85]; *Tanrikulu v Turkey* (2000) 30 E.H.R.R. 950 at [101]–[110]; *Khashiyev v Russia* (2006) 42 E.H.R.R. 20 at [156]–[166]; *Isayeva* (2005) 41 E.H.R.R. 38 at [215]–[224]; *Musayev v Russia* (57941/00, 58699/00 & 60403/00) July 26, 2007 at [158]–[165].

¹⁰⁰ See *Özkan* (21689/93) April 6, 2004 at [310]; *Isayeva* (2005) 41 E.H.R.R. 38 at [210].

¹⁰¹ See, for example, *Jordan* (2003) 37 E.H.R.R. 2 at [141].

procedural obligation of the state under art.2 cannot be satisfied merely by awarding damages.¹⁰²

166 As stated above, the investigation must be effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must take the reasonable steps available to them to secure the evidence concerning the incident, including inter alia eye-witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.¹⁰³

167 For an investigation into alleged unlawful killing by state agents to be effective, it is necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence.¹⁰⁴ A requirement of promptness and reasonable expedition is implicit in this context. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the victim's next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.¹⁰⁵

(ii) Application of these principles to the facts of the case

168 The Court takes as its starting point the practical problems caused to the investigatory authorities by the fact that the United Kingdom was an occupying power in a foreign and hostile region in the immediate aftermath of invasion and war. These practical problems included the breakdown in the civil infrastructure, leading inter alia to shortages of local pathologists and facilities for autopsies; the scope for linguistic and cultural misunderstandings between the occupiers and the local population; and the danger inherent in any activity in Iraq at that time. As stated above, the Court considers that in circumstances such as these the procedural duty under art.2 must be applied realistically, to take account of specific problems faced by investigators.

169 Nonetheless, the fact that the United Kingdom was in occupation also entailed that, if any investigation into acts allegedly committed by British soldiers was to be effective, it was particularly important that the investigating authority was, and was seen to be, operationally independent of the military chain of command.

¹⁰² See *McKerr* (2002) 34 E.H.R.R. 20 at [121]; *Bazorkina* (2008) 46 E.H.R.R. 15 at [117].

¹⁰³ See *Özkan v Turkey* (21689/93) April 6, 2004 at [312]; *Isayeva* (2005) 41 E.H.R.R. 38 at [212] and the cases cited therein.

¹⁰⁴ See, for example, *Shanaghan* (37715/97) May 4, 2001 at [104].

¹⁰⁵ See *Özkan v Turkey* (21689/93) April 6, 2004 at [311]–[314]; *Isayeva* (2005) 41 E.H.R.R. 38 at [211]–[214] and the cases cited therein.

- 170 It was not in issue in the first, second and fourth applicants' cases that their relatives were shot by British soldiers, whose identities were known. The question for investigation was whether in each case the soldier fired in conformity with the Rules of Engagement. In respect of the third applicant, art.2 required an investigation to determine the circumstances of the shooting, including whether appropriate steps were taken to safeguard civilians in the vicinity. As regards the fifth applicant's son, although the Court has not been provided with the documents relating to the court-martial, it appears to have been accepted that he died of drowning. It needed to be determined whether British soldiers had, as alleged, beaten the boy and forced him into the water. In each case eye-witness testimony was crucial. It was therefore essential that, as quickly after the event as possible, the military witnesses, and in particular the alleged perpetrators, should have been questioned by an expert and fully independent investigator. Similarly, every effort should have been taken to identify Iraqi eye witnesses and to persuade them that they would not place themselves at risk by coming forward and giving information and that their evidence would be treated seriously and acted upon without delay.
- 171 It is clear that the investigations into the shooting of the first, second and third applicants' relatives fell short of the requirements of art.2, since the investigation process remained entirely within the military chain of command and was limited to taking statements from the soldiers involved. Moreover, the Government accept this conclusion.
- 172 As regards the other applicants, although there was an investigation by the Special Investigation Branch into the death of the fourth applicant's brother and the fifth applicant's son, the Court does not consider that this was sufficient to comply with the requirements of art.2. It is true that the Royal Military Police, including its Special Investigation Branch, had a separate chain of command from the soldiers on combat duty whom it was required to investigate. However, as the domestic courts observed,¹⁰⁶ the Special Investigation Branch was not, during the relevant period, operationally independent from the military chain of command. It was generally for the Commanding Officer of the unit involved in the incident to decide whether the Special Investigation Branch should be called in. If the Special Investigation Branch decided on its own initiative to commence an investigation, this investigation could be closed at the request of the military chain of command, as demonstrated in the fourth applicant's case. On conclusion of a Special Investigation Branch investigation, the report was sent to the Commanding Officer, who was responsible for deciding whether or not the case should be referred to the prosecuting authority. The Court considers, in agreement with Brooke L.J.,¹⁰⁷ that the fact that the Special Investigation Branch was not "free to decide for itself when to start and cease an investigation" and did not report "in the first instance to the [Army Prosecuting Authority]" rather than to the military chain of command, meant that it could not be seen as sufficiently independent from the soldiers implicated in the events to satisfy the requirements of art.2.
- 173 It follows that the initial investigation into the shooting of the fourth applicant's brother was flawed by the lack of independence of the Special Investigation Branch officers. During the initial phase of the investigation, material was collected from the scene of the shooting and statements were taken from the soldiers present.

¹⁰⁶ See [77] and [82] above.

¹⁰⁷ See [82] above.

However, Lance Corporal S, the soldier who shot the applicant's brother, was not questioned by Special Investigation Branch investigators during this initial phase. It appears that the Special Investigation Branch interviewed four Iraqi witnesses, who may have included the neighbours the applicant believes to have witnessed the shooting, but did not take statements from them. In any event, as a result of the lack of independence, the investigation was terminated while still incomplete. It was subsequently reopened, some nine months later, and it would appear that forensic tests were carried out at that stage on the material collected from the scene, including the bullet fragments and vehicle. The Special Investigation Branch report was sent to the Commanding Officer, who decided to refer the case to the Army Prosecuting Authority. The prosecutors took depositions from the soldiers who witnessed the incident and decided, having taken further independent legal advice, that there was no evidence that Lance Corporal S had not acted in legitimate self-defence. As previously stated, eye witness testimony was central in this case, since the cause of the death was not in dispute. The Court considers that the long period of time that was allowed to elapse before Lance Corporal S was questioned about the incident, combined with the delay in having a fully independent investigator interview the other military witnesses, entailed a high risk that the evidence was contaminated and unreliable by the time the Army Prosecuting Authority came to consider it. Moreover, it does not appear that any fully independent investigator took evidence from the Iraqi neighbours who the applicant claims witnessed the shooting.

174 While there is no evidence that the military chain of command attempted to intervene in the investigation into the fifth applicant's son's death, the Court considers that the Special Investigation Branch investigators lacked independence for the reasons set out above. In addition, no explanation has been provided by the Government in respect of the long delay between the death and the court-martial. It appears that the delay seriously undermined the effectiveness of the investigation, not least because some of the soldiers accused of involvement in the incident were by then untraceable.¹⁰⁸ Moreover, the Court considers that the narrow focus of the criminal proceedings against the accused soldiers was inadequate to satisfy the requirements of art.2 in the particular circumstances of this case. There appears to be at least *prima facie* evidence that the applicant's son, a minor, was taken into the custody of British soldiers who were assisting the Iraqi police to take measures to combat looting and that, as a result of his mistreatment by the soldiers, he drowned. In these circumstances, the Court considers that art.2 required an independent examination, accessible to the victim's family and to the public, of the broader issues of state responsibility for the death, including the instructions, training and supervision given to soldiers undertaking tasks such as this in the aftermath of the invasion.

175 In the light of the foregoing, the Court does not consider that the procedural duty under art.2 has been satisfied in respect of the fifth applicant. Although he has received a substantial sum in settlement of his civil claim, together with an admission of liability on behalf of the Army, there has never been a full and independent investigation into the circumstances of his son's death.¹⁰⁹ It follows that the fifth applicant can still claim to be a victim within the meaning of art.34

¹⁰⁸ See, in this respect, the comments in the *Aitken Report*, 2008, [61] above.

¹⁰⁹ See [165] above.

and that the Government's preliminary objection regarding his lack of victim status must be rejected.

176 In contrast, the Court notes that a full, public inquiry is nearing completion into the circumstances of the sixth applicant's son's death. In the light of this inquiry, the Court notes that the sixth applicant accepts that he is no longer a victim of any breach of the procedural obligation under art.2. The Court therefore accepts the Government's objection in respect of the sixth applicant.

177 In conclusion, the Court finds a violation of the procedural duty under art.2 of the Convention in respect of the first, second, third, fourth and fifth applicants.

II. Application of article 41 of the Convention

178 Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

179 The first, second, third, fourth and fifth applicants asked the Court to order the Government to carry out an art.2-compliant investigation into their relatives' deaths. They also claimed £15,000 each in compensation for the distress they had suffered because of the United Kingdom's failure to conduct a Convention-compliant investigation into the deaths.

180 The Government pointed out that the Court had repeatedly and expressly refused to direct the state to carry out a fresh investigation in cases in which it had found a breach of the procedural duty under art.2.¹¹⁰ It further submitted that a finding of a violation would be sufficient just satisfaction in the circumstances. In the alternative, if the Court decided to make an award, the Government noted that the sum claimed by the applicants was higher than generally awarded. It did not, however, propose a sum, leaving it to the Court to decide on an equitable basis.

181 As regards the applicants' request concerning the provision of an effective investigation, the Court reiterates the general principle that the respondent State remains free to choose the means by which it will discharge its legal obligation under art.46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment. Consequently it considers that in these applications it falls to the Committee of Ministers acting under art.46 of the Convention to address the issues as to what may be required in practical terms by way of compliance.¹¹¹

182 As regards the claim for monetary compensation, the Court recalls that it is not its role under art.41 to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in

¹¹⁰ See for example *Varnava v Turkey* (2010) 50 E.H.R.R. 21 at [222]; *Ülkü Ekinci v Turkey* (27602/95) July 16, 2002 at [179]; *Finucane* (2003) 37 E.H.R.R. 29 at [89].

¹¹¹ See *Varnava* (2010) 50 E.H.R.R. 21 at [222] and the cases cited therein.

which the breach occurred. Its non-pecuniary awards serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage.¹¹² In the light of all the circumstances of the present case, the Court considers that, to compensate each of the first five applicants for the distress caused by the lack of a fully independent investigation into the deaths of their relatives, it would be just and equitable to award the full amount claimed, which, when converted into euros, comes to approximately €17,000 each.

B. Costs and expenses

- 183 The applicants, emphasising the complexity and importance of the case, claimed for over 580 hours' legal work by their solicitors and four counsel in respect of the proceedings before the Court, at a total cost of £119,928.
- 184 The Government acknowledged that the issues were complex, but nonetheless submitted that the claim was excessive, given that the applicants' legal advisers were familiar with all aspects of the claim since they had acted for the applicants in the domestic legal proceedings, which had been publicly funded. Furthermore, the hourly rates claimed by the applicants' counsel, ranging between £500 and £235, and the hourly rates claimed by the applicants' solicitors (£180 and £130) were unreasonably high. Nor had it been necessary to engage two Queen's Counsel and two junior counsel.
- 185 According to the Court's case law, an applicant is entitled to the reimbursement of costs and expenses only insofar as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of €50,000 for the proceedings before the Court.

C. Default interest

- 186 The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added 3 percentage points.

For these reasons, THE COURT unanimously:

(1) *Rejects* the Government's preliminary objections regarding attribution and non-exhaustion of domestic remedies.

(2) *Joins* to the merits the questions whether the applicants fell within the jurisdiction of the respondent State and whether the fifth and sixth applicants retained victim status.

(3) *Declares* the application admissible.

(4) *Holds* that the applicants' deceased relatives fell within the jurisdiction of the respondent State and *dismisses* the Government's preliminary objection as regards jurisdiction.

(5) *Holds* that the sixth applicant can no longer claim to be a victim of a violation of the procedural obligation under art.2 of the Convention.

¹¹² See *Varnava* (2010) 50 E.H.R.R. 21 at [224] and the cases cited therein.

(6) *Holds* that there has been a breach of the procedural obligation under art.2 of the Convention to carry out an adequate and effective investigation into the deaths of the relatives of the first, second, third, fourth and fifth applicants and *dismisses* the Government's preliminary objection as regards the victim status of the fifth applicant.

(7) *Holds*:

- (a) that the respondent State is to pay each of the first five applicants, within three months, €17,000 (seventeen thousand euros), plus any tax that may be chargeable on this sum, in respect of non-pecuniary damage, to be converted into pounds sterling at the rate applicable at the date of settlement;
- (b) that the respondent State is to pay jointly to the first five applicants, within three months, €50,000 (fifty thousand euros), plus any tax that may be chargeable to the applicants on this sum, in respect of costs and expenses, to be converted into pounds sterling at the rate applicable at the date of settlement;
- (c) that from the expiry of the abovementioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus 3 percentage points.

8. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Concurring Opinion of Judge Rozakis¹¹³

O-11 When citing the general principles relevant to a state party's jurisdiction under art.1 of the Convention,¹¹⁴ the Court reiterates its established case law that apart from the territorial aspect determining the jurisdictional competence of a state party to the Convention, there are "exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries".¹¹⁵ It then proceeds to discuss such exceptional circumstances. At [133]–[137], under the title "State agent authority and control", it refers to situations where state agents operating extraterritorially, and exercising control and authority over individuals, create a jurisdictional link with their state and its obligations under the Convention, making that state responsible for the acts or omissions of its agents, in cases where they affect the rights or freedoms of individuals protected by the Convention. Characteristic examples of such exceptional circumstances of extraterritorial jurisdiction are mentioned in the judgment,¹¹⁶ and concern the acts of diplomatic and consular agents, the exercise of authority and control over foreign territory by individuals which is allowed by a third state through its consent, invitation or acquiescence, and the use of force by state agents operating outside its territory.

O-12 So far so good, but then, under the title "Effective control over an area", the Court refers to "[a]nother exception to the principle of jurisdiction", when "as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside [its] national territory". I regret to say that I

¹¹³ Paragraph numbering added by the publisher.

¹¹⁴ See [130] et seq. of the Grand Chamber's judgment.

¹¹⁵ See [132].

¹¹⁶ See [134]–[136].

cannot agree that this ground of jurisdiction constitutes a separate (“another”) ground of jurisdiction, which differs from the “State authority and control” jurisdictional link. It is part and parcel, to my mind, of that latter jurisdictional link, and concerns a particular aspect of it. The differing elements, which distinguish that particular aspect from the jurisdictional categories mentioned by the Court, can be presented cumulatively or in isolation as the following: (a) the usually large-scale use of force; (b) the occupation of a territory for a prolonged period of time; and/or (c) in the case of occupation, the exercise of power by a subordinate local administration, whose acts do not exonerate the occupying state from its responsibility under the Convention.

- O-I3 As a consequence, I consider that the right approach to the matter would have been for the Court to have included that aspect of jurisdiction in the exercise of “State authority and control” test, and to have simply determined that “effective” control is a condition for the exercise of jurisdiction which brings a state within the boundaries of the Convention, as delimited by its art.1.

Concurring Opinion of Judge Bonello¹¹⁷

- O-II1 These six cases deal primarily with the issue of whether Iraqi civilians who allegedly lost their lives at the hands of UK soldiers, in non-combat situations in the UK-occupied Basrah region of Iraq, were “within the jurisdiction” of the United Kingdom when those killings took place.
- O-II2 When, in March 2003, the United Kingdom, together with the other coalition forces invaded Iraq, the Coalition Provisional Authority (CPA) conferred upon members of that Authority the fullest jurisdictional powers over Iraq: “The CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives.” This included the “power to issue legislation”: “The CPA shall exercise powers of government temporarily.”¹¹⁸
- O-II3 I fully agreed with the findings of the Court, but I would have employed a different test (a “functional jurisdiction” test) to establish whether or not the victims fell within the jurisdiction of the United Kingdom. Though the present judgment has placed the doctrines of extra-territorial jurisdiction on a sounder footing than ever before, I still do not consider wholly satisfactory the re-elaboration of the traditional tests to which the Court has resorted.

I. Extra-territorial jurisdiction or functional jurisdiction?

- O-II4 The Court’s case law on art.1 of the Convention (the jurisdiction of the contracting parties) has, so far, been bedevilled by an inability or an unwillingness to establish a coherent and axiomatic regime, grounded in essential basics and even-handedly applicable across the widest spectrum of jurisdictional controversies.
- O-II5 Up until now, the Court has, in matters concerning the extra-territorial jurisdiction of contracting parties, spawned a number of “leading” judgments based on a need-to-decide basis, patchwork case law at best. Inevitably, the doctrines established seem to go too far to some, and not far enough to others. As the Court has, in these cases, always tailored its tenets to sets of specific facts, it is hardly surprising that those tenets then seem to limp when applied to sets of different

¹¹⁷ Paragraph numbering added by the publisher.

¹¹⁸ Grand Chamber’s judgment at [12].

facts. Principles settled in one judgment may appear more or less justifiable in themselves, but they then betray an awkward fit when measured against principles established in another. *Issa* flies in the face of *Banković* and the cohabitation of *Behrami v France* (2007) 45 E.H.R.R. SE10 with *Berić v Bosnia and Herzegovina* (2008) 46 E.H.R.R. SE6 is, overall, quite problematic.

- O-II6 The late Lord Rodger in the House of Lords had my full sympathy when he lamented that, in its application of extra-territorial jurisdiction “the judgments and decisions of the European Court do not speak with one voice”. The differences, he rightly noted, are not merely ones of emphasis. Some “appear much more serious”.¹¹⁹
- O-II7 The truth seems to be that art.1 case law has, before the present judgment, enshrined everything and the opposite of everything. In consequence, the judicial decision-making process in Strasbourg has, so far, squandered more energy in attempting to reconcile the barely reconcilable than in trying to erect intellectual constructs of more universal application. A considerable number of different approaches to extra-territorial jurisdiction have so far been experimented with by the Court on a case-by-case basis, some not completely exempt from internal contradiction.
- O-II8 My guileless plea is to return to the drawing board. To stop fashioning doctrines which somehow seem to accommodate the facts, but rather, to appraise the facts against the immutable principles which underlie the fundamental functions of the Convention.
- O-II9 The founding members of the Convention, and each subsequent contracting party, strove to achieve one aim, at once infinitesimal and infinite: the supremacy of the rule of human-rights law. In art.1 they undertook to secure *to everyone within their jurisdiction* the rights and freedoms enshrined in the Convention. This was, and remains, the cornerstone of the Convention. That was, and remains, the agenda heralded in its preamble: “the *universal* and effective recognition and observance” of fundamental human rights. “Universal” hardly suggests an observance parcelled off by territory on the checkerboard of geography.
- O-II10 States ensure the observance of human rights in five primordial ways: first, by not violating (through their agents) human rights; secondly, by having in place systems which prevent breaches of human rights; thirdly, by investigating complaints of human-rights abuses; fourthly, by scourging those of their agents who infringe human rights; and, finally, by compensating the victims of breaches of human rights. These constitute the basic minimum *functions* assumed by every state by virtue of its having contracted into the Convention.
- O-II11 A “functional” test would see a state effectively exercising “jurisdiction” whenever it falls within its power to perform, or not to perform, any of these five functions. Very simply put, *a state has jurisdiction for the purposes of art.1 whenever the observance or the breach of any of these functions is within its authority and control.*
- O-II12 Jurisdiction means no less and no more than “authority over” and “control of”. In relation to Convention obligations, jurisdiction is neither territorial nor extra-territorial: it ought to be functional—in the sense that when it is within a state’s authority and control whether a breach of human rights is, or is not, committed, whether its perpetrators are, or are not, identified and punished, whether

¹¹⁹ House of Lords opinion in *Al Skeini* [2007] UKHL 26; [2008] 1 A.C. 153 at [67].

the victims of violations are, or are not, compensated, it would be an imposture to claim that, ah yes, that state had authority and control, but, ah no, it had no jurisdiction.

- O-III13 The duties assumed through ratifying the Convention go hand in hand with the duty to perform and observe them. Jurisdiction arises from the mere fact of having assumed those obligations *and from having the capability to fulfil them* (or not to fulfil them).
- O-III14 If the perpetrators of an alleged human-rights violation are within the authority and control of one of the contracting parties, it is to me totally consequential that their actions by virtue of that state's authority, engage the jurisdiction of the contracting party. I resist any helpful schizophrenia by which a nervous sniper is within the jurisdiction, his act of shooting is within the jurisdiction, but then the victims of that nervous sniper happily choke in blood outside it. Any hiatus between what logical superglue has inexorably bonded appears defiantly meretricious, one of those infelicitous legal fictions a court of human rights can well do without.
- O-III15 Adhering to doctrines other than this may lead in practice to some riotous absurdities in their effects. If two civilian Iraqis are together in a street in Basrah, and a UK soldier kills the first before arrest and the second after arrest, the first dies desolate, deprived of the comforts of UK jurisdiction, the second delighted that his life was evicted from his body within the jurisdiction of the United Kingdom. Same UK soldier, same gun, same ammunition, same patch of street—same inept distinctions. I find these pseudo-differentials spurious and designed to promote a culture of law that perverts, rather than fosters, the cause of human-rights justice.
- O-III16 In my view, the one honest test, in *all* circumstances (including extra-territoriality), is the following: did it depend on the agents of the state whether the alleged violation would be committed or would not be committed? Was it within the power of the state to punish the perpetrators and to compensate the victims? If the answer is yes, self-evidently the facts fall squarely within the jurisdiction of the state. All the rest seems to me clumsy, self-serving alibi hunting, unworthy of any state that has grandiosely undertaken to secure the “universal” observance of human rights whenever and wherever it is within its power to secure them, and, may I add, of courts whose only *raison d'être* should be to ensure that those obligations are not avoided or evaded. The Court has, in the present judgment, thankfully placed a sanitary cordon between itself and some of these approaches.
- O-III17 The failure to espouse an obvious functional test, based exclusively on the programmatic agenda of the Convention, has, in the past, led to the adoption of a handful of sub-tests, some of which may have served defilers of Convention values far better than they have the Convention itself. Some of these tests have empowered the abusers and short-changed their victims. For me the primary questions to be answered boil down to these: when a state ratifies the Convention, does it undertake to promote human rights wherever it can, or does it undertake to promote human rights inside its own confines and to breach them everywhere else? Did the contracting party ratify the Convention with the deliberate intent of discriminating between the sanctity of human rights within its own territory and their paltry insignificance everywhere else?
- O-III18 I am unwilling to endorse à la carte respect for human rights. I think poorly of an esteem for human rights that turns casual and approximate depending on geographical co-ordinates. Any state that worships fundamental rights on its own

territory but then feels free to make a mockery of them anywhere else does not, as far as I am concerned, belong to that comity of nations for which the supremacy of human rights is both mission and clarion call. In substance the United Kingdom is arguing, sadly, I believe, that it ratified the Convention with the deliberate intent of regulating the conduct of its armed forces according to latitude: gentlemen at home, hoodlums elsewhere.

O-II19 The functional test I propose would also cater for the more rarefied reaches of human-rights protection, like respect for the positive obligations imposed on contracting parties: was it within the state's authority and control to see that those positive obligations would be respected? If it was, then the functional jurisdiction of the state would come into play, with all its natural consequences. If, in the circumstances, the state is not in such a position of authority and control as to be able to ensure extraterritorially the fulfilment of any or all of its positive obligations, that lack of functional authority and control excludes jurisdiction, limitedly to those specific rights the state is not in a position to enforce.

O-II20 This would be my universal vision of what this Court is all about—a bright line approach rather than case by case, more or less inspired, more or less insipid, improvisations, cluttering the case law with doctrines which are, at best, barely compatible and at worst blatantly contradictory—and none measured against the essential yardstick of the supremacy and universality of human rights anytime, anywhere.

II. Exceptions?

O-II21 I consider the doctrine of functional jurisdiction to be so linear and compelling that I would be unwilling to acquiesce to any exceptions, even more so in the realm of the near-absolute rights to life and to freedom from torture and degrading or inhuman treatment or punishment. Without ever reneging on the principle of the inherent jurisdiction of the occupying power that usually flows from military conquest, at most the Court could consider very limited exceptions to the way in which art.2 and art.3 are applied in extreme cases of clear and present threats to national security that would otherwise significantly endanger the war effort. I would not, personally, subscribe to any exceptions at all.

III. Conclusion

O-II22 Applying the functional test to the specifics of these cases, I arrive at the manifest and inescapable conclusion that all the facts and all the victims of the alleged killings said to have been committed by UK servicemen fall squarely within the jurisdiction of the United Kingdom, which had, in Basrah and its surroundings, an obligation to ensure the observance of arts 2 and 3 of the Convention. It is uncontested that the servicemen who allegedly committed the acts that led to the deaths of the victims were under UK authority and control; that it was within the United Kingdom's authority and control whether to investigate those deaths or not; that it was within the United Kingdom's authority and control whether to punish any human-rights violations, if established; and that it was within the United Kingdom's authority and control whether to compensate the victims of those alleged violations or their heirs. Concluding that the United Kingdom had *all this* within its full authority and control, but still had no jurisdiction, would for me amount to a finding as consequential as a good fairy tale and as persuasive as a bad one.

O-II23 The test adopted by the Court in this case has led to a unanimous finding of jurisdiction. Though I believe the functional test I endorse would better suit any dispute relating to extra-territorial jurisdiction, I would still have found that, whatever the test adopted, all the six killings before the Court engaged UK jurisdiction. I attach to this opinion a few random observations to buttress my conclusions.

IV. Presumption of jurisdiction

O-II24 I would propose a different test from that espoused by the domestic courts to establish or dismiss extra-territorial jurisdiction in terms of art.1, in cases concerning military occupation, when a state becomes the recognised “occupying power” according to the Geneva and The Hague instruments. Once a state is acknowledged by international law to be “an occupying power”, a rebuttable presumption ought to arise that the occupying power has “authority and control” over the occupied territory, over what goes on there and over those who happen to be in it—with all the consequences that flow from a legal presumption. It will then be incumbent on the occupying power to prove that such was the state of anarchy and impotence prevailing, that it suffered a deficit of effective authority and control. It will no longer be for the victim of wartime atrocities to prove that the occupying power actually exercised authority and control. It will be for the occupying power to rebut it.

O-II25 I was puzzled to read in the domestic proceedings that “the applicants had failed to make a case” for UK authority and control in the Basrah region. I believe that the mere fact of a formally acknowledged military occupation ought to shift any burden of proof from the applicants to the respondent Government.

O-II26 And it will, in my view, be quite arduous for an officially recognised “occupying power” to disprove authority and control over impugned acts, their victims and their perpetrators. The occupying power could only do that successfully in the case of infamies committed by forces other than its own, during a state of total breakdown of law and order. I find it bizarre, not to say offensive, that an occupying power can plead that it had no authority and control over acts committed by its own armed forces well under its own chain of command, claiming with one voice its authority and control over the perpetrators of those atrocities, but with the other, disowning any authority and control over atrocities committed by them and over their victims.

O-II27 It is my view that jurisdiction is established when authority and control over others are established. For me, in the present cases, it is well beyond surreal to claim that a military colossus which waltzed into Iraq when it chose, settled there for as long as it cared to and only left when it no longer suited its interests to remain, can persuasively claim not to have exercised authority and control over an area specifically assigned to it in the geography of the war games played by the victorious. I find it uncaring to the intellect for a state to disclaim accountability for what its officers, wearing its uniforms, wielding its weapons, sallying forth from its encampments and returning there, are alleged to have done. The six victims are said to have lost their lives as a result of the unlawful actions of United Kingdom soldiers in non-combat situations—but no one answers for their death. I guess we are expected to blame it on the evil eye.

O-II28 Jurisdiction flows not only from the exercise of democratic governance, not only from ruthless tyranny, not only from colonial usurpation. It also hangs from the mouth of a firearm. In non-combat situations, everyone in the line of fire of a gun is within the authority and control of whoever is wielding it.

V. Futility of the case law

O-II29 The undeniable fact is that this Court has never, before today, had to deal with any case in which the factual profiles were in any way similar to those of the present applications. This Court has, so far, had several occasions to determine complaints which raised issues of extra-territorial jurisdiction, but all of a markedly different nature. Endeavouring to export doctrines of jurisdiction hammered out in a case of a solitary air-strike over a radio station abroad¹²⁰ to allegations of atrocities committed by the forces of an occupying power, which has assumed and kept armed control of a foreign territory for well over three years, is anything but consequent. I find the jurisdictional guidelines established by the Court to regulate the capture by France of a Cambodian drug-running ship on the high seas, for the specific purpose of intercepting her cargo and bringing the crew to justice,¹²¹ to be quite distracting and time-wasting when the issue relates to a large territory outside the United Kingdom, conquered and held for over three years by the force of arms of a mighty foreign military set-up, recognised officially by international law as an “occupying power”, and which had established itself indefinitely there.

O-II30 In my view, this relentless search for eminently tangential case law is as fruitful and fulfilling as trying to solve one crossword puzzle with the clues of another. The Court could, in my view, have started the exercise by accepting that this was judicial terra incognita, and could have worked out an organic doctrine of extra-territorial jurisdiction, untrammelled by the irrelevant and indifferent to the obfuscating.

VI. Indivisibility of human rights

O-II31 The foregoing analysis is not at all invalidated by what is termed the “indivisibility of human rights” argument which runs thus: as human rights are indivisible, once a state is considered to have extra-territorial “jurisdiction”, then that state is held to be bound to enforce *all* the human rights enshrined in the Convention. Conversely, if that state is not in a position to enforce the whole range of Convention human rights, it does not have jurisdiction.

O-II32 Hardly so. Extraterritorially, a contracting state is obliged to ensure the observance of all those human rights which *it is in a position to ensure*. It is quite possible to envisage situations in which a contracting state, in its role as an occupying power, has well within its authority the power not to commit torture or extra-judicial killings, to punish those who commit them and to compensate the victims—but at the same time that contracting state does not have the extent of authority and control required to ensure to all persons the right to education or the right to free and fair elections: those fundamental rights it can enforce would fall squarely within its jurisdiction, those it cannot, on the wrong side of the bright line. If the “indivisibility of human rights” is to have any meaning at all, I would

¹²⁰ *Banković* (2007) 44 E.H.R.R. SE5.

¹²¹ *Medvedev* (2010) 51 E.H.R.R. 39.

prefer that meaning to run hand in hand with that of the “universality of human rights”.

- O-II33 I believe that it ill suits the respondent Government to argue, as it has, that its inability to secure respect for all fundamental rights in Basrah, gave them the right not to respect any at all.

VII. A vacuum of jurisdiction?

- O-II34 In spite of the fact that, as a leading partner in the Coalition Provisional Authority, the UK Government was “vested with all executive, legislative and judicial authority”¹²² over that part of vanquished Iraq assigned to them, the United Kingdom went a long and eloquent way in its attempt to establish that it did not exercise jurisdiction over the area assigned to it. It just stopped short of sharing with the Court who did. Who was the mysterious, faceless rival which, instead of it, exercised executive, legislative and judicial authority for three years and more over the area delegated to the United Kingdom? There unquestionably existed a highly volatile situation on the ground, pockets of violent insurgency and a pervasive, sullen resistance to the military presence.
- O-II35 However, in the Basrah region, some authority was still giving orders, laying down the law (*juris dicere*—defining what the binding norm of law is), running the correctional facilities, delivering the mail, establishing and maintaining communications, providing health services, supplying food and water, restraining military contraband and controlling criminality and terrorism as best it could. This authority, full and complete over the UK military, harassed and maimed over the rest, was the United Kingdom’s.
- O-II36 The alternative would be to claim that Basrah and the region under the United Kingdom’s executive, legislative and judicial responsibility hovered in an implacable legal void, sucked inside that legendary black hole, whose utter repulsion of any authority lasted well over three years. A proposition unlikely to find many takers on the legal market.

VIII. Human-rights imperialism

- O-II37 I confess to be quite unimpressed by the pleadings of the UK Government to the effect that exporting the European Convention on Human Rights to Iraq would have amounted to “human rights imperialism”. It ill behoves a state that imposed its military imperialism over another sovereign state without the frailest imprimatur from the international community, to resent the charge of having exported human-rights imperialism to the vanquished enemy. It is like wearing with conceit your badge of international law banditry, but then recoiling in shock at being suspected of human-rights promotion.
- O-II38 Personally, I would have respected better these virginal blushes of some statesmen had they worn them the other way round. Being bountiful with military imperialism but bashful of the stigma of human-rights imperialism, sounds to me like not resisting sufficiently the urge to frequent the lower neighbourhoods of political inconstancy. For my part, I believe that those who export war ought to see to the parallel export of guarantees against the atrocities of war. And then, if

¹²² See [12] of the Grand Chamber’s judgment.

necessary, bear with some fortitude the opprobrium of being labelled human-rights imperialists.

O-II39 I, for one, advertise my diversity. At my age, it may no longer be elegant to have dreams. But that of being branded in perpetuity a human-rights imperialist, I acknowledge sounds to me particularly seductive.



Neutral Citation Number: [2015] EWCA Civ 582

Case No: C1/2015/0892

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEENS BENCH DIVISION
ADMINISTRATIVE COURT
MR JUSTICE COLLINS
CO/3348/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 11th June 2015

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE DAVIS
and
LORD JUSTICE SALES

Between :

George Turner
- and -

Appellant

- (1) The Secretary of State for Communities and Local
Government
(2) Mayor of London
(3) The Shell International Petroleum Company and
Braeburn Estates Limited Partnership
(4) London Borough of Lambeth

Respondents

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr Jonathan Darby (appearing Pro Bono) for the **Appellant**
Mr Daniel Kolinsky QC & Ms Zoe Leventhal (instructed by **The Government Legal
Department**) for the **1st Respondent**
Mr Douglas Edwards QC & Ms Caroline Daly (instructed by the **Solicitor to the London
Borough of Lambeth and Mayor of London**) for the **2nd & 4th Respondents**
Mr Timothy Corner QC & Mr Paul Brown QC (instructed by **Hogan Lovells**) for the
3rd Respondent

Hearing dates : 20 May 2015

Judgment
As Approved by the Court

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Lord Justice Sales :

Introduction

1. This is the judgment of the court.
2. This case concerns decisions by the Secretary of State dated 5 June 2014 to allow the proposed development of a site of 3.5 ha in central London on the south bank of the Thames presently occupied as the headquarters of the Shell Petroleum Company and known as the Shell Centre. According to the development plans, the Shell Tower, an existing part of the Centre, will remain in place but adjoining buildings will be demolished and redeveloped for office, retail and residential uses, along with pedestrian walkways and open spaces. The Secretary of State’s decisions were made pursuant to a Report by an inspector appointed by him (Mr John Braithwaite: “the Inspector”) produced after a public inquiry.
3. This is an appeal against the judgment of Collins J ([2015] EWHC 375 (Admin)) brought with permission granted by Sullivan LJ on a single ground, namely a contention that the Inspector gave an appearance of bias by the way in which he dealt with matters before and in the course of the inquiry and in his Report. The appeal is brought by Mr George Turner, who represented Riverside Communities Limited as one of the principal objectors to the proposed development at the inquiry. Other challenges to the Secretary of State’s decisions brought by Mr Turner were dismissed by Collins J and permission to appeal in relation to them was refused by Sullivan LJ.
4. In relation to the part of the judgment to which the sole ground of appeal relates, it is common ground that Collins J directed himself correctly as to the test for apparent bias at para. [64]. The judge found that no part of the conduct of the Inspector in the period before the inquiry commenced gave any appearance of hostility against the objectors to the applications for planning consents, pre-determination or bias: para. [53]. The judge was critical of certain respects in which the Inspector behaved during the inquiry, but held that the conduct was not such as to give rise to an appearance of bias on his part: paras. [55]-[67]. In the course of his reasoning, the judge said that it was clear that the Inspector’s conduct “fell short of that which should have been displayed” (para. [65]), and stated that “His conduct in appearing to favour the applicants’ counsel against the claimant was most unfortunate, but is consistent with judicial misconduct as opposed to bias” (para. [66]).
5. At first instance, Mr Turner appeared in person. On the appeal, Mr Darby appeared for Mr Turner, acting pro bono. The court was greatly assisted by Mr Darby’s attractively presented submissions. Mr Darby’s contention was that the judge had erred in his application of the test for appearance of bias by concluding that there was no appearance of bias given by the Inspector, whereas on the basis of his own findings he ought to have concluded that the test had been satisfied. In the alternative, Mr Darby submitted that all the evidential material before the judge was before this court, no oral evidence had been given, and so this court could and should make its own assessment on that material that the Inspector had given an appearance of bias in his conduct, taking account of his conduct before the inquiry commenced, at the inquiry and in how he dealt with certain points in his Report.

6. The response of Mr Kolinsky QC for the Secretary of State was the mirror image of Mr Darby’s submissions: the judge had correctly applied the test for appearance of bias on the basis of the facts found by him, but in the alternative the judge’s criticism of the conduct of the Inspector had gone beyond what was properly justified on the evidence and this court should make its own evaluation of the facts of the case and should conclude that no appearance of bias had been given. A Respondent’s Notice was filed to that effect. Other interested parties who supported the proposed development scheme (the Greater London Authority, the London Borough of Lambeth – “Lambeth” - and the developers) appeared at the hearing to support those submissions.
7. In our judgment, for reasons explained below, the appeal must be dismissed. The objectors to the scheme, including in particular Mr Turner, were treated fairly by the Inspector both before and during the inquiry. We can detect nothing that was done by the Inspector which gave any appearance of bias to the notional fair-minded and informed observer. We do not endorse the criticisms of the Inspector made by the judge at paras. [65] and [66] of his judgment. In our view, the Inspector’s conduct cannot be castigated as something equivalent to judicial misconduct.

The legal test for appearance of bias

8. There was no significant dispute between the parties regarding the test for an appearance of bias. Collins J summarised it pithily and accurately at para. [64]:

“The test applicable to determine whether there has been apparent bias is based on the notional fair minded and informed observer. That individual must be taken to have formed an objective judgment having regard to all the circumstances. The fears expressed by a complainant that there has been an appearance of bias are relevant, as Lord Hope said in paragraph 104 of *Porter v Magill* [2002] 2 AC 387 at 494, at the initial stage when the court has to decide whether the complaint needs to be investigated. But they lose their importance when the stage is reached of looking at the matter objectively. And the assertions by the inspector that he was not biased are not likely to be helpful even if true. The test applicable is whether having regard to all the circumstances a fair minded observer would conclude that there was a real possibility that the inspector was biased.”

9. For other recent authority, see *Resolution Chemicals Ltd v H Lundbeck A/S* [2013] EWCA Civ 1515; [2014] 1 WLR 1943, [36]: while the test of a real possibility of bias “is certainly less rigorous than one of probability, it is a test which is founded on reality. The test is not one of ‘any possibility’ but of a ‘real’ possibility of bias.”
10. Mr Kolinsky also drew our attention to, among other authorities, *National Assembly for Wales v Condrón* [2006] EWCA Civ 1573, at [50], where Richards LJ emphasised that in applying the test “The court must look at all the circumstances as they appear from the material before it, not just at the facts known to the objectors or available to the hypothetical observer at the time of the decision.” Mr Darby did not dispute this.

11. Mr Kolinsky and Mr Darby, for their own separate reasons, each emphasised passages in *Halifax Building Society v Secretary of State for the Environment* [1983] JPL 816, in the summary form of report of the decision available in the Journal of Planning Law. That case concerned an appeal to the High Court in relation to a refusal of planning permission by the Secretary of State after an inquiry before an inspector. The disappointed applicant appealed to the High Court, contending that the decision was unlawful by reason of an appearance of bias given by the inspector in the course of the inquiry. It was said that the inspector seemed wholly uninterested in the evidence, had pursued a number of small points on the witness statement of the applicant's primary witness at the inquiry "in the form of a hostile cross-examination" and accused the witness of lying because of a trivial matter regarding frontage measurements for the site in question. Woolf J (as he then was) found that the complaint of apparent bias was made out on the facts and quashed the decision. In particular, he found that "[t]here was no possible basis, on the difference in frontage measurements, for making any criticism of [the witness]". On the facts, this is far removed from the present case.
12. Mr Kolinsky emphasised that at p. 817 Woolf J is reported as accepting certain submissions of the Secretary of State, as follows:

"Mr Brown [for the Secretary of State] properly submitted that an inspector was entitled to have his conduct considered by the court in the same way as a judge's conduct would be considered if criticism of this nature [i.e. an alleged breach of the rules of natural justice and impartiality] was made. Indeed, Mr Brown, with justification, submitted that, in some ways, the position in relation to criticisms of this nature of the inspector was less vulnerable than that of a judge because the inspector's role, at least in part, was inquisitorial. Mr Brown rightly pointed out that a tribunal, be it a judge or inspector, should not be criticised if he made clear his view of issues which were advanced. He was not to be criticised if he manifested a lack of enthusiasm for submissions or evidence advanced before him. Indeed, it was often desirable that litigants or appellants should know the provisional views of a tribunal, be it a judge or any other type of tribunal, so that they could address their arguments and evidence to the matters on which the tribunal had reservations.

[Woolf J] accepted all the points of that nature made by Mr Brown, so long as they did not impinge upon the general principle that a litigant before a court, or a party conducting an appeal before an inspector, was entitled to have a fair crack of the whip and was also entitled to a hearing at which justice not only was done, but appeared to be done."
13. Mr Kolinsky also emphasised a later passage (p. 818), where Woolf J is reported as saying:

“It will be rare, because of the right of the tribunal to form preliminary views about issues, that the necessary degree of unwillingness to consider the issues will be established”,

and Woolf J’s description of the case before him as an “exceptional” case in which the court was justified in intervening.

14. Mr Darby, for his part, drew particular attention to a passage at p. 818, where the report says this:

“Looking at the material as a whole, [Woolf J] came firmly to the conclusion that there was at least a degree of hostility and a degree of refusal to pay attention to the evidence manifested by the inspector, so that it gave the impression to reasonable people attending the inquiry that justice was not being done. If reasonable people could take the view that they were not being given a fair crack of the whip, and that view was reasonably taken in this case, it seemed that that was the sort of situation where the court must intervene.”

15. Mr Darby referred to witness statements from Mr Turner, from another objector (Mr Tamplin, who represented the Twentieth Century Society) and from a Mr Ball, who all said that there had been an impression of unfairness in relation to the inquiry in the present case. Mr Darby submitted that Mr Ball, in particular, was a reasonable and neutral person who attended the inquiry, so that considerable weight should be given to his evidence about the impression given by the Inspector. Mr Darby suggested that Mr Ball was a good proxy, in real life, for the notional fair-minded and informed observer referred to in *Porter v Magill*.
16. The *Halifax Building Society* case needs to be approached with some care. The report which is available is not a transcript of Woolf J’s judgment. The leading authorities on the issue of appearance of bias, particularly *Porter v Magill*, came much later, and require adoption of a rather more sophisticated approach, as explained in them. The notional fair-minded and informed observer is a legal construct, and a court will be very cautious about treating any particular person who attends a hearing in real life as the actual personification of that observer. We deal below with the weight to be attached to the evidence from various sources, including Mr Turner, Mr Tamplin and Mr Ball. It suffices at this stage to say that we do not accept Mr Darby’s submission that Mr Ball should be taken to be the personification of the notional observer referred to in *Porter v Magill*.
17. We do, however, consider that *Halifax Building Society* provides some support for a series of points made by Mr Kolinsky at the start of his submissions, which in any event appear to us to be correct. Mr Kolinsky rightly submitted that an assessment whether an unlawful appearance of bias has been given has to take into account the nature of the functions and responsibilities of an inspector acting in the present type of situation.
18. The notional fair-minded observer would appreciate a number of aspects of the present context: (i) an inspector’s role has a strong inquisitorial dimension, investigating matters in a way which will enable him to report helpfully to the

relevant decision-maker, the Secretary of State; with that end in view, it is fair and appropriate for an inspector to seek to focus debate at an inquiry by making interventions to ensure that he is provided with material to assist him in his task; (ii) an inspector has to manage efficiently the conduct of an inquiry within a limited time-frame and involving a range of parties wishing to give evidence, make submissions and participate in cross-examination of witnesses; this may require robust case management in the interests of all participants; (iii) an inspector is entitled to expect, and may legitimately seek to encourage, focused questioning and short and focused answers in the course of cross-examination of witnesses; (iv) the inquiry process provides an inspector with relevant information through a range of media, including written opening statements, examination of plans and the making of detailed closing submissions, as well as through the evidence of witnesses (both by witness statement and orally in cross-examination), and an inspector is expected to have done a good deal of preparation before an inquiry commences and is entitled to seek to focus debate on particular issues in the form which is most likely to provide clarity about what is at stake and assistance for him in writing a report; and (v) as part of his inquiry-management function, and to encourage a focus on what is most likely to assist him in his reporting task, an inspector is entitled to give indications in the course of an inquiry of points which appear to him to be unrealistic or bad and to require concentration on what appear to him to be the real substantive points of contention or where continued debate will be most helpful to him. It is of course possible that an inspector may go too far in robust inquiry management or in closing down debate, so as to give an appearance of bias. But given the expectation that an inspector should be actively managing the inquiry process to ensure that it is efficient, effective and fair to all interested parties, it will be a rare case, as Woolf J observed, in which it is likely that robust inquiry management will be found to have done so.

19. Another part of the context is the guidance issued by the Planning Inspectorate in the form of “The Inspector’s Code of Conduct”. This sets out principles of conduct for inspectors. Amongst other things, they “should make their decisions and recommendations fairly and in the public interest”; “should not be fettered with pre-determined views and should not judge cases before they have considered the evidence”; “should not be influenced by irrelevant considerations or outside influences when making their decisions and recommendations”; “should avoid unnecessary delay in reaching their decisions and recommendations”; and “should treat each person with dignity and respect”, behaving “at all times with courtesy, patience and understanding, whilst at the same time ensuring that cases are conducted efficiently and effectively.” This guidance is designed to promote best practice. It does not in itself create the standard by which an appearance of bias is to be judged. For example, a lapse in courtesy or patience on the part of an inspector in the course of an inquiry will not in itself give an appearance of bias in the requisite sense. A good deal more than that would be required: cf *HCA International Ltd v The Competition and Markets Authority* [2015] EWCA Civ 492, in which even a serious element of actual unfairness of treatment of the appellant by the relevant public authority, which misled the appellant at one stage about an aspect of its inquiry, was found not to create an appearance of bias or pre-determination such as to prevent the same personnel in that authority from making a re-determination of matters in contention. (So that we are not misunderstood, and in fairness to the Inspector in the present case, we should add that on the limited evidence which is available we are not persuaded that he behaved discourteously to Mr Turner or anyone else at the inquiry).

The factual background

20. Mr Darby divided his submissions about the facts into three chronological phases (conduct pre-inquiry, at the inquiry and in the writing of the Report), whilst also rightly emphasising that it is the overall impression given by the Inspector's conduct which is in issue.
21. The main thrust of Mr Turner's criticisms of the Inspector relate to his conduct at the inquiry. This posed a difficulty for the judge and for this court, since there were conflicting accounts of what happened at the inquiry and of the overall impression given. Mr Turner, Mr Tamplin and Mr Ball were critical of the Inspector in their witness statements. Mr Turner and Mr Tamplin were objectors to the scheme at the inquiry, and so not disinterested observers. We address Mr Ball's position below. On the other hand, Mr Gallimore, the experienced solicitor who attended the inquiry for the developer (who, again, therefore, was not a disinterested observer), said that he did not consider that there was any unfairness in the way the Inspector treated Mr Turner or anyone else at the inquiry. Ms Nicks, the principal planning officer for Lambeth (and hence, again, not a disinterested observer), who also attended the inquiry, said the same. The Inspector put in a witness statement to explain decisions he had made before and in the course of the inquiry, which he said were aimed at ensuring that it was conducted in a fair and efficient manner which would best assist him in carrying out his task of preparing a report for the Secretary of State. Another participant at the inquiry, Mr Ayton, a planning officer for Westminster City Council ("Westminster", which objected to the development), who Mr Turner maintained had been treated unfairly, did not provide a witness statement and appears not to have complained in the course of the inquiry or subsequently about how he was treated.
22. Mr Ball is the Director of Waterloo Community Development Group ("WCDG"), which has a remit to consult the local community on planning issues and to advocate on residents' behalf. There was a range of local opinion, both for and against the development, so WCDG agreed neither to support nor to object to the applications, but simply to comment on them. Mr Ball participated at the inquiry on that basis. However, he does not explain his personal attitude to the proposed development and it is fair to say that his representations for WCDG at the inquiry (as summarised in paras. 14.15 to 14.18 of the Inspector's Report, in a passage which was not suggested to be inaccurate) were hostile to significant aspects of the proposed development. Mr Ball says that he was alarmed at the pre-inquiry meeting and at the inquiry by decisions and behaviour of the Inspector, and that during the inquiry he drafted a letter of complaint to the Chief Inspector on behalf of himself and the other rule 6 parties (Westminster, the Twentieth Century Society and Riverside Communities Limited – all objectors to the scheme), although in the event it was decided not to send it. In the draft letter Mr Ball aligned himself with the objectors to the scheme (he wrote: "... the Inspector has made and continues to make decisions and interventions which are proving systematically unhelpful to the Rule 6 parties, all of whom are opposing the proposed scheme"). The points of concern set out in that letter included matters where the Inspector had plainly acted fairly: e.g. "Dispensing with the need for any party to provide a Statement of Case" (even though no-one had in fact objected to that proposal at the pre-inquiry meeting: see paras. [24]-[25] below) and "Dispensing with the need for any party to provide Summaries of Proofs of Evidence ... this was reinstated by email after complaints were made by the Rule 6 parties" (i.e.

the Inspector acted to uphold the objectors' complaints: see para. [26] below). In the light of all this, we do not consider that Mr Ball can be regarded as a wholly neutral and disinterested observer. It is not appropriate to treat his personal views as equivalent to, or a proxy for, those of the notional fair-minded observer which the relevant legal test requires us to postulate.

(i) *Conduct pre-inquiry*

23. The inquiry was scheduled to begin on Thursday, 21 November 2013. It sat on 21 and 22 November, for the whole week commencing 25 November, and then after a break resumed on 9 and 10 December, with a site visit on 11 December and closing submissions on 12 December 2013. There was a pre-inquiry meeting on 9 October 2013.
24. At the pre-inquiry meeting, at the request of the developers, the Inspector directed that statements of case by the parties should be dispensed with. He did this for understandable reasons, because parties' cases would be set out in their proofs of evidence and he thought there would be unnecessary duplication of work in the short time before the inquiry began. The developers had already submitted extensive information about their applications and the justifications for them. It is common ground that no party at the meeting objected to the Inspector's decision to dispense with statements of case.
25. In fact, however, under the relevant rules in the Town and Country Planning (Inquiries Procedure) (England) Rules 2000, the provision of statements of case is mandatory and it is now common ground that the Inspector had no discretion to dispense with them. This was overlooked by everyone attending the pre-inquiry meeting and was a simple mistake. It gives rise to no impression of bias.
26. On a distinct application by the developers dated 15 October 2013, the Inspector also agreed (without first obtaining the views of other parties) that summaries of proofs of evidence should be dispensed with and notified the parties of this by email dated 17 October. Again, the Rules require such summaries for longer proofs of evidence, but this was overlooked by mistake. On 18 October, however, Mr Turner sent an email to the Inspector to object and to request that summaries of proofs should be provided. By email dated 22 October, the Inspector acceded to Mr Turner's request and directed that summaries should be provided. This incident shows that the Inspector was prompt in responding to Mr Turner's complaint and in correcting the error. One of the objectors, Mr Tamplin, in fact emailed to thank him "for the prompt notification of this very welcome decision". Again, it gives rise to no impression of bias.
27. Mr Darby complains that the Inspector decided that the inquiry should sit the full week commencing 25 November 2013, rather than a more usual four-day inquiry week, to accommodate counsel for the developers. It seems that this decision was made despite the objection of Mr Turner, who said it would raise difficulties for the less well-resourced objectors if they did not have a long weekend to prepare. Again, this incident gives rise to no impression of bias. It was a routine and unremarkable inquiry-management decision. By way of comparison, on another occasion the inquiry timetable was adjusted to accommodate Mr Tamplin, one of the objectors. Five day sitting weeks are not unusual for planning inquiries, when necessary to accommodate parties. There was no serious detriment to the objectors from being expected to cope

without the additional day. In particular, there was to be a significant break of a week before Mr Turner came to present his evidence in opposition to the scheme.

28. A further complaint was that on 24 October the Inspector acceded to a request by Lambeth (which was supporting the development) for an extension of time to 28 October to exchange the proof of evidence of its planning witness, which Mr Turner agreed to. However, when it emerged that the developers maintained that all other proofs of evidence should be exchanged on the original assigned date, Mr Turner sent an email to the Inspector, also on 24 October, to ask for exchange when all proofs of evidence were ready, and at 12.15 pm the same day the Inspector acceded to his request and directed that all proofs of evidence be exchanged on 28 October. This decision shows that the Inspector was seeking to be fair and even-handed in his management of the inquiry. It gives rise to no impression of bias.
 29. Next, Mr Darby complains that the Inspector accepted the submission of a report on viability by BNP Paribas for Lambeth just two working days before the commencement of the inquiry, and refused an adjournment of the inquiry to allow the objectors more time to study this document. However, there is no extant challenge that any of this was unfair. We therefore proceed on the footing that this constituted fair conduct of the inquiry. In fact, Mr Turner was going to have ample time to consider and respond to the BNP Paribas report before he came to give his evidence and present his case in the week commencing 9 December. This is plainly not something which gives rise to any impression of bias.
 30. For these reasons, we agree with the assessment of the judge (para. [53]) that the pre-inquiry decisions of the Inspector did not indicate any hostility towards Mr Turner or any objector and did not create any impression that the Inspector had pre-determined the inquiry. That is so whether one takes the points of complaint individually or cumulatively with the other points of complaint by Mr Turner.
- (ii) *At the inquiry*
31. Mr Darby referred to a number of incidents at the inquiry which he said gave rise to an appearance of bias.
 32. The Inspector asked all advocates to provide time estimates for their evidence and cross-examination, which is accepted to be a normal way of proceeding. However, Mr Darby submits that the Inspector failed to be even-handed in the way in which he applied these time limits. He allowed over-runs for witnesses for the promoters of the scheme without comment and sometimes allowed advocates for the promoters to exceed their time on cross-examination.
 33. In our judgment, none of the evidence on these points adduced by Mr Turner gives rise to any appearance of bias. The picture which emerges overall is one of reasonable inquiry management decisions being made by the Inspector.
 34. There is little detail given in the evidence before us about the circumstances in which overruns occurred in the giving of evidence in chief, but there is nothing to indicate that this was for any reason other than that the Inspector found it useful to receive relevant information in that way. In relation to cross-examination, an inspector is entitled to expect parties to adhere to their time estimates, since otherwise an inquiry

could be delayed and rendered more costly. There is nothing in the evidence to suggest that the Inspector did anything inappropriate or objectionable in holding objectors (in particular, Mr Ayton for Westminster and Mr Turner) to their estimates. It is said that he counted them down towards the end of their allotted time and then cut them short at the end of that time. But there is no unfairness in this: the counting down consisted of no more than giving the questioner fair warning that their time was coming to an end, at 15 minutes, 10 minutes and 5 minutes before the end, and requiring the conclusion of the cross-examination on time was appropriate, especially given the fairness of the warnings regarding time which had been given.

35. In our view, there was no appearance of bias given by what happened in relation to adherence to time estimates by counsel for the developers. The Inspector did not count down the experienced counsel appearing for the developers and Lambeth as they reached the end of their cross-examinations, but in our view he was entitled to assume that they would observe their time estimates without him having to do that. Mr Turner's main complaint was that Mr Corner QC for the developers applied for and was granted an extension of time to cross-examine Mr Turner on his evidence in opposition to the development, with the Inspector giving as his reason that Mr Turner was not being helpful and had insisted on making statements rather than answering the questions (i.e., in the Inspector's assessment, had not answered questions directly and succinctly). However, the Inspector had heard the evidence and was entitled to make judgments of this kind, to ensure fairness all round. There is no extant challenge of actual unfairness. The available evidence simply indicates that the Inspector engaged in reasonable inquiry management. Again, this gives rise to no appearance of bias.
36. Mr Turner also gave evidence that he was sometimes interrupted by the Inspector in the course of his questioning of witnesses. The Inspector says that it is his practice at inquiries to communicate to advocates where he considers that the line of questioning being adopted does not appear to be of sufficient relevance to assist him in making a decision or reporting to the Secretary of State. This is entirely legitimate. There is nothing in the available evidence which leads us to conclude that the Inspector did anything other than this when supervising Mr Turner's cross-examination of witnesses in the course of the inquiry.
37. Mr Turner gives one detailed example of an interruption by the Inspector. Mr Turner was in the course of putting questions to a witness for the developer regarding the alleged failure of the development to meet design standards, when the Inspector stopped this line of questioning and said words to the effect:

“You will no doubt list all of the ways in which you find the scheme deficient, in fact I demand you do. And your case will no doubt be that those deficiencies are so terrible that they warrant refusal.”
38. The Inspector, in his evidence, does not deny that some such intervention took place. In the absence of a transcript, it is difficult to be sure of the full context for this.
39. However, on the available evidence, this intervention appears to us to have been a legitimate attempt by the Inspector, in line with his description of his usual practice, to focus debate in the cross-examination on points where live witness evidence would

be likely to assist him in his task. In making such an intervention, he was entitled to observe that Mr Turner would have an opportunity to make the points he wished on design matters in his closing submissions, and to encourage him to do so as a way of presenting that part of his case in a manner of greater assistance to the Inspector. It does not give rise to an appearance of bias.

40. Next, Mr Darby complained that the Inspector refused to accept a voluminous document from Mr Turner dealing with viability issues (“RCL2”) on the afternoon of Friday, 22 November 2013, on the grounds that it was unbound, inviting him instead to provide it at 9 am on Monday, 25 November so that the Inspector could read it on his arrival at that time before the commencement of evidence for the developers at 9.30 am. The Inspector would not stay to allow Mr Turner to put RCL2 into bound form on the Friday afternoon. But the Inspector only arrived and took receipt of RCL2 at 9.15 am on the Monday. The Inspector did not dispute this account in his witness statement.
41. In our judgment, however, this incident does not give rise to any appearance of bias. The Inspector was entitled to refuse to take receipt of the voluminous RCL2 in unbound form. It was only presented to him after the inquiry had closed on the Friday. In unbound form it would be unwieldy and difficult for the Inspector to use and there would be a risk that pages might get lost. It was not incumbent on the Inspector to hang around after the close of the inquiry hearing on the Friday to allow time for Mr Turner to try to bind the document and re-present it that day. The difference between taking receipt of RCL2 at 9.15 am rather than 9 am on the Monday is minimal. What is important is that it was unnecessary for the Inspector to read and digest RCL in its entirety before oral evidence commenced that day. RCL2 contained Mr Turner’s evidence and case, and he was going to have the opportunity to present it many days later, on 9 December (by which time he had supplemented his evidence by a further document, RCL3, which the Inspector permitted him to adduce into evidence). By then, the Inspector would clearly have had time to read and digest it; he confirms in his witness statement that all of the evidence presented by Mr Turner was taken into account in reaching his conclusions and there is no reason to doubt this. On Monday, 25 November, Mr Turner would just be cross-examining witnesses, and he would need to explain any significant point to be drawn from RCL2 for that purpose when putting his questions to them. The Inspector would have had no difficulty in following this, as he confirms in his witness statement.
42. Mr Darby also complained that the Inspector pre-empted and cut short the objectors’ case at the inquiry on a number of occasions. He shortened a debate about floor space in the development by stating that “the bottom line” was about jobs. He shortened a debate about the permeability of the development by holding up a map of the development (which showed the entrances, exits and public walkways etc) and said words to the effect, “I will be reporting that this is an eminently permeable scheme”. The Inspector told the inquiry that he would not report that the development was too dense nor that there had been any impropriety in the way that Lambeth had come to a decision to support the scheme, despite objections referring to these points. The Inspector does not dispute that he made interventions of this kind. He says he intervened to ensure the efficient conduct of the inquiry: “I did so to prevent wasting time on matters of fact and because I considered that I had all the necessary information to reach conclusions on these matters.”

43. Having regard to the way in which it is to be expected that a public planning inquiry should be conducted (see para. [18] above), we do not consider that the way in which the Inspector conducted this inquiry gives rise to any appearance of bias. Mr Turner has not succeeded in making out any complaint of substantive unfairness in the way the inquiry was conducted. It was proper for the Inspector to seek to focus debate, evidence and submissions at the inquiry in the way he did, and his seeking to do so would not lead a fair-minded observer to think that there was a real risk of bias or pre-determination in the requisite sense.
44. The judge was critical of the Inspector's conduct at the inquiry in various respects, albeit at the end of the day he was not persuaded that any appearance of bias had been given. Having had the benefit of detailed and focused submissions on this point and having reviewed the evidence in full detail ourselves, we would not, with respect, endorse the criticisms made by the judge. In particular, we do not agree (if this is what the judge meant to imply at para. [66] of his judgment) that the Inspector's conduct amounted to judicial misconduct. In our view, the Inspector's conduct of the inquiry was proper and appropriate. The steps he took to focus debate were legitimate ones, in line with the standards to be expected for managing the conduct of a planning inquiry in an efficient and effective way. The judge's opinion that the Inspector's conduct appeared to favour the applicant's counsel seems to be based principally on the 5 day sitting week before the non-sitting week and the facts that Mr Corner was not given timing warnings and was given extra time for cross-examination while Mr Turner and Mr Ayton, for Westminster, were not accorded any such extension. For the reasons we have given, however, none of these apparent instances of counsel being favoured constituted indications that there was a real possibility of bias on the part of the Inspector; nor, without more, would they, in a judge, be instances of judicial misconduct.

(iii) *Post-inquiry: the Report*

45. Before this court, Mr Darby relied on two matters in the Inspector's Report which he said showed that the Inspector failed properly to listen to and report accurately the evidence of the objectors. It does not appear that Mr Turner relied on these points at first instance for his appearance of bias case, though they did feature in relation to substantive challenges to the decision which he made which were rejected by the judge and in respect of which he has not been granted permission to appeal.
46. First, Mr Darby referred to para. 16.64 of the Inspector's Report, which states as follows:

"I found the criticism at the Inquiry, by Mr Turner for RCL, of the values used to establish the review mechanism and the maximum financial contribution, to be confused. He questioned whether an Internal Rate of Return (IRR) of 20%, used by BNP Paribas in their assessment, was reasonable, *without bringing forward any evidence to justify such a claim*. An IRR of 20% is quite common for a development of such complexity as that proposed for the Shell Centre site. He also questioned the average sales figure per square foot used by the Applicants in their assessment and the sales value used by BNP Paribas as a sensitivity test. He did produce evidence but some of this

confirmed the figures used to assess the scheme and some was from a source that was used to market and promote schemes to investors, rather than figures used to assess development viability” (emphasis supplied).

47. Mr Darby focused on the words in italics and submitted that they gave the appearance that the Inspector had not read and digested the material in RCL2, which did put forward evidence in support of Mr Turner’s contention that an IRR of 20% was not appropriate for the purposes of viability analysis. Mr Turner’s challenge based on a substantive claim of unfairness based on the contention that para. 16.64 showed the Inspector had not considered RCL2 was rejected by the judge at paras. [28]-[29], and Mr Turner was refused permission to appeal on the point. However, it is now re-introduced as an aspect of his case on appearance of bias.
48. In our judgment, on a fair reading of para. 16.64 no appearance is given that the Inspector failed to consider RCL2. The substance of the paragraph addresses the detail of the argument on the relevant IRR to be used, as does para. 16.65. Contrary to Mr Darby’s submission, these paragraphs show that the Inspector had indeed considered RCL2 and was here concerned to set out his reasoning why he did not accept Mr Turner’s case on the IRR as set out in RCL2. The words in italics have to be read in context. They do not bear the weight which Mr Darby sought to place on them. Read in context, they simply express the Inspector’s view that Mr Turner had failed to provide evidence to justify (i.e. substantiate) his claim, for reasons which the Inspector then goes on to explain. The Inspector did not say that Mr Turner had failed to provide any evidence at all. Again, therefore, this is not a matter which gives rise to any appearance of bias.
49. Secondly, Mr Darby referred to para. 16.45 of the Inspector’s Report, and suggested that it showed that he did not appreciate that it was the case of Westminster and other objectors that the development site constituted part of the setting of the World Heritage Site around the Houses of Parliament on the north bank of the Thames. This also was originally the basis for a complaint by Mr Turner of substantive error on the part of the Inspector which was rejected by the judge at paras. [40]-[41] and in relation to which Mr Turner has not been granted permission to appeal. Again, Mr Darby has re-introduced it as an aspect of Mr Turner’s case on appearance of bias.
50. In our judgment, this complaint also fails, essentially for the same reasons as those given by the judge at para. [41]. As the judge says, “It may well be that [the Inspector] has not expressed himself as well as he should have done in paragraph 16.45, but he clearly has considered whether there would be harm caused to the setting of any heritage asset on the north side of the river.” This is abundantly clear from the face of the Report. In section 11 of the Report, the Inspector accurately sets out the case for Westminster in opposition to the development, including that it would cause harm to the setting of the World Heritage Site. Paragraph 16.45 appears in a section of the Report entitled “The Setting of the [World Heritage Site] and Heritage Assets on the North Bank”, which includes discussion of the impact upon the settings of that Site and those Assets. Read, as it must be, in the context of the whole Report, para. 16.45 gives no appearance whatever of bias on the part of the Inspector.

Conclusion

51. For the reasons set out above, we dismiss this appeal. None of the matters relied on by Mr Turner, whether taken individually or together, indicate that there was a real possibility that the Inspector was biased. The Inspector acted properly and without giving any appearance of bias according to the relevant test in *Porter v Magill*.

A Congregation of the Poor Sisters of Nazareth v Scottish Ministers

OUTER HOUSE

LORD WOOLMAN

1 JULY 2015

B [2015] CSOH 87

Administrative law — Judicial review — Scottish Ministers — Scottish Ministers appointing advocate as chair of inquiry into historic child abuse in Scotland — Petitioners operating care homes for children which would be scrutinised in course of inquiry — Advocate having acted in appeal for individuals seeking damages from petitioners for alleged abuse — Whether apparent bias — Whether advocate having close association to interested party to inquiry — Inquiries Act 2005 (c.12), s.9(1).

Religious organisations lodged a petition for judicial review seeking reduction of a decision of the Scottish Ministers appointing an advocate as chair of an inquiry into historic child abuse in Scotland. The petitioners had operated care homes for children which would come under scrutiny in the course of the inquiry. The petitioners relied on the principle of apparent bias, contending that where the advocate had acted in an appeal for individuals seeking damages from the petitioners for alleged abuse as well as other alleged victims of abuse, and had assisted a pressure group seeking to change the law relating to time bar, a fair minded and informed observer would conclude that she was moving from the role of adviser to adjudicator in the same cause and that she had supported the claims made by acting in the damages case. They further argued that the Scottish Ministers were not entitled to appoint the advocate as she had a close association with an interested party to the inquiry, contrary to s.9(1) of the Inquiries Act 2005.

Held, (1) that the advocate did not have a close association with an interested party to the inquiry: there was no feature of her involvement in the damages case which took it away from the ordinary receipt of instructions; there was no real ground for doubt; and her assistance of the pressure group weighed lightly on the scales (paras 23–27); (2) that the fair minded and informed observer would not conclude there was a real possibility that the tribunal was biased where he would be aware that the inquiry would not determine liability and that the advocate did not support her clients' claims, and within the observer's knowledge would also be the inquiry's purpose, the code of conduct for advocates, and the advocate's judicial experience (paras 32–36); and petition *refused*.

Petition for judicial review

The Congregation of the Poor Sisters of Nazareth and the Daughters of the Charity of Saint Vincent de Paul lodged a petition for judicial review seeking reduction of a decision of the Scottish Ministers appointing an advocate as chair of an inquiry into historic child abuse in Scotland.

The petition came before the Lord Ordinary (Woolman).

Cases referred to

AS v Poor Sisters of Nazareth [2008] UKHL 32; 2008 S.C. (H.L.) 146; 2008 S.L.T. 561.
Belize Bank Ltd v Attorney General of Belize [2011] UKPC 36.
Davidson v Scottish Ministers (No.2) [2004] UKHL 34; 2005 1 S.C. (H.L.) 7; 2004 S.L.T. 895.
Gillies v Secretary of State for Work and Pensions [2006] UKHL 2; [2006] 1 W.L.R. 781; 2006 S.C. (H.L.) 71; 2006 S.L.T. 77.
Johnson v Johnson, 2000 C.L.R. 201.
Locabail (UK) Ltd v Bayfield Properties Ltd [2000] Q.B. 451; [2000] 2 W.L.R. 870; [2000] 1 All E.R. 65.
Porter v Magill [2001] UKHL 67; [2002] 2 A.C. 357; [2002] 2 W.L.R. 37.
Prince Jefri Bolkiah v Brunei [2007] UKPC 62.
R v Sussex Justices (ex parte McCarthy) [1924] 1 K.B. 256.

Textbooks referred to

Public Inquiries, edn Beer (2011), para.3.49.

On 1 July 2015 the Lord Ordinary *refused* the petition.

LORD WOOLMAN.—

Introduction

[1] On 28 May 2015 the Scottish Ministers appointed Ms Susan O'Brien, QC, to chair an inquiry into historic child abuse in Scotland ("the inquiry"). She is due to commence her duties on 1 July 2015. The inquiry will take place in terms of the Inquiries Act 2005 ("the Act").

[2] The petitioners are religious organisations. From the 1950s to the 1970s, they both operated care homes for children in Scotland. Those homes will come under scrutiny in the course of the inquiry.

[3] In 2007 Ms O'Brien represented two clients in an appeal. They sought damages for alleged abuse from the first petitioner. The claims failed on a preliminary point. The House of Lords held that they were time barred: *AS v Poor Sisters of Nazareth*. In the course of her career, Ms O'Brien acted for other individuals who alleged that they were the victims of abuse. She also assisted a pressure group that sought to change the law relating to time bar.

[4] Against that background, the petitioners A challenge Ms O'Brien's appointment. They seek reduction of the Scottish Ministers' decision dated 28 May. The petitioners rely on the common law principle of apparent bias. They contend that a fair minded and informed observer would conclude that Ms O'Brien was moving from the role of adviser to adjudicator in the same cause and that by appearing in *AS*, she had supported the claims of her clients.

[5] The petitioners also contend that the Scottish B Ministers were not entitled to appoint Ms O'Brien, because she has a close association with an interested party to the inquiry, contrary to s.9(1) of the Act.

[6] Counsel appeared on behalf of the petitioners. He emphasised that they do not impugn the integrity of Ms O'Brien. They accept that she has no actual bias and that as the chair of the inquiry, she would do her level best to discharge her role fairly, taking into account the positions of all the parties.

C [7] On behalf of the Scottish Ministers counsel submitted that the petitioners had failed to identify any flaw in the decision making process. She maintained that Ms O'Brien's role in *AS* was a restricted one. All she did was to act as an advocate at the appellate stage and present her clients' case. That did not compromise her position. Further, she had not moved from the role of adviser to adjudicator because the inquiry tribunal is not a court. It cannot D determine liability. In terms of the Act it can only make recommendations. Accordingly the appointment decision should stand.

[8] Counsel for the petitioners accepted that the two issues of apparent bias and close association stood or fell together. Before turning to them, it is necessary to give a fuller account of the background.

E [9] I begin with the facts in *AS*. The claims arose in this way. A number of children alleged that they had been the subject of abuse while living in homes operated by the petitioners. Many years after the events in question were said to have taken place, they raised actions for damages. They were met with a plea of time bar. In order to test the validity of that defence, the claimants' solicitors took forward two individual cases, which were heard together. Mr Colin McEachran, QC, acted as senior counsel in each of them. Both at first instance and in the reclaiming F motion (appeal), the court upheld the time bar plea.

[10] The claimants decided to mount a further appeal. As Mr McEachran had retired from practice they instructed Ms O'Brien as their new senior counsel. She presented the case to the Judicial Committee of the House of Lords.

[11] In his speech (judgment), Lord Hope of Craighead stated: "These appeals are concerned only with the issue of time bar. Before I explain why this is

so, I ought to mention that the issue should be seen in a wider context. The allegations of child abuse which the G appellants make are grave enough in themselves. But your Lordships were told that several hundred other actions have been raised against the same religious order by other persons who lived as children in homes which were run by it. Several hundred more have been raised against other institutions, which ran children's homes during the same period" (2008 S.C. (HL), p.148; 2008 S.L.T., p.562, para.3).

[12] Section 9(2) of the Act provides that a person H must notify the minister in advance of any matters that could affect her eligibility for appointment. The relevant minister is the Cabinet Secretary for Education and Lifelong Learning ("the Cabinet Secretary"). She requested disclosure from Ms O'Brien in terms of that provision.

[13] Ms O'Brien replied on 27 May 2015. The material parts of the letter are as follows:

"Dear Minister,

"National Historical Child Abuse Inquiry
"You have asked me to set out matters which might affect public perception of my impartiality, as you intend to appoint me as Chair of the Historical Child Abuse Inquiry.

"As far as I am aware, I do not have any direct interest in the matters to which the Inquiry relates, nor to my knowledge, do I have a close association J with any persons who may be interested parties. I have had a long career at the Scottish Bar, representing thousands of clients, so it is difficult to recall all of the matters which might be relevant, and it is important to record that I have seen none of the evidence which has been gathered to date. All I can do is to take the Inquiry Terms of Reference as my starting point, particularly the definition of 'In Care'.

"I have at various times acted for the UK K government (largely prior to 1999), and in particular, I acted for the Home Secretary in numerous immigration cases, some of which may have involved migrant children. Equally, I have often sued the UK government on behalf of clients, and once in my personal capacity. I have represented many Scottish Local Authorities and their predecessors, and sued on behalf of clients. I have been instructed by the Scottish Ministers, and sued them on behalf of clients. I acted for the defence in a brief career in the criminal courts when I was young, and I once acted as an ad hoc Advocate Depute more than a decade ago. I have visited Young Offenders Institutions and Prisons, as a solicitor, as an Advocate, and as a part-time sheriff. I have acted for the insurers of a residential children's care home, and for various educational institutions, in cases which did not involve child abuse. I cannot recall acting for private boarding schools or List D schools. On the other side, I have often acted for victims of physical and sexual abuse, both in cases which relate to a long time ago, and occa- L

A sionally in claims which relate to the past decade, in
civil claims where they sought compensation. Some
of those Pursuers were suing religious groups. I have
acted for victims, who tried to challenge the existing
law of Time Bar, taking a test case to the House of
Lords on the issue, and I assisted a legal pressure
group which unsuccessfully attempted to persuade
the Scottish Law Commission to change that law. I
cannot recall acting for or against any Healthcare
establishments which provided long-term care for
children. I have sometimes been instructed by the
Central Legal Office to represent Health Boards and
NHS Trusts, and I have often acted for people suing
them, and suing doctors or midwives, in medical
negligence cases. I have acted for many clients who
have pursued Human Rights challenges to legislation
and rules, mostly in contexts unrelated to the subject
matter of the Inquiry, but including a case for a child
who sought to be released from detention when she
was in care.

C ...

"I have about 20 years of judicial experience in four
tribunals and courts, and I have been trained to put
out of my mind knowledge and prejudice which
might have an impact on the case I am hearing. I
believe you can have confidence that my training and
experience will minimise any risk of compromise to
the Inquiry."

D

The Scottish government website

[14] The Scottish government's website has a page
dedicated to the inquiry. It contains hyperlinks to Ms
O'Brien's letter, together with three further
documents that provide important background infor-
mation.

(i) The terms of reference of the inquiry

E

[15] The inquiry's terms of reference are as follows:

"The overall aim and purpose of this Inquiry is to
raise public awareness of the abuse of children in
care, particularly during the period covered by the
Inquiry. It will provide an opportunity for public
acknowledgement of the suffering of those children
and a forum for validation of their experience and
testimony. The Inquiry will do this by fulfilling its
Terms of Reference, which are set out below.

F

"1. To investigate the nature and extent of abuse of
children whilst in care in Scotland, during the
relevant time frame.

"2. To consider the extent to which institutions and
bodies with legal responsibility for the care of children
failed in their duty to protect children in care in
Scotland (or children whose care was arranged in
Scotland) from abuse, and in particular to identify
any systemic failures in fulfilling that duty.

"3. To create a national public record and
commentary on abuse of children in care in Scotland G
during the relevant time frame.

"4. To examine how abuse affected and still affects
these victims in the long term, and how in turn it
affects their families.

"5. The Inquiry is to cover that period which is
within living memory of any person who suffered
such abuse, up until such date as the Chair may
determine, and in any event not beyond 17 December H
2014.

"6. To consider the extent to which failures by state
or non-state institutions (including the courts) to
protect children in care in Scotland from abuse have
been addressed by changes to practice, policy or legis-
lation, up until such date as the chair may determine.

"7. To consider whether further changes in practice, I
policy or legislation are necessary in order to protect
children in care in Scotland from such abuse in future.

"8. Within 4 years (or such other period as Ministers
may provide) of the date of its establishment, to report
to the Scottish Ministers on the above matters, and to
make recommendations."

(ii) The minister's statement

[16] The Cabinet Secretary made a statement to the J
Scottish Parliament on 28 May 2015 that includes the
following passages:

"I expect the inquiry to take a human-rights-based
approach, to be inquisitorial rather than adversarial
and to enable people with little experience of legal
processes to engage with it. Crucially, the inquiry will
examine the on-going effects of abuse on survivors
and their families in order to improve our understand-
ing of the issues they face and help us to improve
support for them now and in future.

K

"Taking all that into account, the inquiry needs a
chair who can rise to those challenges while gaining
and maintaining the confidence of survivors. I am
pleased to announce that Susan O'Brien QC will
chair the inquiry. Ms O'Brien is an experienced
advocate in civil litigation, including on issues
pertinent to the inquiry, and has a knowledge of and
expertise in human rights." (p.36)

"... many of those who were abused in care as L
children called for the right to seek reparation. That
would involve removing the time bar that requires a
civil case for compensation to be brought to court
within the three-year limitation period. At the heart
of the issue is the reality of childhood abuse. It can
take decades for a survivor to have the strength to
challenge their abuser in court.

"Having listened to survivors and examined the
legal position carefully, I can announce that this
Scottish Government intends to lift the three-year

time bar on civil action in cases of historical childhood
A abuse since September 1964" (p.37)

[17] In response to a question from Iain Gray MSP following her statement, the Cabinet Secretary said: "In the 1980s, Ms O'Brien was also on the steering committee that set up the Scottish Child Law Centre. I am confident that we have struck the right balance with someone who has the necessary legal skills and experience and who also, crucially, understands first and foremost the needs of survivors" (p.38).

B

(iii) "*What's an Inquiry*"

[18] The third document is dated 9 June 2015 and provides general guidance to members of the public about the inquiry. It states: "An inquiry is not designed to rule on anyone's civil or criminal liability and has no power to do this. It may be that liability can be inferred from facts that come out of the inquiry, or from recommendations it makes."

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[19] It also states that "it is crucial that the inquiry has due regard for the human rights of all groups involved" including current or former staff in institutions and continues: "... with everyone's human rights as a priority, we propose that the inquiry is about establishing the truth rather than attributing blame."

Does Ms O'Brien have a close association with an interested party?

D

[20] Counsel for the petitioners first considered the common law challenge. That appears to me to be the wrong starting point. Primacy must be given to the legislation. Accordingly, I begin with s.9(1) of the Act, which is headed "Requirement of impartiality": "The Minister must not appoint a person as a member of the inquiry panel if it appears to the Minister that the person has — ... (b) a close association with an interested party, unless, despite the person's ... association, his appointment could not reasonably be regarded as affecting the impartiality of the inquiry panel."

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[21] The Act does not define "close association". Plainly it could include a professional connection: *Public Inquiries*, edn Beer (2011), para.3.49. The nature of the connection must be examined with care. In many instances an advocate could not be seen to have a close association with his client. For example, he may only have had a fleeting involvement in the case, or accepted the instructions under "the cab rank rule" despite holding personal views entirely at odds with those of his client. In others, however, the advocate may be identified with the cause he is espousing. Someone who only acted for one client might be classified as having a close association with him.

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[22] Assistance is provided by the Court of Appeal decision in *Locabail (UK) Ltd v Bayfield Properties Ltd*. The opinion of the court (comprising Lord Bingham CJ, Lord Woolf MR and Sir Richard Scott

V-C) states: "25. It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on ... previous receipt of instructions to act for or against any party... if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal" ([2000] QB., p.480A–H).

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[23] That captures the exercise that must be undertaken. I therefore pose two questions. First, is there some feature of Ms O'Brien's involvement in AS that takes it away from the ordinary receipt of instructions? I conclude that the answer is no. She only acted for the claimants at a very late stage to argue a point of law. I do not accept counsel for the petitioners' submission that she "supported" the written pleadings, in the sense that she was seen to personally endorse their veracity. She was not responsible for drafting the summons. She simply advanced her clients' case to the court. If carrying out that task involves being identified with the cause, every advocate would have a myriad of close associations. In Ms O'Brien's case, that might amount to thousands.

I

J

[24] Second, is there a real ground for doubt? Again I answer that question no. Ms O'Brien's narrative of her career discloses that she had a wide ranging practice covering many areas of the law. She represented pursuers and defenders. In particular, she acted both for and against the government. She could not be identified with only one side. In addition, she has extensive judicial experience and swore the judicial oath as long ago as 1995.

K

[25] The fact that she assisted a pressure group to change the law on time bar appears to me to weigh lightly in the scales. The petitioners do not contend that she actively or publicly campaigned for a change. In any event, there is widespread support for the proposal that the three year time limit should be altered. The Cabinet Secretary stated that the ministers intend to introduce legislation in this regard.

L

[26] Having regard to the whole circumstances, I hold that Ms O'Brien does not have a close association with an interested party to the inquiry.

[27] In arriving at that conclusion, I note that the phrase "if it appears to the Minister" in s.9(1) indicates the high test that the petitioners must surmount. They must establish that no reasonable minister could have made the decision in question. In my view they have failed to do so.

The common law test

A [28] The common law jurisprudence provides guidance on the relevant factors to take into account in relation to s.9(1), and acts as a cross check. In *Porter v Magill* at [2002] 2 A.C., p.494, para.103, Lord Hope stated: “The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there is a real possibility that the tribunal was biased.”

B [29] That statement echoes an earlier one made by Hewart CJ in *R v Sussex Justices (ex parte McCarthy)*, which the petitioners say is the closest case on the facts. There the police prosecuted M for dangerous driving following a collision with A. The acting clerk to the justices that convicted M was a member of the firm of solicitors which acted for A. In quashing the conviction, Lord Hewart stated (at [1924] 1 K.B., p.259) that the question was whether the clerk: “was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done, but upon what might appear to be done.”

C [30] A number of more recent cases have considered the question of apparent bias: *Davidson v Scottish Ministers (No.2)*; *Gillies v Secretary of State for Work and Pensions*; *Prince Jefri Bolkiah v Brunei*; and *Belize Bank Ltd v Attorney General of Belize*. From them, I draw the following key propositions:

- D
1. Each case is intensively fact sensitive.
 2. The threshold for establishing a case of apparent bias is a high one.
 3. The fair minded and informed observer takes a balanced approach.
 4. He expects that (a) the decision maker will not be chosen to suit one party; and (b) any doubt will be based on objective grounds.
- E

F [31] Kirby J outlined the knowledge and approach of the fair minded and informed observer in his well known judgment in *Johnson v Johnson*: “The attributes of the fictitious bystander to whom courts defer have ... been variously stated. Such a person is not a lawyer. Yet neither is he or she a person wholly uninformed and uninstructed about the law in general or the issue to be decided. Being reasonable and fair-minded, the bystander, before making a decision important to the parties and the community, would ordinarily be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances. The bystander would be taken to know commonplace things, such as the fact that adjudicators sometimes say, or do, things that they might later wish they had not, without necessarily disqualifying themselves from continuing to exercise their powers. The

bystander must also now be taken to have, at least in a very general way, some knowledge of the fact that an adjudicator may properly adopt reasonable efforts to confine proceedings within appropriate limits and to ensure that time is not wasted. The fictitious bystander will also be aware of the strong professional pressures on adjudicators (reinforced by the facilities of appeal and review) to uphold traditions of integrity and impartiality” (para.53).

[32] That petitioners contend that in this case the fair minded and informed observer would note the following points: H

The inquiry will consider whether and to what extent individuals were abused in institutions such as Nazareth House.

Its overarching aim is to “validate” the allegations of abuse.

Ms O’Brien will have to determine the veracity of allegations made by her former clients against the first petitioner and its staff. I

She supported her clients’ claims by inviting the House of Lords to send their cases to proof.

Prior to the appointment of a chairman, the Scottish Ministers consulted extensively with victims’ groups to ensure that Ms O’Brien’s appointment would be acceptable.

J [33] In my view that list is flawed and incomplete. It is flawed because for the reasons given above, I hold that the fair minded and informed observer would be aware that the inquiry will not determine liability and that Ms O’Brien did not support her clients’ claims. Further there is no basis to make the assumption about the consultation process. Counsel for the respondents informed me that the Scottish Ministers did not consult with victims’ groups about Ms O’Brien’s suitability for appointment. K

[34] The list is incomplete, because it leaves out of account a variety of matters that would also be within the knowledge of the fair minded and informed observer. He would have access to all the inquiry documents on the Scottish government website. He would note that it was “about establishing the truth rather than attributing blame” and that everyone’s human rights would be respected. L

[35] If he wished to find out about the role of an advocate, he could access the Faculty of Advocates code of conduct, which is also available online. He would take into account that Ms O’Brien had a very broad based career, including some experience of child abuse, but also involving some 20 years of judicial experience. He would note that she represented pursuers and defenders and that her role in AS was a very limited one.

[36] In my view, the fair minded and informed
A observer would not conclude that there is a real possi-
bility that the tribunal was biased. I therefore hold that
the common law challenge based on apparent bias also
fails.

G

*Counsel for Petitioner, Duncan, QC, Paterson;
Solicitors, Simpson & Marwick — Counsel for Respon-
dents, Haldane, QC, Ross; Solicitors, Scottish
Government Legal Directorate.*

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King's Bench Division

Rex (Cabinet Office) v Chair of the UK Covid-19 Inquiry

[2023] EWHC 1702 (Admin)

B

2023 June 30;
July 6

Dingemans LJ, Garnham J

Tribunal — Tribunal of inquiry — Evidence — Chair of public inquiry issuing notice requiring provision of documents — Whether notice invalid if yielding irrelevant documents — Appropriate procedure where relevance of requested documents contested — Inquiries Act 2005 (c 12), s 21

C

The Prime Minister set up a public inquiry into the United Kingdom's response to the Covid-19 pandemic, pursuant to the Inquiries Act 2005¹. The Chair of the Inquiry issued a notice under section 21(2)(b) of the 2005 Act requiring the Cabinet Office to provide various documents in unredacted form, namely WhatsApp communications recorded on devices owned or used by the former Prime Minister and by one of his senior advisers, comprising exchanges between senior government ministers, senior civil servants and their advisers during the pandemic (including both group messages and messages between individuals), and the Prime Minister's diaries

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and notebooks for the same period. The Cabinet Office applied to the Chair of the Inquiry to revoke the notice pursuant to section 21(4), contending that the documents contained unambiguously irrelevant material in respect of which the Chair of the Inquiry was not entitled to issue a notice. The Chair of the Inquiry made a ruling rejecting the application on the basis that the entire contents of the documents required to be provided were of potential relevance. The Cabinet Office brought a claim for judicial review of the decision to issue the notice and the ruling on the revocation application, contending: (i) that a notice issued under section 21 was unlawful if it did not by its terms limit the documents required to be provided to those which "related to a matter in question at the inquiry" within section 21(2)(b); and (ii) that it had been irrational for the Chair of the Inquiry to conclude that the entire contents of the documents that were required to be provided were of potential relevance.

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F

On the claimant's application for permission to proceed with the claim—

Held, granting permission to proceed but dismissing the claim, that the fact that a notice issued under section 21(2)(b) of the Inquiries Act 2005 would yield some irrelevant documents did not invalidate the notice or mean that the power under section 21(2)(b) could not be lawfully exercised; that, rather, as a matter of general principle, public inquiries were to be given a latitude, not provided to parties in civil proceedings, to enable them to make informed but speculative requests for documents relevant to lines of inquiry or documents which led to new lines of inquiry, notwithstanding that such an exercise was bound to lead to the inclusion of some irrelevant material; that, furthermore, the scheme of the 2005 Act was inconsistent with the proposition that a section 21 notice was unlawful if it sought the provision of an obviously irrelevant document, since it made provision in section 21(4)(b) for a recipient of a section 21 notice to apply for the revocation of the notice on the grounds that it was not reasonable in all the circumstances to require him to comply with it, which application could be made on the grounds that a document caught by the section 21 notice did not, as a matter of fact, "relate to a matter in question at the inquiry" within section 21(2)(b); that, likewise, the fact that

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¹ Inquiries Act 2005, s 21: see post, para 46.

S 35: see post, para 48.

S 36: see post, para 49.

a notice issued under section 21(2)(b) would yield some irrelevant documents did not make it irrational to issue the notice, or thereafter to refuse to revoke the notice in its entirety, since the Chair of the Inquiry would be entitled to seek classes of documents which related to a matter in question at the inquiry and the recipient of the notice could be protected from producing an obviously irrelevant document by using the section 21(4) process; and that, accordingly, the section 21 notice issued by the Chair of the Inquiry was valid and the Chair of the Inquiry had acted rationally in issuing the notice and in refusing the application to revoke it (post, paras 52–53, 62–67, 71–74, 76).

Ross v Costigan (1982) 41 ALR 319, *Douglas v Pindling* [1996] AC 890, PC and *Mount Murray Country Club Ltd v Macleod* [2003] STC 1525, PC applied.

Per curiam. If a person responding to a notice under section 21 of the 2005 Act contends that a document caught by the request does not, as a matter of fact, “relate to a matter in question at the inquiry” within section 21(2)(b), it will be for the Chair of the Inquiry to determine how to deal with such a contention. The Chair of the Inquiry might accept the claim at face value, but is more likely to require the provision of the disputed documents on a “de bene esse” basis, namely without prejudice to the objection to provide them, so that the Chair of the Inquiry can consider the application under section 21(4)(b) that it is unreasonable to comply with the notice. If, on examination, the Chair of the Inquiry rules that the document relates to a matter in question at the inquiry, and the person who has the document accepts this, that will be an end of the matter. If the Chair of the Inquiry rules that the document does not relate to a matter in question at the inquiry, then the Chair of the Inquiry will not be entitled to retain the document. If, however, the Chair of the Inquiry rules that the document relates to a matter in question at the inquiry and the person producing the document continues to contend that it does not do so, that person may refuse to provide the document (albeit at the risk of criminal proceedings under section 35 of the 2005 Act) and invite the Chair to certify the question to be determined by the High Court pursuant to section 36 of the 2005 Act. The High Court will then determine the issue for itself after hearing evidence and representations (post, paras 68–70, 75).

The following cases are referred to in the judgment of the court:

Barras v Aberdeen Steam Trawling and Fishing Co Ltd [1933] AC 402, HL(Sc)
Cie Financière du Pacifique v Peruvian Guano Co (1882) 11 QBD 55, CA
Douglas v Pindling [1996] AC 890; [1996] 3 WLR 242, PC
GE Capital Corporate Finance Group Ltd v Bankers Trust Co [1995] 1 WLR 172; [1995] 2 All ER 993, CA
Mount Murray Country Club Ltd v Macleod [2003] UKPC 53; [2003] STC 1525, PC
Paisley Junior, In re [2009] NIQB 40
R v HM Coroner for North Humberside and Scunthorpe, Ex p Jamieson [1995] QB 1; [1994] 3 WLR 82; [1994] 3 All ER 972, CA
R v Lord Saville of Newdigate, Ex p A [2000] 1 WLR 1855; [1999] 4 All ER 860, CA
R (EA) v Chairman of the Manchester Arena Inquiry [2020] EWHC 2053 (Admin); [2020] HRLR 23, DC
Ross v Costigan (1982) 41 ALR 319

The following additional cases were cited in argument:

British Broadcasting Corp'n v Chair of the Scottish Child Sex Abuse Inquiry [2022] CSIH 5; 2022 SC 184, Ct of Sess
Chairman of the Manchester Arena Inquiry v Romdhan [2021] EWHC 3274 (Admin); [2022] ACD 24
Chairman of the Manchester Arena Inquiry v Taghdi [2021] EWHC 2878 (Admin)

- A *Dunn v Durham County Council* [2012] EWCA Civ 1654; [2013] 1 WLR 2305; [2013] 2 All ER 213, CA
Lord Advocate v Dumbarton District Council [1990] 2 AC 580; [1989] 3 WLR 1346; [1990] 1 All ER 1, HL(Sc)
Moore-Bick v Mills [2020] EWHC 618 (Admin); [2020] ACD 55
R v Bristol Justices, Ex p E [1999] 1 WLR 390; [1998] 3 All ER 798; [1999] 1 Cr App R 144, DC
- B *S v United Kingdom* (Application Nos 30562/04 and 30566/04) (2008) 48 EHRR 50, ECtHR (GC)
Shah v HSBC Private Bank (UK) Ltd [2011] EWCA Civ 1154; [2012] Lloyd's Rep FC 105, CA

The following additional cases, although not cited, were referred to in the skeleton arguments:

- C *Cabinet Office v Information Comr* [2018] UKUT 67 (AAC); [2018] AACR 28, UT
Genius Sports Technologies Ltd v Soft Construct (Malta) Ltd [2022] EWHC 2637 (Ch)
Inner West London Assistant Deputy Coroner v Channel 4 Television Corp'n (Practice Note) [2007] EWHC 2513 (QB); [2008] 1 WLR 945
JKL v VBN [2020] EWHC 458 (QB)
- D *Paddick v Associated Newspapers Ltd* [2003] EWHC 2991 (QB)
Pipia v BGEO Group Ltd [2020] EWHC 402 (Comm); [2020] 1 WLR 2582; [2021] 1 All ER (Comm) 365
R (A) v Croydon London Borough Council [2009] UKSC 8; [2009] 1 WLR 2557; [2010] PTSR 106; [2010] 1 All ER 469, SC(E)
R (All the Citizens) v Secretary of State for Digital, Culture, Media and Sport [2022] EWHC 960 (Admin); [2022] 1 WLR 3748, DC
- E *Sheeran v Chokri* [2021] EWHC 3553 (Ch)
Somerville v Scottish Ministers [2007] UKHL 44; [2007] 1 WLR 2734, HL(Sc)

APPLICATION for permission to proceed with claim for judicial review

- By a claim form issued on 1 June 2023 the claimant, the Cabinet Office, applied for permission to proceed with a claim for judicial review of the decisions of the defendant, the Chair of the UK Covid-19 Inquiry, dated 28 April 2023 and 22 May 2023 to issue a notice under section 21 of the Inquiries Act 2005 requiring the production of documents that related to a matter in question at the inquiry and, subsequently, not to revoke the notice following an application by the Cabinet Office under section 21(4) seeking its revocation. The grounds of the claim were that: (1) the compulsory powers conferred on inquiries by the 2005 Act did not extend to the compulsion of material that was irrelevant to the work of an inquiry; (2) a notice issued pursuant to section 21 had to be limited by reference to relevance; and (3) it had been irrational for the Chair of the Inquiry to conclude that the entirety of the material compelled by the notice was, or might be relevant, to the inquiry's work

- The question of permission to proceed was listed to be determined at the same hearing as the substantive claim. Henry Cook and the Rt Hon Boris Johnson were joined as interested parties to the proceedings. The Chair of the Scottish Covid-19 Inquiry was given permission to intervene by written submissions.

The facts are stated in the judgment of the court, post, paras 6–32.

Sir James Eadie KC, Christopher Knight and Shane Sibbel (instructed by *Treasury Solicitor*) for the Cabinet Office. A

The power of a statutory inquiry to compel the provision of documents under section 21 of the Inquiries Act 2005 is expressly limited to documents in the custody or control of the recipient “that relate to a matter in question at the inquiry”: section 21(2)(b). Those limiting words refer to documents which are relevant to matters within an inquiry’s terms of reference. That includes train of inquiry documents and any document in respect of which there is a serious issue as to its relevance. What cannot be compelled under section 21 are documents which are clearly or unambiguously irrelevant to the matters within the terms of reference. Relevance for those purposes is a precedent fact, which, in the case of any dispute, falls to be determined by the court. It is not a matter of discretion for the chair of an inquiry to consider; the statutory draftsman knew how to confer a discretion on the chair of the inquiry in the opening words of section 21(2) (“as appears to the inquiry panel to be reasonable”), which were omitted from section 21(2)(b). B

There is no support in the wording or context of the 2005 Act, or in previous authority, for the interpretation advanced by the Chair of the UK Covid-19 Inquiry (“the Chair of the Inquiry”), which is that the words of section 21(2)(b) go wider, including any document which the chair “reasonably considers” to be “potentially” relevant, and that potential relevance is a precedent fact, thus limiting any judicial assessment of vires under section 21 to *Wednesbury* irrationality as at the date of the notice. C

The notice issued by the Chair of the Inquiry purported to compel the provision of an extremely broad category of material. There was no limitation at all on that breadth by reference to the subject matter or content of the material. As such, it was bound to include, and did in fact include, material (and a significant quantity of material) which was entirely irrelevant to the inquiry; or, to put the point in the language of section 21, which did not on any view “relate to a matter in question at the inquiry”. Accordingly, the notice is ultra vires, since (i) it is not limited by reference to relevance and (ii) is cast by reference to documents and classes of documents in a manner which is bound to include a significant quantity of irrelevant material. Further, the conclusion of the Chair of the Inquiry that the entirety of the material compelled to be produced by the notice was or might be relevant was irrational, given the breadth of the notice and in the light of the material before her (including the fact that she had been told that the notice covered a significant range of irrelevant material). D

The inquiry is a creature of statute. It has only those powers conferred on it by or under the 2005 Act. It must act within them or it will exceed its jurisdiction: see *British Broadcasting Corpn v Chair of the Scottish Child Sex Abuse Inquiry* 2022 SC 184, paras 40–41. E

The words “relate to a matter in question at the inquiry” in section 21(2)(b) signify, on their ordinary and natural meaning in the context of the 2005 Act as a whole, that the documents in question must be relevant to the matters before the inquiry, as defined and limited in the inquiry’s terms of reference. F

This reflects the fact that an inquiry cannot exercise its functions beyond its terms of reference: see section 5(5) of the 2005 Act. It is a fortiori where section 35(1) criminalises non-compliance with a section 21 notice. G

A Compulsory powers backed by criminal sanction should in principle be read strictly. The principle against doubtful penalisation strongly militates against reading the power under section 21 in a manner which introduces ambiguity and vagueness, as well as extending the language beyond its clear and ordinary meaning: see *R v Bristol Justices, Ex p E* [1999] 1 WLR 390.

The words “relate to” do not imply anything broader than “relevant to”.
 B *Stroud’s Judicial Dictionary of Words and Phrases*, 11th ed (2023), treats the words “relevant to” as synonymous with the concept of “relating to”, reflecting the ordinary and natural use of that language. In the similar context of disclosure in civil proceedings, the words “relating to a matter in question” were authoritatively interpreted as long ago as *Cie Financière du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 to refer to documents which are “directly or indirectly” relevant to the issues in the action,
 C including “train of inquiry” documents. Moreover, *GE Capital Corporate Finance Group Ltd v Bankers Trust Co* [1995] 1 WLR 172 makes clear (per Leggatt LJ at p 177A–B) that the words “relate to a matter in question” for the purposes of RSC Ord 24 refer to material which is (directly or indirectly) relevant, and redactions cannot be challenged by reference to some looser formulation of “potential relevance” which does not satisfy that test. The
 D fact that there is long-standing judicial authority for the meaning of that term, in a similar context, raises a presumption that Parliament intended the words to have that meaning when passing the 2005 Act: see *Barras v Aberdeen Steam Trawling and Fishing Co Ltd* [1933] AC 402, 411, per Viscount Buckmaster.

There is no reason why, as a matter of legislative policy, Parliament would
 E have intended to confer power to compel the provision of material which was irrelevant to an inquiry. On the contrary, there is every reason to suppose that Parliament would have intended the opposite. First, the provision of irrelevant material would not assist the work of the inquiry. Indeed, such provision and/or insisting that irrelevant material be produced
 F alongside relevant material on the basis of setting broad categories of documents would be likely to be highly inefficient and an unnecessary waste of both time and resource for an inquiry. Second, and more fundamentally,
 irrelevant material would be likely to cover material which might be personal or sensitive for a raft of different reasons. Why would Parliament have chosen to impose that intrusive, compulsory provision unless the material, as relevant, would advance the public interests served by an inquiry because it was relevant?

G It makes sense, in the context of inquisitorial proceedings, that “relevance” for these purposes goes as wide as “train of inquiry” documents as defined in *Peruvian Guano*. By contrast, in civil litigation disclosure of that breadth is unusual: it falls outside of standard disclosure following the introduction of the CPR (see *Shah v HSBC Private Bank (UK) Ltd* [2012] Lloyd’s Rep FC 105, paras 32–33, per Lewison LJ) and CPR PD 57AD provides that such disclosure will only be ordered “in an exceptional case”.
 H What makes no sense, and what is entirely unnecessary, is for the powers under section 21 to go even further than *Peruvian Guano* and cover documents which cannot even under that test be said to be relevant.

The Chair of the Inquiry argues that, because the lines of an inquiry develop, there might be documents which cannot be said to be relevant now,

but which might become relevant in the future. But that is in effect to assert an unlimited power of compulsion, which was evidently not intended by Parliament. The practical answer is to request or compel the provision of such documents (where not volunteered) once their relevance can properly be asserted. Nothing in the statutory scheme affords the chair of an inquiry only a single opportunity to use the section 21 power.

The Chair of the Inquiry also contends that it cannot be for a material provider to withhold or redact documents on the basis of (unambiguous) irrelevance: she alone, it is said, is in a position to make such determinations. Five points are made in response to that contention.

(i) It was plainly intended by Parliament that there should be objective standards. They are in the terms of reference, and in any further description of aspects of an inquiry falling within them. Those are accessible to the public and, especially in the context of compulsory powers, it is right that they should be so. There is no insuperable practical difficulty in material providers reaching judgments as to what is unambiguously irrelevant when providing disclosure in response to requests under rule 9 of the Inquiry Rules 2006 (SI 2006/1838) or section 21 notices.

(ii) Judgments of that kind are made all the time in litigation. Litigants are permitted to cover up or blank out irrelevant parts of documents: see *GE Capital* [1995] 1 WLR 172, 176H–177A, per Leggatt LJ. This remains the position under the CPR: see *Shah* [2012] Lloyd’s Rep FC 105. There is no proper basis for objecting to a process whereby a material provider, by a process carried out and supervised by legal representatives owing professional duties, produces all relevant documents to an inquiry, in response to a section 21 notice, but withholds or redacts material that is unambiguously relevant.

(iii) As in civil litigation, if there arises a proper basis for doubting the diligence or bona fides of a provider’s disclosure, a range of tools are then available to an inquiry to deal with any such issue and ensure the provision of all relevant material.

(iv) There is nothing in the point which asserts that, unless the inquiry makes decisions as to what is relevant and irrelevant, public confidence in the process will be undermined. There is no principled or practical difficulty with material providers withholding unambiguously irrelevant material. This is entirely standard as part of the English system of justice.

(v) The conduct of the inquiry in the present proceedings is itself inconsistent with the suggestion that material providers cannot properly make judgments as to relevance. The rule 9 requests sent to the Rt Hon Boris Johnson and Mr Cook were framed by reference to relevance. They expressly requested recipients to consider which of their documents constituted communications “about the UK Government’s response to Covid-19” and which of their notes were “relating to your involvement in the UK Government’s response to Covid-19”. Furthermore, the inquiry’s own Protocol on Documents imposes a standing instruction on material providers to consider what is relevant to the work of the inquiry and to volunteer it, whether or not requested.

The powers afforded to the inquiry by Parliament under the 2005 Act are to be interpreted in circumstances where Parliament knew that those powers must be exercised compatibly with human rights and data protection law.

A All public inquiries will process large quantities of personal data protected by the United Kingdom General Data Protection Regulation (“UK GDPR”) and private information to which the protections of article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms apply.

B Article 5(1)(c) of the UK GDPR imposes the principle of “data minimisation”, requiring that processing be “relevant and limited to what is necessary in relation to the purposes for which they are processed”. The principle precludes excessive processing and relevance is used as the applicable touchstone. The purposes for which the inquiry processes personal data are set by the terms of reference. Collection and storage of such data on the off-chance that it might become relevant to the terms of reference in future is precisely what article 5(1)(c) prohibits. The data minimisation principle applies to the disclosure process in judicial proceedings (a fortiori those before a statutory inquiry), and the Court of Justice of the European Union has held that in that context consideration must be given to whether some less intrusive form of processing is available, and that where only part of a document is relevant, additional minimisation measures should be taken in respect of the irrelevant parts.

D Article 8 of the Convention similarly prohibits unnecessary or disproportionate intrusion into an individual’s private and family life. The protection of personal data is “of fundamental importance” to the right under article 8. Such a test of strict necessity is closely analogous to the data minimisation principle, which the court has found to be an aspect of article 8: see *S v United Kingdom* (2008) 48 EHRR 50, para 103.

E Even where a document is relevant, if disclosure of that document would engage or infringe an individual’s rights under article 8 (e.g. where the material to be disclosed contains sensitive personal information) the courts will engage in a balancing exercise and might on such a basis exempt, limit or control the relevant disclosure: see *Dunn v Durham County Council* [2013] 1 WLR 2305, para 23, per Maurice Kay LJ.

F Compelling the provision of material which contains or is likely to contain private or personal information, where such material is unambiguously irrelevant, is by definition neither a necessary nor proportionate interference with those rights and principles. An interpretation of section 21 which permits such an outcome would improperly permit an inquiry to breach article 8 rights and its own obligations to process personal data in accordance with article 5(1)(c) of the UK GDPR. Those are strong indicators that the Chair of the Inquiry’s interpretation of the scope of her section 21 power is not consistent with Parliament’s intention.

G Further, the notice issued in the present case is ultra vires, since it is extraordinarily broad and goes well beyond material which is relevant to the inquiry. There is no limit by reference to the subject matter or content of the material at all. It is the content or subject matter that is the essence of relevance. A notice, without such a limit, requiring the provision of every WhatsApp message thread over a more than two-year period with a large number of named individuals would be bound to cover a significant volume of irrelevant and personally sensitive material. The notice also goes far beyond anything which would be contemplated by the courts in civil

proceedings when making orders for disclosure: unlike an order for standard disclosure under CPR r 31.6, or Model D disclosure under CPD PD 57AD, the section 21 notice is not qualified or limited by reference to the inquiry's terms of reference or module 2 of the inquiry, or particular issues for disclosure. Nor is there any authority to support the proposition that a notice under section 21 can lawfully be framed in such broad terms: see *Moore-Bick v Mills* [2020] EWHC 618 (Admin) and *Chairman of the Manchester Arena Inquiry v Romdhan* [2021] EWHC 3274 (Admin).

The rationality of the ruling arises as a free-standing ground of the claim (irrationality), and also as a matter of vices if (contrary to the above) the Chair of the Inquiry is right that section 21 imposes no limits upon her vires beyond a rationality review of her decision. The ruling maintained the notice and set out the Chair of the Inquiry's explanations for its issue in that form. The Chair of the Inquiry's core conclusion was that the entirety of the range of documents covered by the notice is "potentially relevant". That was an untenable, irrational conclusion. The question was whether the breadth of the terms of reference and the potential scope of the lines of investigation can justify, or are sufficient to support, a conclusion that the entirety of the documents covered by the notice "relate to a matter in question at the inquiry". For each of the following reasons, the only rational answer was (and remains): "Plainly not".

(i) Given the breadth of the notice, and the absence of any subject matter/content limit, it was bound to include documents that were irrelevant.

(ii) The Chair of the Inquiry had already been informed that, following the process of review described above, there was a significant quantity of irrelevant material, purportedly covered by the notice.

(iii) Prior to the ruling, the Chair of the Inquiry was provided with unredacted copies of Mr Cook's WhatsApp messages so that she could have assurance that a significant quantity of irrelevant material was indeed covered by the notice. The Chair of the Inquiry, in her ruling, accepted that, outside of certain (unidentified and unspecified) redactions of which complaint is made, the "balance" of the redactions are of matter which she is unable to class as relevant.

(iv) The ruling seeks to justify the breadth of the notice, and its lawfulness, on the basis that it covers documents that are "potentially relevant". However, the problem with the notice is that it requires provision of irrelevant material. If it is bound to cover irrelevant material (and a fortiori if it is made clear before the notice is issued that it does in fact do so) it is no answer to say that the notice might also cover, or would cover, relevant documents. Irrelevant documents do not become "potentially relevant" because they are included in a very broad notice which also covers relevant documents.

(v) The Chair of the Inquiry relied on the "great breadth" of the terms of reference and on the fact that she might need to undertake a large number of extremely diverse lines of investigation. The terms of reference are broad, but there is a limit to them. If further lines of inquiry develop, a properly targeted request (and section 21 notice, if required) can be revisited at that point. Whatever the breadth of the terms of reference, they do not extend to matters which are not about Covid-19.

Accordingly, the court is invited to quash the notice and the ruling. It will be a matter for the Chair of the Inquiry, in accordance with the guidance of

- A the High Court, to consider how most appropriately to proceed with seeking evidence which relates to the terms of reference of the inquiry.

Hugo Keith KC, Andrew O'Connor KC and Natasha Barnes (instructed by *Solicitor to the UK Covid-19 Inquiry*) for the Chair of the Inquiry.

- B The correct interpretation of section 21 of the Inquiries Act 2005, which empowers the chair of an inquiry to require production of any documents that “relate to a matter in question at the inquiry”, is that it includes all documents that the chair reasonably considers are “potentially relevant” to her ongoing investigation. That is so for the following five reasons.

- C First, that interpretation enables the chair of an inquiry to undertake a wide-ranging search for documents, which is itself a necessary element of a thorough investigation. A broad approach to evidence-gathering is essential because an unduly narrow approach risks missing key documents and therefore undermining the purpose of the inquiry. But “casting the net wide” will inevitably involve the chair of the inquiry requiring the production of sets of documents that she has not seen, and about which she might know little. At the time of issuing a section 21 notice in respect of such documents, the most she can possibly say is that such documents are, in her judgment, “potentially relevant” to her investigation. Furthermore, it is in the way of things that most categories of documents will be neither entirely relevant nor entirely irrelevant to a given set of issues. In most cases, they will be mixed, with some documents relevant, others not. Moreover, within those relevant documents, only certain passages might be relevant. It follows that most categories of documents that are assessed to be of potential relevance for the purposes of issuing a section 21 notice will contain at least some documents that are ultimately judged by the chair of the inquiry to be irrelevant to the issues, and/or some content within relevant documents that is similarly determined to be irrelevant. But that subsequent conclusion is independent of and cannot undermine the assessment, made at the time the section 21 notice was issued, that the entirety of all documents in the category was potentially relevant. Such a construction, and the analysis that supports it, is entirely consistent with practice and case law in the closely related field of coronial law. The coronial power for the compulsory production of documents is drafted in almost identical terms to section 21. Both case law and the relevant Chief Coroner’s Guidance Note on coronial disclosure refer to coroners seeking disclosure of “potentially relevant” documents.

- G Second, and by contrast, a construction of section 21 that would make the chair’s power to compel the production of documents (and indeed passages within documents) dependent upon a determination by the recipient of the section 21 notice as to whether the documents in question are in fact relevant in their entirety (i.e. the Cabinet Office’s construction) is novel and unprincipled. It would inevitably frustrate the chair’s ability to discharge her investigative function, for the following reasons. (i) At the time of issuing a section 21 notice, the chair of an inquiry is not likely to have seen the documents that are the intended subject of the notice. It would be anomalous in the extreme if the lawful exercise of the chair’s power to issue a section 21 notice were dependent upon the existence of facts which she had no way of establishing at the time she wished to exercise the power. (ii) The chair of an inquiry must have freedom to pursue lines of inquiry in order that she can properly discharge her investigative function. The very purpose of seeking

particular documents might be to assist the chair in deciding what particular matters to investigate further. Without sight of such documents, she might not know which lines of inquiry should be pursued. Enabling the chair to seek documents that she reasonably considers are “potentially relevant” to her lines of inquiry allows her to gain a full appraisal of the facts before deciding which points are of particular significance and require more detailed exploration. It is accepted that a chair has no power to issue a section 21 notice when she has no reasonable belief that the documents sought are potentially relevant to her terms of reference. (iii) A binary view of documents as either relevant or irrelevant does not work in the context of an investigation. Even once documents are received and reviewed, their relevance might not be immediately apparent. Further facts might emerge as new lines of investigation develop, which cast a different light on documents previously received.

Third, neither of the proposals advanced by the Cabinet Office as practical methods by which (assuming its construction is correct) the section 21 power can lawfully be exercised are tenable. The first proposal (that section 21 notices must be formulated as demands for e.g. documents “relevant to” or “relating to” matters in question at the inquiry) has the fundamental flaw of making the material provider the arbiter of relevance. Whilst that is appropriate in the very different context of a disclosure exercise conducted by parties to civil litigation (where the issues are crystallised in pleadings drafted by the same parties who are disclosing documents), it is not appropriate here. In an inquiry it is the chair of the inquiry who decides what particular lines of investigation are to be pursued within the terms of reference, and those lines of investigation will inevitably be added to and modified as the inquiry proceeds. It is neither possible nor appropriate for a material provider to make an accurate judgment on whether a document (or a part of a document) is or is not relevant to lines of investigation of which they might not even be aware. The second proposal would require the chair of an inquiry to draft every section 21 notice so precisely that she could guarantee that no such notice would return any documents that were found to be irrelevant upon later review. In any event, given that the chair of the inquiry would normally not have seen the documents in question, that would be an all but impossible task. Attempting to pursue that course would inevitably mean that relevant documents were missed.

Fourth, the Cabinet Office’s interpretation would make the exercise of the section 21 power unworkable in practice. The logical consequence of the Cabinet Office’s position that the relevance of a document is a question of precedent fact is that the chair of an inquiry has no power to issue a notice if a single document sought (or, perhaps, even a single passage within such a document) turns out to be irrelevant. That would be the case even if all other documents sought under the notice were centrally relevant to the inquiry’s terms of reference. Were that interpretation to be upheld, it would have profound adverse effects on the way in which section 21 (which the statutory scheme clearly intends to be the most potent set of powers available to the chair of a statutory inquiry) could be used in practice.

Fifth, neither article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms nor the UK GDPR compel a different

A conclusion. The proper interpretation of section 21 is compatible with article 8 and the UK GDPR. Empowering the court to compel production of “potentially relevant” documents is necessary and proportionate. In the present case it allows the Chair of the Inquiry to undertake a thorough and effective investigation, and make recommendations for the better protection of the United Kingdom and its citizens from any future pandemics.

B The Chair of the Inquiry’s decision to issue the section 21 notice, on the basis that the entirety of the documents sought were all “potentially relevant” to the inquiry’s lines of investigation, was not irrational for the following reasons.

(i) The 2005 Act imposes a wide discretion on the chair of an inquiry as to how she exercises her inquisitorial function. Whilst the chair’s functions must be exercised within the inquiry’s terms of reference, section 17 of the 2005 Act specifically provides that the “procedure and conduct of an inquiry are to be such as the chairman of the inquiry may direct”.

(ii) The terms of reference in this inquiry are particularly broad. They require the inquiry to “examine the Covid-19 response and the impact of the pandemic in England, Wales, Scotland and Northern Ireland, and produce a factual narrative account”.

D (iii) Such broad terms of reference invariably lead to diverse lines of inquiry.

(iv) Contrary to the Cabinet Office’s assertions, the fact that a document is not directly about the Covid-19 response does not necessarily mean that it is irrelevant to the lines of inquiry.

E (v) The precise scope of the notice was articulated with care. The Chair of the Inquiry was entitled to take the view that all WhatsApp messages between the Rt Hon Boris Johnson, Mr Cook and the individuals listed in Annex B to the notice during the period 1 January 2020 to 24 February 2022 were potentially relevant to her investigation.

F (vi) A broad approach to the potential relevance of WhatsApp correspondence was further justified in light of the well-established public concern around the use of WhatsApp messages for conducting Government business.

(vii) The Chair of the Inquiry does not act irrationally merely because she does not accept at face value an individual’s assertion that documents (or parts of documents) that they hold are irrelevant.

G (viii) The fact that the notice will invariably return specific WhatsApp messages that turn out to be irrelevant does not undermine, still less render irrational, the Chair of the Inquiry’s decision to issue the notice.

H (ix) The Chair of the Inquiry has never sought to characterise as “potentially relevant” any document which she cannot assert as currently relevant but which she wishes to retain on a purely speculative basis in case it becomes relevant in the future. Rather, the Chair of the Inquiry reasonably took the view that the material sought was potentially relevant to her lines of investigation and that, once received, that assessment would be kept under review as the investigation progressed.

Ben Fullbrook (instructed by *Ignition Law*) for Mr Cook.

No position is taken on the correctness of the submissions of either the Cabinet Office or the Chair of the Inquiry.

Lord Pannick KC, Georgina Wolfe and Jason Pobjoy (instructed by *Peters & Peters*) for Mr Johnson. A

The submissions of the Chair of the Inquiry are adopted.

Denis Edwards (instructed by *Bindmans LLP*) for the Chair of the Scottish Covid-19 Inquiry, intervening by written submissions only.

The approach taken by the Chair of the Inquiry to section 21 of the Inquiries Act 2005 is supported. The contentions of the Cabinet Office are misconceived. They are not consistent with the terms of section 21, nor with what must have been Parliament's intention in enacting section 21, nor with the purposes of statutory inquiries which the Act envisages. Any construction of section 21 must be one which works throughout the United Kingdom. In short, the meaning of section 21 cannot turn on the law applying only in one part of the United Kingdom. B

Section 21 and, in particular, the terms of subsections (1)(b) and (2)(b), must be understood in light of section 5(6), which defines "terms of reference" in relation to an inquiry. The power of the chair of an inquiry to decide whether documents "relate to" a matter in question at the inquiry can only be determined by reference to the particular inquiry's terms of reference. Sections 5(6) and 21 work together for that purpose. There is no "one size fits all" meaning to be given to the words "relate to" in section 21(2)(b) which applies to all inquiries. The question of what relates to a matter in question at an inquiry is wholly dependent on the terms of reference of the particular inquiry and that is a question to be determined by the inquiry chair, subject to challenge for *Wednesbury* unreasonableness. C

The key words in section 21(1)(b) are "relate to". They cannot have the same meaning as "relevance" for the purposes of disclosure duties in civil litigation in England or, for that matter, in Scotland. In particular, the submission of the Cabinet Office that section 21(2)(b) is to be interpreted against the background of the common law and goes no wider than "train of inquiry" disclosure under the test in *Cie Financière du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, or takes its meaning from the rules on disclosure in English civil litigation, must be rejected. D

It is well established that an enactment which applies throughout the United Kingdom cannot have a different meaning in England and Scotland unless Parliament has made clear that it should do so: see *Lord Advocate v Dumbarton District Council* [1990] 2 AC 580. There is nothing in section 21 of the 2005 Act which provides that any of its terms must take their colour from the law in one part of the United Kingdom, a fortiori discrete rules of civil procedure in one jurisdiction or another. Accordingly, there is no basis at all in the 2005 Act for the construction of section 21 to be determined or influenced by any doctrine in English law, including the approach to relevance for disclosure duties in English civil litigation. E

Any construction of section 21 which turned on legal doctrine forming part of the law of England and Wales alone would give rise to significant practical difficulties in Scotland. If the meaning of section 21 were influenced by the doctrine on relevance for the purposes of disclosure of documents in civil litigation in England and Wales, that would mean that a 2005 Act inquiry in Scotland would be governed by rules of English law. Before exercising powers under section 21 of the 2005 Act, the inquiry would have to take advice from English counsel so as to be sure that it was F

- A conducting the inquiry lawfully. Likewise, any person subject to a call under section 21 from an inquiry in Scotland would have to take advice on English law in order to understand the inquiry's powers and the meaning of the words "relate to". That cannot remotely have been Parliament's intention when enacting section 21 as a provision of the 2005 Act applying throughout the United Kingdom. There is no basis in the 2005 Act for
- B imposing those requirements on a Scottish inquiry, parties to it or persons who might be called before it, or indeed, on a Scottish court determining a dispute regarding the lawfulness of a request under section 21 made by a 2005 Act inquiry in Scotland.

- C It suffices for present purposes to observe that the law on production of documents in Scotland has developed differently from that in England. The powers of an inquiry under section 21 cannot be governed by the law pertaining to production of evidence under rules of civil procedure, whether in Scots law, English law, in judicial review or generally in civil litigation. This would lead to an inquiry being conducted, in effect, as if it were a court or tribunal involved in inter partes litigation, which is very much not the purpose of statutory inquiries which Parliament has provided for in the 2005 Act.

- D It is well established that the functions of investigative commissions and inquiries are not to be equated with inter partes litigation: see *Mount Murray Country Club Ltd v Macleod* [2003] STC 1525.

- E Since the words "relate to" in section 21(2)(b) of the 2005 Act depend crucially on the terms of reference of an inquiry, the "relevance" or "potential relevance" of documents or other evidence to an inquiry can only be determined from inquiry to inquiry and must be a matter for the inquiry chair if the inquiry is to be able effectively to comply with its terms of reference. It is only with its powers under section 21 construed in that way that an inquiry can conduct an effective and thorough inquiry leading ultimately to a comprehensive and reasoned report that fulfils the terms of reference and in which the public can have full confidence.

- F Any challenge to an inquiry chair's determinations on what relates to a question in the inquiry for the purposes of section 21(2)(b) are inherently about an aspect of the conduct of the inquiry proceedings. They are therefore for the inquiry chair, whose decisions attract a high degree of deference from the courts in the event that they are challenged for unlawfulness: see *R v Lord Saville of Newdigate, Ex p A* [2000] 1 WLR 1855, para 31. Only some serious error amounting to *Wednesbury* unreasonableness concerning construction
- G of the inquiry's terms of reference could give rise to unlawfulness.

The court took time for consideration.

6 July 2023. DINGEMANS LJ and GARNHAM J handed down the following judgment of the court.

H

Introduction

1 This is the judgment of the court. This claim raises issues about the proper interpretation of section 21 of the Inquiries Act 2005 ("the Inquiries Act") and the validity of a section 21 notice dated 28 April 2023 ("the

notice”) issued by the defendant, the Rt Hon Baroness Hallett DBE, the Chair of the United Kingdom Covid-19 Inquiry (“the Chair of the Inquiry”) to the claimant, the Cabinet Office (“the Cabinet Office”). The notice required the production of various WhatsApp messages between 2020 and 2022 exchanged between the second interested party, the former Prime Minister, the Rt Hon Boris Johnson (“Mr Johnson”), and his advisers including a senior adviser to Mr Johnson, the first interested party, Henry Cook (“Mr Cook”). The notice also sought Mr Johnson’s diaries and notebooks.

2 The Cabinet Office seeks permission to apply for judicial review and, if permission is granted, judicial review of both the decision to issue the notice and a ruling dated 22 May 2023 (“the ruling”) of the Chair of the Inquiry on an application dated 15 May 2023, made pursuant to section 21(4) of the Inquiries Act by the Cabinet Office, to revoke the notice. In the ruling, the Chair of the Inquiry dismissed the Cabinet Office’s application.

3 The claim made by the Cabinet Office is opposed by the Chair of the Inquiry. Mr Johnson supports the approach taken by the Chair of the Inquiry. Mr Cook adopts a neutral stance on the dispute, but wanted the court to understand the circumstances in which he had come to be an interested party. The Chair of the Scottish Covid-19 Inquiry (“the Chair of the Scottish Inquiry”) has intervened by written representations, which support the approach taken by the Chair of the Inquiry.

The evidence

4 There was no material dispute between the parties about the factual background. There are witness statements from: Martin Smith, a partner at Fieldfisher LLP, who is solicitor to the inquiry, who summarised the background to the notice and ruling; and Mr Cook, who referred to his role as a former special adviser in No 10 supporting Mr Johnson, and who summarised his dealings with the inquiry.

5 We were also provided with a confidential annexe to the core bundle. This contained 265 pages of WhatsApp threads in their complete form. There were seven different threads with various different persons all including Mr Cook. The whole of the bundle had been provided, without prejudice to the Cabinet Office’s challenge to the legality of the notice, to the Chair of the Inquiry in support of the Cabinet Office’s application to revoke the notice. The Cabinet Office had marked up those passages which it considered to be “unambiguously irrelevant” and which the Chair of the Inquiry commented upon in the ruling.

The factual background

6 Mr Johnson, when Prime Minister, announced in May 2021 the setting up of an inquiry pursuant to the Inquiries Act, which was to commence in 2022. There was a public consultation on the terms of reference. Final terms of reference were published on 28 June 2022.

7 The terms of reference provided that: “the inquiry will examine, consider and report on preparations and the response to the pandemic in England, Wales, Scotland and Northern Ireland, up to and including the inquiry’s formal setting-up date, 28 June 2022.”

A 8 The terms of reference identified the aims of the inquiry. These provided:

“Aim 1. Examine the COVID-19 response and the impact of the pandemic in England, Wales, Scotland and Northern Ireland, and produce a factual narrative account, including:

- B “(a) The public health response across the whole of the UK . . .
 “(b) The response of the health and care sector across the UK . . .
 “(c) The economic response to the pandemic and its impact . . .

“Aim 2. Identify the lessons to be learned from the above, to inform preparations for future pandemics across the UK.”

C 9 The Chair of the Inquiry made an opening statement emphasising that “I am determined to run the inquiry as thoroughly and as efficiently as possible”. The Chair of the Inquiry reported that there would be a number of different modules. The notice which has given rise to this claim for judicial review arises in relation to module 2. The inquiry has published a document in August 2022 setting out the provisional scope of module 2. That provides:

D “This module will look at, and make recommendations upon, the UK’s core political and administrative decision-making in relation to the Covid-19 pandemic between early January 2020 until February 2022, when the remaining Covid restrictions were lifted. It will pay particular scrutiny to the decisions taken by the Prime Minister and the Cabinet, as advised by the Civil Service, senior political, scientific and medical advisers, and relevant Cabinet sub-committees, between early January
 E and late March 2020, when the first national lockdown was imposed.”

10 The inquiry has published a draft list of issues for module 2. This includes:

F “did the UK central Government structures and processes at Prime Minister, Cabinet, Cabinet Office and ministerial levels work effectively? . . . Were key decisions taken in a timely way and after a proper process of advice/consultation? . . . To what extent did informal communication (such as WhatsApp messaging) contribute to key strategic decision-making?”

It is specifically recorded that the list is not exhaustive or prescriptive and issues may emerge as the investigation progresses.

G 11 Mr Smith, as solicitor to the inquiry, referred to the iterative process by which documents were obtained. This included issuing of draft rule 9 requests, reviewing and analysing the materials, making requests to complete a particular line of inquiry or to pursue a new line of inquiry. Rule 9 is part of the Inquiry Rules 2006 (SI 2006/1838) (“the Inquiry Rules”).

H 12 The inquiry has published various protocols for the handling of documents. A Protocol on Documents was published on 29 July 2022, and a further Protocol on the Redaction of Documents on 18 October 2022. A Protocol on Applications for Restriction Orders was also published. So far as is material the Protocol on the Redaction of Documents provides:

“3. . . . First, it will make requests from Material Providers for documents which are considered to be of potential relevance to its Terms

of Reference. The scope of each request will be set by the inquiry's legal team and may relate to one or more of the inquiry's modules. It is important that the inquiry receives documents from Material Providers in clean, unredacted form. The provision of documents must not be delayed on grounds that the Material Provider seeks redactions to the material . . .

"5. Second, the inquiry legal team will review the documents to identify those which are relevant to the scope of any module. It is for the inquiry legal team alone to determine relevance of any particular document. Any document which is identified as relevant will be disclosed to Core Participants, subject to the application of redactions which will be made by the Inquiry . . .

"6. Third, before documents are disclosed to Core Participants, the Inquiry will share such documents with the Material Provider in question who will be given an opportunity to review and approve the redactions applied and identify any further redactions it seeks (the 'Material Provider Review') . . ."

The requests and the section 21(4) application

13 On 5 September 2022 the inquiry issued a rule 9 request to the Cabinet Secretary seeking a corporate statement in draft form. Notice was given that the inquiry was likely to make requests for, among other matters, WhatsApp messages and other types of communication. Attention was drawn to the Protocol on Documents which required documents to be provided in unredacted form.

14 On 12 December 2022 the inquiry issued a rule 9 request to Mr Cook. A rule 9 request was issued to Mr Johnson in draft in February 2023 and, following further discussions between the inquiry and Mr Johnson's legal team, a rule 9 request in final form was made on 1 March 2023.

15 The rule 9 requests provided requests for, among other matters,

"key Cabinet Office e-mails and other correspondence in relation to the issues you have discussed in your witness statement . . . any informal or private communications in the Cabinet Office about the Government's response to Covid-19 of which you were part including informal groups (such as text messages and WhatsApp groups)".

The Cabinet Office relies on the limitation "in relation to the issues" set out in the rule 9 request, and submits that the omission of similar wording in the notice makes it ultra vires.

16 In discussions between the inquiry and the Government Legal Department in February 2023 concerns were reported about the security and sensitivity of information contained in various WhatsApp communications. Concerns were raised about using third party information technology forensic teams to extract the data. There was a discussion about potential closed material and sensitive and irrelevant material. In March 2023 the Cabinet Office stated that it had started a process of redacting content from WhatsApp messages, but the inquiry stated that content should not be redacted. The inquiry suggested a process for review of the unredacted material to be led by senior individuals, where the Cabinet Office could

A make representations about redactions. It was also pointed out that the Cabinet Office would be entitled to apply for a restriction order in accordance with the relevant inquiry protocol.

B 17 There were further communications between those acting on behalf of the Cabinet Office and the inquiry. It is not necessary to set out the points made in the correspondence in order to decide this claim, but it is apparent that there was an issue between the Cabinet Office and the inquiry about who should decide whether any particular WhatsApp message was or might be relevant to the work of the inquiry. The inquiry insisted on clean unredacted copies of all the WhatsApp messages so that they could be seen in context. The Cabinet Office asserted that it was entitled to redact the messages for relevance. It is apparent from the evidence before us that, by 14 June 2023, over 3,000 documents have already been supplied by the C Cabinet Office to the inquiry, including minutes of Cabinet meetings. These had been supplied without redactions and had then been redacted prior to disclosure to the core participants.

D 18 It appears that the Cabinet Office supplied to the inquiry on 21 April 2023 WhatsApp messages from threads which involved Mr Cook. These threads showed the redactions which had been made by the Cabinet Office. This mirrored the confidential annexe provided to the court. In the confidential annexe there were messages marked in yellow which the Cabinet Office maintained should be redacted because they were unambiguously irrelevant. There were messages marked in green, which showed messages which had been redacted but which redactions had been removed by the Cabinet Office after 21 April 2023. There were messages marked up in blue, which were redactions added by the Cabinet Office after E 21 April 2023. In the yellow redacted category were, for example: messages about border incursions by one foreign state into the territory of another foreign state; and the trial of foreign nationals in the courts of another foreign state. It was submitted on behalf of the Cabinet Office that roughly a third of the WhatsApp messages were “unambiguously irrelevant”, although it might be noted that this meant that two thirds of the messages were F relevant.

19 On 28 April 2023 the Chair of the Inquiry issued the notice requiring the Cabinet Office to produce the documents listed in various annexes in unredacted form. The documents were to be produced by 12 May 2023 for annex A(i) and by 29 May 2023 for annex A(ii).

20 Annex A(i) provided:

G “1. Unredacted WhatsApp communications dated between 1 January 2020 and 24 February 2022 which are recorded on device(s) owned/used by Henry Cook and which: a. Comprise messages in a group chat established, or used for the purpose of communicating about the UK Government’s response to Covid-19 (‘group messages’); or b. Were exchanged with any of the individuals listed in Annex B (‘individual threads’)

H “2. Unredacted WhatsApp communications dated between 1 January 2020 and 24 February 2022 which are recorded on device(s) owned/used by the former Prime Minister, the Rt Hon Boris Johnson MP and which: a. Comprise messages in a group chat established, or used for the purpose of communicating about the UK Government’s response to Covid-19

(‘group messages’); or b. Were exchanged with any of the individuals listed in Annex B ‘individual threads’). A

“3. Unredacted diaries for the former Prime Minister, The Rt Hon Boris Johnson MP covering the period 1 January 2020 to 24 February 2022.”

21 Annex A(ii) identified:

“Copies of the 24 notebooks containing contemporaneous notes made by the former Prime Minister, the Rt Hon Boris Johnson MP during the period 1 January 2020 to 24 February 2022. These notebooks are to be provided in clean unredacted form, save only for any redactions applied for reasons of national security sensitivity.” B

The issues of national security sensitivity had been identified in discussions between the legal teams acting on behalf of the inquiry and Cabinet Office. C

22 The requests were summarised in the ruling by the Chair of the Inquiry as being:

“First, WhatsApp communications recorded on devices owned or used by the former Prime Minister Boris Johnson MP and also an adviser named Henry Cook, comprising exchanges between senior government ministers, senior civil servants and their advisers during the pandemic (including both group messages and also messages between individuals (or ‘threads’)). Second, Mr Johnson’s diaries for the same period, together with notebooks that I have been told contain his contemporaneous notes.” D

23 The notice stated that “For the avoidance of any doubt, this notice is issued on the basis that I consider the entire contents of the documents listed in Annex A(i) and (ii) to be potentially relevant to the lines of investigation being pursued by the UK Covid-19 inquiry”. The notice identified that “if the Cabinet Office claims that it is unable to comply with the notice, or that it is unreasonable in all the circumstances for the Cabinet Office to do so, it may apply to me, pursuant to section 21(4) of the Inquiries Act 2005, for revocation or variation of the notice”. E

24 On 15 May 2023 the Cabinet Office made an application pursuant to section 21(4) of the Inquiries Act to revoke the entirety of the notice served on 28 April 2023. F

25 We were told at the hearing that after the notice had been issued and the Cabinet Office had made its application pursuant to section 21(4) of the Inquiries Act there were no further written or oral communications between the Chair of the Inquiry and the Cabinet Office about the notice. G

The ruling by the Chair of the Inquiry

26 The Chair of the Inquiry ruled on the Cabinet Office’s application to revoke the notice in the ruling. The Chair of the Inquiry stated that she regarded the documents as being of significance in two ways. The first was that they contained information potentially relevant to module 2 of the inquiry. The second was that there was an expectation by the core participants and the public that all relevant documents were disclosed for use H

A in the inquiry and that the Chair and her team would keep that position under review as the inquiry progressed.

27 The Chair of the Inquiry turned to a jurisdictional objection to the notice. The Cabinet Office argued that the documents contained “unambiguously irrelevant material” and that the Chair of the Inquiry had no power to issue a notice in respect of material falling within that category, meaning that the notice should be revoked. The Cabinet Office had also provided on a pragmatic basis copies of materials in unredacted form showing that the materials included information that was clearly irrelevant to the work of the inquiry.

28 The Chair of the Inquiry doubted that a wholesale challenge to the legality of a section 21 notice fell within the scope of section 21(4) of the Inquiries Act. The Chair of the Inquiry inferred that the challenge was pursuant to section 21(4)(b) of the Inquiries Act on the basis that “it is not reasonable in all the circumstances to require him to comply with” the notice. The Chair of the Inquiry considered that the better procedure for challenging the whole notice was an application for judicial review but dealt with the application on its merits.

29 The Chair of the Inquiry rejected the Cabinet Office’s challenge on the basis that her decision to ask for the documents was premised on her assessment that the entire contents of the documents that were required to be produced were of potential relevance, which was not an irrational conclusion. The fact that the Cabinet Office reviewed the material and found some to be unambiguously irrelevant did not make the Chair of the Inquiry’s assessment irrational.

30 The Chair of the Inquiry rejected the proposition that she would be acting ultra vires in requiring the production of material where the recipient of a section 21 notice declared the material to be “unambiguously irrelevant”. This was because it “wrongly allocates to the holder of the documents, rather than to the inquiry chair, the final decision on whether documents are or are not potentially relevant to the inquiry’s investigations”. This was held to be problematic on the grounds that it was inconsistent with the broader statutory scheme, the mere assertion of unambiguous irrelevance could not extinguish the power to require production of the documents. There was no proper parallel with litigation because there was no judge to look at the documents in cases of disputed relevance. Further those who hold documents will never be in as good a position as the inquiry to judge the possible relevance of the documents.

31 In that regard the Chair of the Inquiry referred to a comparison of the redacted and unredacted documents which had been provided by the Cabinet Office to show that the redactions had been properly made. The Chair of the Inquiry recorded that some important passages, an example related to discussions between the Prime Minister and his advisers about the enforcement of Covid regulations by the Metropolitan Police during public demonstrations following the murder of Sarah Everard, were originally assessed by the Cabinet Office as unambiguously irrelevant when it was now common ground that they were relevant. The Chair of the Inquiry also recorded that there were some further passages, an example relating to WhatsApp messages about policy formation and relations between the Scottish and UK Governments, which the Chair of the Inquiry considered

were relevant to her inquiry. Finally the Chair of the Inquiry recorded that the balance of the material could, at present, be categorised as not relevant, but that the matter would be kept under review and that the Cabinet Office had not formally sought a ruling on relevancy. A

32 The Chair of the Inquiry did not consider that the requirements of the notice infringed article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) or the UK General Data Protection Regulations. B

Further communications and these proceedings

33 Following the ruling the Cabinet Office applied for permission to seek judicial review. Mr Johnson made it clear that he was willing to provide the documents requested to the inquiry without redactions. C

The respective cases and the issues

34 The grounds on which the Cabinet Office bring their claim for judicial review are that: (1) the compulsory powers conferred on inquiries by the Inquiries Act do not extend to the compulsion of material that is irrelevant to the work of an inquiry; (2) a notice issued pursuant to section 21 of the Inquiries Act must be limited by reference to relevance; (3) the Chair of the Inquiry concluded that the entirety of the material compelled by the notice was, or might be relevant, to the inquiry’s work. That conclusion was irrational given the breadth of the notice, and the material before the Chair of the Inquiry. D

35 Sir James Eadie KC submitted on behalf of the Cabinet Office that the inquiry, being a creature of the Inquiries Act, could only act in accordance with the Inquiries Act and this notice was ultra vires. This was because the notice was not limited by reference to relevance and it was cast by reference to documents and classes of documents which was bound to include a significant quantity of irrelevant material. The requirement for every document to “relate to a matter in question at the inquiry” was a precedent fact. The notice was not sufficiently targeted so as to ensure that each document was relevant to the work of the inquiry. A limitation similar to that in the rule 9 notices which had been served, which provided limitations such as “relating to your involvement in the UK Government’s response to Covid-19”, should have been inserted into the notice. Section 21 set out a precedent fact for the exercise of the power, namely that the documents “relate to a matter in question at the inquiry”. It was not a matter of discretion for the Chair of the Inquiry to consider, because the statutory draftsman knew how to confer a discretion on the Chair in the opening words of section 21(2) (“as appears to the inquiry panel to be reasonable”) which were omitted from 21(2)(b). The fact that a single document would be obtained which was irrelevant to the inquiry’s terms of reference was enough to show that the notice was unlawful, but in this case roughly a third of the documents were irrelevant. E
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36 It was further submitted that the Chair of the Inquiry’s conclusion that the entirety of the material compelled to be produced by the notice was or might be relevant was irrational, given the breadth of the notice and in the light of the material before the Chair of the Inquiry.

A 37 It was submitted by Hugo Keith KC on behalf of the Chair of the Inquiry that the correct interpretation of section 21, which empowers the Chair of the Inquiry to require production of any documents that “relate to a matter in question at the inquiry”, is that it includes all documents that the Chair of the Inquiry reasonably considers are potentially relevant to her ongoing investigation. This was not a case of precedent fact because an inquiry was entitled to explore lines of investigation and fish for documents.

B The Chair of the Inquiry was entitled to take the view that the requested documents were potentially relevant to the inquiry’s lines of investigation and she had made a decision to that effect as appeared from the terms of the notice and ruling. The Cabinet Office could not show that either (a) the Chair’s initial conclusion that the entirety of the documents covered by the notice were “potentially relevant”, or (b) her subsequent decision under

C section 21(4) of the Act to reject the Cabinet Office’s challenge to the notice, were irrational or wrong in law. Mr Keith submitted that permission to apply for judicial review should be refused and, in any event, if the claim proceeded it should be dismissed.

38 Mr Fullbrook on behalf of Mr Cook relied on Mr Cook’s witness statement and his written skeleton argument. These explained that Mr Cook had got caught up in the dispute between the Cabinet Office and the Chair of the Inquiry because he had completed his draft witness statement pursuant to the rule 9 request before other former Downing Street advisers.

39 Lord Pannick KC on behalf of Mr Johnson adopted and supported the submissions made by Mr Keith on behalf of the Chair of the Inquiry. Lord Pannick referred to authorities showing the latitude given to inquiries seeking to pursue lines of inquiry.

E 40 The Chair of the Scottish Inquiry intervened by way of written submissions only. In those submissions Denis Edwards supported the approach taken by the Chair of the Inquiry to section 21 and drew attention to the fact that the Inquiries Act applied throughout the UK. It was submitted that this meant that peculiarly English concepts of civil procedure relating to disclosure were unlikely to assist in interpreting the Act. The

F Cabinet Office responded to those written submissions pointing out that Parliament must be taken to have known the long-established and authoritative meaning of “relates to a matter in question” and that the test proposed on behalf of the Cabinet Office could properly apply throughout the UK.

41 By the conclusion of the hearing it was apparent that the following matters were in issue: (1) whether we should grant permission to apply for judicial review to the Cabinet Office; and if permission to apply is granted: (2) whether the section 21 notice was valid; (3) whether the Chair of the Inquiry’s conclusion that the material produced by the notice was or might be relevant was irrational.

42 We are very grateful to Sir James Eadie, Mr Keith, Mr Fullbrook, Lord Pannick and Mr Edwards, and their respective legal teams, for their helpful submissions.

Relevant statutory provisions

43 Section 1 of the Inquiries Act provides that a minister may cause an inquiry to be held where “(a) particular events have caused . . . public

concern, or (b) there is public concern that particular events may have occurred”. Section 2 provides that an inquiry panel is not to rule on and has no power to determine civil or criminal liability.

44 Section 5 featured prominently in the submissions before the court. It provides for the setting up of an inquiry and the requirement on the minister to “set out the terms of reference of the inquiry”. Section 5(5) provides that “Functions conferred by this Act . . . are exercisable only within the inquiry’s terms of reference”. Section 5(6) provides that “‘terms of reference’, in relation to an inquiry under this Act, means— (a) the matters to which the inquiry relates; (b) any particular matters as to which the inquiry panel is to determine the facts”.

45 Section 17 provides:

“(1) Subject to any provision of this Act or of rules under section 41, the procedure and conduct of an inquiry are to be such as the chairman of the inquiry may direct.”

“(3) In making any decision as to the procedure or conduct of an inquiry, the chairman must act with fairness and with regard also to the need to avoid any unnecessary cost . . .”

46 Section 21 confers a power on the Chair to compel the production of, among other matters, documents. The notice in this case was issued under section 21. It provides:

“(1) The chairman of an inquiry may by notice require a person to attend at a time and place stated in the notice— (a) to give evidence; (b) to produce any documents in his custody or under his control that relate to a matter in question at the inquiry; (c) to produce any other thing in his custody or under his control for inspection, examination or testing by or on behalf of the inquiry panel.

“(2) The chairman may by notice require a person, within such period as appears to the inquiry panel to be reasonable— (a) to provide evidence to the inquiry panel in the form of a written statement; (b) to provide any documents in his custody or under his control that relate to a matter in question at the inquiry; (c) to produce any other thing in his custody or under his control for inspection, examination or testing by or on behalf of the inquiry panel.

“(3) A notice under subsection (1) or (2) must— (a) explain the possible consequences of not complying with the notice; (b) indicate what the recipient of the notice should do if he wishes to make a claim within subsection (4).

“(4) A claim by a person that— (a) he is unable to comply with a notice under this section, or (b) it is not reasonable in all the circumstances to require him to comply with such a notice, is to be determined by the chairman of the inquiry, who may revoke or vary the notice on that ground.

“(5) In deciding whether to revoke or vary a notice on the ground mentioned in subsection (4)(b), the chairman must consider the public interest in the information in question being obtained by the inquiry, having regard to the likely importance of the information.

“(6) For the purposes of this section a thing is under a person’s control if it is in his possession or if he has a right to possession of it.”

A 47 Section 22 is headed “Privileged information etc” and provides that:

“(1) A person may not under section 21 be required to . . . provide any . . . document if— (a) he could not be required to do so if the proceedings of the inquiry were civil proceedings in a court in the relevant part of the United Kingdom . . .

B “(2) The rules of law under which . . . documents are permitted or required to be withheld on grounds of public interest immunity apply in relation to an inquiry as they apply in relation to civil proceedings in a court in the relevant part of the United Kingdom.”

C 48 Section 35(1) provides that a person is guilty of an offence if “he fails without reasonable excuse to do anything that he is required to do by a notice under section 21”. Section 35(3) provides that a person is guilty of an offence “if during the course of an inquiry— (a) he intentionally suppresses or conceals a document that is . . . a relevant document . . . a document is a ‘relevant document’ if it is likely that the inquiry panel would (if aware of its existence) wish to be provided with it”. Section 35(5) provides that proceedings in relation to an offence under section 35(1) may be commenced only by the chairman. The maximum imprisonment for such an offence is, D in England and Wales, 51 weeks and the proceedings are summary in the magistrates’ courts.

E 49 Section 36 of the Inquiries Act provides that where a person fails to comply with, among other matters, a section 21 notice, or threatens to do so, the chairman may certify the matter to the High Court. Section 36(2) provides that the court may make such order by way of enforcement or otherwise as it could make if the matter had arisen in proceedings before the court.

50 Section 41 of the 2005 Act provides that the Lord Chancellor may make rules dealing with matters of evidence and procedure in relation to inquiries. The Lord Chancellor has made the Inquiry Rules using that power.

F 51 The Inquiry Rules provide, among other rules for the making of written requests by the inquiry panel for documents (rule 9); and for the restriction of the disclosure of evidence or documents pending the determination of an application under section 19 of the Inquiries Act or by reference to public interest immunity (rule 12).

Some relevant principles of law

G 52 Public inquiries are convened to address matters of public concern. The matters of public concern are identified by the terms of reference and the powers of the inquiry can only be carried out within the terms of reference, see *R (EA) v Chairman of the Manchester Arena Inquiry* [2020] HRLR 23, para 46. It is well established that regard must be had to the investigatory and inquisitorial nature of a public inquiry. An inquiry is not determining H issues between parties to either civil or criminal litigation, but conducting a thorough investigation. The inquiry has to follow leads and it is not bound by the rules of evidence.

53 If an inquiry is bona fide seeking to establish a relevant connection between certain facts and the subject matter of the inquiry, it will not be regarded as acting outside its terms of reference if it does so, compare *Ross v*

Costigan (1982) 41 ALR 319, 334, *Douglas v Pindling* [1996] AC 890 and *Mount Murray Country Club Ltd v Macleod* [2003] STC 1525. Those were cases decided by the Federal Court of Australia, and in the Privy Council on appeal from the courts in Bahamas and the Isle of Man respectively, and related to different statutory provisions and Commissions of Inquiry, but in our judgment the general principles can be fairly applied to public inquiries established under the Inquiries Act. In *Douglas v Pindling* at p 903 Lord Keith of Kinkel specifically approved dicta of Ellicott J to the effect that

“This does not mean, of course, that a commission [of inquiry] can go off on a frolic of its own. However, I think a court if it has power to do so, should be very slow to restrain a commission from pursuing a particular line of questioning and should not do so unless it is satisfied, in effect, that the commission is going off on a frolic of its own. If there is a real as distinct from a fanciful possibility that a line of questioning may provide information directly or even indirectly relevant to the matters which the commission is required to investigate under its letters patent, such a line of questioning should, in my opinion, be treated as relevant to the inquiry.”

Lord Keith also approved dicta from Henry JA that because a commission of inquiry “is an investigative body it must necessarily embark on what might otherwise be described as ‘fishing’”.

54 Although there are different statutory provisions governing inquiries and coroners, there are some parallels between public inquiries and the role of a coroner. This is particularly so when the inquest avoids the need for a public inquiry. The duty of a coroner is “to ensure that the relevant facts are fully, fairly and fearlessly investigated. He is bound to recognise the acute public concern rightly aroused where deaths occur in custody. He must ensure that the relevant facts are exposed to public scrutiny . . . He fails in his duty if his investigation is superficial, slipshod or perfunctory. But the responsibility is his. He must set the bounds of the inquiry”, see *R v HM Coroner for North Humberside and Scunthorpe, Ex p Jamieson* [1995] QB 1, 26.

55 The powers of an inquiry are not without limits. This is because chairs of public inquiries are subject to the supervisory role of the courts, although courts should be “loath to do anything which could in any way interfere with or complicate the extraordinarily difficult task of the tribunal . . . courts have to bear in mind at all times that the members of the tribunal have a much greater understanding of their task than the courts”. It is, however, essential for courts to exercise their supervisory jurisdiction where necessary to uphold the rule of law, see *R v Lord Saville of Newdigate, Ex p A* [2000] 1 WLR 1855, para 31. In that case the Court of Appeal upheld a ruling by the Divisional Court quashing a ruling by the tribunal which had refused to grant anonymity to soldiers who had fired live rounds on Bloody Sunday.

56 We were also referred, by way of analogy, to authorities about what used to be called discovery, and what is now called disclosure, in civil proceedings in England and Wales. In *Cie Financière du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, 63 Brett LJ had considered Ord 31, r 12 of the Rules of the Supreme Court 1875. This rule provided for

A discovery of documents “relating to any matter in question in the action”. Brett LJ held that:

“every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may*—not which *must*—either directly or indirectly enable the party requiring the affidavit
B either to advance his own case or damage the case of his adversary . . . a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences.”

C 57 Sir James Eadie emphasised the use of the words “relating to” in the rule considered in *Peruvian Guano* and drew attention to the phrase “that relate to a matter in question at the inquiry” as used in section 21(2)(b) of the Inquiries Act. Reference was made to the established principle where words have received a judicial interpretation in the same or similar context, they should bear that interpretation unless a contrary intention is indicated, see
D *Barras v Aberdeen Steam Trawling and Fishing Co Ltd* [1933] AC 402, 411 and *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), section 24.6 and supplement.

58 Reference was also made to *GE Capital Corporate Finance Group Ltd v Bankers Trust Co* [1995] 1 WLR 172 where the Court of Appeal confirmed that a party giving discovery was not obliged to disclose any part of a document which was irrelevant. The court confirmed that parties were
E not obliged to disclose the irrelevant parts of documents and that “litigants have been permitted to cover up or blank out irrelevant parts of documents”. Sir James Eadie submitted that this principle should apply to documents produced under a section 21 notice, and that the Cabinet Office should be entitled to redact those parts of the document which were irrelevant.

F 59 In civil proceedings a party may seek disclosure of specific documents from the other party. It is well known that such a request may lead to the disclosure of some relevant, and some irrelevant, documents, compare *GE Capital*. The fact that irrelevant documents may be caught by the request does not mean in civil proceedings that the request is *ultra vires*, it simply means that the party may redact those irrelevant documents.

Permission to apply for judicial review (issue one)

G 60 We grant permission to the Cabinet Office to apply for judicial review of the notice and ruling. This is because the claim for judicial review raises issues about the proper interpretation of section 21 of the Inquiries Act which should be addressed.

A valid section 21 notice (issue two)

H 61 We agree that the inquiry’s powers derive from the Inquiries Act. The inquiry may exercise functions only within its terms of reference pursuant to section 5(5) of the Inquiries Act. In this case the terms of reference are very wide, but they are not without limits. The Chair of the Inquiry is, subject to the overarching duty of fairness, entitled to direct the

procedure to be employed by the inquiry. The Chair of the Inquiry may, pursuant to section 21(2)(b), by notice require a person to provide documents “that relate to a matter in question at the inquiry”, which picks up the wording used in section 5(6)(a) of the Inquiries Act.

62 In our judgment this section 21 notice was served to require the production of documents that “relate to a matter in question at the inquiry”. This is because one of the classes of documents sought were the WhatsApp messages in a group chat which had been established for the purpose of communicating about the UK Government’s response to the Covid-19 pandemic. Another class of documents sought were the specific threads of WhatsApp messages exchanged between ministers and advisers who were dealing with the Covid-19 pandemic. The diaries and notebooks sought were very likely to contain information about decision-making relating to the Covid-19 pandemic and therefore “relate to a matter in question at the inquiry”.

63 The fact that it is common ground that two thirds of the WhatsApp messages that were produced on 21 April relate to a matter in question at the inquiry part proves the proposition that the Chair of the Inquiry was justified in requesting those WhatsApp messages.

64 That leaves, however, the issue that the notice appears to have yielded some WhatsApp messages which do not relate to a matter in question at the inquiry and, as Sir James Eadie put it, the section 21 notice was always likely to yield some such messages. Does this mean, as was contended on behalf of the Cabinet Office, that the section 21 notice was invalid because the factual basis for the exercise of the power in section 21(2)(b) was not satisfied, unless there were limiting words in the notice such as “relating to a matter in question at the inquiry”? The effect of adding in such a qualification would have meant that the Cabinet Office could take their own view about whether the documents related to a matter in question, and make redactions accordingly. This exposes part of the dispute between the Cabinet Office and the Chair of the Inquiry, namely who gets to decide on the redactions to the WhatsApp messages. If the qualification of “relating to a matter in question at the inquiry” (or an equivalent form of wording) is required in order to make a valid section 21 notice, the Cabinet Office will redact the WhatsApp messages and exclude matters which it believes are not relevant. Mr Keith submits that this leaves the Cabinet Office making decisions about whether documents relate to a matter in question at the inquiry which have, at least in some respects, proved wrong. This is because some of what the Cabinet Office considered “unambiguously irrelevant” material is relevant to other lines of inquiry being pursued by the inquiry, as appears from the ruling.

65 In our judgment the fact that the section 21 notice will yield some irrelevant documents does not invalidate the notice or mean that the section 21(2)(b) power cannot be lawfully exercised. This is for a number of reasons. First the authorities referred to above show that inquiries are to be given a latitude, not provided to parties in civil proceedings, to enable them to “fish” for documents, meaning to make informed but speculative requests for documents relevant to lines of inquiry, or documents which lead to new lines of inquiry. Such an exercise is bound to lead to the inclusion of some irrelevant material. This fact does not answer the question but suggests that

A the approach contended for by the Cabinet Office needs to be carefully examined.

B 66 Secondly the fact that a request for documents in civil proceedings for disclosure may yield some irrelevant documents does not invalidate the request, it simply means that the irrelevant documents may be redacted. It was common ground that the analogy with civil proceedings could only be a loose one, because there were different rules applying for civil proceedings and civil proceedings pursue a different aim to public inquiries, but it would be surprising if a valid request in civil proceedings made under the former Rules of the Supreme Court (“relating to any matter in question in the action”) might yield irrelevant documents and still be lawful, but such a request by an inquiry acting under a statutory power permitting requests for documents (“that relates to a matter in question at the inquiry”) would be unlawful.

D 67 Thirdly the scheme of the Inquiries Act recognises that irrelevant documents might be obtained by a section 21 notice. This is why there is a provision in section 21(4) enabling a party required to produce documents to make an application to the Chair of the Inquiry saying that “it is not reasonable in all the circumstances to require him to comply”. One of the grounds that a recipient of such a notice might rely on is that although the document was lawfully requested as part of a class of documents under section 21, the document caught by the request does not, as a matter of fact, relate to a matter in question at the inquiry. In this sense the statutory and factual limitation on the power exercised under section 21(2)(b) is preserved.

E 68 If a person responding to a section 21 notice contends that a document caught by the request does not, as a matter of fact, relate to a matter in question at the inquiry, it will be for the Chair of the Inquiry to determine how to deal with such a contention. The Chair might accept the claim at face value, but is more likely to require the provision of the disputed documents on a “de bene esse” basis, namely without prejudice to the objection to produce them, so that the Chair of the Inquiry can consider the application under section 21(4) that it is unreasonable to comply with the notice. The Chair of the Inquiry will be able to decide whether they do relate to a matter in question at the inquiry. The Chair of the Inquiry will have knowledge of the lines of inquiry which persons asked to produce documents do not have.

G 69 If, on examination, the Chair of the Inquiry rules that the document relates to a matter in question at the inquiry, and the person who has the document accepts this, that will be an end of the matter. If the Chair of the Inquiry rules that the document does not relate to a matter in question at the inquiry, then the Chair will not be entitled to retain the document, and it might be noted that it would be a waste of time and resources to do so. Further it is not fair to a person for the inquiry to retain a document which does not relate to a matter in question at the inquiry. This is particularly so if H the document contains sensitive personal information.

70 If, however, the Chair of the Inquiry rules that the document relates to a matter in question at the inquiry and the person producing the document continues to contend that it does not do so, that person may refuse to produce the document (albeit at the risk of criminal proceedings under

section 35) and invite the Chair to certify the question to be determined by the High Court pursuant to section 36 of the Inquiries Act. The High Court will then determine the issue for itself after hearing evidence and representations, see *In re Paisley Junior* [2009] NIQB 40 at [36].

71 In our judgment the existence of such a scheme for determining whether a document relates to a matter in question at the inquiry is inconsistent with the Cabinet Office's proposition that obtaining one "obviously irrelevant" document means that the precedent fact for a lawful request under section 21 does not exist. This is because the person who has the obviously irrelevant document is protected by section 21(4) from producing it. In the meantime that person will have to produce the other documents which do "relate to a matter in question at the inquiry". Further, and to answer the practical issue which seems to have divided the Cabinet Office and the Chair of the Inquiry, the Chair of the Inquiry may examine the contested documents, and if the Chair of the Inquiry agrees that they are obviously irrelevant, will return them. We therefore find that the section 21 notice issued by the Chair of the Inquiry to the Cabinet Office was valid.

No irrationality (issue three)

72 In our judgment the Chair of the Inquiry was not acting irrationally in issuing the notice on the Cabinet Office. This was because the Chair of the Inquiry was, for the reasons given above, entitled to take the view that the documents requested related to a matter in question at the inquiry as identified in the notice and ruling. The fact that it is common ground that two thirds of the WhatsApp messages relate to a matter in question at the inquiry part proves that.

73 Although this ground of challenge is irrationality, it is apparent that it is premised on the basis that the Chair of the Inquiry had no power to request the documents if it were clear that some obviously irrelevant documents would be returned. This ground of challenge substantially overlaps with the ground challenging the validity of the section 21 notice, and in our judgment fails for similar reasons. So far as the section 21 notice is concerned, the fact that an "obviously irrelevant" document was going to be caught with the request for "obviously relevant" documents did not make it irrational to issue the section 21 notice, because first, the Chair of the Inquiry was entitled to seek classes of documents where, as here, those classes related to a matter in question at the inquiry, and secondly the Cabinet Office could be protected from producing an "obviously irrelevant" document by using the section 21(4) process.

74 The claim for irrationality also extended to the ruling made by the Chair of the Inquiry. It is important to recognise what was put in issue by the section 21(4) application made by the Cabinet Office. This was to revoke the whole of the section 21 notice on the basis that the Chair of the Inquiry did not have lawful authority to issue it. The Chair of the Inquiry noted that that issue might properly have been dealt with by making an application for judicial review (as it now has been) but went on to rule on it. The Chair specifically noted that the Cabinet Office had not formally sought a ruling on relevancy and so it is not appropriate for this court to rule on a matter which has not yet been formally determined by the Chair of the Inquiry. It is apparent from what we have said above, if the Chair finds that the section 21

A notice has generated documents which do not relate to a matter in question at the inquiry, those documents should be returned.

75 As set out above, in our judgment if a party is concerned about producing documents some of which do relate to a matter in question at the inquiry and some of which do not relate to a matter in question at the inquiry (and many persons might be content to leave it to the inquiry to ensure that irrelevant documents are not passed on to anyone else) then the proper procedure is to make an application pursuant to section 21(4) on the basis that it is unreasonable to be required to produce documents which do not, in fact, relate to a matter in question at the inquiry. The Chair of the Inquiry may examine the documents, without prejudice to the objection to produce them, and determine that claim, returning those “obviously irrelevant” documents.

C
Conclusion

76 For the detailed reasons set out above we: (1) grant the Cabinet Office permission to apply for judicial review; (2) find that the section 21 notice issued by the Chair of the Inquiry to the Cabinet Office was valid; (3) find that the Chair of the Inquiry acted rationally in issuing the section 21(2)(b) notice and making the ruling. We therefore dismiss the claim for judicial review but record that the Cabinet Office may respond to the notice by making an application pursuant to section 21(4), that it is unreasonable to produce material which does not relate to a matter in question at the inquiry. It will be for the Chair of the Inquiry to rule on that application.

E
*Permission to proceed granted.
Claim dismissed.*

BENJAMIN WEAVER, Barrister

F

G

H

Sheku Bayoh Public Inquiry

List of Authorities

For Core Participants Smith, Good and Tomlinson

For the Procedural Hearing on 12 and 13 June 2025

Cases

1. Beaton v Ivory (1887) 14 R 1057 at 1061
2. Rae v Strathern 1924 SC 147
3. Kanda v Malaya [1962] AC 322 at 337
4. Al Rawi v Security Service [2012] 1 AC 531 at para 30
5. Whitehouse v Lord Advocate 2020 SC 133 at para 84
6. Greater Glasgow Health Board v The Chairman of the Scottish Hospitals Inquiry 2025 SLT 205

Articles

7. <https://www.bbc.co.uk/news/uk-scotland-33658656>
8. <https://www.crowdjustice.com/case/justiceforsheku/>
9. <https://news.stv.tv/east-central/sheku-bayohs-family-hold-brutally-honest-meeting-with-police-scotland-chief-jo-farrell>

JOHN BEATON, Pursuer (Reclaimer).—*J. C. Thomson—W. Campbell.*
W. IVORY, Defender (Respondent).—*D.-F. Mackintosh—Jameson.*

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JOHN MACPHERSON, Pursuer (Reclaimer).—*J. C. Thomson—W. Campbell.*

JOSHUA M'LENNAN, Defender (Respondent).—*D.-F. Mackintosh—
M'Lennan.*

Reparation—Wrongful apprehension—Public officer—Malice.—In order to found a relevant action of damages against a public officer for a wrongous official act, it is not enough to aver malice in general terms, but facts and circumstances must be set forth from which the Court or a jury may legitimately infer that the defender was not acting in the discharge of his duty, but from a malicious motive.

Observed that there may be cases between private individuals where a general averment of malice will be sufficient.

Observations on Scott v. Turnbull, 11 R. 1131.

Public officer—Powers of magistrate.—*Observations* upon the powers of magistrates to make apprehensions without written warrant.

JOHN BEATON, residing at Herbista, Skye, and cowherd for the neighbouring township of Peingown, brought an action of damages for wrongful apprehension against William Ivory, Sheriff of Inverness, Elgin, and Nairn. His averments were:—(Cond. 2) "On or about 27th October 1886 the pursuer was engaged in his ordinary occupation of herding cattle on the said pasture ground when he was accosted by two police-constables, one of whom was constable Grant of Edinbane, near Portree, who demanded his name, which the pursuer gave. Grant then apprehended the pursuer and marched him down to the township of Herbista, where he gave the pursuer in charge of a body of marines. The pursuer asked Grant the reason of his arrest, but got no reply. The pursuer was then marched (in custody of the marines) three miles to Duntulin Bay, put on board the gunboat 'Seahorse,' and conveyed as a prisoner to Portree, where he arrived about 11 P.M., and was taken to the prison and confined in a cell. Next day he was brought before Sheriff-substitute Hamilton and questioned by the procurator-fiscal for more than an hour. He was not again taken before the Sheriff, but was detained in prison until the following Saturday, October 30th, when he was liberated without any explanation for his arrest. No document was served upon the pursuer shewing why he was arrested and detained in custody, nor have any further proceedings been taken against him." (Cond. 3) "Grant possessed no warrant for arresting the pursuer, nor had any information been received either by him or by the defender, or by any of the authorities, charging the pursuer with the commission of a crime. Grant arrested the pursuer in obedience to general instructions given to the police by the defender, who was personally present at the township of Herbista, where he had come with a large body of police and marines for the purpose of apprehending the parties who had (as was alleged) deforced a sheriff-officer near Herbista two days before. The instructions referred to were that the police should search for, apprehend, and convey to prison every person whom they could find in the locality where the alleged deforcement took place. . . . The said instructions were illegal and oppressive, and the apprehension of the pursuer in pursuance thereof was wrongful, and was moreover malicious and without probable cause on the part of the defender. The defender had no probable cause for believing that the pursuer had been concerned in the alleged deforcement. In point of fact the pursuer was not present at the deforcement,

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but was more than a mile away at the time repairing the roof of his house. Both the pursuer and his wife and others informed the defender of these facts shortly after the pursuer's apprehension; but the defender nevertheless persisted in detaining him in custody."

The defender in his answers referred to the criminal proceedings in the case, and explained that he took no part in them, but confined himself to the execution of his duty as executive officer in charge of the expedition which the Government had found it necessary to send to Skye. The answer to cond. 3 was,—“Admitted that on the occasion in question the defender, in pursuance of instructions received from the Lord Advocate and Secretary for Scotland, and in the discharge of his duty as the executive officer responsible for the execution of the law in the island of Skye, had accompanied a force of police and marines which had been despatched to the district in question in order to effect arrests in connection with the recent deforcement of Alexander Macdonald, the officer of the law mentioned in the preceding answer. Believed to be true that in the course of the said expedition the pursuer was arrested by the constable mentioned as a person who was suspected to be among those guilty of the said deforcement, and explained that at the time he was taken into custody he was identified by the said Alexander Macdonald as one of the members of the crowd who had taken part in the said deforcement. *Quoad ultra* denied. The expedition was accompanied by the Sheriff-substitute, the sheriff-clerk, and the procurator-fiscal, and the defender took no concern with the particular arrests, but confined himself strictly to his duty as the magistrate in charge of the expedition."

The pursuer pleaded;—The pursuer having been wrongfully arrested and detained in prison by the instructions of the defender, and, *separatim*, the defender having acted maliciously and without probable cause, the pursuer is entitled to decree as concluded for.

The defender pleaded, *inter alia*, that the pursuer's averments were not relevant.

The Lord Ordinary (Fraser), on 28th May 1887, held that the action was not relevant, and dismissed it.*

* “OPINION.—The claim in this case is for damages against the Sheriff of the county of Inverness, because it is alleged that he wrongfully arrested and detained in prison, maliciously, and without probable cause, the pursuer of this action.

“The circumstances, as appearing from the record, are these: The pursuer, who is a herd, was apprehended on the 27th of October 1886, taken to Portree and detained there for three days, when he was liberated. The person by whose orders the pursuer was apprehended and detained was the defender, the Sheriff of the county of Inverness. In this county, and especially in the island of Skye, there had occurred tumultuary proceedings; meetings were held at which resolutions were passed of a very illegal character—pointing to the resistance of payment to the landlords of their rents. The law had been set at defiance by the deforcement of an officer of the law, and it was found necessary to supplement the ordinary executive officers of the law by additional police force and Royal Marines in order that judgments of Courts of law should be carried out. At the head of this force of police and marines was the Sheriff of the county, and along with him there came the officer of the law (Alexander Macdonald, a messenger-at-arms), who had been deforced. The Sheriff gave verbal instructions to the police to apprehend all those who could be identified as persons who had been guilty of this deforcement; and Macdonald identified the pursuer as one of these persons, and he was immediately taken into custody and carried to Portree.

“At Portree the pursuer was brought before the Sheriff-substitute upon the

The pursuer reclaimed, and argued ;—(1) The Lord Ordinary had taken a very unusual course when dealing with a question of relevancy, for he had accepted as true the statements made in the defender's answers, even where these were in direct contradiction to the pursuer's averments. And he had further looked at the documents produced by the defender, viz., a signed information and petition, which he was not entitled to do at this stage. The pursuer's case was that he was apprehended simply because he was found in the locality. The Lord Ordinary assumed, which he had no right to do, that there had been an identification of the pursuer by Macdonald prior to the apprehension. It would be extravagant to argue that a written warrant was necessary in every case of apprehension, but if an apprehension was ordered, it must be because the person to be apprehended had been seen in the act of committing a crime, or there was reasonable ground for believing that he had com-

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charge of mobbing and rioting, and of obstructing and deforming the messenger-at-arms in the execution of his duty ; but after consideration of the matters laid before him, the Sheriff-substitute found that there was not sufficient evidence to justify a committal for trial, and the pursuer was liberated.

"Everything here was regularly gone about in usual course, with one exception. There was no written warrant for the apprehension of the pursuer, and consequently the apprehension, it is said, was illegal.

"Now, this proposition is untenable. A magistrate, according to the law of Scotland, is entitled, if he sees a crime committed, at once, himself, to apprehend the delinquent, or to give a verbal order to any policeman or citizen to do so. Nay, although he does not himself see the crime committed, but is informed upon credible authority that it has been committed, he may give a verbal order to pursue and apprehend the suspected person. Baron Hume states that in such a case it 'is a sufficient justification of a verbal order to the informer and others, to pursue and take the individual, thus positively charged, who might escape through the delay of waiting for a written warrant,'—(II. Hume, 75). The messenger in the present case was deformed by a mob of people, the names of whom he did not know, but the faces of whom he remembered. The deforcement took place on the 25th of October 1886. The Sheriff, with the police and marines came to the ground on the 27th of October, and the police received orders from the Sheriff to apprehend any person identified by the deformed messenger, and upon these general instructions the pursuer was apprehended. What the Sheriff here did was entirely within his power. He met an assemblage of people, but had then no means of ascertaining the names of the persons who were the wrongdoers, except by getting them pointed out on the spot by the deformed messenger. Written warrants were out of the question in such circumstances. Before a formal complaint and warrant could be written out the wrongdoer would have been away over the hills.

"It would be idle to send this case for trial in any view, seeing that malice must be proved. Now, to say that the action of the Sheriff was malicious is to contradict the statement upon the record to the effect that the pursuer was apprehended under 'general instructions'—unless, indeed, it be meant to be averred that the Sheriff had malice against the whole population of crofters. In what he did in this case the Sheriff evinced firmness and resolution, and if he had not done so he would not have done his duty. If the chief magistrate of a county, responsible for its peace, were to lie under the threat of actions of damages for what he did in the *bona fide* execution of his duty, the result would be that his powers to quash tumult and insurrection would be altogether paralysed. It seems to be forgotten that the freedom from responsibility for damages—the absolute privilege that is given to the chief magistrate endeavouring to do his duty—is given to him not for his own sake, but for the sake of the public, whose servant he is, and for the advancement of justice. Upon this ground the Lord Ordinary is of opinion that no relevant case has been stated for the pursuer, and that the action must be dismissed."

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mitted a crime. But a general order to apprehend all persons in a locality was very different. There was therefore a *prima facie* case for an issue of this kind, viz., whether the pursuer was apprehended by order of the defender wrongfully and illegally given. (2) It was not necessary to aver or prove personal malice. If a reckless disregard of the rights and liberties of others was proved, that was enough. What was done here by the defender was in itself illegal. If it had been legal, but carried out in a harsh and oppressive way, then no doubt the pursuer would have been obliged to take an issue of malice, and facts must have been averred from which to deduce the malice.¹

The respondent argued;—(1) No case of damages for wrongful apprehension by a public officer could be cited where malice and want of probable cause were not both held to be necessary. A general averment of malice was not enough; there must be averments of facts and circumstances from which malice could be inferred.² A case of judicial slander—*e.g.*, *Scott v. Turnbull*²—was the strongest case for presuming the absence of malice, but a case of the nature of the present, against a public officer, was only second to it. It was said that there were averments in this case shewing such recklessness in the character of the orders given by the pursuer as to reasonably imply malice. But, even upon that footing, the statements made were vague and ambiguous. It might have been quite proper for the Sheriff to order all the grown-up people in the locality or township to be apprehended, as he had information that they were all guilty. That was in his discretion. And, accordingly, while something short of personal ill-will might be sufficient, it was not enough to prove the mere absence of probable cause, or that the defender had not sufficient grounds for suspecting that the whole inhabitants of the township had been art and part in the deforcement. Both malice and want of probable cause required to be put in issue. (2) The pursuer's general averments of malice and want of probable cause were negatived by the official documents produced, which were part of the record, viz., the signed information by the deforced officer, and the petition and warrant. The absence of a warrant was not very material here, because the names of the persons engaged in the deforcement might not be known until they were brought up for identification. The documents were not perhaps evidence, but were part of the *res gestæ*. The pursuer had had an opportunity of making any explanation he chose about them at adjustment of the record, but he had not done so.

LORD PRESIDENT.—I think the whole question now under consideration depends upon the terms of the third article of the condescendence, in which the pursuer avers that Grant, the police-officer who apprehended the pursuer, “possessed no warrant, nor had any information been received either by him or by the defender, or by any of the authorities, charging the pursuer with the commission of a crime. Grant arrested the pursuer in obedience to general instructions given to the police by the defender, who was personally present at the

¹ *Denholm v. Thomson*, Oct. 22, 1880, 8 R. 31; *Bayne v. Macgregor*, March 14, 1863, 1 Macph. 615, 35 Scot. Jur. 368; *Urquhart v. Dick*, June 10, 1865, 3 Macph. 932; *Cameron v. Hamilton*, Jan. 31, 1856, 18 D. 423 (Lord Deas, p. 426), 28 Scot. Jur. 179; *Arbuckle v. Taylor*, May 1, 1815, 3 Dow's App. 160; *Rae v. Linton*, March 20, 1875, 2 R. 669; *Craig v. Peebles*, Feb. 16, 1876, 3 R. 441; *Urquhart v. Grigor*, Dec. 21, 1864, 3 Macph. 283, 37 Scot. Jur. 134; *Hassan v. Paterson*, June 26, 1885, 12 R. 1164.

² *M'Murphy v. Campbell*, May 21, 1887, *supra*, 725; *Scott v. Turnbull*, July 18, 1884, 11 R. 1131; *Urquhart v. Grigor*, Dec. 21, 1864, 3 Macph. 283, 37 Scot. Jur. 134.

township of Herbista, where he had come with a large body of police and marines for the purpose of apprehending the parties who had (as was alleged) deforced a sheriff-officer near Herbista two days before. The instructions referred to were that the police should search for, apprehend, and convey to prison every person whom they could find in the locality where the alleged deforcement took place.”

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Now, the allegation that general instructions were given to apprehend persons who were suspected of having been engaged in deforcing the officer two days before is not in any respect relevant. I think that was a very proper course to pursue upon the face of it, because the averment of the pursuer impliedly admits that there had been a deforcement at Herbista two days before, and that it had been found necessary—for all that is implied also—to assemble a large body of police as well as of marines for the purpose of ensuring the apprehension of the persons who had been engaged in the riotous proceedings. It is said, however, “that the instructions referred to were that the police should search for, apprehend, and convey to prison every person whom they could find in the locality where the alleged deforcement took place.” Now, that is undoubtedly the strongest averment made by the pursuer, and *prima facie*, there is a kind of recklessness about an order such as that, viz., that everybody in a locality should be apprehended. But one cannot help knowing—indeed it is patent upon the face of this record—that Herbista is a small township, the inhabitants of which cannot be very numerous; and that the rioting two days before had been of a very serious character, probably involving almost all, if not all, the inhabitants of this township. There must have been a large number of rioters, because it was found necessary to assemble so large a force as the pursuer himself admits.

If it had not been that the pursuer is under an obligation to aver and prove malice as the condition of his succeeding in his case against the defender, I should have been of opinion that we could not have disregarded that averment made as it is, and must have sent the case to trial. But I think there is a very special protection surrounding the defender in the execution of his duty as Sheriff of the county, and so responsible for the peace of the county. That protection extends to this, that he will not be liable for anything that he does in the performance of that duty unless it can be shewn that he was actuated by a malicious motive of some kind. The mere use of the word “malice” in a case of this description is, I think, quite insufficient to fulfil the condition upon which alone such an action can be entertained. The presumption in favour of a public officer that he is doing no more than his duty, and doing it honestly and *bona fide*, is a very strong one, and certainly ought not to be overcome by the simple use of the word “malice.” I think the duty of the pursuer in a case of this kind is to aver facts and circumstances, from which the Court or a jury may legitimately infer that the defender was not acting in the ordinary discharge of his duty, but from an improper or malicious motive. I must not be supposed as enouncing the proposition that in every case where malice requires to be libelled it is necessary to be so specific as I say the present pursuer must be. There are cases where I think an averment of malice in general terms may be sufficient as between private individuals; but I do not know of any case in which an action has been sustained against a public officer in the execution of his duty where the presumption of a proper motive has been held to be displaced by a mere general averment of malice, and I should think

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most unfortunate if any such rule were to be introduced into practice. It is for the benefit of the public, and for the interests of justice and good government that public officers acting in the execution of their duty should be surrounded by a very considerable protection. The circumstances brought out in the third article of the condescendence I need hardly say are not such as to warrant any inference of malicious motive, and therefore in that respect I conceive the record to be irrelevant.

I am very much inclined to adopt the opinions which were delivered by the Second Division in the recent case of *M'Murphy v. Campbell*, *supra*, p. 725, referred to in the course of the discussion, and I only desire to say in regard to the opinion of one of the Judges there that I think he has a little misapprehended an observation which I made in the case of *Scott v. Turnbull*, 11 R. 1131. In matters of this kind it is very desirable that one should never be misunderstood without correcting the misunderstanding, and that must be my apology for bringing this personal observation into the case. Lord Rutherford Clark, in referring to the case of *Scott v. Turnbull* (*ante*, p. 729 and 24 S. L. R. 516), in support of the view he took in *M'Murphy's* case, said,—“Although I cannot say that I altogether agree with the rule so broadly stated,”—that is to say, so broadly stated as it was by me in *Scott v. Turnbull*. I think his Lordship can hardly have adverted to the fact that that was a case of judicial slander, and it was a case of judicial slander in which the averment complained of was an averment strictly relevant to the case in which it was made. And it is in reference to such a case as that, and such a case only, that I made the observations which are contained in the report, and certainly I never intended to lay down a general rule in such terms as applicable to all cases. I think a case of judicial slander a very special case indeed, because there is a very strong presumption in such a case that if a man makes an averment which, whether it be irrelevant or not, is at least pertinent to the case, he must be presumed to have made it from an honest motive, with a view to urging everything that he knows of in support of his case. That is a perfectly justifiable and proper motive, and it will protect the party making it against the consequences of any injury that he may have done by that statement to a third party. Now, this becomes all the more strong if the averment is not only pertinent to the case, but is a perfectly relevant averment, for then it becomes the duty of the party to himself and to his advisers and to the Court to make the averment. The case would not be complete, and would not be ripe for judgment, unless the averment were made, and therefore the presumption in favour of proper motive in such a case is stronger than in almost any other case of slander.

I think it right to make these observations, because I have always considered a case of judicial slander to be a very special one, and in like manner I consider a case of a public officer to be a very special one, although upon totally different grounds. There is a very high privilege both in the one case and in the other, but they are totally different kinds of privilege.

I am of opinion that this record is irrelevant, because there are no facts and circumstances averred from which a malicious motive upon the part of the Sheriff can be inferred.

LORD MURE concurred.

LORD SHAND.—If this question had arisen entirely with reference to the first ground upon which the Lord Ordinary proceeded, I should have had some difficulty in concurring with his Lordship. I doubt whether, at least in a record

made up as this has been, without any revisal and therefore without having the pursuer's answers, whether admissions, explanations, or, it might be, merely evasive replies, the defences and the documents there founded on ought to be taken into account and acted on in a question of relevancy.

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But I entirely agree with your Lordship upon the other ground, with reference to which the Lord Ordinary says,—“It would be idle to send this case for trial in any view, seeing that malice must be proved.” It is said by the pursuer that general instructions were given by the defender that the police should search for, apprehend, and convey to prison every person whom they could find “in the locality” where the deforcement took place, and that from this malice may be inferred. The very statement of the generality of the order seems to negative the proposition that the defender acted from malice towards the pursuer. Malice has no meaning except as applied to individuals. It is of the utmost importance for the public benefit that an official in the position in which the defender was should have the fullest protection in the discharge of his public duty. A very strong force was admittedly required in order to seize the persons guilty of the deforcement, and prompt and decisive action was required, and if we were to entertain actions of this kind,—founded upon the assumption that an order of apprehension was given which may have been injudicious or imprudent, and, in the opinion of some, even somewhat reckless, where there was no feeling of malice against the individual,—it would paralyse those who are engaged in the execution of a public duty, and deter them from doing what they thought was right and proper, and what might even be necessary for the vindication of the law in the circumstances. I think there should be such a shield put round public officials in the performance of such duties as will prevent their feeling that they will be liable for actions of this kind for an error in judgment.

I agree with your Lordships in thinking that in order to make an action of this kind relevant there must be averments which will shew, if proved, that the defender acted from improper motives, such as can be characterised as malicious. In the absence of such averments, I think this record is irrelevant.

LORD ADAM concurred.

THE COURT adhered.

The following case came next in the roll to that of *Beaton v. Ivory*, and was heard immediately after it :—

JOHN MACPHERSON, crofter, Glendale, Skye, brought an action of damages for wrongous apprehension against Joshua M'Lennan, Procurator-fiscal of the Sheriff Court of the Skye district of Inverness-shire, under the following circumstances as averred by him.

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On 10th November 1886, the defender presented a petition to the Sheriff for a warrant to apprehend the pursuer and the Rev. D. M'Callum, minister of Waternish, on certain charges of having promoted an unlawful agitation against paying rents and taxes and for resisting the execution of legal warrants for the recovery of these, and of having incited the inhabitants to resist and obstruct the officers of the law in enforcing these warrants and decrees by attending and speaking at certain public meetings, and otherwise, as set forth in the petition. The pursuer further averred :—“(Cond. 3) Upon the petition being presented to him, Mr Sheriff-substitute Hamilton granted a warrant in the following or similar terms :—‘ . . . The Sheriff-substitute grants warrant to search for, seize, and apprehend John Macpherson and Donald M'Callum complained

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and I am fortified and justified in that view by what passed in the subsequent case of *Anderson v. Grant*.¹ To hold that the case of *Howard*² was not decisive against the contention of the first parties would involve the assumption that both the Lord President and Lord Kinnear, who gave judgment in the case of *Anderson*,¹ and the former of whom had taken part in the judgment in the case of *Howard*,² had misapprehended the tenor of that judgment. That is an assumption which I am not prepared to make.

THE COURT answered the fourth question of law in the affirmative.

R. ADDISON SMITH & CO., W.S.—MACKENZIE & WYLLIE, W.S.—Agents.

WILLIAM RAE, Pursuer (Reclaimer).—*Gentles, K.C.—Garrett.*
JOHN DRUMMOND STRATHERN, Defender (Respondent).—*Fenton, K.C.—Hunter.*

No. 15.

Dec. 15, 1923.

Limitation of Actions—Reparation—Wrongous acts of public officials—Statutory protection against claims of damages—Procurator-fiscal—Malicious prosecution—Alleged lack of jurisdiction—Malice and want of probable cause—Arrest of person ready to answer citation—Failure to make inquiry as to facts—Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. cap. 65), sec. 59—“Suffered imprisonment”—“Quashed.”

Statutory offences—Neglecting child—Sheriff—Jurisdiction—Locus delicti—Locus of child's residence or of accused's residence—Children Act, 1908 (8 Edw. VII. cap. 67), sec. 12.

The Summary Jurisdiction (Scotland) Act, 1908, enacts, by sec. 59, that no prosecutor in the public interest shall be liable to pay damages for any proceeding taken under the Act, unless the person suing shall have suffered imprisonment and the proceeding shall have been quashed, and unless he shall specifically aver that such proceeding was taken maliciously and without probable cause.

A father, resident in Midlothian, was arrested and detained in prison on a charge at the instance of the Procurator-fiscal of Lanarkshire, purporting to be brought under the Summary Jurisdiction Act, 1908, of neglecting his child in Glasgow in contravention of sec. 12 of the Children Act, 1908. He was subsequently tried in the Sheriff Court of the county of Lanark, where the child was living with its mother, and was acquitted, on the ground that the case was one of a dispute between the husband and the wife, who had left her husband and was supporting the child, and that the Act was not designed for the purpose of compelling payment of aliment in such circumstances.

In an action of damages brought by the accused against the Procurator-fiscal in respect of the proceedings, the pursuer contended (1) that proceedings in the Sheriff Court of Lanarkshire were *ultra vires* and outwith the Summary Jurisdiction Act, in respect that the place of the alleged offence was in Midlothian and not in Lanarkshire; (2) that the defender had acted maliciously and without probable cause (a) in obtaining the arrest and imprisonment of the pursuer when the pursuer was ready to answer a citation, and (b) in failing to make inquiries which would have at once disclosed the facts upon which the Sheriff had acquitted him.

¹ 1 F. 484.

² 21 R. 787.

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Held (1) that, whether the *locus delicti* was in Midlothian or in Lanarkshire, the taking of proceedings in the Sheriff Court of Lanarkshire was not *ultra vires*, and did not take the proceedings outwith the Summary Jurisdiction Act; and (2) that, in the absence of averment that the Procurator-fiscal had acted from any oblique motive, the pursuer had failed to aver facts and circumstances from which malice could be inferred; and, accordingly, that the action was excluded by sec. 59 of the Act.

Opinions reserved as to whether the pursuer had "suffered imprisonment," and whether the proceedings had been "quashed," within the meaning of the Summary Jurisdiction Act.

1ST DIVISION. (SEE case of *Rae v. Royal Scottish Society for the Prevention of
Lord Cruelty to Children, supra*, p. 102.)
Blackburn.

On 17th August 1922 William Rae, wire worker, residing at 36 Market Street, Musselburgh, brought an action against John Drummond Strathern, Procurator-fiscal for the Lower Ward of Lanarkshire, concluding for £500 as damages for illegal apprehension and detention and for wrongous prosecution.

The pursuer averred:—(Cond. 2) "The pursuer was married to his wife in Musselburgh on 8th April 1921, and there is one child of the marriage, viz., George Rae, who was born on 25th September 1921. The pursuer's wife deserted him on 25th February 1922, having gone to live with her parents at 8 Bellfield Street, Glasgow. When she went to Glasgow, as aforesaid, she took with her the child of the marriage. On several occasions pursuer endeavoured to induce his wife to return to him, but she refused to do so. On his wife declining to return and live with the pursuer, he did his utmost to obtain possession of his child, but his wife refused to deliver it to him." (Cond. 3) "On 19th June 1922, defender presented in the Sheriff Court of Lanarkshire, at Glasgow, a complaint * . . ." (Cond. 4) "On the above-mentioned complaint, the defender applied for a warrant to arrest the pursuer, and, on 20th June 1922, Sheriff-substitute Thomson, on the defender's application, granted a warrant for the apprehension of the pursuer, and on this warrant the pursuer was apprehended at Musselburgh on 26th June. He was detained in the police cells at Musselburgh that night, and on the following day was taken to Glasgow by a police-constable and detained in the police cells at Glasgow until 28th June, when he was brought before the said Sheriff-substitute. Pursuer pleaded not guilty to the charge, and the Court adjourned the diet to 8th July and ordered pursuer to be detained in prison until that date." (Cond. 5) "On said 8th July, pursuer was brought before Sheriff-substitute Lyell. The only witness examined for the prosecution was pursuer's wife, whose evidence

* The complaint, which bore to be brought under the Summary Jurisdiction (Scotland) Act, 1908, was in the following terms:—"William Rae, (25) 36 Market Street, Musselburgh, you are charged at the instance of the complainer that being the father and having the custody or care of your child George Rae, aged 8 months, you did between 25th February 1922 and 17th June 1922 at 8 Bellfield Street, Glasgow, wilfully illtreat and neglect him in a manner likely to cause him unnecessary suffering or injury to his health, by failing to provide him with adequate food, clothing, bedding, and lodging: contrary to the Children Act, 1908, sec. 12."

was to the effect that she had been staying in Glasgow with the child since February 1922, and that she had received nothing from her husband, in name of aliment, either for herself or the child. Sheriff Lyell elicited from the witness that it was she who had left pursuer and not pursuer who had left her, and he suggested that the Children Act was not designed for the purpose of compelling payment of aliment in circumstances such as had been disclosed. The Procurator-fiscal-depute agreed, and the pursuer was found not guilty." (Cond. 6) "The pursuer was not subject to the jurisdiction of the Sheriff of Lanarkshire in Glasgow, and the defender's application for said warrant of apprehension was improper and wrongful, and the warrant obtained by him was illegal. It was *ultra vires* of the said Sheriff to issue said warrant, which was done in consequence of the wrongful and illegal application of the defender as condescended on." (Cond. 7) "Moreover the said application was nimious, oppressive, and unjust. The defender knew, or ought to have known, that not only was the pursuer innocent of any ill-treatment or neglect of his child, but that he had been wrongfully deprived of its possession and custody; and that he had done and was doing all in his power to obtain possession of it, and exercise his paternal rights over it and on its behalf. The pursuer is unaware whether any complaint against him was presented to the defender by his wife, but if defender had made any inquiry, as he was bound but neglected to do, he would have learned that it was the pursuer's wife who was in desertion and that the pretended necessity for aliment for the said child was a pretext for obtaining money for herself to enable her to continue in resistance to the pursuer's demands for her return to him, and also for the delivery of his child into his care and keeping." (Cond. 8) "Further, if the defender had made any due inquiry, he would have ascertained that the said child was well nourished and cared for. He was, or ought to have been, aware that the pursuer was in regular employment in Musselburgh, and was resident at 36 Market Street there, and was ready to answer to any citation. In those circumstances, even if there had been jurisdiction in the Sheriff at Glasgow, the proceedings condescended on constituted a gross abuse of the provisions of the Children Act upon which the said complaint was founded, and the application for a warrant of apprehension and the proceedings following thereon were wrongful and malicious on the part of the defender, and without probable cause."

The pursuer pleaded, *inter alia*:—"(1) The said warrant of apprehension being illegal and having been wrongfully obtained by the defender to the loss, injury, and damage of the pursuer, the defender is liable in reparation therefor. (2) The said prosecution at the instance of the defender being wrongful, malicious, and without probable cause, the defender is liable in damages."

The defender pleaded, *inter alia*:—"(1) The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed." "(3) The defender, having acted throughout the proceedings complained of in the *bona fide* execution of his duty as Procurator-fiscal without malice and with probable cause, should be assoilzied. (4) The warrant of apprehension complained of having been formally and regularly applied for and granted by the Court in a competent process, the

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defender is entitled to absolvitor. (5) The action is excluded by section 59 of the Summary Jurisdiction (Scotland) Act, 1908,* in respect that the proceedings complained of (a) have not been quashed, and (b) were not taken maliciously and without probable cause."

On 9th February 1923 the Lord Ordinary (Blackburn) sustained the fifth plea in law for the defender, and dismissed the action.

LORD BLACKBURN'S OPINION.—[After a summary of the pursuer's averments]—As the complaint was presented under the Summary Jurisdiction Act, 1908, it seems to me that a complete defence to this action is provided by section 59 of the Act. That section provides that no prosecutor shall be liable in damages in respect of any proceeding taken under the Act unless the person suing has suffered imprisonment in consequence thereof and such proceeding has been quashed, and unless the person suing shall specifically aver and prove that the proceeding was taken maliciously and without probable cause.

Dealing with the first of these conditions which are requisite to justify an action of damages, and assuming in the pursuer's favour that he has suffered imprisonment within the meaning of the section, as to which I entertain serious doubts, it is at least clear that the proceedings before the Sheriff have not been quashed, and, accordingly, that this condition is unfulfilled. Dealing next with the condition that the pursuer must specifically aver that the proceedings were taken maliciously, there are no facts or circumstances averred in the present action from which I think it would be possible to infer that the complaint was presented from malicious motives and not from a sense of duty. In an action against a public officer for a wrongous official act, a mere averment of malice in general terms is not sufficient to make the action relevant (*Beaton v. Ivory*, 14 R. 1057, per Lord President Inglis, at p. 1061). There are averments in this action which might justify an issue of want of probable cause, but this, even if established, would not in itself be sufficient to entitle the pursuer to proceed with this action of damages, although proof of want of probable cause might strengthen the evidence as to malice. The pursuer maintained that the defender was not entitled to rely on the provisions of section 59, in respect that he had no jurisdiction over the pursuer. This was supported by the argument that failure to provide for a child is an act of omission and not of commission, and that, therefore, the offence, if any, was committed at Musselburgh, where the pursuer resided, and not in Glasgow, where the child was. I entertain no doubt that the Procurator-fiscal, who obtains information that a child is living in his jurisdiction in a state of desertion within the meaning of the Children Act, is entitled to bring a complaint before the Sheriff of his district and to obtain a warrant for the arrest of the person responsible, wherever he or she may be found. I shall accordingly dismiss the action with expenses.

* The Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. cap. 65), enacts:—Sec. 59. "No judge, clerk of court, or prosecutor in the public interest shall be liable to pay or be found liable by any court in damages for or in respect of any proceeding taken, act done, or judgment, decree, or sentence pronounced under this Act, unless the person suing has suffered imprisonment in consequence thereof and such proceeding, act, judgment, decree, or sentence has been quashed, and unless the person suing shall specifically aver and prove that such proceeding, act, judgment, decree, or sentence was taken, done, or pronounced maliciously and without probable cause. . . ."

The pursuer reclaimed, and the case was heard before the First Division (without the Lord President) on 2nd November 1923. Dec. 15, 1923.

Argued for the reclaimer;—The proceedings taken by the defender as Procurator-fiscal of Lanarkshire were fundamentally illegal for want of jurisdiction. Certain offences, such as forging a document outside the jurisdiction to be uttered within the jurisdiction, would give the Court jurisdiction,¹ but such offences were all crimes of commission, whereas the offence charged against the pursuer was a crime of omission, viz., neglect, which could only be charged in the place where the pursuer actually lived, because there alone could it be committed. A mistake in jurisdiction resulted in the proceedings being incompetent and illegal.² It was no answer that the mistake was *bona fide*, as a Procurator-fiscal was bound to know the limits of his own authority,³ and warrants for arrest and imprisonment were issued on his responsibility. An objection to jurisdiction was so fundamental that by leave of the Court it might be pleaded by the accused at any stage of the proceedings, unless he had been represented by a law-agent at the first diet.⁴ Section 59 of the Summary Jurisdiction Act did not apply to the circumstances so as to exclude the present action. The three conditions imposed upon a pursuer were all satisfied. The pursuer had suffered imprisonment; the proceedings, so far as they went, were quashed by the Sheriff finding the pursuer not guilty. The word “quash” in its technical sense was not strictly applicable to a prosecution which broke down, but it was defined in the dictionaries as “to throw out or reject as invalid an indictment, etc.”⁵ and “to annul or make void,”⁶ and in that sense there had been quashing. In another view it might be held that there was nothing to quash, and it had been decided in a case prior to the Act that it was not necessary, as a preliminary to instituting a civil action of damages for wrongful prosecution, to get the criminal proceedings quashed.⁷ The pursuer had satisfied the third condition in section 59 by averring malice and want of probable cause. There could be no probable cause for obtaining and executing an illegal warrant,⁸ and want of probable cause was in itself evidence of malice.⁹ This was a case of malice in law arising from the fact that an injury had been inflicted through a contravention of the law, and, accordingly, it was unnecessary to aver extrinsic facts to show the defender’s state of mind.¹⁰ Malice was to be inferred from the act itself. In any event, the defender had been guilty of such gross negligence in failing to investigate the facts before bringing proceedings as

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¹ Macdonald, Criminal Law (3rd ed.), p. 7; Trotter on the Summary Jurisdiction Act, p. 7.

² Wilson v. Glasgow Tramways Co., (1878) 5 R. 981, Lord Gifford, at p. 993.

³ M’Crone v. Sawers, (1835) 13 S. 443.

⁴ Summary Jurisdiction (Scotland) Act, 1908, secs. 29 and 75.

⁵ Oxford Dictionary.

⁶ Chambers’s Dictionary.

⁷ Barnet v. Whyte, (1849) 11 D. 666.

⁸ Bell v. Black, (1865) 3 Macph. 1026, Lord Justice-Clerk Inglis, at p. 1029; M’Creadie v. Thomson, 1907 S. C. 1176.

⁹ Johnstone v. Sutton, (1786) 1 T. R. 493, Lord Mansfield at p. 544; Arbuckle v. Taylor, (1815) 3 Dow’s App. 160, Lord Eldon, L.C., at p. 180.

¹⁰ Shields v. Shearer, 1914 S. C. (H. L.) 33, Lord Haldane, L.C., at p. 34, Lord Dunedin, at p. 35, [1914] A. C. 808, at pp. 813, 815.

Dec. 15, 1923. would amount to malice.¹ There was no urgency, as the child was being well cared for, and, if there had been urgency, proceedings should have been taken in the first instance against the wife as the person having the actual custody of the child.² Moreover, malice was to be inferred from the unnecessary character of the warrants for arrest and imprisonment, the pursuer being ready to answer a citation and having a known address and being in regular employment.

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Counsel for the respondent were not called upon.

At advising on 15th December 1923,—

LORD SKERRINGTON.—The first point which the claimer's counsel tried to establish was that the warrants for his apprehension and detention issued by the Sheriff of Lanarkshire in Glasgow were illegal and *ultra vires*, in respect that the *locus delicti* was Musselburgh and not Glasgow. It followed, according to the argument, that the defender acted wrongfully and illegally when he applied for, and caused to be executed, warrants which the Sheriff had no power to grant. There is no substance in this contention. The complaint mentions "36 Market Street, Musselburgh," as part of the designation of the accused, and not as the place where the offence was committed. It is plainly stated to have been committed at 8 Bellfield Street, Glasgow. The Procurator-fiscal (who is the defender in this action) failed to prove his case before the Sheriff, with the result that the accused (the present pursuer) was found to be not guilty. That circumstance, however, does not suggest, much less prove, that the Sheriff of Lanarkshire had no jurisdiction to adjudicate upon the complaint. The pursuer's first plea is therefore bad in law, and, if the case is relevant, malice and want of probable cause must be put in the issue. In other words, the proceedings complained of by the pursuer were (as they purported to be) taken under the Summary Jurisdiction (Scotland) Act, 1908, and the defender is entitled to the protection of section 59 of that statute.

The next question is whether the pursuer has relevantly averred that the defender acted maliciously in regard to the proceedings complained of. The pursuer's grievance is twofold. He avers (*a*) that being a law-abiding citizen with a known address he was apprehended and detained in prison when a warrant of citation would have ensured his presence at the trial; and (*b*) that, if the Procurator-fiscal had made proper inquiries before bringing the prosecution, he would have discovered that the child was not in the custody of the pursuer, but in the custody of the pursuer's wife, at the time when the offence was alleged to have been committed. It is a sufficient answer for the defender to point out that in the matters complained of he acted within the scope of his official duties as a Procurator-fiscal; that there is a strong presumption that he acted from a proper motive, viz., the desire to do his duty; and that the pursuer has failed to allege any facts and circumstances which, if proved, would rebut that presumption. It would be difficult, if not impossible, to carry on

¹ Callendar v. Milligan, (1849) 11 D. 1174, Lord Mackenzie, at p. 1176; Cooper on Defamation (2nd ed.), p. 197.

² Children Act, 1908, sec. 38 (2).

the administration of justice, if a Procurator-fiscal was to be hampered in Dec. 15, 1923. the discharge of his duties by having to consider at every stage whether he could justify to a jury the manner in which he proposed to exercise ^{Rae v.} Strathern. the difficult and delicate discretionary powers which the law has com- ^{Lord} Skerrington. mitted to him. The authorities, and in particular the cases of *Beaton v. Ivory*¹ and *M'Pherson v. M'Lennan*,² show that, in the ordinary case, an issue will not be allowed against a public official unless the pursuer alleges facts and circumstances, in addition to the act of which he complains, from which a jury may reasonably infer that the defender acted maliciously.

In the view which I take of this case it is not necessary to consider whether, and if so to what effect, the condition in section 59 of the Summary Jurisdiction Act, 1908, to the effect that no prosecutor in the public interest shall be found liable in damages in respect of any proceeding under that Act, unless such proceeding "has been quashed," applies to a prosecution which ended in the accused being acquitted.

I think that the Lord Ordinary's interlocutor ought to be affirmed.

LORD CULLEN.—I have come to the same conclusion as your Lordship in the chair.

The defender pleads section 59 of the Summary Jurisdiction (Scotland) Act, 1908, and the first question is whether he is entitled to do so. The pursuer maintains the negative.

He contends that, on his averments, the complaint, and the proceedings and actings under it, were not taken and done under the Act. The ratio of this contention, as stated in argument, was that, while the complaint bore to be brought under the Act, it was in truth a lawless proceeding, in respect that it was presented to and dealt with by a judge who had no jurisdiction in the matter. I am unable to take that view. Under the complaint the alleged *locus delicti* was in Glasgow, where the child was living. Now it may be the proper legal view, as the pursuer maintains, that, *esto* he was neglecting his child, the place where he was neglecting it was Musselburgh—although, to say the least, this is not clear. But I see no sufficient ground for holding that, because the defender considered and alleged that the *locus* of the offence was Glasgow and therefore instituted his complaint in the Sheriff Court there, while there was, *ex hypothesi*, a good defence available to the effect that the *locus* of the offence, if offence there was, lay elsewhere, the proceedings were not proceedings taken under the Act of 1908.

Turning therefore to section 59, one finds that it lays down certain conditions as necessary to the relevancy and success of such an action as the present.

The first is that the person suing has suffered imprisonment in consequence of the proceeding of which he complains. The defender in his pleas does not take any point on this head, and, looking to the whole terms of the section, I am disposed to think that the pursuer did suffer imprisonment within its meaning, although such imprisonment was not *in pœnam*. I do not think it necessary, however, to express any final

¹ 14 R. 1057.

² (1887) 14 R. 1063.

Dec. 15, 1923. opinion on the matter. I desire also to reserve my opinion as to the application to such a case as the present of the second condition in section 59, viz., that the proceeding, act, &c., complained of shall have been "quashed." It may be that the pursuer is right in so far as he says that his acquittal by the Sheriff-substitute amounted to a "quashing" of the complaint within the meaning of section 59. But, even so, it is not quite clear whether the warrants under which the pursuer was detained in prison *pendente processu* can be regarded as having been quashed. This latter topic was not discussed in the argument.

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The remaining conditions of section 59 are that the person suing shall specifically aver both malice and want of probable cause. The pursuer's averments under the head of want of probable cause come in substance to this: that the defender, before presenting this complaint did not make a sufficiently full inquiry into the facts; that if he had done so, and if he had duly construed the provisions of the Children Act, 1908, he would or ought to have been convinced that there was no ground for the complaint in respect (1) that the pursuer's wife had, without his consent, and against his desires and efforts to the contrary, left him and remained apart from him, taking and keeping the child with her, and (2) that the child was *de facto* well cared for, although not by the pursuer. The latter of these two points seems to be met by section 12 (2) of the Children Act, 1908. As regards the former, while the Sheriff-substitute took the view that, on a due construction of the Act, the matrimonial situation was such as to relieve the pursuer from the charge of neglect brought against him, I am unable to hold that the contrary view was so obviously wrong that the defender was destitute of any reasonable justification in entertaining and acting on it. It does not seem clear from the point of view of the Act that, because a wife deserts her husband taking a child with her and refuses against his remonstrances to return or give back the child, the husband and father is thereby necessarily relieved from his parental duty of seeing to and providing for his child's welfare. But, in any case, I am unable to find any relevant averments of malice on the part of the defender. *Esto* the defender ought to have made fuller inquiry, and that he did not rightly construe the Children Act, 1908, there may be ascribable to him negligence or defect of legal acumen; but I am unable to infer that he acted maliciously, that is to say that he acted not from the motive, alone proper for him, of fulfilling his public duty, but from some other and improper motive by which he should not have been actuated.

Apart from the institution and carrying on of the complaint the pursuer complains of the defender having obtained and acted on the warrants for his imprisonment *pendente processu*. The granting of these warrants was the act of the Sheriff-substitute. They were granted on the defender's application, but it is not alleged that the defender obtained them on false information as to the facts, or by any other improper means. The only utility of them, so far as the defender was concerned, was to ensure the pursuer being brought to trial. It may be that it was a case of overdone precaution, so that the procedure was harsher than it need have been. But does this infer malice or improper motive on the

part of the defender? On the pursuer's averments I see no sufficient ground for such an inference. Dec. 15, 1923.

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I accordingly agree with your Lordship in the chair in the view that the pursuer's averments are irrelevant and that we should adhere to the Lord Ordinary's interlocutor.

LORD SANDS.—In this case the pursuer contends that the defender is deprived of the special protection which, either by common law or by statute, is extended to a public prosecutor, by reason of the fact that the proceedings which the defender instituted were absolutely without any warrant of law. The charge, it is said, was the commission of an offence outwith the boundaries of the jurisdiction of the Sheriff Court of Lanarkshire. But the charge against the pursuer was the commission of an offence at a specified place which is admittedly within the boundaries of the sheriffdom. I have, I confess, difficulty in appreciating how proceedings following upon such a charge can be regarded as proceedings outwith the Summary Jurisdiction (Scotland) Act, 1908. The charge may have been altogether groundless, or the offence, if there was an offence, may have been committed in some other sheriffdom. Either proposition, if established, would have been a complete answer to the charge. The pursuer may have remedies in respect of one or other of these considerations. But the charge made was a charge of an offence committed at a place which is admittedly in the sheriffdom of Lanarkshire, and, whatever error or wrong may have been committed in the bringing of such a charge, the Sheriff Court of Lanarkshire, as it seems to me, had jurisdiction to entertain it. The case is differentiated from that of *M'Crone v. Sawers*.¹ There the charge was an offence alleged to have been committed in a place which was said not to be within the sheriffdom. The present case would have been on all-fours with that case if the charge had been the commission of an offence "at Musselburgh in the county of Lanark." Musselburgh not being in the county of Lanark, or within the jurisdiction, such proceedings would have been *ab initio* null. It is unnecessary, however, to make this consideration a ground of judgment. The child who was said to be neglected was in Glasgow, and where there is a charge of child-neglect it appears to me that the Court of the district within which the child is alleged to have suffered this neglect has jurisdiction to deal with the person charged with responsibility for such neglect.

The pursuer maintains further that, *esto* that the proceedings were not unlawful as an excess of jurisdiction, and that the proceedings must be held to have been competently taken under the Summary Jurisdiction (Scotland) Act, 1908, he is entitled to damages against the defender in respect that the prosecution was groundless and oppressive.

Under section 59 of the said Act certain conditions are attached to the entertainment of an action against a prosecutor in respect of any proceeding taken, act done, or judgment, decree, or sentence pronounced under this Act—(1) the complainer must have suffered imprisonment; (2) "such proceeding, act, judgment, decree, or sentence" must have

¹ 13 S. 443.

Dec. 15, 1923. been "quashed"; (3) "the person suing shall specifically aver and prove that such proceeding, act, judgment, decree, or sentence was taken, done, or pronounced maliciously and without probable cause."

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Lord Sands.

As regards the first condition, the pursuer was detained in prison before trial, but he suffered no imprisonment under sentence. It might, perhaps, be open to argument that the statute contemplated only the latter. But I understood that this contention was not advanced by the defender, and it is therefore unnecessary to consider it.

The second condition creates difficulty in view of the fact that it is not in accordance with our practice or understanding to take action after acquittal to quash the previous proceedings, or, after conviction, to quash anything but the conviction and sentence. I reserve my opinion as to the meaning and effect of this condition.

The third condition raises only one possible difficulty as to construction. Does "specifically" mean "definitely" or "categorically," or does it mean with specification of facts and circumstances as contrasted with "generally"? Having regard to the history of the law in the matter, and to the collocation of the word "prove" with the word "aver," I am disposed to think that this latter was in contemplation. But the point does not appear to me to be of importance. Even if the word "specifically" had not been present, and the requirement had been simply "aver and prove malice and want of probable cause," I should have construed this as implying that the malice and want of probable cause must be averred in a manner consistent with the general requirements of the law in such a case.

In my view the pursuer has failed to aver facts and circumstances from which, if proved, malice can be inferred. There is no averment of any personal animus or of any malicious motive. Doubtless it is not in every case necessary to specify such animus or motive. It may be enough to specify certain reckless and inconsiderate actings, and to aver that they disclose the existence of some personal animus or sinister motive, the origin and nature of which are unknown. But I cannot so read the averments in this case. Certain actings are specified which might satisfy the requirement of averment of want of probable cause, and then the word "malicious" is thrown in in an attempt to meet the requirements of the law. It is well settled that malice and want of probable cause are separable. Either may be present without the other. In this case the presence of both is required. It may happen that the facts and circumstances averred as showing want of probable cause may be such that the existence of some unknown and malicious motive may be inferred from them. In the present case, however, no facts and circumstances are averred from which the existence of some unknown malicious motive could reasonably be inferred, nor has the pursuer so framed his pleadings. I am accordingly of opinion that the action fails, and that the interlocutor of the Lord Ordinary ought to be affirmed.

THE COURT adhered.

JOHN ANDERSON, Solicitor—MORTON, SMART, MACDONALD, & PROSSER, W.S.—
Agents.

provisions as were consistent with the commission carrying out the duty entrusted to it. Where, however, as here, there was a conflict between the existing law and the Constitution the former would have to be modified so as to accord with the latter, and the court itself, where the Head of the Federation of Malaya had not done so under article 162 (4) of the Constitution within the prescribed time limit, could and would under article 162 (6) make the necessary modification in the powers of the Commissioner of Police. There could not, at one and the same time, be two authorities with concurrent power to appoint members of the police service. The Constitution must prevail and the existing law must be applied with such modification as might be necessary to bring it into accord with it. Accordingly, since Merdeka Day the commission and not the commissioner had power to appoint and dismiss members of the police service and the dismissal of the appellant by the commissioner was therefore void.

Held, secondly, that the failure to supply the appellant with a copy of the report of the board of inquiry, which contained matter highly prejudicial to him and which had been sent to and read by the adjudicating officer before he sat to inquire into the charge, amounted to a failure to afford the appellant "a reasonable opportunity of being heard" in answer to the charge within the meaning of article 135 (2) of the Constitution and to a denial of natural justice (post, p. 338).

Order of the Court of Appeal of the Supreme Court of the Federation of Malaya reversed.

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APPEAL (No. 9 of 1961) from an order of the Court of Appeal of the Federation of Malaya (December 9, 1960) setting aside a judgment of the High Court at Penang (March 24, 1960).

The following introductory statement is taken from the judgment of the Judicial Committee: The appellant, B. Surinder Singh Kanda, was an inspector of police in the Royal Federation of Malaya Police. On July 7, 1958, he was dismissed by the Commissioner of Police on the ground that he had been guilty of an offence against discipline. Inspector Kanda brought an action in the High Court challenging that dismissal. Rigby J. declared that his dismissal was void and of no effect. The Government appealed. The Court of Appeal by a majority (Thomson C.J. and Hill J.A., with Neal J. dissenting) allowed the appeal and held that inspector Kanda was validly dismissed. He now appealed to their Lordships' Board.

The appeal raised two questions: (1) The first question was whether the Commissioner of Police had any power to dismiss him. Inspector Kanda said that under the Constitution the power rested only with the Police Service Commission: (2) The second

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question was whether the proceedings which resulted in his dismissal were conducted in accordance with natural justice. Inspector Kanda said they were not.

The Federation of Malaya came into being on Merdeka Day, that was, August 31, 1957. Thenceforward the Constitution was the supreme law of the Federation (article 4). The Supreme Head of the Federation was the Yang di-Pertuan Agong (article 32). Great changes were made in the structure of government. In particular the public services were placed under commissions. Thus a Police Service Commission was set up with jurisdiction over all members of the police service (article 140). But the persons serving in the police force continued in general to have the same powers and functions as before (article 176). And for the most part the existing laws were continued unchanged (article 162).

In September, 1957, after Merdeka Day, two men were charged in the Supreme Court at Penang with uttering forged lottery tickets. The prosecution failed. The reason was because the prosecution called a number of witnesses, including police officers, whose evidence was palpably false. The two accused men were acquitted. The Commissioner of Police ordered an inquiry to be held. The board of inquiry was presided over by Mr. D. W. Yates, a very senior police officer. It reported that false evidence had been fabricated for use at the trial.

After considering the report the Commissioner of Police decided that proceedings should be taken against inspector Kanda. Not criminal proceedings before the courts of law, but disciplinary proceedings under what the Police Regulations called "Orderly Room Procedure." The commissioner appointed Mr. Strathairn to be the adjudicating officer to inquire into the charges. Mr. Strathairn was junior to Mr. Yates who had conducted the inquiry. Mr. Yates drafted a specimen charge, but Mr. Strathairn preferred his own. He drafted another. The charge, as eventually laid against inspector Kanda, was that he had failed to disclose evidence which to his knowledge could be given for the two accused men: or alternatively, that he had been guilty of conduct to the prejudice of good order and discipline in that he had submitted investigation papers to his superior officer knowing the same to be false. Another charge was afterwards added that he wilfully disobeyed a lawful command to subpoena a witness.

In April and May, 1958, the charges were heard by Mr. Strathairn, the adjudicating officer. He found inspector Kanda guilty on the original charge of failing to disclose evidence and

recommended that he be dismissed from the Force. He also found him guilty on the added charge of disobeying a lawful command and recommended an award of a severe reprimand. The Commissioner of Police approved the recommendations: and on his direction, on July 7, 1958, inspector Kanda was formally notified that he was dismissed from the Force. On July 14, 1958, inspector Kanda appealed to the Ministry of Defence and also to the Police Service Commission. (He did that because he was not sure which was the right authority to hear his appeal.) Over a year later, on July 19, 1959, the secretary to the Police Service Commission informed him that his appeal was dismissed. It was not contended that, by that internal appeal within the administration, he in any way waived his right to apply to the courts.

On October 1, 1959, inspector Kanda brought this action against the Government of the Federation of Malaya claiming a declaration that his dismissal was void, inoperative and of no effect. He put it on two grounds: (1) His dismissal was effected by an authority which had no power to dismiss him, contrary to article 135 (1) of the Constitution; (2) he was not given a reasonable opportunity of being heard, contrary to article 135 (2) of the Constitution.

1962. Feb. 8, 12, 13, 14. *Rodney Bax* for the appellant. The main and short point is that the purported dismissal of the appellant by the Commissioner of Police on July 7, 1958, was, as the trial judge found, invalid because the commissioner on that date no longer had power to dismiss him. Article 4 of the Federal Constitution provides that the Constitution "is the supreme law of the Federation." Article 135 (1), which is absolutely vital and has no qualification whatever, enacts that "No member of "any of the services"—which includes the police—"shall be "dismissed . . . by an authority subordinate to that which, at "the time of the dismissal . . . has power to appoint a member "of that service of equal rank." Article 140 (1) established a Police Service Commission, and article 144 (1) provided that "Subject to the provisions of any existing law and to the provisions of this Constitution, it shall be the duty of a commission "to appoint . . . and exercise disciplinary control over members "of the service . . ." The submission is that, relating that to article 135 (1), the Police Service Commission had the power and duty to appoint, and therefore no subordinate authority—and the commissioner is an authority subordinate to the commission—

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shall dismiss. The power previously vested in the commissioner by virtue of the provisions of the Police Ordinance, 1952, to dismiss a superior police officer was impliedly revoked by articles 135 (1), 140 and 144 of the Constitution and was thereby transferred to the commission as from Merdeka Day. The power of dismissal has thus clearly been transmitted to the commission and the court must apply the existing law. All that the appellant has to show is that the commission at the relevant date had power to appoint a member of the police force of his grade, and that is enough, because admittedly he was dismissed by a subordinate authority.

Article 162 (6) of the Constitution provides that "Any court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day under this article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution," and the alternative submission is that the provisions of the Police Ordinance, 1952, must, after Merdeka Day, be modified, that is to say repealed, by the court applying the same, pursuant to article 162 (6), so as to give effect to article 144. The effect of article 162 (6) is to bring any provisions of any existing law into accord with the Constitution. The provisions of the Constitution in that context mean the express provisions to set up bodies and functions themselves. If that is right, then it is plain that the Police Service Commission had the power and, indeed, the duty to appoint. The pre-existing law gives the power to one authority and the Constitution to another, and if the effect of the provisions is to leave the pre-existing law in force, then the Constitution power is merely theoretical.

The second point is that the purported dismissal of the appellant was in any event invalid because he was not given a reasonable opportunity of being heard, in accordance with the provisions of article 135 (2) of the Constitution, in that the terms of the findings of the board of inquiry were before the adjudicating officer but unknown to the appellant, who never had any knowledge of the contents of the report until about the fourth day of the trial of the action. The trial judge rightly found on the evidence that the proceedings before the adjudicating officer were, by reason of the appellant's lack of knowledge, held in a manner contrary to natural justice. If there was in the report of the board of inquiry, as in fact there was, matter to the appellant's disadvantage, strongly prejudicial to him, the existence of which he did not know and with which he had no chance to deal, then it cannot

be said that he was given a reasonable opportunity of being heard. Thomson C.J. in his judgment in the Court of Appeal said that "the charges themselves must have conveyed to him [the appellant] the view regarding himself which the board of inquiry had formed. The only thing he was not aware of was the precise words in which these views were expressed . . . the actual words, however, are of little importance." It is submitted that the actual words used in the report here are of the utmost importance. The trial judge said that "the very fact he [the adjudicating officer] was furnished with, and read, the findings of the board must, in my view, to put it at its lowest, have created a very real likelihood that he would have a pre-determined bias or—to use the words of Lord O'Brien L.C.J. in the case of *Rex v. Justices of Queen's County*¹—'an operative 'prejudice, whether conscious or unconscious,' against the plaintiff in respect of the disciplinary charges upon which he was to adjudicate." Those words of Lord O'Brien L.C.J. were adopted by Lord Parker C.J. in *Reg. v. Duffy, Ex parte Nash*.² At the very least the appellant should have been told what was in the report. It is also submitted that the proceedings were not in conformity with the Police Regulations, and as Hill J.A. said in his judgment in the Court of Appeal: "Such proceedings could invariably result in unconscious bias in the mind of any or all adjudicating officers as a result of knowledge of the proceedings before and the findings of boards of inquiry." There are two cases on bias which may be of assistance: *Cooper v. Wilson*³; *Reg. v. Grimsby Borough Quarter Sessions, Ex parte Fuller*⁴; the present is a stronger case. The judgment of the trial judge was right and should be restored.

Lord Bledisloe Q.C. and *Philip Clough* for the respondent. There are two questions: first, a point of construction, whether the power to appoint and dismiss a superior police officer, which was conferred under the Police Ordinance, 1952, on the Commissioner of Police, remained vested in him after Merdeka Day when the Federal Constitution came into force, or whether the relevant provisions of the Constitution are to be construed as having divested the commissioner of that power and as having conferred

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¹ [1908] 2 I.R. 285, 294.² [1960] 2 Q.B. 188, 200; [1960] 3 W.L.R. 320; [1960] 2 All E.R. 891, D.C.³ [1937] 2 K.B. 309, 322, 342; 53 T.L.R. 623; [1937] 2 All E.R. 726, C.A.⁴ [1956] 1 Q.B. 36, 41; [1955] 3 W.L.R. 563; [1955] 3 All E.R. 300, D.C.

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it on the Police Service Commission. Secondly, whether or not in the course of the disciplinary proceedings the appellant was given a reasonable opportunity of being heard in compliance with article 135 (2) of the Constitution. It is clear that under the pre-existing law the commissioner had power to appoint and dismiss. It has been conceded, rightly or wrongly, that the commissioner is subordinate in rank to the commission. If he had power to appoint, there must be power to dismiss.

The initial jurisdiction of the commission is conferred by article 140 (1) of the Constitution "subject to article 144," which itself is a general provision and is "subject to the provisions of "any existing law and to the provisions of this Constitution." "Existing law" is defined in article 160 (2) as meaning "any law in operation in the Federation . . . immediately before "Merdeka Day." That definition must be applied, "unless "the context otherwise requires," throughout the Constitution. Reading article 144 (1) with that definition in it, it reads: "Sub-ject to the provisions of any law in operation in the Federation "immediately before Merdeka Day . . . it shall be the duty of "the commission, etc. Under article 162 (1) the existing law shall be continued in force, but it may be modified by the Head of the Federation as provided in article 162 (4). In the present case it is common ground that the pre-existing law has not been modified under sub-article (4), and the court should not apply the rather curious power under article 162 (6) to import a modification unless it is absolutely necessary—not merely expedient—to do so, and the submission is that it is not necessary or even desirable. Further, article 176 (1) supports the argument that all existing law in force was to continue and that the same persons should have the same functions. The commissioner's powers have been preserved under article 144 and have not been taken away by legislative modification, and, unless the court thinks it absolutely necessary to modify under article 162 (6), the power remains. If it results that there are two persons with the power, that cannot take away the plain meaning of the words—that power is vested in the commissioner.

The process of appointing the Police Service Commission must necessarily take some time. There was no commission in existence on July 7, 1958 (the date of dismissal). If the appellant's contention that the power of the commissioner came to an abrupt end on Merdeka Day is correct, then there would be an interval of time between that date and when the Police Service Commission was appointed. If that is right, chaos would reign in that

interval, and that illustrates the difficulties which would arise. The matter is a pure question of construction, but reference may be made to *Rex v. Churchwardens of St. James, Westminster*⁵—it is rather a long way from the present case. See also *Akisatan Apena of Iporo v. Akinwande Thomas*.⁶ In *Smith v. London Transport Executive*⁷ Lord Simonds said: “The words ‘subject ‘to the provisions of this Act’ . . . are naturally words of ‘restriction. They assume an authority immediately given and ‘give a warning that elsewhere a limitation upon that authority ‘will be found.” *Suresh Chandra v. Himangshu*⁸ has no real bearing on this case—the dismissal there was by an officer subordinate in rank. It may be that, as a practical result of the construction contended for, the Police Service Commission looks after the executive officers and the commissioner looks after the junior officers.

In summary on the point of construction: (1) The jurisdiction of the Police Service Commission was from its very inception expressly made subject to existing law: articles 140, 144. (2) The jurisdiction of the commission was also made subject to the provisions of the Constitution: article 144 (1). (3) “Existing ‘law’ is widely defined in article 160 (2) and can be modified. “Existing law” clearly includes the Police Ordinance, 1952, and its meaning cannot be restricted to mere legal procedure or machinery. (4) “Subject to the provisions of the Constitution” refers to provisions such as article 144 (3), (4) and (5) and article 135 (2), and in particular to article 162 (1)–(4), which provided machinery for the modification or amendment of existing law. (5) Article 176 (1) preserves the powers and functions of the pre-Merdeka Day officials, including the commissioner of police. (6) The respondent’s construction simply results in the Police Service Commission inheriting the powers of the High Commissioner to deal with gazetted police officers, leaving the power to deal with junior ranks in the Commissioner of Police, and that is a very sensible division of functions. (7) If the Ruler and the Government had wished to alter this state of affairs they would have made an order under article 162 (4). (8) The power of the court or tribunal under article 162 (6) is a power to apply existing law in a particular way, and is only exercisable in a particular way where it is necessary—the word “necessary” is stressed;

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⁵ (1836) 5 A. & E. 391.⁶ [1950] A.C. 227, 233, P.C.⁷ [1951] A.C. 555, 569; [1951] 1 T.L.R. 683; [1951] 1 All E.R. 667, H.L.⁸ (1951) 55 Cal.W.N. 605, 608.

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there is no such necessity here. (9) There is nothing indefinite about the period during which the existing law must continue in force. If it is not already modified under article 162 (4) it can still be amended under article 162 (1). (10) Article 176 (1) renders it impossible to adopt Neal J.'s view in the court below of the meaning of existing law that it merely relates to procedure or machinery.

With regard to the second point—whether the appellant was in the course of the disciplinary proceedings given a reasonable opportunity of being heard in compliance with article 135 (2)—the principle stated by Blackburn J. in *Reg. v. Rand*⁹ is applicable in all cases where there is bias or prejudice or poisoned mind—where there is “a real likelihood” of bias. *Frome United Breweries Co. Ltd. v. Bath Justices*¹⁰ applies Blackburn J.'s test of real likelihood of bias. The cases are all reviewed in *Reg. v. Camborne Justices, Ex parte Pearce*,¹¹ which is the last word on this subject and makes the principle very clear. Here it comes down to whether there was any real likelihood that the adjudicating officer's mind was in any way poisoned by the fact that he knew the contents of the report of the board of inquiry. In applying the general principle it was assumed in certain of the cases that there was a real likelihood of bias—where, e.g., there was a financial interest. Here the adjudicating officer *had* to read the report; it contained unquestioned statements of witnesses. It may be that there was an outside possibility of bias, but it was not a case of likelihood. If there was bias, and it is submitted that there was not, it could not be put right by supplying the document to the appellant. In *Cooper's* case,¹² which is very near the present case, conflicting views were taken. [Reference was also made to *Byrne v. Kinematograph Renters Society Ltd.*,¹³ *University of Ceylon v. Fernando*,¹⁴ *Russell v. Duke of Norfolk*,¹⁵ *Goold v. Evans*,¹⁶ *In re an Arbitration between Gregson and Armstrong*,¹⁷ *Ridge v. Baldwin*¹⁸ and *Reg. v. Duffy, Ex parte Nash*.¹⁹] The principle to be culled from those cases is that it must be determined whether there is a real likelihood of bias or

⁹ (1866) L.R. 1 Q.B. 230, 232.

¹⁰ [1926] A.C. 586, 590; 42 T.L.R. 571, H.L.

¹¹ [1955] 1 Q.B. 41; [1954] 3 W.L.R. 415; [1954] 2 All E.R. 850, D.C.

¹² [1937] 2 K.B. 309, 357, C.A.

¹³ [1958] 1 W.L.R. 762, 784; [1958] 2 All E.R. 579.

¹⁴ [1960] 1 W.L.R. 223, 227; [1960] 1 All E.R. 631, P.C.

¹⁵ (1949) 65 T.L.R. 225; [1949] 1 All E.R. 109, C.A.

¹⁶ [1951] 2 T.L.R. 1189.

¹⁷ (1894) 70 L.T. 106.

¹⁸ [1961] 2 W.L.R. 1054; [1961] 2 All E.R. 523.

¹⁹ [1960] 2 Q.B. 188.

prejudice; each case depends on its own circumstances and no general rule can be laid down to cover every case. The underlying principle is that nothing should be done in the name of justice which would strike a reasonable man as unjust. It is more important that justice should be done than that it should be seen to be done. In the present case the adjudicating officer was in fact carrying out the duties of both judge and prosecuting counsel. He was really conducting an investigation, and must necessarily be supplied with all the material which would be available to prosecuting counsel; that is inevitable and one should not shut one's eyes to the reality of the situation. It is unfortunate, but that is the procedure laid down in the regulations. One has to make up one's mind whether there is a reasonable likelihood of bias; the trial judge found in favour of the appellant on this point; the three judges in the Court of Appeal were against him.

Bax in reply. There is no evidence on whether there was a gap before the commission came into existence—it should not be assumed that there was. “Subject to the provisions of any “existing law” is not intending to sweep away existing law, but to apply the provisions of the Constitution to existing law *mutatis mutandis*, that is, to retain the existing law so far as it can be applied in conformity with the provisions of the Constitution. The Constitution intends to create a new machinery of government. In other words, the police force and other services remain unchanged, but the persons to administer those bodies are henceforth to be the commissions and not whatever other authority it may have been. The Police Regulations which applied before Merdeka Day were thereafter to be applied by the Police Service Commission.

With regard to article 162 (6), if the Ruler of the Federation has not seen fit to make any modification other than that made by the Constitution itself, then the court is entitled to look at the existing law and apply it as provided by the Constitution, and to say here that the commission is the authority to appoint or dismiss. Under the existing law the powers of the commissioner are to be preserved, and preserved also subject to the provisions of the Constitution, but that means not necessarily preserved in their entirety, and his functions of appointing and dismissing members of the police force are transferred to the commission. That is, he held on the same terms as before, but subject to the provisions of the Constitution.

There was here a breach of natural justice. Examination as to previous bad conduct would have been forbidden, and that very

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 1962 means—he saw the report. [*Rex v. Justices of Bodmin, Ex*
*parte McEwen*²⁰ was referred to.]

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April 2. The judgment of their Lordships was delivered by LORD DENNING, who stated the facts set out above and continued: Their Lordships will consider the two grounds of appeal separately.

First. The power of the commissioner to dismiss.

The governing article of the Constitution on this point is article 135 (1), which came into operation at once on Merdeka Day (August 31, 1957): "135 (1): No member of any of the "services mentioned [the police service is one of these] shall "be dismissed or reduced in rank by an authority subordinate "to that which, at the time of the dismissal or reduction, has "power to appoint a member of that service of equal rank."

Inspector Kanda was dismissed on July 7, 1958, nearly a year after Merdeka Day. In order to see who had power to dismiss him, it is necessary under article 135 (1) to ask who had power at that time to *appoint* an officer of his rank: for no one could dismiss who could not appoint.

Under the law as it existed prior to Merdeka Day the Commissioner of Police could appoint superior police officers, including inspectors of police, see section 9 (1) of the Police Ordinance, 1952; and if an inspector had been found guilty of an offence against discipline, the Commissioner of Police could dismiss him, see section 45 (1) of that Ordinance. Did this law continue to exist after Merdeka Day? In particular, did it continue to exist on July 7, 1958?

Inspector Kanda says that that law did not continue to exist. It was replaced, he says, by the articles of the Constitution which set up the Police Service Commission and entrusted to them the power to appoint members of the police service. The power of appointment was, he says, in the commission. The Commissioner of Police was an authority subordinate to the commission. He could not therefore dismiss him, because he could not appoint him.

Inspector Kanda relies for this contention on articles 140 (1) and 144 (1) of the Constitution which read as follows:

"140 (1). There shall be a Police Service Commission, whose "jurisdiction shall, subject to article 144, extend to all persons "who are members of the police service.

"144 (1). Subject to the provisions of any existing law and to

²⁰ [1947] K.B. 321, 325; [1947] 1 All E.R. 109, D.C.

“ the provisions of this Constitution, it shall be the duty of a
 “ Commission . . . to appoint, confirm . . . promote, transfer
 “ and exercise disciplinary control over members of the service . . .
 “ to which its jurisdiction extends.”

In answer to this contention, the Government of Malaya point to the words “subject to” in both articles 140 (1) and 144 (1). Those words give priority, they say, to the existing law and preserve it intact, including the power of the commissioner to appoint superior police officers.

The Government admit that after Merdeka Day a Police Service Commission was established and that since Merdeka Day all superior police officers, including police inspectors, have been appointed by the Police Service Commission. They admit, too, that on July 7, 1958, the Commissioner of Police was an authority subordinate to the Police Service Commission. But, despite these admissions, they say that the existing law as to appointment and dismissal was preserved by the opening words of article 144 (1) which says that the duty of the commission is “subject to the provisions of any existing law.” This gives priority, they say, to the existing law. The Constitution is subject to the existing law, and not vice versa. The words “subject to the provisions of this Constitution” can be amply satisfied, they say, by reference to article 144 (3) (4) (which refers to special posts) and 135 (2) (which gives a right to be heard).

This argument found favour with Thomson C.J. and Hill J.A.: but their Lordships find themselves unable to accept it. Their Lordships realise that it is a difficult point but they prefer the view taken by Rigby J. and Neal J. It appears to their Lordships that, as soon as the Yang di-Pertuan Agong appointed the Police Service Commission, that commission gained jurisdiction over all members of the police service and had the power to appoint and dismiss them. It is true that under article 144 (1) the functions of the Police Service Commission were “subject to the provisions of any existing law”: but this meant only such provisions as were consistent with the Police Service Commission carrying out the duty entrusted to it. If there was in any respect a conflict between the existing law and the Constitution (such as to impede the functioning of the Police Service Commission in accordance with the Constitution) then the existing law would have to be modified so as to accord with the Constitution. There are elaborate provisions for modification contained in article 162 which run as follows:

“ 162 (1) Subject to the following provisions of this article . . .

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“ the existing laws shall . . . continue in force on and after Merdeka Day, with such modifications as may be made therein under this article . . . (4) The Yang di-Pertuan Agong may, within a period of two years beginning with Merdeka Day, by order make such modifications in any existing law . . . as appear to him necessary or expedient for the purpose of bringing the provisions of that law into accord with the provisions of this Constitution . . . (6) Any court or tribunal applying the provision of any existing law (which has not been modified on or after Merdeka Day under this article or otherwise) may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution. (7) In this article ‘ modification ’ includes amendment, adaptation, and ‘ repeal.’ ”

It appears to their Lordships that, in view of the conflict between the existing law (as to the powers of the Commissioner of Police) and the provisions of the Constitution (as to the duties of the Police Service Commission) the Yang di-Pertuan Agong could himself (under article 162 (4)), have made modifications in the existing law within the first two years after Merdeka Day. (The attention of their Lordships was drawn to modifications he had made in the existing law relating to the railway service and the prison service.) But the Yang di-Pertuan Agong did not make any modifications in the powers of the Commissioner of Police, and it is too late for him now to do so. In these circumstances, their Lordships think it is necessary for the court to do so under article 162 (6). It appears to their Lordships that there cannot, at one and the same time, be two authorities, each of whom has a concurrent power to appoint members of the police service. One or other must be entrusted with the power to appoint. In a conflict of this kind between the existing law and the Constitution, the Constitution must prevail. The court must apply the existing law with such modifications as may be necessary to bring it into accord with the Constitution. The necessary modification is that since Merdeka Day it is the Police Service Commission (and not the Commissioner of Police) which has the power to appoint members of the police service. And that is just what has happened. The Police Service Commission has in fact made the appointments. And their Lordships are of opinion that they were lawfully made.

Their Lordships do not overlook the argument of the Government that there was no conflict. The jurisdiction of the Police Service Commission, they said, would be satisfied by entrusting

them with the power to appoint gazetted police officers, leaving the Commissioner of Police to appoint all others. Their Lordships cannot accede to this argument. Under article 140 the jurisdiction of the Police Service Commission extends to *all* persons who are members of the police service: and their functions under article 144 apply to all of them also. The commission has the duty, and therefore the power, to appoint *all* members of the police service, and not merely the gazetted police officers. The Police Service Commission can, of course, delegate any of its functions under article 144 (6), but still it is its own duty and its own power that it delegates. It remains throughout therefore the authority which has power to appoint, even when it does it by a delegate.

The result is that on July 7, 1958, the Police Service Commission was the authority to appoint an officer of the rank of inspector Kanda: and therefore under article 135 (1) it was the authority to dismiss him. The Commissioner of Police had no authority to dismiss inspector Kanda as he did. The dismissal was therefore void.

Second. The reasonable opportunity of being heard.

The governing article of the Constitution on this point is article 135 (2), which came into operation on Merdeka Day (August 31, 1957): "135 (2) No member of such a service as 'aforesaid [the police service is one of these] shall be dismissed 'or reduced in rank without being given a reasonable opportunity 'of being heard.'"

Several complaints were made by inspector Kanda of a failure to comply with this article, but none of them survived for argument before their Lordships except one complaint which related to the report of the board of inquiry. This complaint was not contained in the statement of claim, but this was because inspector Kanda did not know the contents of the report until the fourth day of the trial. Their Lordships think that an amendment should have been made even at that stage to permit it, but as the case proceeded before Rigby J. and the Court of Appeal as if an amendment had been made, their Lordships think it would be wrong to shut it out now.

The report of the board of inquiry contained a severe condemnation of inspector Kanda. It was sent to the adjudicating officer before he sat to inquire into the charge. He read it and had full knowledge of its contents. But inspector Kanda never had it. He never had an opportunity of dealing with it. Indeed, he never got it until the fourth day of the hearing of this action, when

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P. C. this took place between the judge and the legal adviser to the
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"*The court to legal adviser:* Am of the opinion that in the
" interests of justice the findings of the board of inquiry ought to
" be made available to the court and to the plaintiff and privilege
" waived thereon. . . .

" *Legal adviser:* Must be some misunderstanding—they have
" always been available—and no privilege claimed thereon.

" *Court:* It is my clear impression that both in court and
" throughout earlier proceedings in chambers, privilege has been
" consistently claimed in respect of the board of inquiry file and
" the findings thereon."

The report was then made available to inspector Kanda and his advisers. It dealt in detail with the evidence of each witness heard by the board, and expressed views as to the credibility of each witness, and the weight to be attached to his statement. It referred to inquiries made by the board itself apart from the evidence given by witnesses. In the result it presented, as Rigby J. said, a most damning indictment against inspector Kanda as an unscrupulous scoundrel, who had suborned witnesses, both police and civilian, to commit perjury. It said: "The board are
" unanimously of opinion that inspector Kanda is the 'villain of
" 'the piece'. . . . The board were forced to the conclusion
" that inspector Kanda is a very ambitious and a thoroughly
" unscrupulous officer who is prepared to go to any lengths,
" including the fabrication of false evidence, to add to his reputa-
" tion as a successful investigator. The board could not help
" considering how many of his previous successful cases had been
" achieved by similar methods."

The question is whether the hearing by the adjudicating officer was vitiated by his being furnished with that report without inspector Kanda being given any opportunity of correcting or contradicting it. Much of the argument before their Lordships and, indeed, before the courts in Malaya proceeded on the footing that this depended on this further question: Was there a "real
" likelihood of bias," that is, "an operative prejudice, whether
" conscious or unconscious," on the part of the adjudicating officer, Mr. Strathairn, against inspector Kanda? The well-known line of cases was cited from *Reg. v. Rand*¹ to *Reg. v. Camborne Justices, Ex parte Pearce*.² Adopting this test, much effort was

¹ (1866) L.R. 1 Q.B. 230.

² [1955] 1 Q.B. 41; [1954] 3
W.L.R. 415; [1954] 2 All E.R. 850,
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devoted to showing that Mr. Strathairn was not biased against inspector Kanda. Thus he had not adopted the specimen charge drafted for him by his superior officer, Mr. Yates, but had framed lesser charges of his own. And he deliberately refrained from calling the two accused men as witnesses because he realised that their evidence might be very prejudicial to the accused. He only called them at a later stage because Mr. Yates directed him to do so. The trial judge, Rigby J., was not persuaded by these arguments. He held that there was a very real likelihood of bias. But all the members of the Court of Appeal thought otherwise. They held that there was no real likelihood of bias. So inspector Kanda failed on that way of looking at the case.

In the opinion of their Lordships, however, the proper approach is somewhat different. The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: *Nemo iudex in causa sua*: and *Audi alteram partem*. They have recently been put in the two words, Impartiality and Fairness. But they are separate concepts and are governed by separate considerations. In the present case inspector Kanda complained of a breach of the second. He said that his constitutional right had been infringed. He had been dismissed without being given a reasonable opportunity of being heard.

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. This appears in all the cases from the celebrated judgment of Lord Loreburn L.C. in *Board of Education v. Rice*³ down to the decision of their Lordships' Board in *Ceylon University v. Fernando*.⁴ It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not inquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to

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³ [1911] A.C. 179, 182; 27 T.L.R.
 378, H.L.

⁴ [1960] 1 W.L.R. 223; [1960] 1
 All E.R. 631, P.C.

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—

the judge without his knowing. Instances which were cited to their Lordships were *In re an Arbitration between Gregson and Armstrong*,⁵ *Rex v. Bodmin Justices, Ex parte McEwen*⁶ and *Goold v. Evans & Co.*,⁷ to which might be added *Rex v. Architects' Registration Tribunal*,⁸ and many others.

Applying these principles, their Lordships are of opinion that inspector Kanda was not in this case given a reasonable opportunity of being heard. They find themselves in agreement with the view expressed by Rigby J. in these words: "In my view, "the furnishing of a copy of the findings of the board of inquiry "to the adjudicating officer appointed to hear the disciplinary "charges, coupled with the fact that no such copy was furnished "to the plaintiff, amounted to such a denial of natural justice "as to entitle this court to set aside those proceedings on this "ground. It amounted, in my view, to a failure to afford the "plaintiff a reasonable opportunity of being heard in answer to "the charge preferred against him which resulted in his dismissal." The mistake of the police authorities was no doubt made entirely in good faith. It was quite proper to let the adjudicating officer have the statements of the witnesses. The Regulations show that it is necessary for him to have them. He will then read those out in the presence of the accused. But their Lordships do not think it was correct to let him have the report of the board of inquiry unless the accused also had it so as to be able to correct or contradict the statements in it to his prejudice.

Since their Lordships have already reached the conclusion that the dismissal was void on the ground that the Commissioner of Police had no authority to effect it, it is unnecessary for their Lordships to consider whether the setting aside of the proceedings would result also in avoiding the dismissal or merely in rendering it wrongful. Their Lordships notice that, before Rigby J., it was suggested that the only remedy was by certiorari. But their Lordships agree with him that the remedy by declaration is available also. There was some question at one time as to the scope of the declaration, but it was agreed before their Lordships that it should be limited to the date of the dismissal.

Their Lordships will therefore report to the Head of the Federation as their opinion that the appeal should be allowed,

⁵ (1894) 70 L.T. 106, D.C.

⁷ [1951] 2 T.L.R. 1189, C.A.

⁶ [1947] K.B. 321; [1947] 1 All E.R. 109, D.C.

⁸ (1945) 61 T.L.R. 445; [1945] 2 All E.R. 131, D.C.

the order of the Court of Appeal should be set aside, and that it should be declared that the dismissal of the plaintiff from the Federation of Malaya Police Force purported to be effected by one W. L. R. Carbonnell, the Commissioner of Police of the Federation of Malaya, on July 7, 1958, was void, inoperative and of no effect. The respondents should pay the costs of the appellant before their Lordships' Board and in the Court of Appeal and in the High Court.

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Solicitors: *Summer & Co.; Wray, Smith & Co.*

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JACK ERIC THORNTON	PETITIONER;	P. C.*
	AND	1962
THE POLICE	RESPONDENTS.	<u>March 26.</u>

ON APPEAL FROM THE SUPREME COURT OF FIJI, APPELLATE
JURISDICTION.

Nationality—Colonial immigration ordinance—Validity—Regulation of entry into and residence in colony—Not repugnant to Imperial Act extending to colony and conferring citizenship of "United Kingdom and Colonies" — Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), s. 2—British Nationality Act, 1948 (11 & 12 Geo. 6, c. 56), s. 12—Immigration Ordinance (Fiji), No. 33 of 1947, s. 8.

Colony—Ordinance—Validity—Immigration ordinance—Colonial Laws Validity Act, 1865, s. 2—British Nationality Act, 1948, s. 12—Immigration Ordinance (Fiji), No. 33 of 1947, s. 8.

The Colonial Laws Validity Act, 1865, provides by section 2: "Any colonial law which is . . . in any respect repugnant to the provisions of any Act of Parliament extending to the Colony to which such law may relate . . . shall be read subject to such Act . . . and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."

By section 12 (1) of the British Nationality Act, 1948: "A person who was a British subject immediately before the date of the commencement of this Act shall on that date become a citizen of the United Kingdom and Colonies. . . ."

By section 8 of the Immigration Ordinance, 1947, of Fiji: "(2) The Principal Immigration Officer may issue a permit to any

* Present: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON and the RT. HON. L. M. D. DE SILVA.

A

Supreme Court

**Al Rawi and others v Security Service and others
(JUSTICE and others intervening)**

[2010] EWCA Civ 482

B

[2011] UKSC 34

2010 March 8, 9; Lord Neuberger of Abbotsbury MR, Maurice Kay, Sullivan LJJ
May 42011 Jan 24, 25; Lord Phillips of Worth Matravers PSC, Lord Hope of
July 13 Craighead DPSC, Baroness Hale of Richmond,

C

Lord Brown of Eaton under Heywood, Lord Mance,
Lord Kerr of Tonaghmore, Lord Clarke of
Stone cum Ebony, Lord Dyson JJSC

*Evidence Disclosure Closed material procedure Claimants detained by
foreign states at various locations claiming damages for ill treatment while in
detention Defendants seeking reliance on closed material to be disclosed to
special advocate and court but not to claimants and legal advisers Whether
inherent jurisdiction to sanction closed material procedure in ordinary civil
action Whether appropriate*

D

The claimants, who had been detained by foreign authorities at various foreign locations and allegedly suffered ill treatment, brought proceedings for damages alleging, in broad terms, that the defendants, a number of public authorities, had caused or contributed to their detention and suffering. They relied on causes of action which included false imprisonment, trespass to the person, conspiracy to injure, torture, breach of contract, negligence and misfeasance in public office. The defendants, while accepting that the claimants had been detained, denied in an open defence any liability for such detention or ill treatment and indicated that they intended to rely on a substantial amount of material, which could not be disclosed without causing a real risk of harm to the public interest, to be set out in closed pleadings which would be withheld from the claimants and their legal advisers but which would be considered by special advocates representing their interests. At a case management hearing determination as a preliminary issue was ordered of the question whether the court was entitled in an ordinary civil claim for damages to order the adoption of a closed material procedure, whereby (a) a party was permitted to comply with his obligations for disclosure of documents and to rely on closed material consisting of pleadings and/or written evidence and/or oral evidence which would not be disclosed to other parties if and to the extent that such disclosure would be contrary to the public interest; (b) disclosure of the closed material was made to special advocates and, where appropriate, the court; and (c) the court had to ensure that such closed material was not disclosed to any other parties or to any other person save where it was satisfied that such disclosure would not be contrary to the public interest. The judge held that the court had such a power under its inherent jurisdiction. The Court of Appeal, allowing the claimants' appeal, declared that it was not open to the court in the exercise of its inherent jurisdiction to order such a closed material procedure for a trial of an ordinary civil claim such as a claim for damages for tort or breach of statutory duty. Subsequently the defendants settled the claims on confidential terms, without admitting liability.

H

On the defendants' appeal

Held, dismissing the appeal (Lord Clarke of Stone cum Ebony JJSC dissenting as to the result), that Parliament alone could introduce a closed material procedure as envisaged by the preliminary issue as a replacement for the existing common law

process for dealing with claims for public interest immunity in ordinary civil claims for damages, and it was not open to the courts to do so; that there was in any event no compelling reason justifying the fundamental change envisaged by the preliminary issue, which involved an inroad into a fundamental common law right; and that, accordingly, the issue would be answered in the negative (post, paras 35, 44, 47, 48, 49, 67, 69, 71, 74, 76, 78, 87, 88, 106, 107, 120, 152, 192, 197).

Per Lord Hope of Craighead DPSC, Lord Brown of Eaton under Heywood, Lord Kerr of Tonaghmore and Lord Dyson JJSC. The principles of open justice and natural justice whereby, as a general rule, proceedings take place and judgments are delivered in public and parties know and can respond to the cases against them, calling witnesses and cross examining opposing witnesses, are fundamental features of a common law trial. Although the court has inherent power to regulate its own procedures, it cannot, in doing so, deny parties' rights to participate in litigation in accordance with those principles. Under the process for dealing with claims for public interest immunity, as developed by the common law, the principles of fairness and equality of arms apply so that documents are either disclosed to or withheld from all the parties and no party is excluded from participation in the litigation. However, a closed material procedure, which excludes a party from part or the whole of a closed hearing and prevents him from seeing and challenging the evidence, save to the limited extent available to him through the assistance of a special advocate, constitutes a departure from those principles which cannot be regarded as a development of the common law, and the court cannot order such a procedure in the absence of statutory authority (post, paras 10, 14, 18, 22, 35, 36, 41, 47, 59, 72, 76, 87, 88).

Carnduff v Rock [2001] 1 WLR 1786, CA and *R v Davis* [2008] AC 1128, HL(E) considered.

Per Baroness Hale of Richmond and Lord Mance JJSC. A closed material procedure is not outside the court's jurisdiction in the strict sense. But, absent statutory authority, the only exception which presently should be accepted is where, after a conventional public interest immunity exercise, the judge concludes that there should be no disclosure of the documents held by the defence and that as a result the case is untriable. Then the court could adopt some form of closed material procedure, if the claimant consents, to avoid denying the claimant any form of access to the court (post, paras 120, 121).

Per Lord Clarke of Stone cum Ebony JSC. The fundamental fair trial principles are not absolute and must yield where it is necessary in the interests of justice that they do so. If the judge concludes, after carrying out the public interest immunity balancing exercise, that some form of closed process is necessary, the same principle which applies to the exceptions permitted in the context of confidential material in intellectual property proceedings would permit such a process at common law (post, paras 159, 164, 177, 181).

Decision of the Court of Appeal, post, p 539; [2010] EWCA Civ 482; [2010] 3 WLR 1069; [2010] 4 All ER 559 affirmed.

The following cases are referred to in the judgments of the Supreme Court:

A (Forced Marriage: Special Advocates), *In re* [2010] EWHC 2438 (Fam); [2010] EWHC 3282 (Fam); [2012] Fam 102; [2011] 2 WLR 1027

A v HM Treasury [2008] EWCA Civ 1187; [2010] 2 AC 534; [2009] 3 WLR 25; [2009] 2 All ER 747, CA; (*JUSTICE intervening*) [2010] UKSC 2; [2010] UKSC 5; [2010] 2 AC 534; [2010] 2 WLR 378; [2010] 4 All ER 745; [2010] 4 All ER 829, SC(E)

Air Canada v Secretary of State for Trade [1983] 2 AC 394; [1983] 2 WLR 494; [1983] 1 All ER 910, HL(E)

Ambard v Attorney General of Trinidad and Tobago [1936] AC 322; [1936] 1 All ER 704, PC

- A *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55; [1976] 2 WLR 162; [1976] 1 All ER 779, CA
Asiatic Petroleum Co Ltd v Anglo Persian Oil Co Ltd [1916] 1 KB 822, CA
Attorney General v Leveller Magazine Ltd [1979] AC 440; [1979] 2 WLR 247; [1979] 1 All ER 745, HL(E)
Balfour v Foreign and Commonwealth Office [1994] 1 WLR 681; [1994] ICR 277; [1994] 2 All ER 588, CA
- B *British Sky Broadcasting Group plc v Competition Commission* [2010] EWCA Civ 2; [2010] 2 All ER 907, CA
Carnduff v Rock [2001] EWCA Civ 680; [2001] 1 WLR 1786, CA
Carnduff v United Kingdom (Application No 18905/02) (unreported) given 10 February 2004, ECtHR
Carphone Warehouse Group plc v Office of Communications [2009] CAT 37
Comet Products UK Ltd v Hawke Plastics Ltd [1971] 2 QB 67; [1971] 2 WLR 361; [1971] 1 All ER 1141, CA
- C *Connelly v Director of Public Prosecutions* [1964] AC 1254; [1964] 2 WLR 1145; [1964] 2 All ER 401, HL(E)
Conway v Rimmer [1968] AC 910; [1968] 2 WLR 998; [1968] 1 All ER 874, HL(E)
D (Minors) (Adoption Reports: Confidentiality), In re [1996] AC 593; [1995] 3 WLR 483; [1995] 4 All ER 385, HL(E)
- D *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314; [2005] QB 207; [2004] 3 WLR 533; [2004] 4 All ER 746, CA
Dorset (Duke of) v Girdler (1720) Prec Ch 531
Duncan v Cammell Laird & Co Ltd [1942] AC 624; [1942] 1 All ER 587, HL(E)
K (Infants), In re [1963] Ch 381; [1962] 3 WLR 1517; [1962] 3 All ER 1000, CA; [1965] AC 201; [1963] 3 WLR 408; [1963] 3 All ER 191, HL(E)
Kanda v Government of Malaya [1962] AC 322; [1962] 2 WLR 1153, PC
- E *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29; [2002] 2 AC 122; [2001] 2 WLR 1789; [2001] 3 All ER 193, HL(E)
Lee v The Queen (1998) 195 CLR 594
Mareva Navigation Co Ltd v Canaria Armadora SA [1977] 1 Lloyd's Rep 368
Norwich Pharmacal Co v Customs and Excise Comrs [1974] AC 133; [1973] 3 WLR 164; [1973] 2 All ER 943, HL(E)
R v Chief Constable of West Midlands Police, Ex p Wiley [1995] 1 AC 274; [1994] 3 WLR 433; [1994] 3 All ER 420, HL(E)
- F *R v Davis* [2006] EWCA Crim 1155; [2006] 1 WLR 3130; [2006] 4 All ER 648, CA; [2008] UKHL 36; [2008] AC 1128; [2008] 3 WLR 125; [2008] 3 All ER 461, HL(E)
R v H [2004] UKHL 3; [2004] 2 AC 134; [2004] 2 WLR 335; [2004] 1 All ER 1269, HL(E)
R v Keane [1994] 1 WLR 746; [1994] 2 All ER 478, CA
- G *R v Lewes Justices, Ex p Secretary of State for the Home Department* [1973] AC 388; [1972] 3 WLR 279; [1972] 2 All ER 1057, HL(E)
R v Shayler [2002] UKHL 11; [2003] 1 AC 247; [2002] 2 WLR 754; [2002] 2 All ER 477, HL(E)
R v Sussex Justices, Ex p McCarthy [1924] 1 KB 256, DC
R (AHK) v Secretary of State for the Home Department (Practice Note) [2009] EWCA Civ 287; [2009] 1 WLR 2049, CA
- H *R (Al Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin); [2010] HRLR 12, DC
R (Malik) v Manchester Crown Court [2008] EWHC 1362 (Admin); [2008] 4 All ER 403, DC
R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 1) [2008] EWHC 2048 (Admin); [2009] 1 WLR 2579, DC

- R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* (Guardian News and Media Ltd intervening) [2009] EWHC 152 (Admin); [2009] 1 WLR 2653, DC; [2010] EWCA Civ 65; [2010] EWCA Civ 158; [2011] QB 218; [2010] 3 WLR 554; [2010] 4 All ER 91, 177, CA
- R (Roberts) v Parole Board* [2005] UKHL 45; [2005] 2 AC 738; [2005] 3 WLR 152; [2006] 1 All ER 39, HL(E)
- R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323; [2004] 3 WLR 23; [2004] 3 All ER 785, HL(E)
- Science Research Council v Nassé* [1980] AC 1028; [1979] 3 WLR 762; [1979] ICR 921; [1979] 3 All ER 673, HL(E)
- Scott v Scott* [1912] P 241, CA; [1913] AC 417, HL(E)
- Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28; [2010] 2 AC 269; [2009] 3 WLR 74; [2009] 3 All ER 643, HL(E)
- Secretary of State for the Home Department v MB* [2007] UKHL 46; [2008] AC 440; [2007] 3 WLR 681; [2008] 1 All ER 657, HL(E)
- Secretary of State for the Home Department v Rehman* [2001] 1 AC 153; [2000] 3 WLR 1240; [2000] 3 All ER 778, CA; [2001] UKHL 47; [2003] 1 AC 153; [2001] 3 WLR 877; [2002] 1 All ER 122, HL(E)
- T (Wardship: Impact of Police Intelligence), In re* [2009] EWHC 2440 (Fam); [2010] 1 FLR 1048
- Tariq v Home Office* [2011] UKSC 35; [2012] 1 AC 452; [2011] 3 WLR 322; [2012] 1 All ER 58, SC(E)

The following additional cases were cited in argument before the Supreme Court:

- A v United Kingdom* (2009) 49 EHRR 625, GC
- Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109; [1988] 3 WLR 776; [1988] 3 All ER 545, HL(E)
- B (Disclosure to other Parties), In re* [2001] 2 FLR 1017
- B v Auckland District Law Society* [2003] UKPC 38; [2003] 2 AC 736; [2003] 3 WLR 859; [2004] 4 All ER 269, PC
- Bagg's Case* (1615) 11 Co Rep 93b
- Barclays Bank plc v Eustice* [1995] 1 WLR 1238; [1995] 4 All ER 511, CA
- Bekhor (AJ) & Co Ltd v Bilton* [1981] QB 923; [1981] 2 WLR 601; [1981] 2 All ER 565, CA
- Bolkiah v State of Brunei Darussalam* [2007] UKPC 62, PC
- Botmeh and Alami v United Kingdom* (2007) 46 EHRR 659
- Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp'n Ltd* [1981] AC 909; [1981] 2 WLR 141; [1981] 1 All ER 289, HL(E)
- Brinkley v Brinkley* [1975] P 65; [1963] 2 WLR 822; [1963] 1 All ER 493, DC
- British & Commonwealth Holdings plc, In re (Nos 1 and 2)* [1992] Ch 342; [1992] 2 WLR 931; [1992] 2 All ER 801, CA
- British Broadcasting Corp'n, In re* [2009] UKHL 34; [2010] 1 AC 145; [2009] 3 WLR 142; [2010] 1 All ER 235, HL(E)
- Brown v Stott* [2003] 1 AC 681; [2001] 2 WLR 817; [2001] 2 All ER 97, PC
- Chilton v Saga Holidays plc* [1986] 1 All ER 841, CA
- Coles and Ravenshear, In re* [1907] 1 KB 1, CA
- Crompton (Alfred) Amusement Machines Ltd v Customs and Excise Comrs (No 2)* [1974] AC 405; [1973] 3 WLR 268; [1973] 2 All ER 1169, HL(E)
- D v D* [1903] P 144
- D v National Society for the Prevention of Cruelty to Children* [1978] AC 171; [1977] 2 WLR 201; [1977] 1 All ER 589, HL(E)
- Davies (Joy Rosalie) v Eli Lilly & Co* [1987] 1 WLR 428; [1987] 1 All ER 801, CA
- Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534; [1993] 2 WLR 449; [1993] 1 All ER 1011, HL(E)
- Diennet v France* (1995) 21 EHRR 554
- Dombo Beheer BV v The Netherlands* (1993) 18 EHRR 213

- A *Dyson Ltd v Hoover Ltd (No 3)* [2002] EWHC 500 (Pat); [2002] RPC 841
English v Emery Reimbold & Strick Ltd (Practice Note) [2002] EWCA Civ 605;
 [2002] 1 WLR 2409; [2002] 3 All ER 385, CA
Errington v Minister of Health [1935] 1 KB 249, CA
Flannery v Halifax Estate Agencies Ltd (trading as Colleys Professional Services)
 [2000] 1 WLR 377; [2000] 1 All ER 373, CA
Gain v Gain [1961] 1 WLR 1469; [1962] 1 All ER 63
- B *General Mediterranean Holdings SA v Patel* [2000] 1 WLR 272; [1999] 3 All ER 673
Godwin v Swindon Borough Council [2001] EWCA Civ 1478; [2002] 1 WLR 997;
 [2001] 4 All ER 641, CA
Grimshaw v Dunbar [1953] 1 QB 408; [1953] 2 WLR 332; [1953] 1 All ER 350, CA
Grosvenor Hotel, London, In re (No 2) [1965] Ch 1210; [1964] WLR 992; [1964]
 2 All ER 674; [1964] 3 All ER 354, Ungeod Thomas J and CA
Guardian News and Media Ltd, In re [2010] UKSC 1; [2010] 2 AC 697; [2010]
 2 WLR 325; [2010] 2 All ER 799, SC(E)
- C *Halford v Sharples* [1992] 1 WLR 736; [1992] ICR 583; [1992] 3 All ER 624, CA
Hamilton, In re [1981] AC 1038; [1981] 3 WLR 79; [1981] 2 All ER 711, HL(E)
Hamilton v Al Fayed [2001] 1 AC 395; [2000] 2 WLR 609; [2000] 2 All ER 224,
 HL(E)
Harman v United Kingdom (1984) 7 EHRR CD 146
Independent News and Media Ltd v A [2010] EWCA Civ 343; [2010] 1 WLR 2262;
 [2010] 3 All ER 32, CA
- D *Jacobs v London County Council* [1950] AC 361; [1950] 1 All ER 737, HL(E)
Jones v National Coal Board [1957] 2 QB 55; [1957] 2 WLR 760; [1957] 2 All ER
 155, CA
Klass v Federal Republic of Germany (1978) 2 EHRR 214
Lamothe v Comr of Police of the Metropolis (unreported) 25 October 1999; [1999]
 CATranscript No 1775, CA
MT (Algeria) v Secretary of State for the Home Department [2007] EWCA Civ 808;
 [2008] QB 533; [2008] 2 WLR 159; [2008] 2 All ER 786, CA; [2009] UKHL 10;
 [2010] 2 AC 110; [2009] 2 WLR 512; [2009] 4 All ER 1045, HL(E)
- E *McPherson v McPherson* [1936] AC 177, PC
Medcalf v Mardell [2002] UKHL 27; [2003] 1 AC 120; [2002] 3 WLR 172; [2002]
 3 All ER 721, HL(E)
Midland Cold Storage v Turner [1972] ICR 230; [1972] 3 All ER 773, NIRC
Myers v Director of Public Prosecutions [1965] AC 1001; [1964] 3 WLR 145; [1964]
 2 All ER 881, HL(E)
- F *Pamplin v Express Newspapers Ltd* [1985] 1 WLR 689; [1985] 2 All ER 185
Prebble v Television New Zealand Ltd [1995] 1 AC 321; [1994] 3 WLR 970; [1994]
 3 All ER 407, PC
Premier Profiles Ltd v Tioxide Europe Ltd [2002] EWHC 3184 (Comm); [2003] FSR
 380
Pretto v Italy (1983) 6 EHRR 182
R v Cambridge University, Ex p Bentley (1723) 1 Str 557
- G *R v Chief Registrar of Friendly Societies, Ex p New Cross Building Society* [1984] QB
 227; [1984] 2 WLR 370; [1984] 2 All ER 27, CA
R v Derby Magistrates' Court, Ex p B [1996] AC 487; [1995] 3 WLR 681; [1995]
 4 All ER 526, HL(E)
R v Legal Aid Board, Ex p Kaim Todner [1999] QB 966; [1998] 3 WLR 925; [1998]
 3 All ER 541, CA
R v Murphy [1990] NI 306, CA(NI)
- H *R v Secretary of State for the Home Department, Ex p Pierson* [1998] 2 AC 539;
 [1997] 3 WLR 492; [1997] 3 All ER 577, HL(E)
R v Secretary of State for the Home Department, Ex p Simms [2000] 2 AC 115;
 [1999] 3 WLR 328; [1999] 3 All ER 400, HL(E)
R (Daly) v Secretary of State for the Home Department [2001] UKHL 26; [2001]
 2 AC 532; [2001] 2 WLR 1622; [2001] 3 All ER 433, HL(E)

- R (Khatun) v Newham London Borough Council* [2004] EWCA Civ 55; [2005] QB 37; [2004] 3 WLR 417, CA
- R (Morgan Grenfell & Co Ltd) v Special Comr of Income Tax* [2002] UKHL 21; [2003] 1 AC 563; [2002] 2 WLR 1299; [2002] 3 All ER 1, HL(E)
- R (Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58; [2006] 2 AC 148; [2005] 3 WLR 793; [2006] 4 All ER 736, HL(E)
- R (Secretary of State for the Home Department) v Assistant Deputy Coroner for Inner West London* [2010] EWHC 3098 (Admin); 174 JP 593, DC
- Raja v Van Hoogstraten* (No 9) [2008] EWCA Civ 1444; [2009] 1 WLR 1143, CA
- Reynolds v Times Newspapers Ltd* [2001] 2 AC 127; [1999] 3 WLR 1010; [1999] 4 All ER 609, HL(E)
- Ridge v Baldwin* [1964] AC 40; [1963] 2 WLR 935; [1963] 2 All ER 66, HL(E)
- Roussel Uclaf v Imperial Chemical Industries plc* [1990] RPC 45, CA
- S (A Child) (Identification: Restrictions on Publication), In re* [2004] UKHL 47; [2005] 1 AC 593; [2004] 3 WLR 1129; [2004] 4 All ER 683, HL(E)
- Schuler Zraggen v Switzerland* (1993) 16 EHRR 405
- Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA* [1979] AC 210; [1977] 3 WLR 818; [1977] 3 All ER 803, HL(E)
- Sunday Times v United Kingdom* (1979) 2 EHRR 245
- Sunday Times v United Kingdom* (No 2) (1991) 14 EHRR 229
- Three Rivers District Council v Governor and Company of the Bank of England* (No 6) [2004] UKHL 48; [2005] 1 AC 610; [2004] 3 WLR 1274; [2005] 4 All ER 948, HL(E)
- Tinnelly & Sons Ltd v United Kingdom* (1998) 27 EHRR 249
- Trinity Mirror plc, In re (A intervening)* [2008] EWCA Crim 50; [2008] QB 770; [2008] 3 WLR 51; [2008] 2 All ER 1159, CA
- VNU Business Publications BV v Ziff Davis (UK) Ltd* [1992] RPC 269
- Ventouris v Mountain* [1991] 1 WLR 607; [1991] 3 All ER 472, CA
- WEA Records Ltd v Visions Channel 4 Ltd* [1983] 1 WLR 721; [1983] 2 All ER 589, CA
- Wallace Smith Trust Co Ltd v Deloitte Haskins & Sells* [1997] 1 WLR 257; [1996] 4 All ER 403, CA
- Warner Lambert Co v Glaxo Laboratories Ltd* [1975] RPC 354, CA
- X Ltd v Morgan Grampian (Publishers) Ltd* [1991] 1 AC 1; [1990] 2 WLR 1000; [1990] 2 All ER 1, HL(E)
- The following cases are referred to in the judgment of the Court of Appeal:
- A v HM Treasury* [2008] EWCA Civ 1187; [2010] 2 AC 534; [2009] 3 WLR 25; [2009] 2 All ER 747, CA; (*JUSTICE intervening*) [2010] UKSC 2; [2010] UKSC 5; [2010] 2 AC 534; [2010] 2 WLR 378; [2010] 4 All ER 745, 829, SC(E)
- Attorney General v Leveller Magazine Ltd* [1979] AC 440; [1979] 2 WLR 247; [1979] 1 All ER 745, HL(E)
- Bank Mellat v HM Treasury* [2010] EWCA Civ 483; [2012] QB 91; [2010] 3 WLR 1090, CA
- Conway v Rimmer* [1968] AC 910; [1968] 2 WLR 998; [1968] 1 All ER 874, HL(E)
- Dorset (Duke of) v Girdler* (1720) Prec Ch 531
- Duncan v Cammell Laird & Co Ltd* [1942] AC 624; [1942] 1 All ER 587, HL(E)
- English v Emery Reimbold & Strick Ltd (Practice Note)* [2002] EWCA Civ 605; [2002] 1 WLR 2409; [2002] 3 All ER 385, CA
- Grosvenor Hotel, London, In re* (No 2) [1965] Ch 1210; [1964] 3 WLR 992; [1964] 3 All ER 354, CA
- Independent News and Media Ltd v A* [2010] EWCA Civ 343; [2010] 1 WLR 2262; [2010] 3 All ER 32, CA
- K (Infants), In re* [1965] AC 201; [1963] 3 WLR 408; [1963] 3 All ER 191, HL(E)
- Kanda v Government of Malaya* [1962] AC 322; [1962] 2 WLR 1153, PC

- A *Murungaru v Secretary of State for the Home Department* [2008] EWCA Civ 1015; [2009] INLR 180, CA
R v Chief Constable of West Midlands Police, Ex p Wiley [1995] 1 AC 274; [1994] 3 WLR 433; [1994] 3 All ER 420, HL(E)
R v Davis [2008] UKHL 36; [2008] AC 1128; [2008] 3 WLR 125; [2008] 3 All ER 461, HL(E)
R v H [2004] UKHL 3; [2004] 2 AC 134; [2004] 2 WLR 335; [2004] 1 All ER 1269, HL(E)
- B *R v Lewes Justices, Ex p Secretary of State for the Home Department* [1973] AC 388; [1972] 3 WLR 279; [1972] 2 All ER 1057, HL(E)
R v Shayler [2002] UKHL 11; [2003] 1 AC 247; [2002] 2 WLR 754; [2002] 2 All ER 477, HL(E)
R (AHK) v Secretary of State for the Home Department (Practice Note) [2009] EWCA Civ 287; [2009] 1 WLR 2049, CA
- C *R (Malik) v Manchester Crown Court* [2008] EWHC 1362 (Admin); [2008] 4 All ER 403, DC
R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2) (Guardian News and Media Ltd intervening) [2010] EWCA Civ 65; [2010] EWCA Civ 158; [2011] QB 218; [2010] 3 WLR 554; [2010] 4 All ER 91, 177, CA
R (Roberts) v Parole Board [2005] UKHL 45; [2005] 2 AC 738; [2005] 3 WLR 152; [2006] 1 All ER 39, HL(E)
Raja v Van Hoogstraten (No 9) [2008] EWCA Civ 1444; [2009] 1 WLR 1143, CA
- D *Science Research Council v Nassé* [1980] AC 1028; [1979] 3 WLR 762; [1979] ICR 921; [1979] 3 All ER 673, HL(E)
Scott v Scott [1913] AC 417, HL(E)
Secretary of State for the Home Department v MB [2007] UKHL 46; [2008] AC 440; [2007] 3 WLR 681; [2008] 1 All ER 657, HL(E)
Secretary of State for the Home Department v Rehman [2001] UKHL 47; [2003] 1 AC 153; [2001] 3 WLR 877; [2002] 1 All ER 122, HL(E)
- E *Tariq v Home Office* [2010] EWCA Civ 462; [2010] ICR 1034, CA

The following additional cases were cited in argument before the Court of Appeal:

- A v United Kingdom* (2009) 49 EHRR 625, GC
Air Canada v Secretary of State for Trade [1983] 2 AC 394; [1983] 2 WLR 494; [1983] 1 All ER 910, HL(E)
- F *Allied Colloids Ltd v Imdex NL* (unreported) 17 December 1996, Robert Walker J
Botmeh and Alami v United Kingdom (2007) 46 EHRR 659
Bow Spring (Owners of the Ship) v Owners of the Ship Manzanillo II [2004] EWCA Civ 1007; [2005] 1 WLR 144; [2004] 4 All ER 899, CA
Brown v Stott [2003] 1 AC 681; [2001] 2 WLR 817; [2001] 2 All ER 97, PC
Church of Scientology of California v Department of Health and Social Security [1979] 1 WLR 723; [1979] 3 All ER 97, CA
D v National Society for the Prevention of Cruelty to Children [1978] AC 171; [1977] 2 WLR 201; [1977] 1 All ER 589, HL(E)
- G *Lamothe v Comr of Police of the Metropolis* (unreported) 25 October 1999; [1999] CA Transcript No 1775, CA
MT (Algeria) v Secretary of State for the Home Department [2009] UKHL 10; [2010] 2 AC 110; [2009] 2 WLR 512; [2009] 4 All ER 1045, HL(E)
Midland Cold Storage Ltd v Turner [1972] ICR 230; [1972] 3 All ER 773, NIRC
Pamplin v Express Newspapers Ltd [1985] 1 WLR 689; [1985] 2 All ER 185
- H *R v Chief Registrar of Friendly Societies, Ex p New Cross Building Society* [1984] QB 227; [1984] 2 WLR 370; [1984] 2 All ER 27, CA
R (Ewing) v Department for Constitutional Affairs [2006] EWHC 504 (Admin); [2006] 2 All ER 993
Raissi v Comr of Police of the Metropolis [2007] EWHC 3421 (QB)
Roussel Uclaf v Imperial Chemical Industries plc [1990] RPC 45, Aldous J and CA

Secretary of State for the Home Department v AF (No 3) [2009] UKHL 28; [2010] 2 AC 269; [2009] 3 WLR 74; [2009] 3 All ER 643, HL(E) A
VNU Business Publications BV v Ziff Davis (UK) Ltd [1992] RPC 269
Warner Lambert Co v Glaxo Laboratories Ltd [1975] RPC 354, CA

APPEALS from Silber J

By claim forms and particulars of claim lodged on 12 September 2008, 9 October 2008 and 30 January 2009 the claimants, Bisher Al Rawi, Jamil El Banna, Richard Belmar, Omar Deghayes, Binyam Mohamed and Martin Mubanga, claimed damages against the defendants, the Security Service, the Secret Intelligence Service, the Attorney General, the Foreign and Commonwealth Office and the Home Office, in respect of their alleged unlawful detention and ill-treatment in a number of foreign locations including Guantanamo Bay, Cuba, which detention and ill-treatment had been facilitated by the defendants' failure to take reasonable steps to end it. The causes of action relied on included false imprisonment, trespass to the person, conspiracy to injure, torture, breach of contract, negligence, misfeasance in public office and breach of the Human Rights Act 1998. The defendants filed an open defence indicating that they intended to rely additionally on closed pleadings and evidence. Burnett J on 24 September 2009 ordered trial of a preliminary issue as to whether it could be lawful and proper for a court to order the adoption in a civil claim for damages of a "closed material procedure" whereby (a) a party was permitted (i) to comply with his obligations for disclosure of documents and (ii) to 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 (b) disclosure of such closed material was made to special advocates and, where appropriate, the court; and (c) the court had to ensure that such closed material was not disclosed to any other parties or to any other person save where it was satisfied that such disclosure would not be contrary to the public interest; disclosure being contrary to the public interest if it were 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 was likely to harm the public interest. Silber J [2009] EWHC 2959 (QB) on 18 November 2009 answered the preliminary issue affirmatively, and granted the claimants permission to appeal.

By appellants' notices filed on 30 November 2009 the claimants appealed on the ground that the judge had erred in declaring that it could be lawful and proper for a court to order that such a closed material procedure be adopted in a civil claim for damages.

The facts are stated in the judgment of the court.

Dinah Rose QC, Richard Hermer QC and Charlotte Kilroy (instructed by *Birnberg Peirce & Partners*) for the first to fourth claimants and (instructed by *Leigh Day & Co*) for the fifth claimant. H

Michael Fordham QC and Naina Patel (instructed by *Christian Khan, Solicitors*) for the sixth claimant.

Jonathan Crow QC, Rory Phillips QC, Daniel Beard and Karen Steyn (instructed by *Treasury Solicitor*) for the defendants.

A *John Howell QC* and *Jessica Boyd* (instructed by *Legal Adviser, Liberty*) for Liberty, intervening, and (instructed by *Legal Adviser, JUSTICE*) for JUSTICE, intervening.

Guy Vassall-Adams (instructed by *Legal Adviser, Guardian News and Media Ltd*) for the Guardian News and Media Ltd, Times Newspapers Ltd, and the British Broadcasting Corporation, intervening.

B The court took time for consideration.

4 May 2010. LORD NEUBERGER OF ABBOTSBURY MR handed down the following judgment of the court.

The issue to be resolved

C 1 This is the judgment of the court to which all members have contributed. The issue on this appeal is whether Silber J was right to conclude, as the defendants contend, that it is open to a court in England and Wales, in the absence of statutory authority, to order a closed material procedure for part (or, conceivably, even the whole) of the trial of a civil claim for damages in tort and breach of statutory duty.

D 2 A closed material procedure has been defined by agreement between the parties, at least for present purposes, as being:

E “A procedure in which: (a) a party is permitted (i) to comply with his obligations for disclosure of documents, and (ii) to 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 (b) disclosure of such closed material is made to special advocates and, where appropriate, the court; and (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. For the purposes of this definition, disclosure is contrary to the public interest if it is made

F 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.”

G 3 The “party” referred to in that definition will almost always be the Crown or some arm or emanation of the Government. A special advocate is a lawyer with rights of audience, who has been cleared by the Government to see closed material, and who is appointed by the Attorney General in a case where closed material is involved. The special advocate’s role was succinctly described by Sedley LJ in *Murungaru v Secretary of State for the Home Department* [2009] INLR 180, para 17, as being “to test by cross-examination, evidence and argument the strength of

H the case for non-disclosure”, and, if the case for non-disclosure is made out,

“to do what he or she can to protect the interests of [the other party], a task which has to be carried out without taking any instructions [from the other party or his lawyers] on any aspect of the closed material”.

Thus, although the special advocate is engaged to protect the interests of the other party in the litigation, he or she does not actually act for, and cannot normally take instructions from, that other party. A

4 The issue is raised as one of general principle. However, perhaps unsurprisingly, Ms Rose QC and Mr Fordham QC for the claimants, and Mr Crow QC for the defendants, have relied in the course of their submissions on the facts of the instant case as an example of why the issue should be resolved in the way that they respectively contend. A very brief summary of the factual background to this appeal is therefore appropriate. B

The factual background

5 The six claimants are individuals who were detained at various locations, including the United States of America detention facility in Guantanamo Bay. Although their claims are, of course, not identical, it is sufficient for present purposes to say that they each contend that, as a result of their respective detention and alleged mistreatment while detained, they have valid claims under at least some of the following heads, namely, false imprisonment, trespass to the person, conspiracy to injure, torture, breach of contract, negligence, misfeasance in public office, and breach of the Human Rights Act 1998. The claimants brought their claims by issuing claim forms together with fully pleaded particulars of claim in the Queen's Bench Division of the High Court. The defendants to the claims are the Security Service, the Secret Intelligence Service, the Foreign and Commonwealth Office, the Home Office, and (in a representative capacity) the Attorney General. The claims are based on the contention that, to put it in broad terms, each of the defendants caused or contributed towards the alleged detention, rendition and ill treatment of each of the claimants. C
D
E

6 The defendants then filed an "open defence" in which, while admitting that each of the claimants was detained and transferred, the defendants put in issue any mistreatment which the claimants allege and, in any event, denied any liability in respect of any of the claimants' detention or alleged mistreatment. Para 1 of the open defence explains that "there is material not pleaded in this open defence which [the defendants] wish to contend that the court should consider but which cannot be included without causing real harm to the public interest". In para 3 it is stated that there is a "defence", which "pleads more fully to the particulars of claim and includes material the disclosure of which the defendants consider would cause real harm to the public interest". Para 3 goes on to explain that "where a paragraph of the particulars of claim is not pleaded to in this open defence, it will have been the subject of pleading in the defence" and that "some of the pleadings in this open defence are more fully pleaded to [sic] or qualified by statements in the defence". F
G

7 The open defence makes it clear that the defendants wish the case to proceed throughout on the basis that it includes what may be characterised as a closed element. Thus, at least on the face of it, during the period prior to trial, there would be parallel open and closed pleadings, parallel open and closed disclosure and inspection, parallel open and closed witness statements, and parallel open and closed directions hearings. Similarly, at the trial, the hearing would be in part open and in part closed, no doubt with some documents and witnesses being seen and heard in the open hearing and others in the closed hearing (and some witnesses conceivably giving evidence H

A at both hearings). After trial, there would be a closed judgment and an open judgment, which would be in substantially the same terms save that those passages in the closed judgment which referred to or relied on closed material would be excluded from the open judgment. In relation to the open elements of the proceedings, the claimants would be represented by their solicitors and counsel in the normal way; however, in relation to the closed elements, their interests would in effect be protected by special advocates.

B 8 The claimants object to the course proposed by the defendants, contending for the normal approach in cases where the Crown or government emanations are parties and consider that they have relevant documents in respect of which public interest immunity (“PII”) might be claimed, and where the defendants could call relevant oral evidence which might not be able to be given on public interest grounds.

C 9 The defendants accept that the PII procedure is well established, but they contend that the course which they favour is permissible in any civil case, at least before a judge sitting without a jury, and that it may well be appropriate in this case, where there is a very substantial amount of potentially relevant material which may be subject to PII. The evidence filed on behalf of the defendants suggests that there may be as many as 250,000 potentially relevant documents, and that PII may have to be at least
D considered in respect of as many as 140,000 of them. It is also said by the defendants that the PII exercise may take three years before the relevant ministers can conscientiously decide in respect of which documents PII can properly be claimed. The effort, cost and delay involved in such an exercise, argue the defendants, may well justify a different approach, such as that presaged by the open defence.

E 10 The issue came before Silber J, and he decided [2009] EWHC 2959 (QB) 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. The claimants’ appeal is supported by JUSTICE and Liberty, represented by Mr Howell QC, and by Guardian News and Media Ltd, Times Newspapers Ltd, and the BBC for whom Mr Vassall-Adams appears.

F *Summary of conclusion*

11 We have concluded that we should allow this appeal, and that we should say 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 that the action should proceed on such a basis, to order a closed material procedure in relation to the trial of an
G ordinary civil claim, such as a claim for damages for tort or breach of statutory duty.

12 The primary reason for our conclusion is that, by acceding to the defendants’ argument, the court, while purportedly developing the common law, would in fact be undermining one of its most fundamental principles. In addition, even if it would otherwise be a legitimate development of the common law, it would be neither permissible in the light of the Civil
H Procedure Rules nor practical, in terms of effective case management or costs management, to adopt the defendants’ proposals.

13 We propose to develop these points in turn, and then to deal with the cases on which the judge relied to justify the contrary conclusion. However, before doing so, it is convenient to identify some relevant basic principles of

common law, to expand a little on the well established practice and procedure involved when PII is claimed by the Crown, and to explain the basis for the more recent closed material procedure.

Principles which are involved in this case

14 Under the common law a trial is conducted on the basis that each party and his lawyer sees and hears all the evidence and all the argument seen and heard by the court. This principle is an aspect of the cardinal requirement that the trial process must be fair, and must be seen to be fair; it is inherent in one of the two fundamental rules of natural justice, the right to be heard (or *audi alterem partem*, the other rule being the rule against bias or *nemo iudex in causa sua*). As the Privy Council said in the context of a hearing which resulted in the dismissal of a police officer, in *Kanda v Government of Malaya* [1962] AC 322, 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.”

15 More recently, in *R v Davis* [2008] AC 1128, para 5, Lord Bingham of Cornhill traced the history of the common law “right to be confronted by one’s accusers”. He explained how this right, having been abrogated during the 16th century by the Court of the Star Chamber, had been effectively established during the 17th century. He relied in particular on a civil case, *Duke of Dorset v Girdler* (1720) Prec Ch 531, 532. In the following paragraph he identified a couple of common law exceptions to the right, namely “dying declarations and statements part of the *res gestae*”, and certain statutory exceptions. He then explained that the right was one which was enshrined in the constitutions of various common law jurisdictions, including the United States and New Zealand. Turning to the specific issue before the House, Lord Bingham said that, although he appreciated the strong practical case for granting anonymity to prosecution witnesses in certain cases, at paras 26–27, he rejected the contention that the courts should sanction such a course, emphasising, at para 34: “that the right to be confronted by one’s accusers is a right recognised by the common law for centuries, and it is not enough if counsel sees the accusers if they are unknown to and unseen by the defendant.”

16 Another fundamental principle of our law is that a party to litigation should know the reasons why he won or lost, so that a judge’s decision will be liable to be set aside if it contains no, or even insufficient, reasons. As Lord Phillips of Worth Matravers MR explained in *English v Emery Reimbold & Strick Ltd (Practice Note)* [2002] 1 WLR 2409, para 16, “justice will not be done if it is not apparent to the parties why one has won and the other has lost”.

17 A further fundamental common law principle is that trials should be conducted in public, and that judgments should be given in public. The importance of the requirement for open justice was emphasised by the House of Lords in *Scott v Scott* [1913] AC 417 and *Attorney General v Leveller Magazine Ltd* [1979] AC 440, 449H–450B. It was recently discussed by Lord Judge CJ in *R (Mohamed) v Secretary of State for Foreign*

A *and Commonwealth Affairs (No 2) (Guardian News and Media Ltd intervening)* [2011] QB 218, paras 38–39, where he made two points. First, “The public must be able to enter any court to see that justice is being done in that court, by a tribunal conscientiously doing its best to do justice according to law”. Secondly, that

B “In litigation, particularly litigation between the executive and any of its manifestations and the citizen, the principle of open justice represents an element of democratic accountability, and the vigorous manifestation of the principle of freedom of expression. Ultimately it supports the rule of law itself.”

C 18 Connected to these fundamental principles are two other rules developed by the common law. First, a civil claim should be conducted on the basis that a party is entitled to know, normally through a statement of case, the essentials of its opponent’s case in advance, so that the trial can be fairly conducted and, in particular, the parties can properly prepare their respective evidence and arguments for trial. Secondly, a party in civil litigation should be informed of the relevant documents in the control of his opponent, through the medium of what is now called disclosure; this helps ensure that neither party is unfairly taken by surprise, and that the court reaches the right result, as neither party is able to rely on a selection of documents which presents the court with a misleading picture.

E 19 Rules of court have always given the court a measure of discretion in relation to matters such as the extent of disclosure and late evidence, but such discretions have to be exercised so as to ensure the trial process is fair (which, at least following the introduction of the CPR, includes the need for proportionality). As Lord Salmon said in *Science Research Council v Nassé* [1980] AC 1028, 1071E–F, if a tribunal “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”.

F 20 The rules are now enshrined in the CPR. Thus CPR Pts 15 and 16 contain the rules relating to the filing of a defendant’s defence, requiring it to set out his case. CPR Pt 32, which is a more recent development, requires the service of witness statements containing the evidence of any witnesses who are to give evidence, and CPR Pt 31 contains the rules with regard to disclosure and inspection of documents.

G 21 At least in the case of some of these principles, the common law has long accepted that there can be exceptions. Thus in *Scott v Scott* [1913] AC 417, 437–438 Viscount Haldane LC, while affirming, and applying, the open justice principle, made it clear that a court could sit in private where “justice could not be done at all if it had to be done in public”, immediately went on to say, the court considering the issue “must treat it as one of principle, and as turning, not on convenience, but on necessity”: see too per Lord Diplock in the *Leveller Magazine* case [1979] AC 440, 450B–F.

H *Public interest immunity*

22 Similarly, in relation to disclosure, the courts have long recognised that some documents, while relevant, even crucial, to the issues between the parties, may be immune from disclosure on various public interest grounds. Thus there is legal professional privilege (based on the public interest of

people being able to seek legal advice) and “without prejudice” privilege (based on the public interest in parties settling their disputes), and, as already mentioned and particularly relevant for present purposes, there is PII. A

23 The development of the law relating to PII can be traced from *Duncan v Cammell Laird & Co Ltd* [1942] AC 624 (which contains a summary of the previous cases on the topic in the speech of Viscount Simon LC, at pp 629–636), through *Conway v Rimmer* [1968] AC 910, to *R v Chief Constable of West Midlands Police, Ex p Wiley* [1995] 1 AC 274. PII has become particularly significant since section 28 of the Crown Proceedings Act 1947 removed the Crown’s exemption from discovery in civil proceedings, while expressly recognising PII. The disclosure exercise where PII may be involved potentially involves three stages before the court is involved. B

24 First, the relevant minister (or his lawyers) must decide whether the documentary material in question is relevant to the proceedings in question—i.e., that the material should, in the absence of PII considerations, be disclosed in the normal way. Secondly, the minister must consider whether there is a real risk that it would harm the national interest if the material was placed in the public domain. The third step is for the minister to balance the public interests for and against disclosure. If the decision is that the balance comes down against disclosure, then the minister states, in a PII certificate, that it is in the public interest that the material be withheld. C

25 As decided in *Conway v Rimmer* [1968] AC 910 and explained in *Ex p Wiley* [1995] 1 AC 274 it is then for the court to weigh, as Lord Simon of Glaisdale put it, “the public interest which demands that the evidence be withheld . . . against the public interest in the administration of justice that courts should have the fullest possible access to all relevant material”, and if “the former public interest is held to outweigh the latter, the evidence cannot in any circumstances be admitted”: *R v Lewes Justices, Ex p Secretary of State for the Home Department* [1973] AC 388, 407. On the other hand, if the court concludes that the latter public interest prevails, then the document must be disclosed unless the Government concedes the issue to which it relates: see per Lord Hoffmann in *Secretary of State for the Home Department v MB* [2008] AC 440, para 51. As Lord Woolf said in *Ex p Wiley* [1995] 1 AC 274, 306H–307B, even where material cannot be disclosed, it may be possible, and therefore appropriate, to summarise the relevant effect of the material, to produce relevant extracts, or even to produce the material “on a restricted basis”. D

26 When conducting the balancing exercise between the two competing aspects of the public interest, the court may, in an appropriate case, inspect the material before reaching a conclusion on the issue. In such a case it has become accepted practice, at least where it is appropriate and fair to do so, for special advocates to be appointed to assist the court on the issue of whether the Crown’s claim for PII should be upheld. As Lord Bingham of Cornhill explained in the criminal case of *R v H* [2004] 2 AC 134, para 22, even though there is “little express sanction in domestic legislation or domestic legal authority for the appointment of a special advocate” in such a case, E

“novelty is not of itself an objection, and cases will arise in which the appointment of an approved advocate as special counsel is necessary, in F

- A the interests of justice, to secure the protection of a criminal defendant's right to a fair trial".

The closed material procedure

- 27 In relation to certain classes of case, the legislature has made further encroachments into these principles. Private hearings and judgments are
 B statutorily mandated in many family and Court of Protection proceedings, as recently discussed in *Independent News and Media Ltd v A* [2010] 1 WLR 2262. More relevantly for present purposes, statute has mandated what has come to be known as a closed material procedure in certain specified circumstances. Two well known examples are to be found in
 C Schedule 1 to the Prevention of Terrorism Act 2005 which deals with control orders, and Schedule 7 to the Counter-Terrorism Act 2008 which is concerned with financial restriction proceedings (the latter of which is considered in our judgments in *Bank Mellat v HM Treasury* [2012] QB 91, which we are handing down today).

- 28 Paragraph 4 of Schedule 1 to the 2005 Act requires rules of court to be made to deal with control order proceedings. By virtue of paragraph 4(2)(b) of Schedule 1 to the 2005 Act, such rules may make
 D provision for proceedings to be conducted "in the absence of any person, including a relevant party to the proceedings and his legal representative". This has resulted in CPR Pt 76, which contains detailed provisions dealing, for instance, with "Hearings in private", "Appointment of a special advocate", "Modification of the general rules of evidence and disclosure", "Closed material" and "Judgments": CPR rr 76.22, 76.23, 76.26, 76.28 and 76.32 respectively. CPR r 76.2 provides that "the overriding objective [in
 E CPR r 1.1] and, so far as relevant, any other rule, must be read and given effect in a way which is compatible with the duty" imposed on the court to "ensure that information is not disclosed contrary to the public interest". Similar, but not identical, rules are to be found in CPR Pt 79, which was mandated by Part 7 of the 2008 Act.

- 29 Closed material procedures are also mandated in other tribunals by
 F legislation. Thus there is rule 6 of the Parole Board Rules 2004, which specifically enables the board to consider material which should be

"withheld from the prisoner on the grounds that its disclosure would adversely affect national security, the prevention of disorder or crime or the health or welfare of the prisoner",

- as discussed in *R (Roberts) v Parole Board* [2005] 2 AC 738, para 55. Also
 G rule 54(2) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (SI 2004/1861) permits a tribunal, if it considers it to be expedient in the interests of national security, to order, inter alia, that the whole or part of any proceedings before it are conducted in private, that the claimant is excluded from the whole or part of the proceedings and that all or part of the tribunal's reasoning is kept secret (and which we consider in our judgments handed down today in *Tariq v Home
 H Office* [2010] ICR 1034).

The objection to the closed material procedure in principle

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.

31 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. It is contrary to the public interest that trials should be conducted in private but, at least absent special circumstances, it could not normally be suggested that any litigant risks suffering an injustice in the conduct or outcome of a particular case simply because the trial takes place in private, although he may of course have cause for complaint if he cannot publicise the contents of the evidence, argument or judgment in the case.

32 A litigant's right to disclosure of documents is not a fundamental right in the same way as the right to know the evidence and argument presented to the judge and the reasons for the judge's decision. Quite apart from this, if PII, legal professional privilege or "without prejudice" privilege is claimed in respect of a relevant document, the trial process itself is not impugned, as it is still fair: all parties are in the same position in that none of them can rely on the document. That cannot be said where the trial is conducted partly, let alone wholly, through a closed material procedure.

33 Different considerations may apply where the proceedings do not only concern the interests of the parties to the litigation, but they also have a significant effect on a vulnerable third party, or where a wider public interest is engaged. Thus, where the case directly impinges on the interests of a child, it may be justifiable for the court to see a document which is not seen by the parties to the proceedings. In *In re K (Infants)* [1965] AC 201, 240–241, Lord Devlin said:

"Where the judge sits purely as an arbiter and relies on the parties for his information, the parties have a correlative right that he should act only on information which they have had the opportunity of testing. Where the judge is not sitting purely, or even primarily, as an arbiter but is charged with the paramount duty of protecting the interests of one outside the conflict, a rule that is designed for just arbitrament cannot in all circumstances prevail."

34 More recently the point was expressed in these terms by Baroness Hale of Richmond in *Secretary of State for the Home Department v MB* [2008] AC 440, para 58:

"If . . . the whole object of the proceedings is to protect and promote the best interests of a child, there may be exceptional circumstances in which disclosure of some of the evidence would be so detrimental to the child's welfare as to defeat the object of the exercise . . ."

A 35 Similarly, in the *Roberts* case [2005] 2 AC 738, para 48 Lord Woolf CJ referred to the Parole Board having

“a triangulation of interests: the board’s obligations to the prisoner and its obligation to protect society and, as part of the latter obligation, its obligation to protect third parties so far as it is practical to do so . . .”

B As a result, even without statutory rules which permitted a closed material procedure, such a procedure would, he implied, have been permissible because of the public interest to which the board had to have regard. At para 56 Lord Woolf CJ said to similar effect that the board should have the power to consider documents which were not seen by the relevant prisoner “to enable the board to perform its statutory duty to protect the public”.

C 36 In our view, such considerations cannot apply to proceedings such as those in the present case. While they may well raise points of some interest and importance to the public and in the eyes of the media, the present proceedings involve claims for damages in tort and breach of statutory duty by a number of claimants against a number of defendants (it is true that all those defendants are emanations of the Crown, but that does not alter the nature or characterisation of the proceedings). They are proceedings in which a judge will in due course be called upon to sit “purely as an arbiter”
D between the claimants and the defendants and no “triangulation of interests” will be involved.

E 37 We accept, of course, that the court has inherent jurisdiction to develop the common law so far as its procedures are concerned. However, as Sir Jack Jacob put it in his Hamlyn lecture on “The Inherent Jurisdiction of the Court” [1970] Current Legal Problems 23, 24, that jurisdiction “is part of the procedural law, both civil and criminal, and not of substantive law”. Lord Denning MR said in *In re Grosvenor Hotel, London (No 2)* [1965] Ch 1210, 1243C that the Rule Committee “can make rules for regulating and prescribing the procedure and practice of the court, but they cannot alter the rules of evidence, or the ordinary law of the land”. It is true that, by virtue of paragraph 4 of Schedule 1 to the Civil Procedure Act 1997,
F the Civil Procedure Rule Committee can now “modify the rules of evidence as they apply to proceedings” where the CPR apply. However, in our opinion, the course proposed by the defendants in this case would involve not merely altering the rules of evidence: it would involve altering what Lord Denning MR called “the ordinary law of the land”, namely (for the reasons already explained) fundamental principles of the law of England and Wales.

G 38 We would respectfully echo Lord Bingham’s approval of, and reliance on, two observations of Lord Shaw of Dunfermline in *Scott v Scott* [1913] AC 417, 477–478, 485, cited in *R v Davis* [2008] AC 1128, para 28. Lord Shaw said that “there is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure, and at the instance of judges themselves”, and that “the 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
H 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*, at para 66, “It is the integrity of the judicial process that is at stake here. This must be safeguarded and vindicated whatever the cost.”

39 Lord Bingham said in the *Roberts* case [2005] 2 AC 738, para 30, that if Parliament

“intends that a tribunal shall have power to depart from the ordinary rules of procedural fairness, it legislates to confer such power in clear and express terms and it requires that subordinate legislation regulating such departures should be the subject of parliamentary control. It follows this practice even when the security of the nation is potentially at stake.”

In relation to tribunals which have to take into account third party interests or the public interest, it may be that the majority of the opinions in that case suggest that this observation is arguably too broadly expressed, but we can see no support from those opinions for the notion that the observation is not applicable to ordinary common law litigation where the judge is acting as an “arbiter” between the parties.

40 The fact that a closed material procedure is adopted when the court is considering whether or not to give effect to a PII certificate, even where the issue arises in ordinary civil litigation (or in criminal proceedings), is nothing to the point. The issue at such a hearing is essentially *ex parte*: it is whether the material in question is immune from disclosure and inspection on the ground that the public interest would be harmed by its release into the public sphere. Further, the issue at such a hearing necessarily concerns material which at least arguably should not be shown to the other party, so that material is the very subject matter of the hearing: that is not true in a case where the material may be relevant, even very important, to the issue or subject matter of the hearing. Even more importantly for present purposes, the hearing is not the trial of the action (or the prosecution): it is merely concerned with an interlocutory matter ahead of the trial, and is bound to result in the material either being available for use in the litigation (or at the criminal trial) by both parties or by neither party.

The effect of the Civil Procedure Rules

41 Even if it was, as a matter of principle, open to the court to adopt a closed material procedure in an ordinary civil claim in the absence of all parties consenting, it seems to us that, in the light of the existence and terms of the CPR, there would be no jurisdiction to do so. This conclusion is reinforced when one turns to consider the existence and terms of the legislation which permits the court to adopt a closed material procedure.

42 In *Raja v Van Hoogstraten* (No 9) [2009] 1 WLR 1143, para 74 this court agreed with Sir Jack Jacob’s statement in his Hamlyn lecture, at pp 50–51, that the court’s inherent powers “are complementary to its powers under rules of court; one set of powers supplements and reinforces the other”. The Court of Appeal then went on to approve a later statement by Professor Martin Dockray in “The Inherent Jurisdiction to Regulate Civil Proceedings” (1997) 113 LQR 120, 128 that “the inherent jurisdiction may supplement but cannot be used to lay down procedure which is contrary to or inconsistent with a valid rule of the Supreme Court”. At paras 78–79, the court confirmed that this applied in relation to the CPR in the same way that

A it applied when the previous rules, the Rules of the Supreme Court, were in force.

43 In our judgment, the defendants face very serious difficulties in their contention that the closed material procedure is compatible with the CPR. The provisions regarding the preparation and service of a defence, and in particular CPR r 16.5 which requires a defendant to state which allegations he admits and denies, his reasons, and his alternative case (if any), are
B inconsistent with the notion of a closed defence as contemplated in the defendants' "open defence" in this case. The fact that the court can, under CPR r 6.28, dispense with the service of any document does not seem to be an answer to this point, as it is concerned with the service rather than the contents, of a document, and it does not undermine the obvious point that its contents should be communicated to the other parties to the litigation
C (unless, for instance, they cannot be found or are evading service).

44 As already mentioned, the extent of any disclosure ordered by the court is a matter of discretion: CPR r 31.5. However, in our view, the discretion is to be exercised in a manner which accords with what Lord Salmon said in the *Nassé* case [1980] AC 1028, 1071E–F, namely, 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
D requires that such an order should be made". This is reinforced by CPR r 1.1, the overriding objective, which requires the court to deal with cases "fairly" and to ensure, as far as possible, "that the parties are on an equal footing".

45 We would make the same points about CPR r 32.2 which states that "the general rule" is that evidence is to be given orally at trial or, if not at trial, in writing, and CPR rr 32.4 and 32.5 which provide that witness
E statements (or, failing that, witness summaries), i.e., statements containing the substance of the evidence to be given by witnesses, should be served on the other parties.

46 It is also germane to note that CPR r 39.2(1) provides that "the general rule is that a hearing is to be in public" and CPR r 39.2(3) sets out the exceptions, which in paragraphs (b) and (c) includes cases involving
F "matters relating to national security" and "confidential information . . . and publicity would damage that confidentiality". There are no such qualifications in relation to the general provisions of the CPR relating to statements of case, disclosure, inspection or witness statements, let alone to evidence and argument being given and heard in the presence of all parties.

47 The notion that a closed material procedure is incompatible with the general provisions of the CPR is confirmed by the provisions of CPR Pts 76
G and 79. In particular, they both effectively acknowledge that such a procedure would at the very least not be reconcilable with the overriding objective as set out in CPR r 1.1: see e.g. CPR r 76.2. Further, there is the apparent acceptance that the general rules about evidence and disclosure have to be modified: see e.g. CPR r 76.26.

48 Again there may be necessary exceptions where the very subject
H matter of the hearing is material which should, or arguably should, not be shown to the other party, as in the PII procedure itself. In such a case it is, as a matter of inevitability, necessary to have a closed material procedure. It is not a question of desirability or convenience: the hearing simply could not occur, as a matter of inevitable logic, other than on a closed basis. In an ordinary civil claim that is not the position. In any event, and crucially, the

closed procedure would not be in connection with, let alone part of, the trial A
but would be part of the disclosure process.

Practical considerations

49 Although we are asked to determine the preliminary issue as a matter of principle, rather than determining whether a closed material procedure could be adopted in this case, it is helpful to consider what are said by the defendants to be the potential advantages of adopting a closed material procedure. Mr Crow submits that there would be two potential advantages. The first is that, in an appropriate case, such a procedure would be more likely to achieve a fair result, because the court would be able to rely at trial on relevant material whose disclosure would, if the PII procedure was adopted, be excluded from the trial process altogether. The second advantage is said to be that, at least in cases such as the present, the PII procedure would be unmanageable in practice, and adopting a closed material procedure would be the only way of bringing the case to trial economically and expeditiously. B C

50 There is obvious attraction in the submission that the court should have power to order a closed material procedure hearing in a case in which it is satisfied that justice would be more likely to be served by adopting such a procedure. However, even putting to one side the objections in principle to the closed material procedure, the submission begs the important practical question as to how the court would be able to satisfy itself that adopting such a procedure would be more likely to achieve a fair result. D

51 It is possible to envisage a procedure which required the court to be satisfied, after having first carried out the balancing exercise laid down in *Ex p Wiley* [1995] 1 AC 274, that: disclosure of certain material would result in a real risk of harm to an important public interest; the only alternative to excluding the material altogether would be to consider it in a closed material procedure; adopting a closed material procedure would better enable the court to deal justly with the case in accordance with the overriding objective than would excluding the material. E

52 When deciding whether adopting a closed material procedure would better enable it to deal justly with the case, the court would have to consider a wide range of factors and not simply the desirability of taking account of as much relevant evidence as possible. Thus weight would have to be given to factors such as the significance of the material that would otherwise have to be excluded, the extent to which the party excluded from the closed hearing would be able to respond to the material, the degree to which the special advocate might be able to mitigate the disadvantage to the excluded party, and the desirability of justice being seen to be done in an open procedure. Subject to these considerations, such a closed material procedure would be capable of providing the first of the claimed advantages; i.e., it would be more likely to achieve a fair result. F G

53 However, such a closed material procedure would not avoid the need to carry out the “unmanageable” PII exercise, and that is why it is not the closed material procedure as defined in the preliminary issue. It is only because the closed material procedure as defined avoids the need to carry out the PII exercise that it is said to be capable of achieving the second advantage: making the procedure “manageable”, and thereby enabling a trial within a reasonable time. H

A 54 There is thus an inherent conflict between the two claimed advantages of the defendants' proposed closed material procedure. If the court has to decide whether the trial is more likely to be fair because the judge will be able to rely on relevant material which would be excluded from the trial process altogether under the PII procedure, then the defendants' proposals would be more expensive and time consuming, as the exercise of deciding whether to have a closed material procedure would be an add-on to the PII procedure. If on the other hand the defendants are suggesting that the closed material procedure is to be adopted without first carrying out the PII procedure, it may be potentially less expensive and time consuming in some cases, but it would mean that material which would not be excluded from the trial process on a traditional PII procedure will not be disclosed to the claimants, but will be considered by the court in closed session which would be to the claimant's obvious disadvantage.

C 55 The preliminary issue is silent as to the role of the special advocate, but it raises the same conundrum for the defendants' case. In those closed material procedures authorised by statutes such as the Prevention of Terrorism Act 2005, the special advocate's most valuable function is often at the disclosure stage—i.e., in assisting the court in deciding whether there is any material for which PII is claimed which should in fact be released into the open proceedings. If, under the defendants' proposals, the special advocate's first task will be to help the court to ascertain whether PII has properly been claimed in respect of any document, there will be no reduction in the "unmanageable" workload, but an increase in his work and a partial shifting of the burden onto the special advocate and the court. On the other hand, if the workload is to be reduced because the special advocate's duties will not include considering whether PII has properly been claimed, then documents which would have been disclosed to the claimants on a PII procedure will remain closed. The special advocate, unable to take a claimant's instructions, would, in dealing with such material in a closed hearing, be a particularly poor substitute for the claimant's own advocate in an open hearing.

D 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.

E 57 The contention that the defendants' proposed procedure should not be adopted is reinforced by recent observations of the Joint Committee on Human Rights on Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010 (HL Paper 64/HC 395) (dated 26 February 2010). In para 15 of the report's conclusions and recommendations, the committee referred to the fact they had previously "maintained an open mind" as to whether "the control orders regime can be made to operate in a way which is compatible with the

requirements of basic fairness which are inherent in both the common law and article 6 ECHR”, and then said that its

“assessment now, in the light of five years’ experience of the operation of the system, is that the current regime is not capable of ensuring the substantial measure of procedural justice that is required.”

It is fair to add that the committee went on to suggest that “fundamental reforms” were needed, which suggests that the closed material procedure might be made to work more fairly. It is also right to add that, subject to its inherent limitations, the special advocate system enjoys a high degree of confidence among the judiciary, as Maurice Kay LJ says in *Tariq v Home Office* [2010] ICR 1034, para 32. However, it seems to us that if a regime which is statutorily authorised in certain classes of case, has been litigated and considered in many cases and is subject to detailed statutory rules, but cannot be guaranteed to ensure procedural justice, that is another reason why the common law should refuse to adopt such a regime.

The authorities relied on by the judge

58 Silber J relied on a number of cases to justify the conclusion that in an ordinary civil claim the court had jurisdiction which it could exercise to order a closed material procedure.

59 First, there was *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 where, at para 31, Lord Woolf MR stated that, albeit “in the most extreme circumstances”, the Court of Appeal could “hear submissions in the absence of [a party] and his counsel, under the inherent jurisdiction of the court”, on the basis that the party’s interests would be protected by a special advocate. We are unconvinced that this is an observation which assists the defendants here. First, there is no suggestion that the contrary was argued (and the list of authorities cited strongly suggests that it was not). Secondly, it was a plainly obiter observation as the procedure was not, in the event, adopted on that appeal. Thirdly, as the tribunal from which the appeal in question was brought, the Special Immigration Appeals Commission (“SIAC”) had statutory power to adopt a closed material procedure, it seems clear that the Court of Appeal did also—quite apart from common sense, see section 15(3) of the Senior Courts Act 1981. Finally, and arguably, the *Rehman* case was not a case where the court was simply an arbiter: there was, at least arguably, a public interest dimension in the issue involved.

60 In *R v Shayler* [2003] 1 AC 247 the House of Lords was concerned with a preparatory hearing in relation to a prosecution of a defendant charged with unauthorised disclosure of material under the Official Secrets Act 1989. The relevant issue arose rather obliquely. The point was made against him that, if the defendant had asked for permission to disclose the material and it had been refused, the refusal would have been subject to judicial review; in response the defendant argued that, if he had taken that course, he may not have been able to show the material to his lawyers. At para 34, Lord Bingham said that, following what was said by Lord Woolf MR in the *Rehman* case [2003] 1 AC 153, in the unlikely event of the court having to consider material which could not be disclosed to the defendant’s lawyer, a special advocate could be appointed.

61 There would, however, have been no question of the defendant himself being in ignorance of the material (ex hypothesi) or of his being

- A excluded from the hearing where it was considered. Anyway such judicial review proceedings would have been like a PII hearing, in that the very subject matter of the proceedings would have been material which should not be released: see paras 40, 48 above. Further, the contemplated judicial review proceedings would have been a very long way from a normal civil claim: they would have involved the public interest dimension as the central issue. In any event, particularly if one looks at the record of the arguments before the House, it seems doubtful to what extent the principles to which the issue gives rise were ventilated in argument.

- B 62 Another House of Lords case relied on by the judge was *R v H* [2004] 2 AC 134, especially the observations of Lord Bingham, at paras 20 and 22. Apart from citing the *Rehman* [2003] 1 AC 153 and *Shayler* [2003] 1 AC 247 cases, those observations were concerned with the preliminary PII process in criminal proceedings (discussed in paras 40, 48 above).

- C 63 The judge also relied on the *Roberts* case [2005] 2 AC 738, which we have already discussed. We do not consider that Lord Woolf CJ's observations in that case support the contention that a closed material procedure can be ordered by the court in an ordinary civil claim. His obiter observations as to the powers of the Parole Board were expressly made in the light of its duty to take into account the public interest. The board was not sitting purely, or even mainly, as an arbiter as in ordinary civil proceedings, as discussed by Lord Devlin in *In re K (Infants)* [1965] AC 201, 240–241. Further, the board had express power to withhold material which was before it from the prisoner under the rules, so the closed material procedure was purely a protective measure for the prisoners' benefit: see per Lord Carswell [2005] 2 AC 738, para 132.

- D 64 In *R (Malik) v Manchester Crown Court* [2008] 4 All ER 403 the Crown Court had ordered, under Schedule 5 to the Terrorism Act 2000, the claimant to produce certain material following hearings held partly in the presence of the claimant and his lawyers and partly in their absence. Silber J relied on what Dyson LJ, giving the judgment of the Divisional Court, said about the use of special advocates, at paras 96–102, where he cited a number of the cases to which reference has been made in this judgment. However, it is clear from the summary of the arguments raised on behalf of the claimant and Dyson LJ's reasoning, at paras 30 and 104–105, that it was not submitted that the Crown Court had no power to hold the hearing partly in the absence of the claimant or his lawyers: the sole question on this aspect of the case was whether the Crown Court should have appointed a special advocate of its own motion. Indeed, it would seem that the claimant, through the lawyers then acting for him, had effectively consented to the Crown Court conducting closed hearings. Again there was, at least arguably, a strong public interest dimension in the hearing.

- E 65 Silber J also cited *A v HM Treasury* [2010] 2 AC 534, 561–562, paras 58 and 60 where, giving the majority judgment of the Court of Appeal, Sir Anthony Clarke MR said in a judgment that has now been reversed [2010] 2 AC 534 that “in an appropriate case the court would have power to authorise or request the use of a special advocate . . . even where it was not sanctioned by Parliament”, albeit “only . . . in an exceptional case and as a last resort”. However, as in other cases, there does not appear to have been any argument as to whether the court had had power to order a closed material procedure in the first place. Once again this was in any event a case

where there was, at least arguably, a substantial public interest dimension, and it cannot be relied on as justifying a closed material procedure in an ordinary civil claim. A

66 Finally, there is another decision of this court, *R (AHK) v Secretary of State for the Home Department (Practice Note)* [2009] 1 WLR 2049 where, at paras 37–38, guidance was given as to the circumstances in which a special advocate should be appointed. Once again there was no consideration as to whether the court could order a closed material procedure, it apparently having been assumed on all sides that it could. Once again there was, at least arguably, a substantial public interest dimension in the proceedings. We also consider that there is force in the point that it is unclear how far it was envisaged the closed material procedure would go: it may well have been limited to the interlocutory stages, and in particular to the issue of what the Home Secretary should disclose—i.e. the classic PII exercise discussed in paras 40 and 48 above. B
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67 One can readily understand why Silber J considered that the cases we have been considering provided support for the defendants’ contention that a closed material procedure can be adopted in civil proceedings, even relating to claims in tort and breach of statutory duty. However, on analysis we do not consider that any of those cases gives any strong or reliable support for that contention. First, it does not appear to have been argued (and in many of the cases it could not have been argued) that, unless authorised by statute or agreed by all parties, a closed material procedure at trial was impermissible as a matter of principle. Secondly, it does not appear to have been argued that the terms of the CPR excluded the court from relying on its inherent jurisdiction to order a closed material procedure at trial (and in some of the cases it could not have been argued, as the CPR were not in point). Thirdly, no consideration was given in any of these cases to the practical aspects discussed above, and in the great majority of the cases it would not really have been in point. Fourthly, in many of these cases the court was apparently dealing with a PII hearing, or a hearing which concerned the material which arguably should not be released. Fifthly, in at least the great majority of these cases there was, at least arguably, a substantial public interest dimension, such that the judge who determined the issues at trial was not simply acting as an arbiter between the competing private law arguments of the parties to the litigation. D
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Concluding remarks

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* [1995] AC 274, 306H–307B, 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, 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 G
H

A 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.

B 69 It is none the less tempting to accept that there may be the odd exceptional ordinary civil claim, where the closed material procedure would be appropriate. “Never say never” is often an appropriate catchphrase for a judge to have in mind, particularly in the context of common law which is so open to practical considerations, and in relation to civil procedure where experience suggests that unpredictability is one of the few dependable features. However, this is one of those cases where it is right for the court to take a clear stand, at least in relation to ordinary civil proceedings. Quite apart from the fact that the issue is one of principle, it is a melancholy truth that a procedure or approach which is sanctioned by a court expressly on the basis that it is applicable only in exceptional circumstances none the less often becomes common practice.

D 70 The importance of civil trials being fair, the procedures of the court being simple, and the rules of court being clear are all of cardinal importance. It would, in our view, be wrong for judges to introduce into ordinary civil trials a procedure which (a) cuts across absolutely fundamental principles (the right to a fair trial and the right to know the reasons for the outcome), initially hard fought for and now well established for over three centuries, (b) is hard, indeed impossible, to reconcile satisfactorily with the current procedural rules, the CPR, (c) is for the legislature to consider and introduce, as it has done in certain specific classes of case, where it considers it appropriate to do so, (d) complicates a well established procedure for dealing with the problem in question, namely the PII procedure, and (e) is likely to add to the uncertainty, cost, complication and delay in the initial and interlocutory stages of proceedings, the trial, the judgment, and any appeal.

F 71 We leave open the question of whether a closed material procedure can properly be adopted, in the absence of statutory sanction in an ordinary civil claim such as the present, where all the parties agree, or in a civil claim involving a substantial public interest dimension (ie where the judge is not simply sitting as an arbiter as between the parties). Both principle and the authorities relied on below seem to us to suggest that a different conclusion may well be justified in such cases, albeit only in exceptional circumstances, but that is an issue which should be considered as and when it arises.

G 72 For these reasons we would allow the claimants’ appeal.

Appeal allowed with costs in Court of Appeal and below.

Detailed assessment of claimants’ publicly funded costs.

Permission to appeal refused.

H 14 July 2010. The Supreme Court (Lord Phillips of Worth Matravers PSC, Lord Hope of Craighead DPSC and Dyson JSC) allowed an application by the defendants for permission to appeal.

ROBERT RAJARATNAM, Barrister

APPEAL

The defendants appealed. The fourth claimant alone responded to the appeal. The first interveners, JUSTICE and Liberty, and the second interveners, Guardian News and Media Ltd, Times Newspapers Ltd and the British Broadcasting Corporation, were permitted to intervene on the appeal. The issue before the Supreme Court, as set out in the agreed statement of facts and issues, was whether, in the absence of a specific statutory power or duty, a closed material procedure could ever be adopted in a civil claim for damages.

The facts are stated in the judgment of Lord Dyson JSC.

Jonathan Crow QC, Rory Phillips QC, Karen Steyn, Daniel Beard and Peter Skelton (instructed by *Treasury Solicitor*) for the defendants.

The role of the court is to deliver justice, its paramount duty being to ascertain the truth in any dispute coming before it. The principle that justice is done is “more fundamental” than the broad principle that it should, subject to exceptions, be administered in public: see *Scott v Scott* [1913] AC 417; *Davies (Joy Rosalie) v Eli Lilly & Co* [1987] 1 WLR 428, 431; *Bingham, The Business of Judging* (2000), p 4 and *Zuckerman on Civil Procedure*, 2nd ed (2006), para 1.8. The right to a fair trial is absolute and is shared by both sides. The rules of evidence and of procedure are intended to assist in achieving the goal of justice as a servant, but not as its master: see *In re Coles and Ravenshear* [1907] 1 KB 1, 4; *In re K (Infants)* [1965] AC 201; *Connelly v Director of Public Prosecutions* [1964] AC 1254, 1347 and *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn Ltd* [1968] AC 909, 977.

While the general approach at common law is that justice is more likely to be achieved by the openness and transparency that comes with full disclosure between the parties, that approach should not be followed slavishly and if compliance would, in fact, defeat the ends of justice a different approach will be adopted: see *R (AHK) v Secretary of State for the Home Department (Practice Note)* [2009] 1 WLR 2049.

Where a party is unable to put forward its case because important public interest considerations prevent it from adducing relevant evidence, there is a real risk that justice will not be done. While claimants in general can choose whether or not to sue, a defendant will not in general have that choice and if he cannot defend himself by relying on important evidence he will be deprived of his right to a fair trial. Disclosure is not an absolute right in any proceedings; it must be ordered by the court and may yield to a higher public interest. Although mutual disclosure of relevant documents is the general approach, there are therefore no inflexible rules: see *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171; *Ventouris v Mountain* [1991] 1 WLR 607; *Barclays Bank plc v Eustice* [1995] 1 WLR 1238, 1249, 1250; *R (Morgan Grenfell & Co Ltd) v Special Comr of Income Tax* [2003] 1 AC 563, para 7; *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610, paras 29–33, 54, 61; *Science Research Council v Nassé* [1980] AC 1028, 1065 and *Wallace Smith Trust Co Ltd v Deloitte Haskins & Sells* [1997] 1 WLR 257.

The flexibility of the common law is one of its fundamental attributes enabling it to cure difficulties which arise in relation to the development of the law: see *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122, para 33; *Hale: The History and Analysis of the Common Law of*

A *England* (1713), ch III, p 45; *Pollock, The Genius of the Common Law* (1912), ch VIII, p 112 and *Comet Products UK Ltd v Hawke Plastics Ltd* [1971] 2 QB 67, 73–74. Where procedural innovation is required so as to achieve substantive justice the common law encourages, rather than prevents, it.

B The essential question is therefore how the considerations of justice and fairness to a defendant can be balanced against fairness to the claimant. The court should, in exceptional circumstances, be able to rely on crucial relevant evidence which cannot openly be disclosed in the public interest. That can be achieved by the adoption of a process of “closed disclosure” whereby one party cannot see and test the closed evidence directly, but where a special advocate is appointed to perform that function on his behalf.

C The essential feature of a closed material procedure is that any material whose open disclosure would cause harm to the public interest may be withheld from open disclosure but may be used in proceedings and tested by the special advocate representing the interests of the other party. At the interlocutory stage the special advocate will test the extent to which particular documents should remain unavailable to the party who does not have possession or control of the documents; and at trial the special advocate can make submissions to the court in closed session on the closed material, acting at all times in the best interests of the party from whom disclosure is withheld.

D The closed material procedure is different from the traditional approach where public interest immunity (“PII”) is claimed. That approach has been developed under the common law: see *Duncan v Cammell Laird & Co Ltd* [1942] AC 624; *In re Grosvenor Hotel, London (No 2)* [1965] Ch 1210 and *Conway v Rimmer* [1968] AC 910. The PII procedure requires the document to be relevant, and its disclosure to cause real harm. Where those factors are present it is for the court to strike a balance between the public interest in maintaining non-disclosure and the interests of justice in making disclosure: see *R v Chief Constable of West Midlands Police, Ex p Wiley* [1995] 1 AC 274. [Reference was made to *R v Lewes Justices, Ex p Secretary of State for the Home Department* [1973] AC 388.] The sole purpose of the PII procedure is to safeguard the public interest. It is a rule which exonerates a party from the disclosure obligation to which he would otherwise be subject. But if the public interest can be safeguarded by means which do not disable a defendant from defending himself the common law can be adapted to permit that outcome.

F There are, however, problems with the traditional PII procedure. G Traditional PII is not the only solution for dealing with sensitive material. It is a creature of the common law; as such it is not carved in stone; like any aspect of the common law it can be developed further and alternative tools can be developed in parallel with it.

H The relative benefits of the closed material procedure compared with traditional PII will vary according to the circumstances. If the former procedure is adopted the court can see and take into account at trial relevant material, written and oral, whose disclosure would, applying traditional PII, be excluded from the trial process, irrespective of its value to either party. Exclusion of evidence under traditional PII can operate unfairly to the party litigating against a party who is obliged to assert PII in relation to it. If the balance falls against disclosure, any closed material which might assist a

party will be excluded from the trial process. Conversely the exclusion of material under traditional PII is also capable of operating unfairly to a defendant public official or body. If the balance falls against disclosure the defendant may have no adequate basis in the open material to defend itself, whereas if the truth were known the sensitive material would have provided a complete answer to the claim against it. Exposing a defendant to a substantial damages claim which might on full investigation be groundless is not a course the courts should favour, if other alternatives are available; nor should the court be faced with the unacceptable option of choosing between depriving the defendant of the means of defending himself or striking out the claim on the grounds that it is untriable: see *Carnduff v Rock* [2001] 1 WLR 1786 and *Carnduff v United Kingdom* (Application No 18905/02) (unreported) given 10 February 2004.

By adopting a closed material procedure, the court could review relevant material in the interests of justice with the assistance of the special advocate who would be in a position to make submissions on behalf of the party from whom disclosure was withheld: see *MT (Algeria) v Secretary of State for the Home Department* [2010] 2 AC 110, paras 94–98; *R (Roberts) v Parole Board* [2005] 2 AC 738 and *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 1)* [2009] 1 WLR 2579. As a result the court will be afforded a fuller picture than on application of traditional PII. A closed material procedure is therefore more likely to achieve justice through a fair trial.

Since the issue is whether a closed material procedure can ever be adopted in a civil claim for damages, it is irrelevant to draw the distinction made by the Court of Appeal between “ordinary” civil claims and those which involve a “substantial public interest dimension”: see ante, pp 552–555, paras 59, 61, 63–67, 71. In any event there is no principled basis for such a distinction and criteria on which it might be applied are unclear. Special procedures are developed by reference to principle, not particular categories of case: see *Scott v Scott* [1913] AC 417; *Attorney General v Leveller Magazine Ltd* [1979] AC 440 and *In re K (Infants)* [1963] Ch 381; [1965] AC 201.

Despite the general presumption in favour of open disclosure, hearings and judgments, courts have repeatedly recognised that the common law permits them to conduct civil proceedings without necessarily requiring full open disclosure between the parties of all written and oral evidence and submissions. That has been achieved both with and without the use of special advocates. The courts have the necessary jurisdiction to adopt the closed material procedure in such proceedings and justice can be served by its use. In the judicial review context, which for present purposes is no different from any other civil claim, courts can lawfully and properly adopt the closed material procedure and in some cases they may not be able to discharge their review functions unless they do: see *R (AHK) v Secretary of State for the Home Department (Practice Note)* [2009] 1 WLR 2049; *R v Shayler* [2003] 1 AC 247 and *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 1)* [2009] 1 WLR 2579.

Justice requires a balance between the parties and different principles may apply depending on whether the public authority is bringing or defending a claim. If the former, it has chosen to litigate and may have to make an election between openly disclosing sensitive material or foregoing the claim. If the latter, it has been brought to court by the claimant and where it needs

- A to defend itself by relying on sensitive material it may be faced by invidious choices (see *Carnduff v Rock* [2001] 1 WLR 1786) and in that situation the common law is sufficiently flexible to achieve a fair result. The use by the courts of the closed material procedure without statutory underpinning provides the authority for that flexibility: see *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, para 31, per Lord Woolf MR; the *Shayler* case [2003] 1 AC 247, para 34; *R v H* [2004] 2 AC 134, paras 21–22;
- B *R (Roberts) v Parole Board* [2005] 2 AC 738; *Jacobs v London County Council* [1950] AC 361, 369; *R (Malik) v Manchester Crown Court* [2008] 4 All ER 403, paras 73, 99; the *AHK* case [2009] 1 WLR 2049, para 86; *A v HM Treasury* [2010] 2 AC 534; *Lamothe v Comr of Police of the Metropolis* (unreported) 25 October 1999; [1999] CA Transcript No 1775; *In re T (Wardship: Impact of Police Intelligence)* [2010] 1 FLR 1048; *In re A (Forced Marriage: Special Advocates)* [2012] Fam 102; *In re D (Minors) (Adoption Reports: Confidentiality)* [1996] AC 593, 615; *In re B (Disclosure to other Parties)* [2001] 2 FLR 1017; *In re British & Commonwealth Holdings plc (Nos 1 and 2)* [1992] Ch 342; *Warner Lambert Co v Glaxo Laboratories Ltd* [1975] RPC 354, 358; *Roussel Uclaf v Imperial Chemical Industries plc* [1990] RPC 45; *Carphone Warehouse Group plc v Office of Communications* [2009] CAT 37; *British Sky Broadcasting Group plc v Competition Commission* [2010] 2 All ER 907, paras 53–61; *Premier Profiles Ltd v Tioxide Europe Ltd* [2003] FSR 380 and *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co* [2005] QB 207.

- The closed material procedure is capable of satisfying the requirements of a fair trial under article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. There is no basis for the suggestion that the procedure is bound to be incompatible with the article in all civil damages claims. While the right to a fair trial under article 6(1) is unqualified and includes the right to disclosure of relevant evidence, the constituent elements of a fair process are not absolute or fixed. In particular the right to disclosure is not absolute: see *Brown v Stott* [2003] 1 AC 681;
- E *Secretary of State for the Home Department v MB* [2008] AC 440; *Dombo Beheer BV v The Netherlands* (1993) 18 EHRR 213 and *Botmeh and Alami v United Kingdom* (2007) 46 EHRR 659.

- Viewing the issue by reference to article 6 of the Convention, any restrictions on the right to a fully adversarial trial has to satisfy the usual requirements of pursuing a legitimate aim, including that of national security, in a proportionate manner while not depriving the litigant of the very essence of a fair trial: see *Tinnelly & Sons Ltd v United Kingdom* (1998) 27 EHRR 249 and *A v United Kingdom* (2009) 49 EHRR 625. So far as proportionality is concerned, the appointment of special advocates to represent the interests of litigants from whom full disclosure is partially withheld, is a relevant factor establishing compatibility with the Convention: see *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269.

- H The closed material procedure is not necessarily precluded by the Civil Procedure Rules on pleadings. Nor, given the wide scope of the court's discretion with regard to the consideration of evidence and the form and manner in which it is produced, is its operation precluded by CPR Pt 32. The fact that detailed rules have been laid down for a specific procedure in

certain contexts (see CPR Pts 76 and 79) does not limit the ability of the common law to adopt comparable, though not necessarily identical, procedures in other contexts. The overriding objective can be read and given effect in a way that is compatible with the closed procedure and the evidence and procedure rules themselves show that they are not necessarily irreconcilable with the adoption of such a procedure.

Unlike the traditional PII approach, which can become highly impractical where there are huge numbers of sensitive documents to assess, the significant benefit of the closed material procedure is that non-sensitive material can be disclosed openly and all sensitive material can be disclosed to the special advocates immediately who can focus on the categories of documents which they consider most important to the case in hand. The practical gains in adopting the closed procedure, both in time and expense, are considerable.

Dinah Rose QC, Richard Hermer QC and Charlotte Kilroy (instructed by Birnberg Peirce & Partners) for the fourth claimant.

The question is whether judges have the power, on an ad hoc case by case basis, to abrogate a number of the most fundamental features of a civil trial for damages. The adversarial system is an essential feature of common law trials and provides the framework for the functioning of the other principles of English civil justice. The key requirements of that system are that (a) each party should plead its case, identifying to all parties the issues in dispute and those which are admitted; (b) all written and oral evidence relied on is disclosed to the other parties to the proceedings; (c) the hearing should take place in public, subject to established and limited exceptions; (d) applying the principle of confrontation, witnesses should give evidence orally and each party can test disputed evidence by cross-examination; (e) established principles govern PII in respect of the disclosure of certain relevant documents; (f) the judge, who is the arbiter of proceedings and adjudicator, not the investigator, may only take into account the evidence placed before him in open court; and (g) a court must give a fully reasoned judgment, available to all parties, so that each knows why it has lost or won and can decide whether or not to appeal: see Jolowicz, “Adversarial and Inquisitorial Models of Civil Procedure” (2003) 52 ICLQ 281, 281; *Blackstone, Commentaries on the Law of England*, Book III, pp 372, 373, 375; *Wigmore, A Treatise on the Anglo-American System of Evidence at Trials at Common Law* (1973), vol III, para 1367; *Hale, The History and Analysis of the Common Law of England* (1713), ch 12; *Duke of Dorset v Girdler* (1720) Prec Ch 531, 532; *Chilton v Saga Holidays plc* [1986] 1 All ER 841, 844; *Lee v The Queen* (1998) 195 CLR 594, para 32; *Myers v Director of Public Prosecutions* [1965] AC 1001, 1020–1021; *Jones v National Coal Board* [1957] 2 QB 55, 63; *Air Canada v Secretary of State for Trade* [1983] 2 AC 394, 434, 438; *Devlin, The Judge* (1979), pp 4, 56; *Phipson on Evidence*, 17th ed (2010), para 1-18 and *English v Emery Reimbold & Strick Ltd (Practice Note)* [2002] 1 WLR 2409, para 16.

Those central requirements are reflected in the rules of court which regulate court procedure, currently, in particular, the Civil Procedure Rules: see Parts 7, 9, 12, 15, 16, applying to the service of claim forms, statements of case and defences, Part 12 to default judgments and Part 32 to evidence.

Although the adversarial system and the procedural rules governing it ensure that courts meet fundamental tenets of procedural fairness, decision-

- A making by other bodies and individuals is not subject to the same forms of protection. The common law courts, exercising their supervisory jurisdiction over inferior courts and tribunal and administrative decision-makers have delineated the common law principles of natural justice, including the principle of audi alteram partem and the rule against bias: see *Bagg's Case* (1615) 11 Co Rep 93b; *R v Cambridge University, Ex p Bentley* (1723) 1 Str 557; *Ridge v Baldwin* [1964] AC 40, 64; *Kanda v Government of Malaya* [1962] AC 322, 337–338; *In re K (Infants)* [1963] Ch 381, 405–406; *Pamplin v Express Newspapers Ltd* [1985] 1 WLR 689, 691; *Brinkley v Brinkley* [1965] P 75, 78 and *Midland Cold Storage v Turner* [1972] ICR 230, 235.
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- The remedy of disclosure, developed as an aid to the administration of justice, is governed by rules of court: see CPR Pt 31 and *Science Research Council v Nassé* [1980] AC 1028. However the law of PII has been developed to deal with the recognition that conflict may arise between the public interest in the administration of justice and other public interests which preclude the disclosure of all relevant materials: see *Duncan v Cammell Laird & Co Ltd* [1942] AC 624; *Conway v Rimmer* [1968] AC 910 and *R v Chief Constable of West Midlands Police, Ex p Wiley* [1995] 1 AC 274. Thus a claim for PII must be supported by a certificate signed by the appropriate government minister relating to the individual documents in question; disclosure of documents which ought otherwise to be disclosed under CPR Pt 31 may only be refused if the court concludes that the public interest in withholding them outweighs the public interest in the administration of justice; in making that decision, the court inspects the documents in necessarily an ex parte process from which the party seeking disclosure is excluded; in making its decision, the court will consider whether safeguards, such as the use of redaction, should be imposed so as to permit disclosure. If the public interest in withholding the material does not outweigh the public interest in the administration of justice, the material must be disclosed unless the party possessing it concedes the issue to which it relates: see *Secretary of State for the Home Department v MB* [2008] AC 440, para 51. If the court concludes that the material should be withheld, the evidence cannot be admitted or relied on by either party: see *R v Lewes Justices, Ex p Secretary of State for the Home Department* [1973] AC 388, 407.
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- In that way the court strikes the balance between competing interests, while acknowledging the opinion and expertise of the Secretary of State and his advisers; the public interest in the administration of justice is given full weight; whatever the outcome, the principles of natural justice and equality of arms are preserved; and both parties are treated equally in relation to the use of sensitive material.
- G

- A closed material procedure is fundamentally different from, and incompatible with, the essential features of a civil trial at common law and the Civil Procedure Rules. The court's inherent jurisdiction is not unlimited and cannot be invoked as the source of its power to adopt a closed material procedure; the inherent jurisdiction complements and is subject to statutory rules; it cannot therefore be used to introduce a procedure which is contrary to or inconsistent with valid rules of court: see *Connelly v Director of Public Prosecutions* [1964] AC 1254, 1301, 1347; *Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA* [1979] AC 210, 262; *AJ Bekhor &*
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Co Ltd v Bilton [1981] QB 923, 943; *Raja v Van Hoogstraten* (No 9) [2009] 1 WLR 1143, para 78; I H Jacob, “The Inherent Jurisdiction of the Court” [1970] Current Legal Problems, pp 23, 50–51 and Martin Dockray, “The Inherent Jurisdiction to Regulate Civil Proceedings” (1997) 113 LQR 120, 128–129, 131. The limits on the ability of the Civil Procedure Rule Committee to make procedural rules provide an important guide to the limits on individual judges acting in the inherent jurisdiction: see *In re Grosvenor Hotel, London* (No 2) [1965] Ch 1210, 1243.

Courts do not therefore have the power to use procedural innovations, here the closed material procedure, to undermine fundamental features of the common law adversarial trial: see *Scott v Scott* [1913] AC 417, 476–480; *R v Davis* [2008] AC 1128, paras 34, 76 and *Myers v Director of Public Prosecutions* [1965] AC 1001, 1021–1022. [Reference was also made to *D v D* [1903] P 144 and *R v Murphy* [1990] NI 306.] The court hearing an ordinary civil claim may not entertain evidence which has not been disclosed to all parties so that it may be tested by cross-examination; the very limited exception exists where the court’s paramount duty is not to sit as arbiter, as in an action for damages, but to protect the interests of someone who is outside the conflict: see *In re K (Infants)* [1963] Ch 381; [1965] AC 201, 237–239, 240–241; *In re D (Minors) (Adoption Reports: Confidentiality)* [1996] AC 593, 604; *Secretary of State for the Home Department v MB* [2008] AC 440, para 58; *VNU Business Publications BV v Ziff Davis (UK) Ltd* [1992] RPC 269, para 276; *Lamothe v Comr of Police of the Metropolis* (unreported) 25 October 1999; [1999] CA Transcript No 1775 and *Secretary of State for the Home Department v AF* (No 3) [2010] 2 AC 269, para 64.

Cases relied on by the defendants as establishing the use of a closed procedure do not, in reality, do so. There is no objection to the use of a special advocate in what would otherwise be, quite properly, an ex parte process, since that would enhance the procedural protection afforded to the party whose interests would not be otherwise represented at all: see *R v H* [2004] 2 AC 134 and *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* (No 1) [2009] 1 WLR 2579. Restrictions on disclosure to protect the confidentiality, at the interlocutory stage, in cases concerning commercial or trade secrets, where the exceptional course is taken of making disclosure to the parties’ legal representatives but not to the parties themselves, are recognised and accepted as exceptional. Such cases form the basis of the widely used practice of confidentiality rings which widen as the trial approaches to include the lay clients, but in none of such cases have the courts imposed secrecy at trial: see *Warner-Lambert Co v Glaxo Laboratories Ltd* [1975] RPC 354; *Roussel Uclaf v Imperial Chemical Industries plc* [1990] RPC 45; *Dyson Ltd v Hoover* (No 3) [2002] RPC 841; the *VNU* case [1992] RPC 269; *WEA Records Ltd v Visions Channel 4 Ltd* [1983] 1 WLR 721; the *Lamothe* case [1999] CA Transcript No 1775; *In re British & Commonwealth Holdings plc* (Nos 1 and 2) [1992] Ch 342 and *Carphone Warehouse Group plc v Office of Communications* [2009] CAT 37 at [14].

Cases where there has been no dispute as to use of a closed procedure do not stand as authority in support of the power to use a closed procedure: in such cases the issue is not live and the court will not have been referred to relevant case law or have considered its powers: see *Secretary of State for the*

- A *Home Department v Rehman* [2003] 1 AC 153, paras 31–32; *R v H* [2004] 2 AC 134; *R v Shayler* [2003] 1 AC 247, para 34; *R (Malik) v Manchester Crown Court* [2008] 4 All ER 403, paras 93–106; *R (AHK) v Secretary of State for the Home Department (Practice Note)* [2009] 1 WLR 2049, paras 14–15 and *A v HM Treasury* [2010] 2 AC 534, paras 55–60, CA. The other cases relied on by the defendants are only examples of the exception to the general rule identified in *In re K (Infants)* [1965] AC 201; *In re T (Wardship: Impact of Police Intelligence)* [2010] 1 FLR 1048, paras 26–29; *In re A (Forced Marriage: Special Advocates)* [2012] Fam 102, para 19; *In re D (Minors) (Adoption Reports: Confidentiality)* [1996] AC 593, 604; *In re B (Disclosure to other Parties)* [2001] 2 FLR 1017, paras 25, 66. *R (Roberts) v Parole Board* [2005] 2 AC 738 is not authority for the proposition that the normal procedural protection applicable to parties in civil trials may be abrogated and such abrogation justified by the use of special advocates. The context there is far removed from the present case. In any event the Parole Board was expressly empowered under its procedural rules to withhold evidence from the prisoner and to exclude him from hearings where such evidence was being considered. The defendants therefore cannot identify any case which affords a precedent for the use of a closed material procedure in the trial of a civil claim for damages.
- D The closed material procedure is inconsistent with the Civil Procedure Rules: see Part 15, rule 16.5 and Parts 31–33. Those rules have their foundation in fundamental principles of the common law adversarial system of trial and the requirements of natural justice. Part 33 is based on the Civil Evidence Act 1995; the admissibility of hearsay evidence at trial, permitted by that statute, is subject to clear protective provisions. While section 2(2) of the 1995 Act permits, by CPR r 76.26, the disapplication of Part 33 in control order proceedings, the court has no power to disapply that Part on an ad hoc basis in relation to civil proceedings of the present type; and the court’s discretion in relation to Parts 31, 32 and 33 must be exercised in accordance with the law. The overriding objective of the CPR, to deal justly with cases, includes ensuring that parties are on an equal footing, saving expense and dealing with cases in an proportionate way. It is not correct that the overriding objective is to enable “substantive justice” as opposed to “procedural justice” to be achieved; there is no suggestion that the former supersedes or is a higher goal than the latter. The objective cannot be used as a basis for abandoning the other parts of the rules or for establishing an entirely separate procedural code to govern the closed material procedure. In particular it cannot be used as a basis for dispensing with the need to ensure that parties are treated on an equal footing. The incompatibility of the closed material procedure with those provisions of the CPR, including its overriding objective, is clear from the explicit, statutory modification of those provisions by CPR Pts 76–79 in control order proceedings.
- G The closed material procedure is prohibited by the Crown Proceedings Act 1947: see section 13 and CPR Pt 66. Parliament plainly envisaged that proceedings by and against the Crown would be subject to rules of court and it expressly prohibited the use of any alternative procedure. In the light of the mandatory language of those provisions no further statutory intention need be shown. But in any event as section 28 of the 1947 Act make clear, the law of PII will apply in proceedings against the Crown. Parliament and the rule committee have expressed the intention that ordinary civil
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procedure rules will govern the proceedings most likely to raise PII issues. It would be anomalous if a different procedure were to be established for other cases.

The adoption of a closed material procedure is not more likely to achieve justice by enabling the court to view material which would otherwise be inadmissible. A fair procedure cannot be separated from a fair and just result. A judge conducting a civil trial by the closed material procedure would have no means of fairly weighing or evaluating the secret evidence before him. A court cannot proceed on the assumption that evidence which is not tested would, if tested, be unanswerable, or that the claimant would not be able to rebut it. The use of special advocates cannot cure fundamental defects in a trial under the closed material procedure. Special advocates were created to perform a limited function and their capacity to mitigate unfairness in civil proceedings would be wholly inadequate. In particular, they would not be able to take instructions from a claimant about any matter raised in the closed material in order to inform their cross-examination: see *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning*, 19th report of Session 2006–07, HL Paper 157/HC 394, (30 July 2007). While the conflict between the interests of justice and the competing claims of national security can cause difficulties for the conduct of trials, the common law has established mechanisms for dealing with those difficulties in the fairest way, in particular, by applying the principles and rules of PII. The fact that a claim may involve substantial documentation does not make it impossible or impracticable to use the CPR procedures.

Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms sets a minimum standard of fairness which must be applied to jurisdictions with different traditions of civil justice. The article does not purport to regulate the detail of procedural standards applicable to national law. Compliance is assessed on a case by case basis: see *Klass v Federal Republic of Germany* (1978) 2 EHRR 214. While article 6 is not determinative of the issue, it would not be satisfied if a closed material procedure were to be adopted in a civil action for damages: see *A v United Kingdom* 49 EHRR 625, para 220 and *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269, paras 59, 81, 96, 119.

The closed material procedure, if adopted, would be contrary to public policy as being contrary to fundamental principle and its application would give rise to profound practical difficulties.

John Howell QC and *Naina Patel* (instructed by *Herbert Smith LLP*) for the first interveners.

The effect of the closed material procedure is that, to avoid disclosure of any material which is likely to harm the public interest, a party is denied the following rights: to attend his own trial, to know another party's statement of case, to know and have the chance to challenge evidence on which another party might rely, to have the opportunity to make submissions on another party's case, to know of material which might support or harm another party's case, to receive a statement of the court's reasons for its decision and to have an effective appeal against an adverse decision.

Those rights are well established in civil claims for damages at common law. They enable parties to be treated on an equal footing, to have a fair hearing on the basis of the admissible evidence and to receive a judgment publicly explaining why the court reached its decision. The administration

- A of justice is thereby conducted openly and contains safeguards against abuse, arbitrariness and error. That gives the parties and the public confidence in an impartial system which is indispensable in a democratic society operating under the rule of law. By contrast the closed material procedure tilts the scales of justice in favour of public authorities. The special advocates system, relied on by government as the only answer to the inequality created by the closed material procedure, is insufficient to counterbalance the difficulties which will be inevitably suffered by parties denied the right to participate effectively in proceedings: see *R (Roberts) v Parole Board* [2005] 2 AC 738, paras 55, 67.

- B The defendants wrongly treat public interest immunity and the parties' fundamental rights in the trial process, which are matters of substantive law, as matters of court procedure and practice which the court is free to adopt or discard in any particular case. The law relating to public interest immunity is a matter of substantive law which courts and tribunals must apply absent a specific statutory provision disapplying it: see *Science Research Council v Nassé* [1980] AC 1028. Public interest immunity ("PII") arises whenever the public interest in disclosure and the use of information which is relevant to the determination of an issue in a case is outweighed by the public interest in the information being withheld from such use. It does not arise merely because information is likely to damage the public interest. When PII applies, the information may not be given in evidence and any document, to the extent that it contains such information, must be withheld. The court must give effect to that rule, of its own motion, even if the parties do not wish it: see *Duncan v Cammell Laird & Co Ltd* [1942] AC 624; *Gain v Gain* [1961] 1 WLR 1469; *In re Grosvenor Hotel, London (No 2)* [1965] Ch 1210; *R v Lewes Justices, Ex p Secretary of State for the Home Department* [1973] AC 388; *Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs (No 2)* [1974] AC 405; *R v Chief Constable of West Midlands Police, Ex p Wiley* [1995] 1 AC 274; the *Science Research Council* case [1980] AC 1028, 1074, 1087; *MT (Algeria) v Secretary of State for the Home Department* [2010] 2 AC 110, para 103 and CPR r 1.1(2)(a).

- F The closed material procedure is not a development of the common law but is alternative to it and an abrogation of it. Whatever view is taken of the merits of the procedure, the changes that would be necessary to the existing law are not ones which the courts can introduce by way of an alleged "development". Its introduction would have to be effected by specific statutory authority, if Parliament were to see fit.

- G In particular, such a change could not be made under the court's inherent power to regulate its own proceedings. That power is subject to the limitations that (1) where the subject matter of an application is governed by the CPR, the court should deal with it under those rules and not by way of its inherent power; (2) the remaining inherent power may not arrive at a different outcome from that which would apply under the rules and (3) since the court's inherent power relates only to practice and procedure the court must not exercise it inconsistently with the substantive law and the fundamental rights that a party to a civil claim for damages may have: see *Raja v Hoogstraten (No 9)* [2009] 1 WLR 1143; *Connelly v Director of Public Prosecutions* [1964] AC 1254; *In re Grosvenor Hotel, London (No 2)* [1965] Ch 1210, 1243; *Bremer Vulkan Schiffbau und Maschinenfabrik v*

South India Shipping Corp'n Ltd [1981] AC 909, 977; *B v Auckland District Law Society* [2003] 2 AC 736, paras 56–58 and *General Mediterranean Holdings SA v Patel* [2000] 1 WLR 272, 292–293. A

The principle of legality will apply and it requires the operation of the rules of natural justice: *R v Secretary of State for the Home Department, Ex p Pierson* [1998] 2 AC 539 and *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115. The principle *audi alteram partem* applies to all judicial proceedings, unless excluded by Parliament expressly or by necessary implication: see *In re Hamilton* [1981] AC 1038, 1045 and *Kanda v Government of Malaya* [1962] AC 322, 337–338. A party has the right to attend and participate in his trial: see the Legal Services Act 2007; *Grimshaw v Dunbar* [1953] 1 QB 408 and *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1. He has the right to know the case against him: see CPR rr 14.2, 16.5, 15.6 and *Godwin v Swindon Borough Council* [2002] 1 WLR 997. A party has the right to know what the evidence is that is adduced against him and he has the right to respond and challenge it: see CPR rr 32.2, 32.4; *Errington v Minister of Health* [1935] 1 KB 249, 280; *Halford v Sharples* [1992] 1 WLR 736; *In re K (Infants)* [1963] Ch 381, 405–406; [1965] AC 201, 237; *In re D (Minors) (Adoption Reports: Confidentiality)* [1996] AC 593, 603–604, 615; *Brinkley v Brinkley* [1965] P 75, 78; *Midland Cold Storage v Turner* [1972] ICR 230, 234–235; *Lamothe v Comr of Police of the Metropolis* (unreported) 25 October 1999; *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co* [2005] QB 207, paras 11–27; *Pamplin v Express Newspapers Ltd* [1985] 1 WLR 689 and *WEA Records Ltd v Visions Channel 4 Ltd* [1983] 1 WLR 721. B C D

Although there is no automatic right to disclosure, an order for standard disclosure will normally be made. However the court has power to dispense with or limit disclosure: see CPR Pt 31. The law of evidence recognises that a party may have the right or duty to withhold certain documents where that would damage the public interest; PII would then attach to that material if the court concludes that, having considered the competing interests, the public interest so requires. By contrast, the closed material procedure requires the withholding of documents whose disclosure would be harmful to the public interest, but regardless of how the balance may be struck. Neither the CPR nor the court's inherent jurisdiction gives the court any power to act on that basis. E F

A person is entitled to receive a statement of the court's reasons for its decision, and a failure to give reasons is a self-standing ground of appeal: see *English v Emery Reimbold & Strick Ltd (Practice Note)* [2002] 1 WLR 2409 and *Flannery v Halifax Estate Agencies Ltd (trading as Colleys Professional Services)* [2000] 1 WLR 377. A reasoned judgment is the essential way of securing the accountability of a branch of the state and of providing a guarantee against abuse or arbitrary exercise of the powers entrusted to it. While the court has power to sit in private when giving judgment, there is no statutory or regulatory provision for a party to be kept in ignorance of any judgment or part of it. Legislation is required to modify or exclude such rights, and Parliament has done so in defined circumstances: see *MT (Algeria) v Secretary of State for the Home Department* [2008] QB 533; [2010] 2 AC 110; Prevention of Terrorism Act 2005, Schedule 1; Counter-Terrorism Act 2008, sections 66, 69 and CPR Pts 76 and 79. G H

- A The Secretary of State's case is wrongly based on the assumption that doing justice merely involves reaching the correct decision, and thereby fails to recognise the importance of the role of due process: see *Secretary of State for the Home Department v MB* [2008] AC 440, para 57; *R (Khatun) v Newham London Borough Council* [2005] QB 37, para 27; *Kanda v Government of Malaya* [1962] AC 322, 337–338; *R v Derby Magistrates' Court, Ex p B* [1996] AC 487, 507 and *Medcalf v Mardell* [2003] 1 AC 120, para 46.

- B If the court decides that, on balance, information, in respect of which PII is sought, ought to be disclosed to the parties it will so order because the overall public interest requires it. In such a case, not to disclose or admit it in evidence would harm the public interest: *R v H* [2004] 2 AC 134, para 36(6); *R v Keane* [1994] 1 WLR 746, 751–752 and
- C *Secretary of State for the Home Department v MB* [2008] AC 440, para 91. Faced with such a decision the unpalatable choice for the party concerned may well be to abandon a claim or concede the case: see *Air Canada v Secretary of State for Trade* [1983] 2 AC 394, 438. In circumstances where a party is prevented from fully making or answering a claim the court itself can, in the interests of fairness, stay the proceedings: see *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, 338;
- D *Hamilton v Al Fayed* [2001] 1 AC 395, 404, 408; *Bolkiah v State of Brunei Darussalam* [2007] UKPC 62 at [31] and *Carnduff v Rock* [2001] 1 WLR 1786. There is no evidence that application of the PII procedure has produced incorrect decisions. No inquiry, whether judicial, parliamentary or governmental, has suggested that material withheld on PII grounds could nevertheless be used as evidence or that a closed material
- E procedure might sometimes be necessary. Use of the closed material procedure is no answer to the unmanageability of a case where extensive documentation has to be considered on a PII claim: special advocates cannot be used to relieve a public authority of its duty to perform that task and there is no line of authority which establishes that, absent specific legislation, the court has power to order closed material procedure when determining a civil claim for damages: *Secretary of State for the Home*
- F *Department v Rehman* [2003] 1 AC 153; para 31, per Lord Woolf MR; the *Shayler* case [2003] 1 AC 247, para 34; *R v H* [2004] 2 AC 134, paras 21–22; *R (Roberts) v Parole Board* [2005] 2 AC 738; *R (Malik) v Manchester Crown Court* [2008] 4 All ER 403, paras 73, 99; the *AHK* case [2009] 1 WLR 2049, para 86; *A v HM Treasury* [2010] 2 AC 534, para 58, per Sir Anthony Clarke MR and in the Supreme Court; *Lamothe v Comr of Police of the Metropolis* (unreported) 25 October 1999; *In re T (Wardship: Impact of Police Intelligence)* [2010] 1 FLR 1048; *In re A (Forced Marriage: Special Advocates)* [2012] Fam 102; *In re D (Minors) (Adoption Reports: Confidentiality)* [1996] AC 593, 615 and *In re B (Disclosure to other Parties)* [2001] 2 FLR 1017 are distinguishable.

- H Lord Lester of Herne Hill QC and Guy Vassall-Adams (instructed by *Herbert Smith LLP*) for the second interveners.

It is a fundamental common law principle that justice is administered in public and its judgments are pronounced publicly: see *R v Sussex Justices, Ex p McCarthy* [1924] 1 KB 256, 259; *Ambard v Attorney General for Trinidad and Tobago* [1936] AC 322, 335 and *McPherson v McPherson* [1936] AC 177, 200. The open justice principle encompasses the right of

every member of the public to enter a courtroom to witness how justice is being administered, and of the media, acting as the eyes and ears of the public, to gain access to the courts and to publish fair and accurate reports of court proceedings fully and freely. Thus open justice proceedings place the courts under public scrutiny and help to ensure that they act fairly and that parties conduct themselves properly. It is one of the processes by which information becomes available to the public and important public interest issues enter the public domain: see *R v Chief Registrar of Friendly Societies, Ex p New Cross Building Society* [1984] QB 227, 235; *Attorney General v Leveller Magazine Ltd* [1979] AC 440, 449–450; *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2) (Guardian News and Media Ltd intervening)* [2009] 1 WLR 2653, paras 40–41; [2011] QB 218, paras 38, 175; *Scott v Scott* [1913] AC 417, 438, 440–441, 447, 463, 476–478; *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, 670 and *R v Legal Aid Board, Ex p Kaim Todner* [1999] QB 966, 977. The requirement for a public hearing is thus an essential part of the fair trial procedure and a major contribution of the common law to the universal principles of the rule of law in democratic societies now recognised generally: see, for example, articles 6 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and article 14 of the International Covenant on Civil and Political Rights.

The text of article 6 expressly recognises the open justice principle and its rationale is the same as that at common law: see *Pretto v Italy* (1984) 6 EHRR 182, para 12; *Diennet v France* (1995) 21 EHRR 554, para 33 and *Schuler-Zraggen v Switzerland* (1993) 16 EHRR 405, para 58. The right to freedom of expression at common law is underpinned by article 10 of the Convention. The fundamental principles are well established: freedom of expression is one of the essential foundations of a democratic society and any restriction must be in accordance with the principles of legal certainty and proportionality. To avoid arbitrary laws, the law must be adequately accessible and must provide basic procedural safeguards against abuse; exceptions to the right must be narrowly interpreted and convincingly established on the evidence; interference must correspond to a pressing social need and be proportionate to the legitimate aim pursued and the reasons given for it by the national authorities must be relevant and sufficient. In that context the European Court of Human Rights jurisprudence recognises the vital role of the media in court reporting and the right of the public to receive such reports: see *Sunday Times v United Kingdom* (1979) 2 EHRR 245, para 49; *Sunday Times v United Kingdom (No 2)* (1991) 14 EHRR 229, paras 50, 65; *R v Shayler* [2003] 1 AC 247, para 21; *R (Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148; *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115; *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534; *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 and *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109. Contrast *Harman v United Kingdom* (1984) 7 EHRR CD 146.

The strength of the general principle is evidenced by the failure to weaken open justice by invoking article 8 to grant anonymity to parties to legal proceedings: see *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593; *In re Trinity Mirror plc (A intervening)*

A [2008] QB 770; *In re British Broadcasting Corpn* [2010] 1 AC 145; *In re Guardian News and Media Ltd* [2010] 2 AC 697; *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2) (Guardian News and Media Ltd intervening)* [2011] QB 218; *Independent News and Media Ltd v A* [2010] 1 WLR 2262 and *R (Secretary of State for the Home Department) v Assistant Deputy Coroner for Inner West London* (2010) 174 JP 593.

B The strict circumscription of the exceptions to the open justice principle at common law starts from the basis that there is a presumption in favour of public hearings; any proposed departure must be strictly necessary in the interests of justice and it is for the party seeking to depart from the principle to satisfy the court that it is necessary to do so. The court will carry out a balancing exercise and any departure must go no further than necessary to meet the legitimate objective of the restriction. The holding of a hearing in camera is a very serious interference which is neither time- nor subject-specific and may result in the permanent removal of material from the public domain: see *Attorney General v Leveller Magazine Ltd* [1979] AC 440; *Scott v Scott* [1913] AC 417 and *R v Legal Aid Board, Ex p Kaim Todner* [1999] QB 966.

D The widening of any area of secrecy in the administration of justice must therefore be the product of parliamentary, not judicial, lawmaking, since it is the function of Parliament to make and of the independent judiciary to interpret and apply the law: see *Scott v Scott* [1913] AC 417; reversing [1912] P 241, and the powerful dissent of Fletcher Moulton LJ [1912] P 241, 274; *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 and *In re Guardian News and Media Ltd* [2010] 2 AC 697.

E Since in law context is everything (see *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532), the proposed closed material procedure is difficult to envisage in practice, not least, as the preliminary question is posed in the abstract. As advocated, the procedure is fundamentally and irreconcilably inconsistent with the open justice principle. It represents the antithesis of, and would completely undermine, the common law principles which are the product of centuries of judicial decision-making and the bedrock of the media's role in court reporting.

F The closed material procedure would involve a major extension of secrecy in the administration of justice: it would mandate the exclusion of a party and their legal advisers from their own civil proceedings; the tests which the court would apply as to the material to be examined in closed session would systematically give priority to secrecy over open justice and would throw a mantle of secrecy over a far wider range of material and result in a far greater part of the case being heard in secret, indefinitely removing it from the public domain. In litigation between the citizen and the executive, the procedure would invariably be invoked at the instance of the public authority whose conduct was being impugned, causing irretrievable damage to public confidence in the administration of justice. The courts are under a duty to ensure that the law is consistent with the Convention rights under the Human Rights Act 1998, including the principle of legal certainty. The procedure would infringe that principle and the article 10 rights of the media since it is not governed by clear pre-existing rules, nor is it predictable,

nor does it contain adequate safeguards against abuse. That is in marked contrast to the detailed substantive and procedural provisions which attend the closed procedures prescribed by legislation: see the Prevention of Terrorism Act 2005; the Counter-Terrorism Act 2008 and CPR Pts 76, 79.

The wide and circular definition of “public interest” contained in the closed material procedure allows for its adoption in any type of civil proceedings. The “melancholy truth” is that what is now advocated as an exceptional remedy would ultimately become common practice across the whole spectrum of civil justice.

Crow QC replied.

The court took time for consideration.

Lord Rodger of Earlsferry JSC, who had sat on the hearing of the appeal, died before judgment was given.

13 July 2011. The following judgments were handed down.

LORD DYSON JSC

Introduction

1 The issue that arises on this appeal is whether the court has the power to order a “closed material procedure” as described in the preliminary issue that was tried by Silber J for the whole or part of the trial of a civil claim for damages and, if so, in what circumstances it is appropriate to exercise the power. The preliminary issue was in these terms:

“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? Definition of ‘closed material procedure’. A ‘closed material procedure’ means a procedure in which (a) a party is permitted to (i) comply with his obligations for disclosure of documents, and (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 (b) disclosure of such closed material is made to special advocates and, where appropriate, the court; and (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. 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.”

2 Silber J [2009] EWHC 2959 (QB) answered the question raised by the preliminary issue in the affirmative. The Court of Appeal (Lord Neuberger of Abbotsbury MR, Maurice Kay and Sullivan LJ), ante, p 539, allowed the claimants’ appeal and held that the court has no such power in an ordinary civil claim for damages. The defendants appeal with the permission of the Supreme Court.

A The proceedings

3 The preliminary issue was raised in proceedings in which the claimants alleged that the Security Service and other organs of the state (the defendants) had been complicit in the detention and ill-treatment of them by foreign authorities at various locations including Guantanamo Bay. The pleaded causes of action included false imprisonment, trespass to the person, conspiracy to injure, torture and breach of the Human Rights Act 1998. A more detailed exposition of the factual background is set out in paras 5–6 of the judgment of Lord Neuberger MR.

4 The defendants filed an open defence in which they admitted that the claimants had been transferred and detained, but they put in issue the alleged mistreatment and denied any liability for the claimants' detention or alleged mistreatment. At a case management hearing, the defendants said that they were in possession of material which they wished the court to consider, but which they would be obliged in the public interest to withhold from disclosure. This material was contained in a closed defence. The course contended for by the defendants would require parallel open and closed proceedings and parallel open and closed judgments. Special advocates would represent the interests of the claimants in the closed hearings.

5 The claimants objected to this course. They argued that a conventional public interest immunity ("PII") exercise should be conducted ex parte by a judge in relation to the "closed" material. Lord Clarke of Stone-cum-Ebony JSC describes the PII procedure in detail at para 145 below. In response, the defendants emphasised the difficulties that would be caused by the vast amount of sensitive material in their possession and the enormous scale of any PII exercise. The evidence filed on behalf of the defendants suggested that there might be as many as 250,000 potentially relevant documents, and that PII might have to be considered in respect of as many as 140,000 of them. It might take three years to complete the exercise of deciding in respect of which documents PII could properly be claimed.

6 Against this background, directions were sought from the court for the determination of four preliminary issues. On 24 September 2009, Burnett J ordered that the first of these issues should be tried first. This was the issue which, in its final form, is the subject of the present appeal.

7 After the decision of the Court of Appeal, but before the appeal came on for hearing before the Supreme Court, the claims were settled on confidential terms. A question therefore arose as to whether the court should permit the appeal to continue. It raises an important point of principle which was the subject of a full and carefully reasoned decision of the Court of Appeal. In my view, it was right to entertain the appeal. Having had the benefit of full legal argument over a period of two days, I am in no doubt that the Supreme Court should decide the issue raised by the preliminary issue so far as it is able to do so.

The positions of the parties in outline

8 The defendants submit that the right to a fair trial is absolute, but the means of satisfying that right vary according to the circumstances of the case. The procedures of the court are the means of achieving real justice between the parties. As a general rule, real justice and a fair trial can only be achieved by open hearings, open disclosure, each side confronting the other's witnesses and open judgments. But in certain circumstances, a closed

procedure may be necessary in order to achieve real justice and a fair trial. Such procedures are adopted in certain classes of case (for example, cases involving children and confidential information). There is no reason in principle why in the exercise of its inherent jurisdiction the court should not be able to order such a procedure in other classes of case, such as cases where a defendant cannot deploy its defence fully (or sometimes not at all) if it is required to follow an open procedure. The defendants' primary case is that a court has the power to substitute, at least in exceptional cases, a closed material procedure for a conventional PII exercise.

9 The respondent says that open procedures are fundamental to our system of justice. His case is that a closed material procedure would be such a fundamental change to the way in which ordinary civil litigation (including judicial review) is conducted that it should not be introduced by the courts. Any such change can only be made by Parliament.

The essential features of a common law trial

10 There are certain features of a common law trial which are fundamental to our system of justice (both criminal and civil). First, subject to certain established and limited exceptions, trials should be conducted and judgments given in public. The importance of the open justice principle has been emphasised many times: see, for example, *R v Sussex Justices, Ex p McCarthy* [1924] 1 KB 256, 259, per Lord Hewart CJ, *Attorney General v Leveller Magazine Ltd* [1979] AC 440, 449H–450B, per Lord Diplock, and recently *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2) (Guardian News and Media Ltd intervening)* [2011] QB 218, paras 38–39, per Lord Judge CJ.

11 The open justice principle is not a mere procedural rule. It is a fundamental common law principle. In *Scott v Scott* [1913] AC 417, Lord Shaw of Dunfermline (p 476) criticised the decision of the lower court to hold a hearing in camera as constituting “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”. Viscount Haldane LC (p 438) said that any judge faced with a demand to depart from the general rule must treat the question “as one of principle, and as turning, not on convenience, but on necessity”.

12 Secondly, trials are conducted on the basis of the principle of natural justice. There are a number of strands to this. A party has a right to know the case against him and the evidence on which it is based. He is entitled to have the opportunity to respond to any such evidence and to any submissions made by the other side. The other side may not advance contentions or adduce evidence of which he is kept in ignorance. The Privy Council said in the civil case of *Kanda v Government of Malaya* [1962] AC 322, 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.”

13 Another aspect of the principle of natural justice is that the parties should be given an opportunity to call their own witnesses and to cross-

A examine the opposing witnesses. As was said by the High Court of Australia in *Lee v The Queen* (1998) 195 CLR 594, para 32: “Confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial.”

B 14 I do not believe that any of this is controversial, but it needs to be emphasised because, unlike the law relating to PII, a closed material procedure involves a departure from both the open justice and the natural justice principles. In recent years, both the courts and Parliament have been exercised by the problem of how to balance (i) the interest that we all have in maintaining a fair system of justice which, so far as possible, respects the essential elements of these principles and (ii) the interest that we also all have in the protection of national security, the international relations of the United Kingdom and the prevention, detection and prosecution of crime. C Thus, Parliament has reacted to the threat of terrorism to our national security interests by introducing a form of closed material procedure (with the use of special advocates) for use in certain categories of case, for example, by enacting the Prevention of Terrorism Act 2005 and the Counter-Terrorism Act 2008.

D 15 A striking example of a case where the court had to balance these two competing interests is *Carnduff v Rock* [2001] 1 WLR 1786. A registered police informer brought an action against the police to recover payment for information and assistance provided to the police. The defendants denied any contractual liability to make such payments or that any information or assistance provided by the plaintiff had led to the arrests or the prosecutions alleged. The claim was struck out by the Court of Appeal on the grounds that a fair trial of the issues raised by the pleadings would require the police to disclose, and the court to investigate and adjudicate upon, sensitive information which should in the public interest remain confidential to the police. Laws LJ (with whom Jonathan Parker LJ agreed) said, at para 36:

F “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.”

G 16 This is the only case that was cited to us in which the court has decided that the public interest in maintaining confidential information trumps the public interest in the administration of justice to the extent that *on that ground* a trial has been denied altogether.

17 This is the background against which the important issues raised by this appeal fall to be considered.

H *The inherent power of the court to regulate its own procedure*

18 A distinction should be made at the outset between the court (i) exercising its inherent power to control its own procedure and (ii) exercising its general power to develop the substantive common law incrementally. We are not here concerned with (ii), a paradigm example of

which would be the incremental development by the courts of the law of negligence. We are concerned with (i). In his seminal article “The Inherent Jurisdiction of the Court” [1970] Current Legal Problems 23, Sir Jack Jacob said: “the source of the inherent jurisdiction of the court is derived from its nature as a court of law, so that the limits of such jurisdiction are not easy to define, and indeed appear to elude definition.” But there is no doubt that the court’s inherent power to regulate its own procedures is not unlimited. For example, the power may not be exercised in *contravention* of legislation or rules of court. In the words of Sir Jack Jacob [1970] Current Legal Problems 23, 24: “the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision.” In such a case, its power has been removed by statute and cannot be exercised.

19 In proceedings which are not regulated by statute or statutory rules, it might be thought that there are no limits to the inherent power of the court to regulate its own procedure and that it has an untrammelled power to manage litigation in whatever way it considers necessary or expedient in the interests of justice.

20 There are many examples of the court in the exercise of its inherent power introducing procedural innovations in the interests of justice. Thus it invented the power to grant *Mareva* injunctions (see *Mareva Navigation Co Ltd v Canaria Armadora SA* [1977] 1 Lloyd’s Rep 368) and make *Anton Piller* orders: see *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55. These orders were devised to prevent misuse of the court’s procedure and to ensure that its procedure is effective. The PII procedure was also a creature of the common law devised by the court in the exercise of its inherent power to regulate its own procedures. The remedy of discovery (now known as disclosure) was developed by the courts of equity in order to aid the administration of justice. Upon the amalgamation of the Court of Chancery and the common law courts into the High Court by the Judicature Acts, that remedy came to be governed by the Rules of Court. It is now contained in CPR Pt 31. The rules governing disclosure recognised that conflict may arise between the public interest in the administration of justice and other public interests which preclude the disclosure of all relevant materials. The law of PII was developed to deal with such situations. The court was exercising its inherent power in controlling its own procedures by deciding the scope of disclosure in cases involving confidential material. The scope of disclosure has long been seen as a matter on which the court has jurisdiction to decide.

21 But even in an area which is not the subject of statute or statutory procedural rules, there are limits to the court’s inherent jurisdiction to regulate how civil and criminal proceedings should be conducted. In my view, there is considerable force in what Professor M S Dockray said in “The Inherent Jurisdiction to Regulate Civil Proceedings” (1997) 113 LQR 120, 131:

“A matter which is procedural from the position of an applicant may be constitutional in the eyes of the respondent. The fact that procedural law can be described as subordinate or adjectival because it aims to give effect to substantive rules should not conceal the truth that procedures can and do interfere with important human rights, while the means by which a decision is reached may be just as important as the decision which

- A is made in the end. Where procedure is as important as substance, procedural change requires the same degree of political accountability and economic and social foresight as reform of an equivalent rule of substantive law. Major innovations in procedural law should therefore be recognised as an institutional responsibility, not a matter on which individual judges should respond to the pleas of particular litigants.
- B Procedural revolutions should appear first in statutes or in the Rules of Court, not in the law reports.”

- 22 For example, it is surely not in doubt that a court cannot conduct a trial inquisitorially rather than by means of an adversarial process (at any rate, not without the consent of the parties) or hold a hearing from which one of the parties is excluded. These (admittedly extreme) examples show that the court’s power to regulate its own procedures is subject to certain
- C limitations. The basic rule is that (subject to certain established and limited exceptions) 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. To put the same point in a different way, the court must exercise the power to regulate its procedure in
- D a way which respects these two important principles which are integral to the common law right to a fair trial.

Discussion

Is there a common law power to require a closed material procedure?

- 23 Mr Crow QC submits that the PII system suffers from five serious defects. These are that (i) the balancing exercise is inherently difficult to perform, because the two public interests are fundamentally different (it involves, as he put it, a comparison of apples and pears); (ii) if the balance is struck against disclosure, relevant evidence is excluded from the trial (thereby reducing the chances that the court will reach the right result); (iii) the party holding the sensitive undisclosed material knows its contents which may inform its preparation and/or conduct of the trial, thereby
- F putting it at an unfair advantage over the other party; (iv) if the balance is struck in favour of disclosure, the party holding the material that is ordered to be disclosed is faced with the invidious choice of disclosing the material, despite the harm that this would or might cause to the public interest, or refusing disclosure and facing the possibility of having to concede the whole of the other side’s case. As *Carnduff v Rock* [2001] 1 WLR 1786 demonstrates, the court may be faced with the stark choice between
- G depriving a defendant of the means to defend himself and striking out the claim on the grounds that it is untriable; and (v) the scale of the PII exercise is sometimes so vast that it can take years to complete. As regards (v), as already pointed out, it is said that in the present case as many as 140,000 documents may have to be the subject of the PII process: a massive and expensive task which will inevitably mean that it will not be possible for the trial to take place for a very long time.

- H 24 Mr Crow submits that the closed material procedure does not suffer from these defects. If such a procedure is adopted, the court is able to see and take into account at trial relevant material (written and oral) whose disclosure would, applying the PII principles, be excluded from the trial process altogether, regardless of whether the material is of assistance to the

claimant or the defendant. If the balancing exercise favours non-disclosure, the defendant may have no adequate basis to defend itself in reliance on the open material when, if the truth were known and the sensitive material were referred to, it had a complete answer to the claim. The court would be able to review relevant material in the overall interests of justice and to do so with the assistance of special advocates who would be able to make submissions on behalf of the party from whom open disclosure was being withheld. In short, in an appropriate case, a closed procedure is more likely than PII to achieve justice *through* a fair trial.

25 Since the shortcomings in the PII process to which Mr Crow draws attention are inherent in the process and are of general application, the logic of his arguments ought to lead to the conclusion that the court should exercise its power *in most if not all cases* to adopt a closed material procedure rather than PII. But his submission is more modest. He seeks to secure from the court no more than an acknowledgement that, in principle, the court has the power to adopt the closed material procedure and that it should exercise that power in exceptional cases where this is *necessary* in the interests of justice. He derives the necessity test from *Scott v Scott* [1913] AC 417, 436, per Viscount Haldane LC.

26 *Scott v Scott* was addressing the very important principle that justice should be administered in public and recognised that there may be a departure from that principle where that is necessary in the interests of justice.

27 It is one thing to say that the open justice principle may be abrogated if justice cannot otherwise be achieved. As Lord Bingham of Cornhill said in *R v Davis* [2008] AC 1128, para 28, the rights of a litigating party are the same whether a trial is conducted in camera or in open court and whether or not the course of the proceedings may be reported in the media. 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). *Scott v Scott* [1913] AC 417 is no authority for such a proposition. How can such a step ever satisfy the requirements of justice? And if the court does have the power to deny a litigant this fundamental common law right, in what circumstances is it appropriate to exercise it? These are the questions that lie at the heart of this appeal.

28 Before attempting to answer these questions, I think that it is instructive to consider *R v Davis* in more detail. It concerned the question whether the judge at a criminal trial could permit witnesses to give evidence for the prosecution under conditions of anonymity. The perceived need for anonymity arose because, owing to threats of intimidation, the witnesses would not be willing to give their evidence without it. In the Court of Appeal [2006] 1 WLR 3130, para 13, Sir Igor Judge P said that the court possesses an inherent jurisdiction at common law to control its own proceedings, if necessary by adapting and developing its existing processes “to defeat any attempted thwarting of its process”: see per Lord Morris of Borth-y-Gest in *Connelly v Director of Public Prosecutions* [1964] AC 1254, 1301. The court concluded that the anonymity ruling did not prevent proper investigation with the witnesses in open court of the essential elements of the defence.

A 29 The House of Lords disagreed. Lord Bingham referred [2008] AC 1128, para 5 to the

“long-established principle of the English common law that, subject to certain exceptions and statutory qualifications, the defendant in a criminal trial should be confronted by his accusers in order that he may cross-examine them and challenge their evidence.”

B The authorities to which Lord Bingham referred at para 5 in support of this proposition were in the field of both criminal and civil law. Thus, for example, in 1720 in a civil case the court declared in *Duke of Dorset v Girdler* (1720) Prec Ch 531, 532 that “the other side ought not to be deprived of the opportunity of confronting the witnesses, and examining them publicly, which has always been found the most effectual method for discovering of the truth”.

C 30 In rejecting the conclusion of the Court of Appeal, Lord Bingham said, at para 34, that at no point in its judgment did the Court of Appeal

“acknowledge that the right to be confronted by one’s accusers is a right recognised by the common law for centuries, and it is not enough if counsel sees the accusers if they are unknown to and unseen by the defendant.”

D 31 It is worthy of note that the House of Lords reached its decision in the face of arguments advanced on behalf of the Crown which included (i) the problem of witness intimidation is real and prevalent and, unless witnesses are allowed to give evidence under conditions of anonymity, dangerous criminals will walk free and society and the administration of justice will suffer; (ii) as Viscount Haldane LC said in *Scott v Scott* [1913] AC 417, the paramount object must always be to do justice and if, in order to do justice, some adaptation of ordinary procedure is called for, it should be made, so long as the overall fairness of the trial is not compromised; and (iii) the Strasbourg jurisprudence does not condemn the use of measures to protect witnesses. These arguments did not prevail. The common law right to be confronted by one’s accusers (an essential element of a fair trial) could not be abrogated by the courts. Any such abrogation was a matter for Parliament. Lord Bingham said [2008] AC 1128, para 28 that it was pertinent to recall the observations of Lord Shaw in *Scott v Scott* [1913] AC 417, 477–478: “There is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure, and at the instance of judges themselves.” Lord Rodger of Earlsferry said [2008] AC 1128, para 45 that Parliament was the proper body to decide whether a change in the law on the way that witnesses gave their evidence where intimidation is a problem was required, and, if so, to devise an appropriate system which still ensures a fair trial. Lord Brown of Eaton-under-Heywood said at para 66 that it was for the Government to decide whether to legislate in the field. Meanwhile, the emasculation of the common law principle must not only be halted but reversed. And Lord Mance made similar observations at para 98.

H 32 Lord Brown of Eaton-Heywood JSC at para 78 of his judgment in the present case suggests that there is a real difference between this case and *R v Davis* in that legislation to meet the problem was envisaged in *R v Davis*, whereas it is highly doubtful whether Parliament will legislate speedily to introduce a closed procedure. But I do not think that the House of Lords’

principled refusal to abrogate the common law right to be confronted by one's accusers can be explained by reference to a belief that Parliament would speedily intervene to resolve the problem. A

33 The House did not state whether the protective measures imposed by the trial judge were ones which the court had no power to impose, or whether, although the power existed, it was inappropriate to exercise it. That is no doubt because it makes no practical difference. Lord Bingham was content to say at para 35 that the protective measures "hampered the conduct of the defence in a manner and to an extent which was unlawful and rendered the trial unfair". B

34 It is not difficult to see the similarities between the arguments that were rejected by the House of Lords in *R v Davis* and those advanced by Mr Crow. The problem here is not that dangerous criminals will walk free. It is that in sensitive material cases, parties will not be able to develop their true case on the basis of all the relevant material with the result that parties will sometimes lose cases that they should win. A defendant who is ordered to disclose sensitive material on a PII hearing has the invidious choice of disclosing material that will damage some important public interest or making admissions and, in an extreme case, conceding the claim. C

35 I return to the questions that lie at the heart of this appeal. In my view, the analogy with *R v Davis* is compelling. As I have said, the fact that *R v Davis* was a criminal case is not material. The issues considered were of application to trials generally. It decided that, subject to certain exceptions and statutory qualifications, the right to be confronted by one's accusers is such a fundamental element of the common law right to a fair trial that the court cannot abrogate it in the exercise of its inherent power. Only Parliament can do that. The closed material procedure excludes a party from the closed part of the trial. He cannot see the witnesses who speak in that part of the trial; nor can he see closed documents; he cannot hear or read the closed evidence or the submissions made in the closed hearing; and finally he cannot see the judge delivering the closed judgment nor can he read it. D E

36 Can all of these flaws be cured by a special advocate system? No doubt, special advocates can mitigate these weaknesses to some extent and in some cases the litigant may be able to add little or nothing to what the special advocate can do. For example, this will be the case where the litigant has no knowledge of the matters to which the closed material relates and can give no instructions which will enable the special advocate to perform his function more effectively. But in many cases, the special advocate will be hampered by not being able to take instructions from his client on the closed material. A further problem is that it may not always be possible for the judge (even with the benefit of assistance from the special advocate) to decide whether the special advocate will be hampered in this way. F G

37 The limitations of the special advocate system, even in the context of the statutory contexts for which they were devised, were highlighted by the Joint Committee on Human Rights in their report on *Counter-Terrorism Policy and Human Rights* (16th report): Annual Renewal of Control Orders Legislation 2010, 9th report of Session 2009–2010, (HL Paper 64/HC 395) (26 February 2010) in the context of the Prevention of Terrorism Act 2005 and cases heard by the Special Immigration Appeals Commission. This report was based on the first-hand experience of those who have acted as H

A special advocates. As the Court of Appeal noted at para 57, it is the committee's view after five years of operation that the closed material procedure (with special advocates) operated under the statutory regimes is not capable of ensuring the substantial measure of procedural justice that is required. At para 210 of its earlier report, *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning*, 19th report of Session 2006–2007, HL Paper 157/HC 394, (30 July 2007), the committee had concluded:

“After listening to the evidence of the special advocates, we found it hard not to reach for well worn descriptions of it as ‘Kafkaesque’ or like the Star Chamber. The special advocates agreed when it was put to them that, in the light of the concerns they had raised, ‘the public should be left in absolutely no doubt that what is happening . . . has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system.’ Indeed, we were left with the very strong feeling that this is a process which is not just offensive to the basic principles of adversarial justice in which lawyers are steeped, but it is very much against the basic notions of fair play as the lay public would understand them.”

D These views may not sufficiently take account of specific statutory protections, (such as those set out in rule 54 of the Employment Tribunals Rules of Procedure contained in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (SI 2004/1861)) to which Lord Mance JSC refers at para 10 of his judgment in *Tariq v Home Office* [2012] 1 AC 452 but they do throw light on the limitations of the special advocate system.

E 38 In my view, Mr Crow provided no satisfactory answer to the questions (i) why it is necessary to introduce a procedure which would deprive a litigant of his fundamental common law rights or (ii) in what circumstances the power to order a closed material procedure should be exercised. Since he disavows the wholesale replacement of PII with the closed procedure, it is difficult to see the relevance of the defects alleged by him in the one and the advantages he claims for the other. As regards the problem of the time-consuming exercise that has to be performed in a PII process, I agree with what Lord Clarke JSC says at para 152 of his judgment: a closed procedure would not achieve any saving.

G 39 Mr Crow's answer to the two questions that I have posed is that the court has the power to order a closed material procedure in exceptional cases where this is necessary in the interests of justice. But this simply prompts the further question: in what circumstances can it ever be in the interests of justice to deny a litigant in ordinary civil claims (including claims for judicial review) the rights which are entrenched in our common law system as being fundamental requirements of justice itself? I deal with special cases at paras 63 to 65 below. Mr Crow did not give a concrete example of a case where the court would or might exercise this exceptional power. This amply demonstrates that the test that he proposes is vague. It is likely to cause uncertainty in the minds of litigants and their advisers and to lead to unwelcome satellite litigation.

H 40 Lord Clarke JSC agrees that the court has the power to order a closed procedure where this is necessary in the interests of justice, and at

paras 159–164 and 178–181 he suggests circumstances in which it may be appropriate to exercise the power. He says that, in the exercise of its inherent jurisdiction, the court has the power *after the PII process has been completed* to order some form of closed procedure involving special advocates. Thus the claimants might seek a closed procedure if they thought that there were advantages in such a procedure, especially if their case was thought to depend to any significant extent on documents in the possession of the defendants. The defendants might also wish to have such a procedure depending on the circumstances. Lord Clarke JSC says that the court has adopted novel procedures in not dissimilar situations by way of development of the common law and pursuant to its obligation under CPR Pt 1 to deal with cases justly. There is no reason why the common law should not be able to develop along these lines. It would be a “development of the common law of PII”.

41 I respectfully disagree with this approach. First, no form of closed material procedure can properly be described as a development of the common law of PII, although there is no objection to the use of special advocates to enhance the PII process: see para 49 below. In many ways, a closed procedure is the very antithesis of a PII procedure. They are fundamentally different from each other. The PII procedure respects the common law principles to which I have referred. If documents are disclosed as a result of the process, they are available to both parties and to the court. If they are not disclosed, they are available neither to the other parties nor to the court. Both parties are entitled to full participation in all aspects of the litigation. There is no unfairness or inequality of arms. The effect of a closed material procedure is that closed documents are only available to the party which possesses them, the other side’s special advocate and the court. I have already referred to the limits of the special advocate system.

42 Secondly, it is obviously true that party A who is in possession of the closed material will know whether there is material on which it may wish to rely and will therefore be in a position to decide whether to ask the court to order a closed procedure in relation to that material. But it is difficult to see how opposing party B will know whether his case will be assisted by, or even depend to a significant extent on, the closed material held by A without knowing what the material is and what it contains. If a special advocate is appointed, he might be able to assess the importance of some of the documents, but the scope for doing so without being able to take instructions from B is bound to be limited. It follows that, if the power to order a closed material procedure turns on such considerations, it is likely to operate in favour of A and to the disadvantage of B. In my view, this is an approach which is inherently unfair. It is certainly not necessary in the interests of justice.

43 Thirdly, it is difficult to see how on the suggested approach the court would be able to judge whether to order a closed procedure in any particular case. Would the court be called upon to decide whether the closed documents are likely to advance the case of one or other of the parties and, if so, how would it do this and what test would it apply? Would the material have to be crucial to the case of the party seeking the closed procedure or would it be sufficient that it provides some support for it? This is not an exercise that the court should be required to perform. It would be likely to give rise to argument about whether the closed material is or is not likely to

A help the cause of the party seeking to invoke the procedure. It would be a recipe for satellite litigation. It would merely add to the complexity and expense of the whole process.

B 44 Fourthly, to allow a closed procedure in circumstances which are not clearly defined could easily be the thin end of the wedge. This is the point that was made by Lord Shaw in his celebrated speech in *Scott v Scott* [1913] AC 417, 477–478: see para 31 above. Mr Crow’s undefined exceptional circumstances in the interest of justice could develop into something more defined and exorbitant. So too could Lord Clarke JSC’s suggested approach. This would be a big step for the law to take in view of the fundamental principles at stake. In my view, this is a matter for Parliament and not the courts.

C 45 Fifthly, like Lord Clarke JSC (subject to the one qualification that he mentions—as to which I express my views at paras 60 and 61 below), I accept the fundamental principles stated by the Court of Appeal at para 70 of its judgment which he has quoted at para 167 below. But in my view these principles do not sit happily with what he proposes. A closed procedure in the circumstances that he suggests would cut across the fundamental principles of the right to a fair trial and the right to know the reasons for the outcome. It would complicate a well-established procedure for dealing with the problem, namely the PII procedure. And for the reasons that I have given would be likely to add to the uncertainty, cost, complexity and delay of all stages of the litigation.

E 46 As I understand it, Lord Mance JSC (with whom Baroness Hale of Richmond JSC agrees) adopts the view of Lord Clarke JSC that the closed material procedure should not be an alternative to PII, but that it may be ordered in addition to PII in certain circumstances. They differ, however, over the circumstances in which a closed procedure may be ordered. Lord Mance JSC limits himself to cases where closed material is in the defendant’s possession and the claimant, in order to avoid his or her claim being struck out, consents to a closed material procedure. The differences between them show that different views may be held as to how the test of “necessity” should be applied in this context. These differences lend further support to the view that, if a closed material procedure is to be available in ordinary civil claims, the decision as to when it might be “necessary” for such a procedure to be used should be left to Parliament. I should make it clear that, like the Court of Appeal (para 71), I leave open the question whether a closed material procedure can properly be adopted where the parties agree. We heard no argument on this point.

G 47 Closed material procedures and the use of special advocates continue to be controversial. In my view, it is not for the courts to extend such a controversial procedure beyond the boundaries which Parliament has chosen to draw for its use thus far. It is controversial precisely because it involves an invasion of the fundamental common law principles to which I have referred. I would echo what Lord Phillips of Worth Matravers said in *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269. H It is true that this was a case concerning the requirements of a fair trial under article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, but in my view it is equally applicable in relation to the common law requirements of a fair trial. At para 64, he said that the best way of producing a fair trial is to ensure that a party has the

fullest information of the allegations against him and the evidence (both oral and documentary) that is relied on in support of those allegations. Both our criminal and civil procedures set out to achieve those aims. In some circumstances, however, they run into conflict with other aspects of the public interest. He then said: “How that conflict is to be resolved is a matter for Parliament and for government, subject to the law laid down by Parliament.”

48 The common law principles to which I have referred are extremely important and should not be eroded unless there is a compelling case for doing so. If this is to be done at all, it is better done by Parliament after full consultation and proper consideration of the sensitive issues involved. It is not surprising that Parliament has seen fit to make provision for a closed material procedure in certain carefully defined situations and has required the making of detailed procedural rules to give effect to the legislation.

49 There is no compelling reason for taking the course that is urged by Mr Crow or that which is suggested by Lord Clarke JSC. The PII process is not perfect. Perfection cannot be achieved in any system. It has been improved over time as the history of its development shows. One particular development to note is the use of special advocates to enhance the PII process. There can be no objection to the use of special advocates for that purpose, since the PII process fully respects the principles of open justice and natural justice. There is nothing objectionable about excluding a party from the PII process. There can, therefore, be no objection to improving the position of that party in the process by the use of a special advocate.

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 v Rock* [2001] 1 WLR 1786. 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 v Rock* 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.

Previous authority

51 As in the Court of Appeal, so here Mr Crow relies on a number of previous authorities where the use of special advocates in a closed material procedure was approved. These were discussed by the Court of Appeal at paras 58–66 of their judgment. Lord Clarke JSC suggests at para 166 below that the Court of Appeal distinguished these cases on the basis that they were not ordinary “civil” claims. But that was not the only reason given by the Court of Appeal for refusing to follow those decisions. In none of the cases was proper consideration given to the question whether a closed material procedure was a permissible development of the common law.

52 Thus, in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, para 31 Lord Woolf MR stated (obiter) that, albeit only “in the most extreme circumstances”, the Court of Appeal could hear submissions in the absence of a party and his counsel under the inherent jurisdiction of the court on the basis that the party’s interests could be protected by a special advocate. But there is no suggestion that the contrary was argued.

A 53 *R v Shayler* [2003] 1 AC 247 was concerned with a preparatory hearing in relation to a defendant who was charged with unauthorised disclosure of material under the Official Secrets Act 1989. A question arose as to whether the defendant could disclose the material to his lawyers. At para 34, Lord Bingham said that, following what Lord Woolf MR said in the *Rehman* case in the unlikely event of the court having to consider the material which could not be disclosed to the defendant's lawyers, a special advocate could be appointed. As the Court of Appeal said at para 61, there would have been no question of the defendant himself being in ignorance of the material or of his being excluded from the hearing where it was considered. It was, therefore, not a closed material procedure at all. In any event, what Lord Bingham said was based on para 31 of the *Rehman* case and does not appear to have been the subject of contrary argument.

C 54 In *R v H* [2004] 2 AC 134, para 22, Lord Bingham made some observations about the use of a special advocate in a PII procedure. But as discussed at para 49 above, that is not the kind of closed material procedure with which we are concerned.

D 55 In *R (Roberts) v Parole Board* [2005] 2 AC 738, the Parole Board decided that evidence on which the Home Secretary intended to rely should be heard in the absence of, and not disclosed to, the claimant or his legal representatives, since to do so would put an informant at risk. Instead they directed that the evidence should be disclosed only to a special advocate. The board had express power under the relevant rules to withhold material which otherwise had to be served on a prisoner. In other words, there was express statutory power to adopt a closed material procedure. One of the issues was whether there was power to require a special advocate. The board had power under paragraph 1(2)(b) of Schedule 5 to the Criminal Justice Act 1991 to do anything incidental or conducive to the discharge of its functions. It was held that appointing a special advocate to mitigate the adverse effects of the closed procedure would be an exercise of that power. The *Roberts* case, therefore, provides no basis for concluding that a court may determine a civil claim on its merits using a closed material procedure in the absence of a specific enactment authorising it to do so.

F 56 In *R (Malik) v Manchester Crown Court* [2008] 4 All ER 403, when giving the judgment of the Divisional Court, I reviewed a number of the authorities about the use of special advocates. But as the Court of Appeal said at para 64, no argument was advanced that the Crown Court had no power to order a closed material procedure in the absence of an enactment enabling it to do so. The sole question was whether the court should have appointed a special advocate of its own motion.

G 57 In *A v HM Treasury* [2010] 2 AC 534, when giving the majority judgment of the Court of Appeal, Sir Anthony Clarke MR said, at paras 58 and 60, that in an appropriate case the court would have power to authorise or request the use of a special advocate even where this was not sanctioned by Parliament. But here too there does not appear to have been any argument as to whether the court had power to order a closed material procedure in the first place.

H 58 Finally, in *R (AHK) v Secretary of State for the Home Department (Practice Note)* [2009] 1 WLR 2049, paras 37–38, Sir Anthony Clarke MR giving the judgment of the Court of Appeal gave guidance as to the circumstances in which a special advocate could be appointed. Here too,

there was no debate as to whether the court could order a closed material procedure. It seems to have been assumed that it could. A

59 None of these authorities is binding on this court. In none of them was there any consideration of the issues which have been considered in detail over two days of argument by this court. They do not amount to a secure and established line of authority to support the proposition that the court has power to order a closed material procedure in the absence of statutory authority. B

The Civil Procedure Rules

60 At para 43, the Court of Appeal, ante, p 549, said that they considered that the defendants faced “very serious difficulties in their contention that the closed material procedure is compatible with the CPR”. They explained why this was the case at paras 41–48. I see the force of the points made by the Court of Appeal and they are supported by Ms Rose QC and Mr Howell QC. In short, there are detailed rules for the filing and service of a defence (CPR rr 15.2 and 16.5); disclosure (CPR r 31.5); giving of evidence orally (CPR r 32.2) and the provision of witness statements: CPR rr 32.4 and 32.5. There is no provision for the filing and service of a closed defence or for closed disclosure or the giving of evidence in a closed hearing or the provision of closed witness statements. By contrast, CPR Pts 76 and 79 explicitly modify or disapply those Parts of the CPR for the purpose of the particular proceedings in which Parliament has decided that a closed material procedure may be used. C
D

61 These points based on the CPR provide some further support for the conclusion which I have reached for other reasons. The rules make no provision for a closed procedure except in circumstances where it is authorised by statute. On the face of it, the general rules are inconsistent with a closed material procedure. But I do not consider that, if the argument based on the CPR stood alone, it would have been sufficient to carry the day for the respondent. It is not sufficiently clear that a closed material procedure would *contravene* the CPR to say that on that account the court has no power to order such a procedure. E
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“Ordinary civil claims”

62 I agree with Lord Clarke JSC, for the reasons that he gives, that there can be no principled basis for distinguishing between ordinary civil claims and claims for judicial review. I would accept the submission of Mr Howell that the mere fact that there may be a public interest involved in the determination of a case does not mean that the court may disregard the duty imposed on it by the law relating to PII or may override the fundamental rights of a party to civil litigation recognised at common law. G

63 But I agree that there are certain classes of case where a departure from the normal rule may be justified for special reasons in the interests of justice. Thus as Baroness Hale of Richmond said in *Secretary of State for the Home Department v MB* [2008] AC 440, para 58: H

“If . . . the whole object of the proceedings is to protect and promote the best interests of a child, there may be exceptional circumstances in which disclosure of some of the evidence would be so detrimental to the child’s welfare as to defeat the object of the exercise.”

A Wardship proceedings are an obvious example of such a case: see *In re K (Infants)* [1965] AC 201, 241A, per Lord Devlin. Cases involving children raise different considerations from those which arise in ordinary civil litigation. That is because the interests of children are paramount. It follows that where the interests of the child are served, so too are the interests of justice.

B 64 Similarly, where the whole object of the proceedings is to protect a commercial interest, full disclosure may not be possible if it would render the proceedings futile. This problem occurs in intellectual property proceedings. It is commonplace to deal with the issue of disclosure by establishing “confidentiality rings” of persons who may see certain confidential material which is withheld from one or more of the parties to the litigation at least in its initial stages. Such claims by their very nature
C raise special problems which *require* exceptional solutions. I am not aware of a case in which a court has approved a trial of such a case proceeding in circumstances where one party was denied access to evidence which was being relied on at the trial by the other party.

D 65 In my view, the children and confidentiality cases cannot be relied on to justify creating a rule of general application in ordinary civil litigation. These are two narrowly defined categories of case where a departure from the usual rules of procedure has been held to be justified. So far as I am aware, the procedures adopted in these cases are not regarded as controversial and work satisfactorily. By contrast, the closed material procedure is controversial and, in some quarters at least, is regarded as unsatisfactory.

E 66 Reference was also made by Mr Crow to proceedings before the Competition Appeal Tribunal (“CAT”) and, for example, the case of *Carphone Warehouse Group plc v Office of Communications* [2009] CAT 37 where the tribunal refused disclosure for the purpose of the substantive hearing. But the CAT emphasised the distinction between the inquisitorial procedure that is adopted in statutory appeals before it and the adversarial procedure adopted in civil trials.

F
Conclusion

G 67 As Lord Clarke JSC has emphasised, the common law is flexible. It develops over time in response to changing circumstances. Sometimes, it takes giant steps forward. More often, it evolves gradually and cautiously. But any change must be justified, otherwise the law becomes unstable. This
H is particularly important where a change involves an inroad into a fundamental common law right. The introduction of a closed material procedure in ordinary civil claims (including claims for judicial review) would do just that. Mr Crow suggests that the court should have the power to replace the PII process with a closed material procedure in exceptional circumstances where this is in the interests of justice. Lord Clarke JSC suggests that the court should be able to supplement the PII process with such a procedure in exceptional circumstances. For the reasons that I have given, there is no compelling reason for change. The PII process is not perfect, but it works well enough. In some cases, it is cumbersome and costly to operate, but a closed material procedure would be no less so.

68 It is true that, by a majority, this court has decided in *Tariq v Home Office* [2012] 1 AC 452 that the use of a statutory closed material procedure before the employment tribunal is lawful under article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) and EU law. But the lawfulness of a closed material procedure under article 6 and under the common law are distinct questions. As Lord Bingham said in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, para 20, “It is of course open to member states to provide for rights more generous than those guaranteed by the Convention”. It is, therefore, open to our courts to provide greater protection through the common law than that which is guaranteed by the Convention.

69 As the Court of Appeal said at para 69 of their judgment, “never say never” is often an appropriate catchphrase to use in the context of the common law. Nobody can predict how the law will develop in the future. We are concerned with the position as it is now. But for the reasons that I have given, I agree with the Court of Appeal that the issues of principle raised by the closed material procedure are 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. No doubt, if Parliament did decide on such a course, it would do so in a carefully defined way and would require detailed procedural rules to be made (such as CPR Pts 76 and 79) to regulate the procedure.

LORD HOPE OF CRAIGHEAD DPSC

70 The issues in this case have been set out so clearly and so comprehensively by Lord Clarke of Stone-cum-Ebony and Lord Dyson JSC that I can go directly to the heart of the question that is before us.

71 The word “never” is such a blunt and uncompromising expression that one has a natural reluctance to lean against it, especially in a case such as this where, as Lord Clarke JSC points out in para 125, we are being asked to decide the issue without reference to the facts of any particular case. But the issue is essentially one of principle. I can see the attractions of the approach that Lord Phillips of Worth Matraves PSC takes, which is to deal only with the preliminary issue which was before the Court of Appeal and not to engage in a consideration of the wider question as to whether it would ever be right for the closed material procedure to be introduced for ordinary civil litigation without the authority of Parliament: see paras 192 and 197. I would like him give a negative answer, for the reasons that Lord Clarke of Stone-cum-Ebony JSC has explained, to the question whether the established PII procedure should be replaced by some sort of closed procedure at common law. I agree that such a fundamental change to that long-established procedure cannot properly be seen as a development of the common law and that it could only be brought about by Parliament. But the argument both in the Court of Appeal and before this court was addressed to the wider issue too. I do not think that it would be right for us to leave the wider issue in a state of uncertainty.

72 I have always believed that a court of unlimited jurisdiction is the master of its own procedure. But that does not mean that the court can do what it likes. Everything that it does must have regard to the fundamental principles of open justice and of fairness. The principle of legality demands nothing less than that. There is, of course, a very wide area of procedure where these issues of principle are not engaged at all. There comes a point,

- A however, where the line must be drawn between procedural choices which are regulatory only and procedural choices that affect the very substance of the notion of a fair trial. Choices as to how the conduct of the court's business may be simplified, made less expensive or made easier to understand are one thing. Choices that cut across absolutely fundamental principles such as the right to a fair trial, the right to be confronted by one's
B accusers and the right to know the reasons for the outcome are entirely different. The court has for centuries held the line as the guardian of these fundamental principles.

- 73 I can see the force of the argument that there are circumstances where justice cannot be done unless a closed procedure is adopted. It is advanced, as Lord Brown of Eaton-Heywood JSC puts it in para 81, as the least bad solution to a difficult problem. But I think that the court must
C resist the temptation to go down that road. It would, at best, be an uncertain journey, beset by problems of the kind that Lord Dyson JSC refers to in para 43. It would also run the risk of opening the door to something else. As the Court of Appeal said, ante, p 555, para 69, it is a melancholy truth that a procedure or approach which is sanctioned by the court expressly on the basis that it is applicable only in exceptional circumstances none the less
D often becomes common practice. Lord Shaw of Dunfermline's warning in *Scott v Scott* [1913] AC 417, 477-478, against the usurpation of fundamental rights that proceeds little by little under the cover of rules of procedure remains just as true today as it was then. This is not the time to weaken the law's defences. On the contrary, any weakening in the face of
E advances in the methods and use of secret intelligence in a case such as this would be bound to lead to attempts to widen the scope for an exception to be made to the principle of open justice. That would create a state of uncertainty in an area of our law which would be inimical to the concept of a fundamental right.

- 74 The proposition that a closed material procedure should only be introduced in ordinary civil litigation if Parliament sees fit to do so should not be seen as surrendering to Parliament something which lies within the
F area of the court's responsibility. Instead it is a recognition that the basic question raises such fundamental issues as to where the balance lies between the principles of open justice and of fairness and the demands of national security that it is best left for determination through the democratic process conducted by Parliament, following a process of consultation and the gathering of evidence. The detailed working out of any change to the procedure that Parliament may sanction would no doubt be left to the court
G in the exercise of its rule-making powers. The court will, of course, be conscious of its responsibility to see that, so far as it is possible to do so, anything that Parliament enacts is read and given effect in a way that is compatible with the Convention rights.

- 75 The question whether it would be open to the court to adopt a closed material procedure if the parties agreed to this raises difficult issues on which
H we did not hear any argument, not the least of which is the pressure that might be brought to bear on a claimant to agree. Like Lord Kerr of Tonaghmore JSC, I very much doubt whether this would ever be appropriate. But, as we do not need to decide it in this case, the proper course is to leave the question open for the time being.

- 76 I would dismiss the appeal for the reasons given by Lord Dyson JSC.

LORD BROWN OF EATON-UNDER-HEYWOOD JSC

77 I have had the advantage (a very real advantage in this particular case) of reading in draft the judgments of Lord Clarke of Stone-cum-Ebony and Lord Dyson JJSC. Lord Clarke JSC envisages circumstances in which the courts could properly order a closed material procedure (with a special advocate) in ordinary civil litigation and so would allow the appeal. Lord Dyson JSC agrees with the Court of Appeal that this would be impermissible without express parliamentary authorisation. I find it difficult to suppose that either viewpoint could be more persuasively expressed. Yet neither conclusion do I find entirely satisfactory. Let me try to explain.

78 If and 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 JSC’s camp. There seems to me at least as good a reason for saying that Parliament alone could sanction this development as for saying, as the House of Lords did in *R v Davis* [2008] AC 1128, that Parliament alone could sanction the use of anonymous evidence in a criminal trial—an invasion of the common law principle that the defendant has the right to be confronted by (or, as I preferred to put it, the right to know the identity of) his accusers. But there is to my mind a real difference between this case and *R v Davis*. This is not, as Lord Clarke JSC suggests, at para 187, because *R v Davis* was a criminal case. Rather it is because, whereas the majority in *R v Davis* envisaged early legislation to meet the problem—legislation did indeed follow within days although whether it meets the problem remains to be decided by the long-awaited judgment of the Grand Chamber in *Al-Khawaja v United Kingdom* (Applications Nos 26766/05 and 22228/06)—it seems to me highly doubtful whether Parliament will legislate speedily here and even more doubtful whether the introduction of a closed procedure, certainly along the lines both Lord Clarke and Lord Dyson JJSC appear to envisage, would indeed meet the very real problems that arise in cases like this.

79 I speak of “cases like this” because it seems to me quite impossible to discuss the issue raised here on an entirely abstract basis and really only useful to do so in a specific context—the very context, I would suggest, in which the question here *was* raised: a claim against the Intelligence Services and their sponsoring departments of the nature summarised by Lord Clarke JSC, at para 132 of his judgment, essentially alleging complicity in the claimants’ extraordinary rendition, false imprisonment, torture and other ill-treatment, involving, as Lord Clarke JSC notes at para 135, up to 250,000 potentially relevant documents of which up to 140,000 may involve considerations of national security—so that a conventional public interest immunity process, notwithstanding the employment of 60 lawyers specifically for the purpose, would be likely to take upwards of three years.

80 Both Lord Clarke and Lord Dyson JJSC envisage that, before any question could arise of introducing a closed procedure into the proceedings (save in so far as necessary to improve the PII process itself, as recognised by the House of Lords in *R v H* [2004] 2 AC 134—see Lord Clarke JSC at para 150 and Lord Dyson JSC at paras 49 and 54) the conventional PII process would have to be completed with first the minister (see *R v Chief Constable of West Midlands Police, Ex p Wiley* [1995] 1 AC 274) and then

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A the court striking the relevant balances. Lord Clarke JSC makes this plain at paras 152 and 153, Lord Dyson JSC at para 38. Both, in short, appear to envisage that the only real object of the closed procedure proposed here would be to enable a party, wishing to rely on documents held to be undisclosable, and thus inadmissible, in the public interest, to rely on them in closed proceedings. In all likelihood, of course, such a procedure would
B be invoked by the Crown in just such a case as this where many of the relevant documents would almost inevitably be undisclosable in the interests of national security. (Although theoretically it would be open to claimants to seek this procedure in order, first, through their special advocate, to examine the undisclosed documents and then, if thought favourable to their case, to deploy them in closed proceedings, frankly this appears a somewhat unrealistic prospect.)

C 81 The advantage of this approach, suggests Lord Clarke JSC (at para 159), is that it avoids both the unpalatable alternative outcomes: either the trial proceeding without the undisclosable documents (generally, it must be supposed, to the Crown's considerable disadvantage) or the action being struck out on the basis that without the disclosed documents a fair trial is not possible (as in *Carnduff v Rock* [2001] 1 WLR 1786). In short, contend its
D proponents, it is the least bad solution to a difficult problem.

82 For my part, however, I am unpersuaded of this. In the first place, it offers no solution at all to the very real problems of having to conduct a conventional PII process in a case like this. To my mind there need to be compelling reasons to justify the enormous expense, effort and delay involved in such a process here. Secondly, the problem is surely not confined to the disclosure, and thus admissibility, of documents. What about oral
E evidence? Presumably in a case like this the Crown would wish, indeed need, to call witnesses from the Security Service and the Secret Intelligence Service. Documentation aside, how is it suggested that such evidence could satisfactorily be adduced at a public hearing (indeed, any hearing attended by the claimants themselves)? Thirdly, any closed material procedure with special advocates raises problems all its own, considerations of open justice
F apart. As the Court of Appeal observed at para 70(e) of its judgment—an observation expressly concurred in by both Lord Clarke JSC (para 168) and Lord Dyson JSC (para 45)—the envisaged closed material procedure “is likely to add to the uncertainty, cost, complication and delay in the initial and interlocutory stages of proceedings, the trial, the judgment, and any appeal”. Further, as Lord Dyson JSC observes at para 43, it would be a
G recipe for satellite litigation. And on top of all this, and by no means least in importance, is the whole question of open justice.

83 One need not take so extreme a view as that expressed by the Joint Committee on Human Rights in 2010 (see Lord Dyson JSC's judgment at para 37) to recognise the grave inroads into our fundamental principles of open justice and fair trials that are made by closed procedures. Without
H “A-type disclosure” (see my judgment in *Tariq v Home Office* [2012] 1 AC 452, para 86), the claimants may not learn sufficient of the case against them to enable them to give effective instructions to the special advocate to meet it. With such disclosure, however, national security may still be put at risk. Whatever the extent of disclosure, moreover, it will be difficult for the claimants' lawyers to advise on the merits (and difficult for the same reason

to secure public funding), difficult similarly to advise on settlement offers, and difficult too to advise on any appeal. But beyond all these considerations would be the damage done by a closed procedure to the integrity of the judicial process and the reputation of English justice. As Lord Atkin, invoking Milton's *Areopagitica*, famously said in *Ambard v Attorney General for Trinidad and Tobago* [1936] AC 322, 335: "Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men." 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. As the Court of Appeal observed below, ante, p 551, para 56:

"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 claim 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."

84 Lord Clarke JSC (para 161) understands it to be common ground that there could be no objection to a closed procedure were the parties to agree to it (as claimants might, were the only alternative to be the striking out of their claims). For my part I respectfully disagree. The rule of law and the administration of justice concern more, much more, than just the interests of the parties to litigation. The public too has a vital interest in the conduct of proceedings. Open justice is a constitutional principle of the highest importance. It cannot be sacrificed merely on the say so of the parties. In *Scott v Scott* [1913] AC 417 itself, after all, there had been no objection at first instance to the proceedings being conducted in camera. That did not prevent the process thereafter being roundly and resoundingly condemned by the House of Lords.

85 What, then, of the several exceptions to the open justice principle that *have* been recognised by the courts? In so far as these exceptions have a statutory basis, of course, no problem arises. *Tariq v Home Office* [2012] 1 AC 452 is, obviously, a case in point. So, too, the control order cases. And *R (Roberts) v Parole Board* [2005] 2 AC 738 seems to me similarly explicable on essentially the same basis: given that the Parole Board was expressly empowered to withhold evidence from the prisoner and exclude him from hearings devoted to its consideration, the House of Lords understandably (although still only by the narrowest of majorities) sanctioned the use of special advocates specifically so as to provide *additional* protection for the prisoner. No problem arises either in certain well-established classes of case of which the most obvious (perhaps the only) examples are wardship/children proceedings (see Lord Dyson JSC's

A judgment at para 63) and, yet more narrowly circumscribed, certain intellectual property proceedings to protect commercial interests: see Lord Dyson JSC's judgment at para 64. In so far, however, as the defendants seek to rely on other recent decisions or dicta of the Divisional Court or the Court of Appeal—most notably in *R (Malik) v Manchester Crown Court* [2008] 4 All ER 403, *A v HM Treasury* [2010] 2 AC 534 and *R (AHK) v Secretary of State for the Home Department (Practice Note)* [2009] 1 WLR 2049 (albeit in none of these cases does it appear that the propriety of a closed procedure was ever actually argued)—I would simply repeat what I said in *R v Davis* [2008] AC 1128, para 66: “If . . . the Government now think it right to legislate in this field, so be it. Meantime, however, the creeping emasculation of the common law principle must be not only halted but reversed.”

C 86 I come then, finally, to the way ahead. If, as I believe, it would be quite wrong for the common law to be developed to provide for a closed procedure in cases like this, and if, as I have suggested, not even the introduction of such a procedure by Parliament would really solve the problems arising, what should instead be done? For my part I have reached the reluctant conclusion that, by their very nature, claims of the sort advanced here, targeted as they are principally against the Intelligence Services, are quite simply untriable by any remotely conventional open court process. The problems they raise, of oral no less than documentary evidence, are just too deep-seated to be capable of solution within such a process. Far too little would be gained, and far too much lost, by the defendants' proposed development of the common law. In short, some altogether more radical solution is, I believe, required. Realistically there seem to be only two possible solutions. Either cases of this kind, necessarily involving highly sensitive security issues, should go for determination by some body akin to the Investigatory Powers Tribunal which does not pretend to be deciding such claims on a remotely conventional basis: see my judgment in *Tariq v Home Office* [2012] 1 AC 452. Or they must simply be regarded as untriable and struck out on the basis that, as Laws LJ put it in *Carnduff v Rock* [2001] 1 WLR 1786, para 36: “[They] cannot, in truth, be justly tried at all.”

F 87 Obviously, I need hardly add, claims of the sort made here—of the complicity of the Intelligence Services in torture—ought not simply to be swept under the carpet. That, of course, explains why, these particular claims having been settled without admission of liability, they are to be the subject of an inquiry under the chairmanship of Sir Peter Gibson. It is to be hoped that, in the light of that inquiry's findings, together with the responses to the Government's proposed Green Paper, an acceptable way ahead may be found for the resolution of this type of case. Meanwhile, whatever else is to be done, it is certainly not the development of the common law in the way proposed. This is one of those cases where the court should indeed say “never”. The appeal should be dismissed.

H LORD KERR OF TONAGHMORE JSC

88 For the reasons given by Lord Dyson JSC, with which I fully agree, I too would dismiss this appeal.

89 As I have observed in the associated case of *Tariq v Home Office* [2012] 1 AC 452, the right to know and effectively challenge the opposing

case has long been recognised by the common law as a fundamental feature of the judicial process. I referred in my judgment in that case to various celebrated expressions of that principle and I need not repeat them here. The right to be informed of the case made against you is not merely a feature of the adversarial system of trial, it is an elementary and essential prerequisite of fairness. Without it, as Upjohn LJ put it in *In re K (Infants)* [1963] Ch 381, a trial between opposing parties cannot lay claim to the marque of judicial proceedings.

90 And so the key nature of this right and its utter indispensability to the fairness of proceedings must occupy centre stage in the debate as to whether it may be compromised to serve the interests which the defendants claim require to be served and which are said to justify a departure from it.

91 The defendants have advanced two principal arguments in support of the claim that a closed procedure is required in this case. The first of these is pragmatic; the second purportedly a matter of principle. It is first asserted that the exercise involved in conducting a conventional public interest immunity exercise would be so daunting that some means should be found to avoid it. The second argument is that the adoption of a closed procedure will actually conduce to a fairer trial than would otherwise be possible.

92 The first of these arguments can easily be—and, in the judgments of Lord Clarke of Stone-cum-Ebony and Lord Dyson JJSC, has been—disposed of and I need say little more about it. As has been observed, unless there is to be complete abandonment of public interest immunity procedure as a means of catering for the tension between disclosure of relevant material and protection of the public interest, the exercise cannot be avoided. For the reasons given by Lord Clarke JSC, to desert that procedure, so deeply embedded in our system of law, for reasons of expediency simply cannot be contemplated. The seemingly innocuous scheme proposed by the defendants would bring to an end any balancing of, on the one hand, the litigant's right to be apprised of evidence relevant to his case against, on the other, the claimed public interest. This would not be a development of the common law, as the defendants would have it. It would be, at a stroke, the deliberate forfeiture of a fundamental right which, as the Court of Appeal has said in its judgment, ante, p 555, para 70, has been established for more than three centuries.

93 The defendants' second argument proceeds on the premise that placing before a judge all relevant material is, in every instance, preferable to having to withhold potentially pivotal evidence. This proposition is deceptively attractive—for what, the defendants imply, could be fairer than an independent arbiter having access to all the evidence germane to the dispute between the parties? 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

A 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.

94 In the solution offered by the defendants a state party can supply evidence to the judge with only (at best) the inquiring confrontation of the special advocate. Quite apart from the reasons so clearly stated by Lord Dyson JSC about the necessary, inevitable but ultimately inherent frailties of the special advocate system, the challenge that the special advocate can present is, in the final analysis, of a theoretical, abstract nature only. It is, self evidently and admittedly, a distinctly second best attempt to secure a just outcome to proceedings. It should always be a measure of last resort; one to which recourse is had only when no possible alternative is available. It should never be regarded as an acceptable substitute for the compromise of a fundamental right such as is at stake in this case.

95 At a somewhat more prosaic level, the arguments against the case made by the defendants appear to me to be overwhelming. If one starts, as I believe we must, with the position that there is a constitutional, common law right to be informed of the case made against you in civil litigation, it becomes clear that what we are here being asked to do is to create an entirely new, hitherto unrecognised exception which has no statutory underpinning. The proposal for the radical change in the law which the defendants seek is openly policy driven. On that account alone, one should be very wary of it. Moreover, the claims that the present system creates impossible logistical burdens or that it produces unfair results on a massive scale are not backed up by any evidence. To accept that claim we would simply be acting on the ipse dixit of counsel.

96 At the moment with PII, the state faces what might be described as a healthy dilemma. It will want to produce as much material as it can in order to defend the claim and therefore will not be too quick to have resort to PII. Under the closed material procedure, all the material goes before the judge and a claim that all of it involves national security or some other vital public interest will be very tempting to make.

97 In this connection, one should not lose sight of the public interest in maintaining confidence in the administration of justice referred to so pertinently by Lord Neuberger of Abbotsbury MR in para 56 of his judgment in the Court of Appeal in the present case. For the reasons that he has given, I consider that this is an extremely important consideration and one which ought not to be overlooked.

98 On the question whether closed material might be provided to a judge where the claimant consents, I confess to grave misgivings as to how this might operate in practice. Consent to the submission of closed material under threat of a *Carnduff* application would not be the most propitious basis on which to found a jurisdiction which would not otherwise exist.

99 I also entertain considerable doubt as to whether it is possible as a matter of principle to invest the court with jurisdiction in this way and tend to agree with what Lord Brown of Eaton-Heywood JSC has had to say on the subject. Since, however, this matter was not argued on the appeal, I consider that it is unnecessary to express any final view on it.

LORD MANCÉ JSC (with whom BARONESS HALE OF RICHMOND JSC agrees) A

100 A conventional PII exercise at common law involves comparing the public interest in the administration of justice secured by availability of the material with the public interest identified by the certificate and court favouring its suppression; and in striking a balance between these two competing interests see Lord Reid's speech in *Conway v Rimmer* [1968] AC 910, 940, 951–952, quoted by Lord Clarke of Stone-cum-Ebony JSC in paras 142–143. B

101 The balance is struck somewhat differently in criminal and civil law contexts: see e.g. *Balfour v Foreign and Commonwealth Office* [1994] 1 WLR 681, 688H–689A. In a criminal context, the general rule is that, if material is necessary to prove the defendant's innocence or avoid a miscarriage of justice, then “the balance comes down resoundingly in favour of disclosing it”: *R v Keane* [1994] 1 WLR 746, 751–752, per Lord Taylor of Gosforth CJ. If the Crown still does not wish to disclose the material, it can and must forgo further prosecution. C

102 In a civil law context, the liberty of the subject is not at stake. Where a prima facie case of public interest immunity is made out, a party who wishes to invite the court to inspect material before determining whether it should after all be deployed must show that it is likely to give substantial support to his or her case: *Air Canada v Secretary of State for Trade* [1983] 2 AC 394. When the court is balancing the competing interests, *Cross & Tapper on Evidence*, 12th ed (2010), p 484 suggests, with reference to case law from various common law jurisdictions, that D

“the court will take into account factors such as the seriousness of the claim for which disclosure is sought, whether or not the Government is itself a party or alleged to have acted unconscionably, the relevance of the particular evidence to the dispute, taking into account other possible sources of evidence, and on the other side, the nature of the state's interest, and the length of time that has elapsed since the relevant discussion took place.” E

103 Thus, in both a criminal and a civil context, a judge dealing with an issue of PII has necessarily to form a view as to the relevance of the material for which PII is claimed. This is a fortiori the position if a judge, having concluded that, in the public interest, material cannot be disclosed, goes on to consider whether, as a result, the case has become untriable: see *Carnduff v Rock* [2001] 1 WLR 1786, below. F

104 Mr Jonathan Crow QC representing the Crown identifies various problems about a conventional PII exercise. Lord Dyson JSC has set them out in para 23. They include the obvious difficulty in some cases of comparing two such different interests as the administration of justice between parties and the general public interest in withholding from outside eyes sensitive state material, the fact that a successful claim to PII can leave a party with relevant knowledge that neither the other party nor the decision-maker will have and may even make a case untriable and the dilemma (whether or not to pursue its case) in which an unsuccessful claim to PII can leave the state. They also include essentially pragmatic concerns such as the cost and time-burden imposed by a conventional PII exercise. G
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A 105 In their light, the Crown's primary case is that a court can decide to replace a conventional PII exercise by a closed material procedure, even without statutory authorisation such as arises for consideration in the linked appeal in *Tariq v Home Office* [2012] 1 AC 452. The court should be able, at least in exceptional cases, to order a closed procedure under which a special advocate would first ascertain the case being advanced by the litigant whose interests he or she was to serve; the material which the Crown seeks to withhold would then be made available to the judge and a special advocate, for the latter to make such forensic use of it as was possible. A balancing of the competing interests in disclosure would become unnecessary, since the judge and the special advocate would have access to everything. Whether or not it might, after a conventional PII exercise, have been excluded or made available would become irrelevant. As a secondary and alternative case, the Crown suggests the possibility that a closed material procedure might be ordered after or at the end of a conventional PII exercise.

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C 106 Ms Dinah Rose QC's submission on behalf of the respondent is that there are inalienable features of a civil trial which no English court can or should abandon or qualify, at least without Parliamentary authority, even though this would involve no infringement of the Convention rights domesticated by the Human Rights Act 1998 (cf *Tariq v Home Office* [2012] 1 AC 452). Lord Dyson JSC has discussed them under the heads of open and natural justice in paras 10–13 and Lord Clarke JSC has identified the principal features in para 126. Ms Rose also noted a number of practical consequences which could flow from their abandonment, including difficulty on the part of the party without access to the material withheld to assess, take proper legal advice on the merits of or fund a case.

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E 107 Taking the Crown's primary submission, I see no basis for the complete substitution of a conventional PII exercise by a closed material procedure, even if this were a possibility limited to "exceptional circumstances". The line between cases where a traditional PII exercise was undertaken and others would be unprincipled and uncertain. It is inherent in a conventional PII exercise that there may be difficulty in comparing the interests of the administration of justice and the general public interest, that a successful claim to PII can leave one party with relevant knowledge, or may even make a case untriable and may place the Crown in a dilemma whether or not to pursue its case after an unsuccessful claim to PII. It would be entirely unclear when these features might justify a judge in abandoning any attempt at a conventional PII exercise. Further, the special advocate would often be likely to become engaged in a modified form of PII exercise, involving arguments as to whether material should after all be disclosed to the litigant, bearing in mind the potential disadvantages for the litigant of a closed material procedure; nothing would then be gained, except to shift the whole burden of conducting that form of PII exercise onto the special advocate.

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H 108 The Crown's alternative submission, that a closed material procedure might be recognised after or as supplementary to a conventional PII exercise, merits close scrutiny. As I understand it, no member of the Supreme Court doubts the approach in *Carnduff v Rock* [2001] 1 WLR 1786 as a possibility: see Lord Dyson JSC at para 15, Lord Brown of Eaton-Heywood JSC at para 86 and Lord Clarke JSC at para 157. In other words,

a successful claim for PII can make an issue untriable, so that the court will simply refuse to adjudicate upon the case. In some circumstances, therefore, 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.

109 Logically, this third possibility may be capable of feeding back into the decision whether a claim for PII should be allowed. If the effect of a successful claim to PII is that the case will not be tried at all, that introduces a different dimension, which may affect the striking of the balance of competing interests, see para 103 above.

110 Lord Brown JSC assumes (para 81) that a trial without the judge having any access to the PII material would be likely to be “to the Crown’s considerable disadvantage”. But it is not right to assume that the executive never errs or that material for which it claims PII is necessarily in its favour. In any event, issues regarding PII can arise between non-state parties, as for example in *Asiatic Petroleum Co Ltd v Anglo-Persian Oil Co Ltd* [1916] 1 KB 822. And it must certainly be regarded as being to a claimant’s considerable disadvantage, if as a result of the withholding of PII material, the court concludes, as in *Carnduff v Rock* [2001] 1 WLR 1786, that the case is not triable at all.

111 Like a number of other members of the court, I believe that the issue upon which the Court of Appeal and now this court has embarked is fraught with danger and in principle undesirable; and that any answer that we give should at least be confined to situations such as the present where the defendant is the state and has the material withheld in its possession.

112 If the court never has jurisdiction (in the strict sense) 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.

113 I note that the judgment of the Court of Appeal, whose decision the respondent has invited the Supreme Court to uphold “as correct for the reasons given by it”, expressly leaves open the question of “whether a closed material procedure can properly be adopted . . . in an ordinary civil case such as the present, where all parties agree, or in a civil claim involving a substantial public interest dimension”, and adds that, although this is an issue to be considered as and when it arises, “principle and the authorities relied upon [in the courts] below . . . suggest that a different conclusion may well be justified in such cases, albeit only in exceptional circumstances”: para 71. Ms Rose did not challenge this qualification in her submissions. On the contrary, she went even further than the Court of Appeal. Her case, at para 133, states:

“There is similarly no need for this court to reach a decision on whether a closed material procedure would be permissible if the parties consented to it, or in different sorts of proceedings, where the task of the

- A judge was not simply to adjudicate on a private law claim for damages. However, in so far as necessary, the respondent would submit: (1) A party may consent to absent himself from all or part of a hearing, and to allow the judge to see material which is not shown to him: there may be cases where it is in his interest to do so, and these are likely to include the public law contexts in which such consent has been given in the recent past.
- B (2) The fundamental principles identified above, and the requirements of the CPR, apply with equal force to claims for judicial review, as to civil claims for damages. In the absence of consent, a court hearing such claims has no power to adopt a closed procedure."

- C Cases of consent are also outside the "basic rule" which Lord Dyson JSC identifies in para 22, that the court cannot exercise its power to "deny" parties their fundamental common law right to participate in proceedings in accordance with the common law principles of natural justice and open justice. An inability to allow a voluntarily accepted closed material procedure, as an alternative to striking a claim out as untriable, would be to deny something even more basic, that is any access to justice at all. Lord Dyson JSC in the first sentence of para 22 uses the phrase "at any rate, not without the consent of the parties" and may therefore also accept this.

- D 114 Further, once it is accepted, as Lord Dyson JSC does (para 63), that "there are certain classes of case where a departure from the normal rule may be justified for special reasons in the interests of justice", for example wardship and other cases where the interests of children are paramount, that to my mind also makes it difficult to suggest that the court lacks jurisdiction in a strict sense to vary the basic principles of open and natural justice mentioned in para 107 above.

- E 115 There is however a real distinction between having jurisdiction and exercising it. Principles as important as open and natural justice ought to be regarded as sacrosanct, as long as they themselves do not lead to a denial of justice. Absent statutory authorisation, any significant deviation from the ordinary process and consequences of a conventional PII exercise can and should only be under the compulsion of necessity, in order to avoid such a denial.
- F Mr Crow acknowledged this as a possible approach. He cited Viscount Haldane LC's well-known statements in *Scott v Scott* [1913] AC 417, 437-438, that exceptions to the principle that justice be administered in public may arise from considerations of necessity (not convenience) as "the outcome of a yet more fundamental principle that the chief object of courts of justice must be to secure that justice is done". In this connection, Viscount Haldane LC referred to two cases: (a) "wards of court and of lunatics", where the court "is really sitting primarily to guard [their] interests" and "the broad principle which ordinarily governs it therefore yields to the paramount duty, which is the care of the ward or the lunatic"—the court's role here, now regulated statutorily under the Mental Health Act 1983 and Mental Capacity Act 2005, has a parallel in that which it has in relation in children—and (b) "litigation as to a secret process, where the effect of publicity would be to destroy the subject matter" and "justice could not be done at all if it had to be done in public", in which case "as the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield". Thus,
- H while it is true, as Lord Brown JSC observes (para 84), that in *Scott v Scott*

the House deprecated the hearing in camera of a matrimonial issue in the interests of decency or delicacy, the House there expressly recognised the possibility that such a hearing might be ordered if the alternative was “a defeat of the ends of justice”: p 439. Subsequent authorities discussing the principle of public justice and the circumstances in which it may be qualified include *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co* [2005] QB 207, where the Court of Appeal recognised that the principle might require modification to respect the confidentiality inherent under English law in their choice of arbitration. Party agreement can therefore have relevance to the modification in the interests of justice of what would otherwise be basic principles.

116 Viscount Haldane LC was speaking in *Scott v Scott* [1913] AC 417 in the context of publicity, where the inroad into ordinary process is of a different order to that involved in any closed material procedure. But a claimant who is told that, because of the defendant’s possession of material which cannot be disclosed, the claim is and must be struck out as untriable is just as effectively told, in Viscount Haldane’s words, that “justice could not be done”. The inference may or may not be that the material favours the defendant state which has the documents and could rely on them for what they were worth in any closed material procedure. The claimant must by definition have a properly arguable case without the documents, since otherwise his or her case would be susceptible to being struck out. I myself see no reason why the court should not in such circumstances be able and prepared to offer the claimant the chance, if he or she wished, to pursue the claim by a closed material procedure, during which his or her interests would be represented by a special advocate. Lord Brown JSC suggests (paras 86–87) that such cases must go off to some specially constituted tribunal, which does not pretend to be deciding such claims “on a remotely conventional basis”. I find this difficult to square with the fact that courts and judges can and do operate closed material procedures where there is statutory authorisation, and can and do also depart from otherwise basic common law principles in the special classes of case which Lord Dyson JSC mentions in para 63. Further, if one assumes that cases such as *Carnduff v Rock* [2001] 1 WLR 1786 are a “rarity” (Lord Dyson JSC, para 50), that does not make it any more palatable, to my mind or to the individual claimant, to be denied any access to justice at all, in circumstances when he or she wishes to accept a closed material procedure. I do not see why a court should, instead of permitting a closed material procedure, insist on washing its hands of the case in such circumstances.

117 In a public law context, statutory schemes, e.g governing suspected terrorism, have given rise to repeated issues about the legitimacy in terms of the Convention rights of closed material procedures: see e.g *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269 and *Tariq v Home Office* [2012] 1 AC 452. It is also possible, at least in theory, to conceive of ordinary civil cases where the material withheld is in the hands of the claimant. A claim to PII is a duty, not an option, on the part of the state. A claimant (who might in some circumstances not be the state itself: see the *Asiatic Petroleum* case [1916] 1 KB 822, cited in para 110 above) might find itself, at one and the same time, wishing to pursue a claim, but bound to raise (or, in the case of a non-state claimant, faced with) a claim for

- A PII in respect of material in its possession. Again, it must be assumed that the claimant could, without the material, show an arguable case. If the court concluded that the material favoured the claimant, then the interests of justice would be unlikely to require its disclosure. The problem arises if the court concluded that it favoured the defendant but that the public interest in its confidentiality outweighed any particular interest of the defendant and that as a result the case could not fairly be tried.

- B 118 Would it then be open to the court, as an alternative, to avoid denying any access to the court to the claimant, to order that the defendant should accept a closed material procedure? In the case of a state claimant, the public interest which required the claim to PII might perhaps also be said to require the state to accept that it could not pursue certain claims which it would otherwise wish to pursue in the public interest. In the case of a non-state claimant, seeking to pursue an ordinary civil claim in his, her or its private interest, that consideration could not be deployed. Nevertheless, it is far from clear that the court could go to the length of ordering a defendant to undergo a closed material procedure, in order to enable a non-state actor to pursue an otherwise untriable civil claim. But I shall express no opinion upon any such case since it lies far outside the realm of the present, and should be considered on its own merits were it ever to arise.

- D 119 I should however address two further possibilities raised by Lord Clarke JSC's judgment in relation to cases like the present where the relevant material is in the defendant's possession. One is the possibility, which I understand to be left open in paras 160–165, that, a judge might be able to order a closed material procedure at the claimant's instance, even though the judge concluded that the case was triable without the disclosure of the material withheld. The other is the suggestion in para 179 that the judge, if he or she declined to strike the claim out, might none the less accede to an application by the defendant for a closed material procedure "based on necessity, namely that such a procedure would be necessary in order to permit a fair trial". Both, it seems to me, involve an inconsistency. If a judge declines both to order disclosure and to strike the claim out, that means that he or she is satisfied that a fair trial, albeit on incomplete or imperfect material, is possible. There cannot in such a case be any "necessity", in the strict sense emphasised in *Scott v Scott* [1913] AC 417, for any departure from basic principles of open and natural justice. Both suggestions would in reality involve modifying the conventional PII exercise to introduce a fourth possibility, additional to the existing three (trial with or without disclosure, or no trial at all). As I have already indicated, I see no principled basis for such a modification.

- G 120 For these reasons, and confining myself to cases such as the present where the material withheld is in the defendant's and not the claimant's possession, I consider that the court can safely decide that there is no general basis for modifying the well-established rules governing the nature of a conventional PII exercise. There is no scope for introducing a closed material procedure as an alternative to such an exercise. I would not rule out a closed material procedure as outside the court's jurisdiction in a strict sense. But, statutory permission aside, 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. A

121 As regards consent, there is, as I see it, nothing between my conclusion and that of the Court of Appeal. If the preliminary issue is treated as raising a question of jurisdiction in the strict sense, where there is no consent, then my view differs on the issue of jurisdiction in the strict sense from that of the Court of Appeal's. As to the exercise of any such jurisdiction, I am in full agreement with the Court of Appeal that it cannot be appropriate to contemplate a closed material procedure in lieu of a conventional PII exercise. I can only envisage the jurisdiction ever being exercised after a conventional PII exercise in circumstances where a claimant would otherwise be denied any access to justice at all. As to what those circumstances might be, I would express an opinion only in relation to cases like the present, where closed material is in the defendant's possession. If the claimant, in order to avoid his or her claim being struck out, consents to engage in a closed material procedure, it would and should be permissible in my opinion for a court to allow a closed material procedure. The contrary, as I have pointed out (para 113), was not argued by the respondent. B
C

LORD CLARKE OF STONE-CUM-EBONY JSC D

Introduction

122 The appellant defendants in this appeal are the Security Service and various other organs of the state. It is an appeal from a declaration made by the Court of Appeal (Lord Neuberger of Abbotsbury MR, Maurice Kay and Sullivan LJ), ante, p 539, on 4 May 2010 allowing an appeal from an order made by Silber J ("the judge") on 18 November 2009 [2009] EWHC 2959 (QB). That order was made after the hearing of a preliminary issue, which had been ordered on 24 September 2009 but was varied by agreement in the course of the hearing. E

123 The preliminary issue as so varied was in these terms:

"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? Definition of 'closed material procedure'. A 'closed material procedure' means a procedure in which (a) a party is permitted to (i) comply with his obligations for disclosure of documents, and (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 (b) disclosure of such closed material is made to special advocates and, where appropriate, the court; and (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. 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." F
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H

A It is interesting to note that, as the judge said at para 2 of his judgment, in its original form the preliminary issue contained the words “*if satisfied that such a procedure is necessary for the just disposal of the case*” after the word “*damage*” in the third line, but those words were deleted by agreement “as their meaning was not clear and they did not appear to add anything to the preceding words”.

B 124 The judge granted the application for the declaration. He declared that it could be lawful and proper for a court to order that a “closed material procedure” (as defined above) be adopted in a civil claim for damages. He granted permission to appeal to the Court of Appeal, which allowed the appeal. It made a declaration that the court does not have power to order that a “closed material procedure” (as so defined) be adopted in an ordinary civil claim for damages. The defendants were granted permission to appeal
C by this court. The underlying claims for damages were then settled and the question arose whether the court should allow the appeal to continue. In very many cases the court would refuse to proceed in such a case but it decided to proceed with this appeal because the point of principle raised by the question whether the court has no power to make a declaration in the terms sought is of general public importance. Moreover, given the fact that
D the Court of Appeal made the declaration in the bald terms which it did, it seemed appropriate for the court to consider it and not leave the matter to a future leapfrog appeal.

125 One of the problems raised by the appeal is that the declaration is stated in absolute terms, without reference to the facts of a particular case. I am firmly of the view that it is in general undesirable to determine bare questions of law in this way. I would expect the court ordinarily to require
E the relevant legal question to be decided in a particular factual context.

The parties’ cases in summary

126 The respondent’s case is that the judges have no power, by developing the common law on an ad hoc case by case basis, to abrogate a number of the most fundamental features of the trial of a civil claim for
F damages. Ms Dinah Rose QC identifies a number of such features as follows: (i) the requirement that each party must plead its case, identifying to all other parties the issues which are in dispute; (ii) the requirement that all written or oral evidence on which a party wishes to rely in support of its case must be disclosed to the other parties to proceedings; (iii) the requirement that each party must be permitted to test the disputed oral evidence of other
G parties by cross examination; (iv) the rules which apply to the disclosure of relevant documents in the possession of a party to proceedings, including the principles that govern claims of public interest immunity (“PII”); and (v) the requirement that a court must give a fully reasoned judgment, to be made available to all parties, so that each party knows why it has won or lost and can decide whether or not to appeal.

H 127 Ms Rose submits that these are requirements which have been developed and maintained over centuries in order to secure basic constitutional rights of fairness, open justice and equality of arms, as well as to maintain confidence in the integrity of the judicial system, and in order to balance those rights and interests against competing considerations, including the interests of national security. Ms Rose cites many cases which

support these fundamental principles, which, subject to what follows, are not disputed by Mr Jonathan Crow QC. Those principles have been endorsed in ringing tones by Lord Kerr of Tonaghmore JSC in his judgment in *Tariq v Home Office* [2012] 1 AC 452, which was heard at the same time as this appeal by the same court and in which judgment has been handed down at the same time. They have also been clearly and accurately set out by Lord Dyson JSC at paras 10–17 above.

128 The defendants' case was summarised by Mr Crow in a short document as follows. The court's objective is to achieve real justice between the parties. Everyone is entitled to a fair trial. That right is absolute, but the means of achieving it are infinitely variable. The practice and procedure of the court are the means of achieving that objective. They should be the servants, not the masters, of justice. As a general rule, real justice and a fair trial can only be achieved by a process which allows open hearings, open disclosure, each side confronting the other's witnesses and open judgments. There are, however, no absolute, inflexible rules as to how real justice or a fair trial can be achieved. The requirements of fairness must always be responsive to the particular circumstances of the case. In particular, the courts have adopted procedures for hearings in private, restricted disclosure, the exclusion of one party from part of the proceedings and closed judgments, with and without the assistance of special advocates. The adoption of such unusual procedures is not confined to any limited class or category of case, whether involving children, wards of court, confidential information, patent actions, insolvency or anything else. While the adoption of such procedures may be more likely in such categories of case, the common law proceeds by reference to principle and not by a "tick-box" system. If a particular procedure is necessary by reference to the circumstances of the particular case, it should be adopted whether or not it falls into a category in which such a procedure has been adopted in the past.

129 In the agreed statement of facts and issues, the issue is said to be whether, in the absence of a specific statutory power, a closed material procedure can ever be adopted in a civil claim for damages.

Defects in the order sought for the use of a "closed material procedure"

130 I will return below to the question whether the court would have power to make an order of the kind sought. However, I should state at the outset that I cannot conceive of circumstances in which the court could in fact properly make an order for use of a "closed material procedure" as defined. It contains no procedure setting out how the claim that disclosure of a particular document or class of document is contrary to the public interest should be made or determined. Is it a matter for the judge and, if so, on what material, with whose assistance and in accordance with what principles? These are critical questions, especially the last. As formulated it seems implicit in the procedure that there is to be no question of any balance between the public interests referred to and interests of the parties. Yet the various public interests sought to be protected are very different. They extend from national security to "any other circumstances where disclosure is likely to harm the public interest", which is very broad indeed. As I see it, very different considerations are likely to apply to each class of case. In these circumstances, it seems to me to be clear that it would never be appropriate

A to make an order in the bald terms apparently sought. It does not, however, follow that it would never be appropriate to make an order suitably tailored to the circumstances of the particular case which has the effect of limiting some of the common law rights identified by Ms Rose. The defendants' case was that there were circumstances in which it would or might have been appropriate to do so on the facts of this case.

B *The factual and procedural background*

131 Although the issues between the parties have now been settled, it is appropriate to summarise the facts very briefly because it is rarely sensible to consider any legal principle in the abstract and because the facts here demonstrate some of the problems that can arise. I can take them, albeit in less detail, from paras 5 to 10 of the judgment of the Court of Appeal (ante, pp 540–541), which was delivered by Lord Neuberger of Abbotsbury MR.

C 132 The claimants were individuals some of whom were detained at Guantanamo Bay. They said that as a result of their detention and mistreatment while detained they had valid claims under at least some of the following heads, namely false imprisonment, trespass to the person, conspiracy to injure, torture, breach of contract, negligence, misfeasance in public office and breach of the Human Rights Act 1998. The claims were based on the contention that, to put it in broad terms, each of the defendants caused or contributed towards the alleged detention, rendition and ill-treatment of each of the claimants. The defendants then filed an open defence in which, while admitting that each of the claimants was detained and transferred, they put in issue any mistreatment which the claimants alleged and, in any event, denied any liability in respect of any of the claimants' detention or alleged mistreatment. It was said that there was material not pleaded in the open defence which the defendants wished to contend that the court should consider but which could not be included without causing real harm to the public interest. That material was said to be contained in a closed defence. The open defence made it clear that the defendants wished the case to proceed throughout on the basis that it included what may be characterised as a closed element.

F 133 Thus, at least on the face of it, during the period prior to trial, there would be parallel open and closed pleadings, parallel open and closed disclosure and inspection, parallel open and closed witness statements and parallel open and closed directions hearings. Similarly, at the trial, the hearing would be in part open and in part closed, no doubt with some documents and witnesses being seen and heard in the open hearing and others in the closed hearing (with some witnesses conceivably giving evidence at both hearings). After trial, there would be a closed judgment and an open judgment, which would be in substantially the same terms save that those passages in the closed judgment which referred to or relied on closed material would be excluded from the open judgment. In relation to the open elements of the proceedings, the claimants would be represented by their solicitors and counsel in the normal way, whereas, in relation to the closed elements, their interests would in effect be protected by special advocates.

H 134 The claimants objected to the course proposed by the defendants, contending for the normal approach in cases where the Crown or government emanations are parties and consider that they have relevant

documents in respect of which PII might be claimed, and where the defendants could call relevant oral evidence which might not be able to be given on public interest grounds. The defendants accepted that the PII procedure was well established, but contended that a closed material procedure was permissible in any civil case, at least before a judge sitting without a jury, and that it might well be appropriate in this case, where there was a very substantial amount of potentially relevant material which would be subject to PII.

135 The evidence filed on behalf of the defendants suggested that there might be as many as 250,000 potentially relevant documents, and that PII might have to be considered in respect of as many as 140,000 of them. It was also said by the defendants that the PII exercise might take three years before the relevant ministers could conscientiously decide in respect of which documents PII could properly be claimed. The defendants argued that the effort, cost and delay involved in such an exercise might well justify a different approach, such as that presaged by the open defence. It was said in a witness statement served on the defendants' behalf in support of the application to use a closed material procedure in this case that the principal motivation for it was the enormous scale of the disclosure exercise and the impracticability of carrying it out.

136 The defendants had initially sought directions from the High Court for the determination of preliminary issues as to whether a court has the power to order that a "closed material procedure" be adopted in a civil claim for damages if satisfied that such a procedure is necessary for the just disposal of the case; and, if so, whether and what arrangements for a closed material procedure should be adopted in relation to the claims brought by the respondent (and others). The High Court accepted the respondent's (and his then fellow claimants') submission that the first issue should be considered alone because the question whether the power to hold a closed material procedure should be exercised in this particular case could itself only be answered by looking at closed material. The preliminary issue described above was subsequently ordered and, as varied, determined by the judge.

The common law

137 It is important to note that the issue between the parties is concerned only with the position at common law. There are now a number of circumstances in which powers have been conferred on the courts to make similar orders by statute.

138 *Tariq v Home Office* [2012] 1 AC 452 is an example of such a case. It concerns the permissibility and in particular compatibility with European Union law and with rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") of a similar closed material procedure authorised by certain statutory provisions. The issues there focus on the lawfulness and effect of those provisions and their compatibility, for example, with article 6 of the Convention, whereas in the instant appeal the court is concerned with the position at common law.

139 Mr Crow submits that the common law is in a permanent state of development and should not be allowed to stultify. Ms Rose submits, by

- A contrast, that the fundamental common law rights summarised in para 126 above lie at the heart of the right to fair treatment before the law and should not be limited or abrogated in any way. She recognises that the common law has developed the principles of PII in order to cater for problems of the kind which concern the state, especially national security. She submits that the state is sufficiently protected by those principles and that there is no warrant
B for permitting any kind of closed material procedure. In these circumstances it is appropriate to consider how PII works and, to do so in the context of a case like this.

PII—the principles

- C 140 The principles of PII are a construct of the common law which were developed because it was appreciated that conflict may arise between the public interest and established rules of discovery and disclosure. They were developed having regard to the public interest in the administration of justice and other public interests which precluded or were said to preclude disclosure of materials which would otherwise be disclosable. As to disclosure, the general principle is that if the court

- D “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”: see e.g. *Science Research Council v Nassé* [1980] AC 1028, 1071E–F.

- E 141 The principles of PII have developed significantly over the years in a way which to my mind shows the flexibility of the common law. In *Duncan v Cammell Laird & Co Ltd* [1942] AC 624 Viscount Simon LC (with whom the other six members of the House agreed) made it clear, at p 629, that the question whether documents were subject to Crown privilege, which was the forerunner of PII, could arise, as in that case, in an action between private parties or, as here, in an action in which the Crown is a party. Crown privilege could be relied upon in respect of an individual document or a class
F of documents. The House of Lords held that it was for the minister personally to consider the question whether it or they should not be disclosed on grounds of public interest. Viscount Simon LC made it clear, at p 642, that disclosure must not be withheld in order to avoid criticism or embarrassment or to avoid paying compensation. He said, at pp 642–643:

- G “In a word, it is not enough that the minister of the department does not want to have the documents produced. The minister, in deciding whether it is his duty to object, should bear these considerations in mind, for he ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damnified, for example, where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class
H of documents secret is necessary for the proper functioning of the public service. When these conditions are satisfied and the minister feels it is his duty to deny access to material which would otherwise be available, there is no question but that the public interest must be preferred to any private consideration.”

Viscount Simon LC had said a little earlier that an objection properly taken by the minister was conclusive. Although he stressed that the ruling was to be made by the judge, not the executive, “the proper ruling” was to accept the minister’s objection. The House thus held that, although the decision excluding such documents was for the court, it had no discretion in the matter. In short, Viscount Simon LC made it clear that a court could never question a claim to Crown privilege if the claim was made in the proper form.

142 However, in *Conway v Rimmer* [1968] AC 910 a five-member appellate committee of the House of Lords disapproved the approach taken in *Duncan v Cammell Laird & Co Ltd* [1942] AC 624. It held, not only that it was for the court to decide whether Crown privilege should apply, but also that it was for the court, not the minister, to balance the competing public interests. Lord Reid said, at p 940:

“It is universally recognised that here there are two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done. 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. With regard to such cases it would be proper to say, as Lord Simon did, that to order production of the document in question would put the interest of the state in jeopardy. But there are many other cases where the possible injury to the public service is much less and there one would think that it would be proper to balance the public interests involved. I do not believe that Lord Simon really meant that the smallest probability of injury to the public service must always outweigh the gravest frustration of the administration of justice.”

143 A little later, at pp 951–952, after quoting the reference in *Duncan v Cammell Laird* to “the proper ruling” referred to above, namely to accept the minister’s view in every case, Lord Reid said:

“in considering what it is ‘proper’ for a court to do we must have regard to the need shown by 25 years’ experience since *Duncan’s* case, that the courts should balance the public interest in the proper administration of justice against the public interest in withholding any evidence which a minister considers ought to be withheld. I would therefore propose that the House ought now to decide that courts have and are entitled to exercise a power and duty to hold a balance between the public interest, as expressed by a minister, to withhold certain documents or other evidence, and the public interest in ensuring the proper administration of justice.”

Lord Reid then gave a number of practical examples of how the balance might be struck in different classes of case. He also said, at p 953, that he could see nothing wrong with the judge seeing the documents without their being shown to the parties. In the event the House of Lords (or at any rate

A Lord Reid) inspected the documents and, the House having found, at pp 996–997, that there was nothing in them which was in any way prejudicial to the proper administration of the relevant police force or to the general public interest, directed that they be disclosed for use in the litigation.

B 144 It is common ground that the current state of the law on what is now called PII is set out in *R v Chief Constable of West Midlands Police, Ex p Wiley* [1995] 1 AC 274. In that case, the House of Lords held that there was no justification for a claim for immunity for the entire class of documents generated by an investigation into a complaint against the police.

C 145 I would accept the submission made by Ms Rose that the following principles correctly state the approach to PII as it has stood until now. (i) A claim for PII must be supported by a certificate signed by the appropriate minister relating to the individual documents in question: *Duncan v Cammell Laird* [1942] AC 624, 638 per Viscount Simon LC. (ii) Disclosure of documents which ought otherwise to be disclosed under CPR Pt 31 may only be refused if the court concludes that the public interest which demands that the evidence be withheld outweighs the public interest in the administration of justice. (iii) In making that decision, the court may inspect the documents: *Science Research Council v Nassé* [1980] AC 1028, 1089–1090. This must necessarily be done in an ex parte process from which the party seeking disclosure may properly be excluded. Otherwise the very purpose of the application for PII would be defeated: see the Court of Appeal judgment, ante, p 548, para 40. (iv) In making its decision, the court should consider what safeguards may be imposed to permit the disclosure of the material. These might include, for example, holding all or part of the hearing in camera; requiring express undertakings of confidentiality from those to whom documents are disclosed; restricting the number of copies of a document that could be taken, or the circumstances in which documents could be inspected (e.g requiring the claimant and his legal team to attend at a particular location to read sensitive material); or requiring the unique numbering of any copy of a sensitive document. (v) Even where a complete document cannot be disclosed it may be possible to produce relevant extracts, or to summarise the relevant effect of the material: *Ex p Wiley* [1995] 1 AC 274, 306H–307B. (vi) If the public interest in withholding the evidence does not outweigh the public interest in the administration of justice, the document must be disclosed unless the party who has possession of the document concedes the issue to which it relates: see *Secretary of State for the Home Department v MB* [2008] AC 440, para 51, per Lord Hoffmann.

H 146 The question then arises, what, if any, use can be made of material which the court has held cannot be disclosed because of PII. Ms Rose submits that, if the court concludes that the public interest in withholding the evidence outweighs the public interest in the administration of justice, then the evidence cannot in any circumstances be admitted, or relied on by either party. She relies upon *R v Lewes Justices, Ex p Secretary of State for the Home Department* [1973] AC 388, 407, per Lord Simon of Glaisdale. He said there that Crown privilege is a misleading expression because it is not in truth a privilege. It refers to the rule that certain evidence is inadmissible on the ground that to adduce it would be contrary to the public

interest. He recognised that PII has to be weighed against the public interest in the administration of justice in accordance with *Conway v Rimmer*. He then said that, once the former privilege is held to outweigh the latter, the evidence cannot in any circumstances be admitted. He added, at p 407B–C:

“It is not a privilege which may be waived by the Crown (see *Marks v Beyfus* (1890) 25 QBD 494, 500) or by anyone else. The Crown has prerogatives, not privilege. The right to procure that admissible evidence be withheld from, or inadmissible evidence adduced to, the courts is not one of the prerogatives of the Crown.”

I will return to this point below.

PII—the facts

147 In the course of the argument, Mr Crow referred the court to the description of the PII certification process contained in the Attorney General’s statement made to the House of Commons on 18 December 1996 following the Matrix Churchill affair (Hansard (HC Debates), cols 949–958) and the decision in *Wiley*. In it the Attorney General noted that PII is subject to the ruling of the court and that, in a criminal case, when government documents are in issue, the judge examines the documents and makes the actual decision on disclosure in the light of the facts of the case. The statement also said that in what it described as the new approach, ministers would focus directly on the damage that disclosure would cause, the former division into class and contents claims would no longer be applied and they would only claim PII when it was believed that disclosure of a document would cause real damage or harm to the public interest. The statement further said that the new approach was subject to the supervision of the courts and that it accorded with the view expressed by the then Lord Chief Justice that PII “should only be claimed for the bare minimum of documents for which the claim of serious harm can be seen to be clearly justified.” Finally, the statement referred to the kinds of serious harm which might be involved.

148 Mr Crow described the certification process in a little more detail in this way. Lawyers consider material to see if it passes the threshold test for disclosure under CPR Pt 31. In so far as it is *prima facie* disclosable, officials review material for potential to cause harm to the public interest. If harm to the public interest is identified, the department carries out a balance between harm caused by the disclosure on the one hand and injustice in the litigation on the other. It also considers whether it is possible to redact or gist the information or to make admissions of fact. Officials consider whether and to what extent the balance falls against disclosure in order to give advice to the minister as to whether to certify. If the minister, having considered the advice, decides that a certificate should be given, a PII certificate is prepared which includes a disclosable certificate or schedule describing the types of harm that might be caused to the public interest and a sensitive schedule as to why it is believed that disclosure of documents would cause real damage or harm to the public interest.

149 After the minister has signed a PII certificate, the balance between the relevant public interests must be made by the judge. In a simple case he will hear argument on both sides and reach a conclusion, often having

A looked at the documents. There will be no need for special advocates. The position may be very different in a case of complexity, especially a case of great complexity such as this was or would have been but for the settlement. The judge may need assistance in order carry out the balance. Such assistance will not of course be available from counsel for the non-state parties because they will not have seen the documents.

B PII— *special advocates*

150 It is common ground between the parties that it is in principle permissible for the court to approve the appointment of one or more special advocates to peruse the documents at an appropriate stage in order to assist the judge to decide how the balance should be struck between the public interest in disclosure and the public interest in non-disclosure. It is thus common ground that the court has the power to give such approval and, no doubt, to make other ancillary orders as to what the special advocate should do. In my opinion the court does have such a power at common law. Just as the House of Lords recognised in *R v H* [2004] 2 AC 134, that the court had power at common law to give such approval in the context of criminal proceedings, so I would accept that there is such a power in this context.

C This is to my mind a classic example of the measured development of the common law in confronting and solving new problems. As Lord Bingham put it extra-judicially in *The Business of Judging* (2000), p 29, “the last quarter century has seen fundamental, judge-made changes in the law relating to [PII]”.

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151 The most obvious role for a special advocate would be to look at the documents which are the subject of a certificate and consider how the balance should be struck. In a complex case like this the exercise would be close to impossible for the judge to do on his own without assistance. One or more special advocates would to my mind be essential. It may be that in such a case it would be sensible for the special advocates to be allowed to see the documents at an early stage in order to avoid or minimise delay, but that would depend upon the facts of the case. However that may be, as I see it the use of special advocates would be (or would have been) necessary here in order to enable the judge to carry out the balancing exercise.

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Should the PII exercise be abandoned?

152 The defendants proposed that there should be a closed material procedure instead of the well recognised and accepted PII procedure, partly if not largely because of the enormous scale of the PII disclosure exercise and the impracticability of carrying it out. I am quite unable to accept that, at any rate in the absence of parliamentary intervention, that was a sufficient reason for abandoning the established PII procedure and replacing it with some form of closed procedure at common law. As I see it, whatever procedure was adopted, it would have been necessary for the defendants to identify what documents were relevant and in principle disclosable under CPR Pt 31. In addition it would have been necessary for the minister to decide which of those documents should not be disclosed in the public interest. That in turn would have required officials to identify which documents potentially came into that category in order to enable the minister to carry out the appropriate balance. A detailed review of the

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documents would have had to be carried out whether the procedure adopted was the PII procedure described above or the proposed closed procedure. In both cases it would have been necessary for the relevant documents to be identified and the balance struck.

153 The critical difference between the two approaches is not that part of the exercise but what happens thereafter. Since the first part of the exercise has to be carried out in any event, I can see no reason for abandoning the PII exercise.

Procedure after the balance is struck

154 In the ordinary case, where PII proceeds as outlined above and there is no closed procedure of the type sought, if the judge rules that some of the documents should not be disclosed because they attract PII, the position to date has been that identified by Lord Simon of Glaisdale in the *Lewes Justices* case [1973] AC 388, namely that they are not disclosed or produced to the non-state parties and are not admissible in evidence. In a criminal case, as explained in *R v H* [2004] 2 AC 134 and other cases, where the judge rules that they are necessary for the defence case, the prosecution must either disclose them or abandon the prosecution.

155 In a civil case of this kind Ms Rose submits that the effect of the PII rules is that (1) the court strikes the balance between the competing public interests, while duly acknowledging the opinion and expertise of the Secretary of State and those advising him; (2) the public interest in the administration of justice is given full weight; and (3) whatever the outcome of the exercise, the principles of natural justice and equality of arms are always preserved; both parties are equally treated in relation to the use which may be made of the sensitive material.

156 Mr Crow submits that that is far from a satisfactory result because in a case of this kind it may well be the position that the claimants are able to deploy their evidence in support of their claims, whereas, by reason of the inadmissibility of evidence which, but for the necessity to certify PII, would be admissible and upon which the defendants would wish to rely at the trial, the defendants are unable to defend the action, either at all or sufficiently. He submits that both parties have the right to a fair trial and that in such circumstances the trial would not be fair to both parties. He submits that it is in these circumstances that justice requires some form of closed procedure and that the court must have power at common law to permit it. There is to my mind considerable force in that submission. In *Tariq v Home Office* [2012] 1 AC 452, Lord Brown of Eaton-under-Heywood JSC describes, at para 84, the suggestion that, where the defendants cannot defend themselves at all, it matters not because they can simply pay up as preposterous.

157 Another possibility canvassed in the course of the argument is for the court to decide that it would not be appropriate for a closed procedure to be introduced for the reasons given by Ms Rose but that the correct course would be to stay or strike out the action because, by reason of circumstances beyond the control of both parties, it was not possible for there to be a fair trial and that the just course was not to have a trial. It was in this connection that the court was referred to *Carnduff v Rock* [2001] 1 WLR 1786. In that case a registered police informer brought an action against a police inspector and his chief constable to recover payment for information and assistance

A provided to the police. The Court of Appeal struck out the action on the basis that a fair trial of the issues arising from the pleadings would require the police to disclose sensitive information which it would be contrary to the public interest to force the police to disclose. Laws LJ said, at para 36, that “a case which can only be justly tried if one side holds up its hands cannot, in truth, be justly tried at all”. It is perhaps noteworthy that the claimant
B complained to the European Court of Human Rights in Strasbourg on the basis that his right of access to the court under article 6 of the Convention had been infringed. His complaint was rejected as unfounded: *Carnduff v United Kingdom* (Application No 18905/02) (unreported) given 10 February 2004.

158 I note in this regard that in *Tariq v Home Office* [2012] 1 AC 452 Lord Mance JSC says (at para 40) that the striking out of the action for these
C reasons is not an option that the law should readily contemplate. By contrast, Lord Kerr JSC says, at para 110, that it is a more palatable course than to adopt a closed procedure. There is plainly a tension between these two approaches, which in my opinion should be resolved on the facts of a particular case. It is not quite clear to me what approach Lord Dyson JSC would take to the question whether the action should be struck out on what
D may be called *Carnduff* principles in a case of this kind.

A possible solution

159 It appears to me that the way forward is or should be along these lines. After the PII process described above it should be for the parties to consider their respective positions and then to make representations to the judge as to the appropriate way forward. Depending upon the submissions
E advanced, the judge may wish to consider the three possibilities to which I have referred. They are (1) that the matter should proceed in the traditional way with the PII material simply being treated as both undisclosable and inadmissible and the trial proceeding on the basis of the disclosed and admissible evidence; (2) that the action should be stayed or struck out on the basis that through neither party’s fault a fair trial is not
F possible; and (3) that there should be some form of closed procedure, involving special advocates, along the lines suggested by the defendants, but subject to the exigencies of the particular case.

160 The stance taken by the protagonists at that stage would no doubt depend very much upon the circumstances at the time. Thus the claimants might adopt the stance now taken by Ms Rose. On the other hand, they
G might conclude that there were advantages in some form of closed procedure, especially if their case was thought to depend to any significant extent upon documents in the possession of the defendants. The defendants might also adopt a different position depending upon the circumstances. However, as things stand at present, they might be expected to contend in every such case that the action should be struck out on the ground that,
H without the documents and/or evidence to which PII attached or would attach, a trial which was fair to both parties including the defendants would not be possible.

161 In that event, the claimants might well perceive it to be in their interest to consent to agree to a closed procedure of some kind as an alternative to their claims being struck out. I understood it to be common

ground between the parties that there would be no objection in principle to such consent being given. It was not contended on behalf of the defendants that, if consent was given, such a procedure was contrary to principle. Indeed, it follows from Mr Crow's submission that it would be appropriate even without consent that, a fortiori, it would be appropriate with consent.

162 If a closed procedure were in principle a possibility, the precise nature of it would no doubt depend upon the circumstances of the particular case. It is only at the conclusion of the PII process that the question whether to direct some form of closed material procedure would arise. That will not of course happen in this case because it has settled. By the time the question comes to be decided in a specific case, Parliament may have intervened. It was suggested in the course of the argument that the common law should not consider inventing some form of closed material procedure but should leave it to Parliament. I agree that it would be better for the problems which arise in this class of case to be dealt with by Parliament. I understand that a green paper is in prospect and that thought is being given to possible Parliamentary intervention. The approach of Parliament would plainly be potentially critical to the appropriate way forward at the conclusion of the PII procedure.

163 However, it may be that the question what directions should be given may arise in a case in circumstances (as occurred for example in *A v HM Treasury* [2010] 2 AC 534, as explained in the Court of Appeal: see paras 59, 64–65), where for one reason or another there has been delay and where Parliament has not decided whether or not to intervene or, perhaps, where it has decided not to intervene. In such circumstances the court would have to decide what, if any, novel procedure to adopt. As appears below the court has adopted novel procedures in not dissimilar situations, no doubt by way of development of the common law and pursuant to its obligation under the CPR Pt 1 to act justly. In considering the relationship between the role of Parliament and the role of the common law, Lord Bingham said in *The Business of Judging*, at pp 386–387, that regard should be had to any relevantly analogous statute and that he saw no reason “why statute and the common law should not feed and refresh each other”.

164 I see no reason in principle why the common law should not be able to develop along these lines. There are many statements in the books of the flexibility of the common law. As Lord Mackay of Clashfern memorably put it in *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122, para 33, “the genius of the common law is its capacity to develop”. See also, for example, Sir Frederick Pollock in *The Genius of the Common Law* (1912), p 45 and Lord Denning MR in *Comet Products UK Ltd v Hawtex Plastics Ltd* [1971] 2 QB 67. In so far as such a development would be a development of the common law of PII, it would be no more than a further development of a process which, as Lord Bingham put it in 2000, has been taking place over the last quarter of a century.

165 In these circumstances I would not grant a declaration such as that granted by the Court of Appeal. The common law should in my opinion very rarely, if ever, say never. Moreover, the argument in this appeal has persuaded me that it is not appropriate to make a declaration such as that granted by the Court of Appeal in a vacuum. The court should consider what orders to make in the context of a specific case.

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A 166 I turn to consider the terms of the declaration which was granted. In it the Court of Appeal distinguishes between “ordinary” or “normal” civil claims and those which involve “a substantial public interest dimension”. I note in this context that in the declaration granted by the judge he referred to “a civil claim for damages”, whereas the Court of Appeal added the word “ordinary”. In its judgment at paras 59, 61, 63–67 and 71, it distinguished the various cases relied upon by the defendants on the ground that they were not ordinary civil claims for damages. Some were criminal cases: see *R v Shayler* [2003] 1 AC 247 and *R v H*. Others were civil cases of various kinds. They include *Secretary for State for the Home Department v Rehman* [2003] 1 AC 153; *R (Roberts) v Parole Board* [2005] 2 AC 738, *R (Malik) v Manchester Crown Court* [2008] 4 All ER 403; *A v HM Treasury* [2010] 2 AC 534 and *R (AHK) Secretary of State for the Home Department (Practice Note)* [2009] 1 WLR 2049. It is true that none of those cases involved an ordinary civil claim for damages, by which it appears from paras 59 and 71 that the Court of Appeal meant a case in which the court was simply an arbiter.

D 167 The reasons for the court’s view can be seen from its concluding remarks at paras 68–71. It expressed concern at para 69 that a procedure which is said to apply only in exceptional circumstances often becomes common practice. It then expressed these conclusions, at paras 70 and 71:

E “70. The importance of civil trials being fair, the procedures of the court being simple, and the rules of court being clear are all of cardinal importance. It would, in our view, be wrong for judges to introduce into ordinary civil trials a procedure which (a) cuts across absolutely fundamental principles (the right to a fair trial and the right to know the reasons for the outcome), initially hard fought for and now well established for over three centuries, (b) is hard, indeed impossible, to reconcile satisfactorily with the current procedural rules, the CPR, (c) is for the legislature to consider and introduce, as it has done in certain specific classes of case, where it considers it appropriate to do so, (d) complicates a well established procedure for dealing with the problem in question, namely the PII procedure, and (e) is likely to add to the uncertainty, cost, complication and delay in the initial and interlocutory stages of proceedings, the trial, the judgment, and any appeal.

F “71. We leave open the question of whether a closed material procedure can properly be adopted, in the absence of statutory sanction in an ordinary civil claim such as the present, where all the parties agree, or in a civil claim involving a substantial public interest dimension (ie where the judge is not simply sitting as an arbiter as between the parties). Both principle and the authorities relied on below seem to us to suggest that a different conclusion may well be justified in such cases, albeit only in exceptional circumstances, but that is an issue which should be considered as and when it arises.”

H 168 Save that I am not persuaded that an appropriate procedure could not be devised which is consistent with the CPR, I entirely accept the fundamental principles summarised in para 70. However, I do not think that there is any principled distinction between an ordinary civil claim and any other civil claim for these purposes. In any event, if there is potentially

such a distinction, this is surely a case in which there is a public interest in the issue involved, at any rate on the approach I have identified. The issue which has given rise to the question in this appeal is what is the correct approach to the fact that the defendants have what may be a valid claim to PII. The question is what to do when such a claim is made and, in particular, what to do when the minister issues a PII certificate. The public interest self-evidently plays a central part in the resolution of those questions. So, if there is a distinction between ordinary civil actions and those involving a substantial public interest dimension, this case falls on the latter side of the line.

169 On the question whether there is a principled difference between ordinary civil actions and others I would accept Mr Crow's submissions on behalf of the defendants, which were shortly to this effect. First, no such distinction has been drawn in the past. Secondly, the question in this appeal is whether a closed material procedure can *ever* be adopted in the case of a civil claim for damages. Distinctions between different claims for damages are irrelevant for the purposes of answering that bald question. The distinction may be relevant to the answer to the question whether an order should be made in a particular case. Thirdly none of the cases in which an exception has been made to the principle that all the material must be shown to both parties in every case depends upon this distinction. They all depend upon what the interests of justice demand. None of them depends upon a classification of the kind adopted by the Court of Appeal: see e.g. the wardship and children cases, including *In re T (Wardship: Impact of Police Intelligence)* [2010] 1 FLR 1048, *In re A (Forced Marriage: Special Advocates)* [2012] Fam 102 and *In re D (Minors) (Adoption Reports: Confidentiality)* [1996] AC 593, 615, per Lord Mustill. There have been other examples in the field of commercial confidentiality; see for example *British Sky Broadcasting Group plc v Competition Commission* [2010] 2 All ER 907.

170 Fourthly, there is no principled basis for accepting that the court can properly adopt a closed material procedure (subject to appropriate safeguards) when government action is subject to judicial review but not when the same action is subject to a claim in tort for damages. The differences between the two procedures are irrelevant to this question. Both may involve identical questions of law and fact. Both may involve the examination of the same evidence and examination and cross-examination of witnesses: see e.g. *R (Al-Sweady) v Secretary of State for Defence* [2010] HRLR 12. Fifthly, the boundaries of the two classes of case are often blurred. I note, for example that in *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 1)* [2009] 1 WLR 2579, the claims were in part for judicial review and in part for *Norwich Pharmacal* relief: see *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133. The natural process for the latter would be by ordinary action. It is of interest to note in passing that there were there both open and closed hearings and cross-examination by a special advocate, no doubt by consent between the parties.

171 In these circumstances, I would not accept the jurisdictional distinction that the Court of Appeal draws between ordinary civil claims and other civil claims. It appears from para 71 of the judgment quoted above

A that, subject to that distinction, the Court of Appeal accepted that both principle and the authorities relied on before the judge suggested that a different conclusion may well be justified in such cases, albeit only in exceptional circumstances, but said that was an issue which should be considered as and when it arose.

B 172 I appreciate that, as both Lord Dyson JSC and the Court of Appeal have pointed out, the issues of jurisdiction were not argued in those cases. That was certainly true in the two cases referred to in which I played a part, namely *A v HM Treasury* [2010] 2 AC 534 and the *AHK* case [2009] 1 WLR 2049. It is also true that, as the Court of Appeal pointed out, the decision in the *A* case was reversed by this court. The principles relevant to this case were not however commented upon adversely. They are summarised at para 58 of the *A* case [2010] 2 AC 534 and at para 17 et seq of the *AHK* case [2009] 1 WLR 2049.

C 173 Both cases involved the appointment of special advocates without express statutory authority. They are to much the same effect. So I refer only to para 58 of the *A* case [2010] 2 AC 534, where I said:

D “There is so far no statutory power to appoint a special advocate in proceedings arising out of a [Terrorism Order]. However, as I see it, there is no reason in principle why a special advocate should not be appointed in a particular case. The authorities show that in an appropriate case the court would have power to authorise or request the use of a special advocate: see in particular the decision of the House of Lords in *R (Roberts) v Parole Board* [2005] 2 AC 738, where it was held that the court had power to do so even where it was not sanctioned by Parliament.

E Whether it should do so or not would depend on the particular circumstances of the case. It has very recently been held by the Divisional Court in . . . *Malik* . . . that the court has power to ask the Attorney General to appoint a special advocate, but that it should only do so in an exceptional case and as a last resort: per Dyson LJ, giving the judgment of the court, at paras 93–102, especially, at para 99. In these circumstances

F the court would have power to procure the appointment of a special advocate through the Attorney General.”

G 174 I am not persuaded by Ms Rose’s submissions that the principles do not remain sound and applicable in an appropriate case. However, all depends upon the circumstances of the particular case and I agree with the view expressed in the Court of Appeal in para 71 (quoted above) that the issue of their correctness and application to the circumstances should be decided when they arise in a particular case.

H 175 If they ever arise in a context like this, it will be in very different circumstances from any of the other cases. If they arise in a case of this kind it will be necessary to examine in detail the relationship between (a) PII and its application in this type of case, (b) the principle in *Carnduff v Rock* [2001] 1 WLR 1786, including its correctness and its application and relationship to PII and (c) the prospect of fashioning a procedure which will on the one hand retain the principles of PII and on the other hand enable the action to proceed in a way which will provide a fair trial to both parties, while respecting their fundamental rights, including the fundamental rights of the claimants relied upon by Ms Rose. In reaching these conclusions I do

not wish to understate the fundamental nature of those rights. It follows that any new procedure which affected them should only be adopted by the common law in most exceptional circumstances. Whether those circumstances exist will depend upon the facts of the particular case and should only be determined in that context.

176 Since writing the above, I have had the opportunity of reading Lord Dyson JSC's judgment in draft. I entirely understand his concern (and that of the Court of Appeal) that a principle that a closed procedure could be used only in exceptional circumstances may become the thin end of the wedge. However, in my opinion the judges can be relied upon to ensure that that will not happen. The test would be one of necessity: see *Scott v Scott* [1913] AC 417, 436–439, per Viscount Haldane LC.

177 As Lord Dyson JSC himself recognises at paras 63 and 64, various exceptions to the fundamental principles he describes have been recognised by the common law. These show that, although fundamental, the principles are not absolute and must yield where it is necessary in the interests of justice that they do so. As Lord Dyson JSC puts it at para 64 in the context of confidentiality, such claims by their very nature raise special problems which require exceptional solutions (his emphasis). If the judge concludes after carrying out the PII balancing exercise that it is necessary to have some form of closed process, that same principle would permit such a process at common law.

178 Thus, at the conclusion of the PII process it will be necessary for the judge to decide how to proceed. If he is persuaded that it is necessary in the interests of justice that some form of closed process should take place, I can see no reason why such a process should not be followed. If, as is common ground, it was open to the courts to develop the common law in children or wardship cases or in confidentiality cases on the ground that it was necessary to do so in the interests of justice, the same principle should apply here. I appreciate that this is at the end of what has hitherto been described as the PII process. However, what to do at that point can to my mind fairly be regarded as part of that process. It is certainly very closely related to it.

179 As stated above, at that stage the whole process and the way forward will have to be reviewed by the judge in the light of the submissions of the parties. Much will depend upon those submissions. In this regard it is important to note that those submissions will depend upon the facts of the particular case. Thus in a case of this kind, where the state organs are the defendants in a civil claim, the position may be very different from a case in which the state has asserted or is asserting rights against a non-state party and it is the latter which needs information in order to enable it to defend its position. In the former case, as explained above, if the judge concludes that, absent some closed procedure the claim should be struck out because a fair trial to both parties is not possible, the claimant may consent to a closed procedure in order to allow his claim to proceed. In that event the action will proceed on the basis of some appropriate closed procedure. No question of necessity will arise. On the other hand, if the judge declines to strike the claim out, the defendants might seek an order for such a procedure based on necessity, namely that such a procedure would be necessary in order to permit a fair trial. Whether this is a realistic possibility should in my opinion be left for decision in a concrete case.

- A 180 A closed procedure might also be necessary in a case in which it is the non-state party which wishes to rely upon the material which would otherwise be subject to PII in order to defend itself in some way against the state. In such a case either party might seek an order for such a procedure based on necessity, namely that such a procedure would be necessary in order to permit a fair trial.
- B 181 These considerations to my mind demonstrate the importance of leaving the question of what, if any, procedure is permissible, to be determined in the context of a specific case. The court should not in my judgment now rule out the possibility of some form of closed procedure in any case in circumstances in which it is not possible to predict what may happen in the future. All should depend upon the particular circumstances after the judge has struck what may be called the PII balance.
- C 182 In this regard the decision in *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* (No 2) [2009] 1 WLR 2653 is instructive. At para 34 Thomas LJ set out four questions that arise when carrying out the balancing test:
- D “(i) Is there a public interest in bringing the redacted paragraphs into the public domain? . . . (ii) Will disclosure bring about a real risk of serious harm to an important public interest, and if so, which interest? . . . (iii) Can the real risk of serious harm to national security and international relations be protected by other methods or more limited disclosure? . . . (iv) If the alternatives are sufficient, where does the balance of the public interest lie?”
- E 183 Thomas LJ then identified factors relevant to determining where the balance of public interest lies. He did so under four headings: (i) the public hearing; (ii) making decisions and reasons public; (iii) public justice, the rule of law, free speech and democratic accountability; and (iv) the role of the media. In discussing the need to uphold the rule of law, he said, at para 41 that “the more serious the alleged infringement of the rule of law, the more strongly that principle applies” and at para 46 he emphasised that “the provision of information . . . which enables public debate to take place and democratic accountability to be made more effective is one of the bases on which democracy rests”.
- F 184 Although the Court of Appeal [2011] QB 218 expressed some disagreement with the Divisional Court on the facts, while they do not say so expressly, as I read their judgments, they agreed with its general approach in principle: see per Lord Judge CJ at para 51, Lord Neuberger of Abbotsbury MR at para 187 and Sir Anthony May P at para 290. At para 295 Sir Anthony emphasised that the balance is not to be struck by the Foreign Secretary but by the court. As I read the judgments in *Mohamed* in both courts, in addition to that principle, they support these further propositions. First, the rule of law and the democratic requirement that governments be held to account mean that the case for disclosure will always be very strong in cases involving alleged misconduct on the part of the state and, secondly, that the more serious the alleged misconduct on the part of the state, the more compelling the national security reasons must be to tip the balance against disclosure.
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185 As I see it, the special advocates will have a significant role at that time because under the present system they will have played a substantial part in the consideration of which documents are relevant and which are (and which are not) subject to PII. In doing so, they will have learned a good deal about the issues between the parties and will have been able to make submissions to the judge on the question how the balance should be struck by the judge as between disclosure and non-disclosure. This might include inviting the judge to consider the balance between the public interest in non-disclosure on the one hand and the public interest in disclosure having regard to the importance of each in the particular context, which would or might include the importance of ensuring that the state does not abuse its power or the rights of the citizen.

186 Equally special advocates would be likely to be valuable in the future, not only in the context of striking that balance, but also both in a consideration of the question which may arise at the end of the PII process as to whether a non-state claimant should consent to some form of closed procedure or, in the case of a non-state defendant, whether the circumstances meet the requirement of necessity such as to justify a closed evidence procedure. In order to carry out these functions effectively and to provide a substantial measure of procedural justice to the party, it may well be that in the future special advocates will need to be permitted to communicate with the party and the parties' representative. The Joint Committee on Human Rights has long advocated relaxation of the rule against communication between special advocates and non-state parties, most recently in its report *Counter-Terrorism Policy and Human Rights* (16th Report): Annual Renewal of Control Orders Legislation (2010) HL Paper 64/HC 395. This is essentially an issue for Parliament but it may also be an issue which, in the absence of Parliamentary intervention, a judge considering whether to order a closed procedure will wish to address, although proper safeguards would of course have to be put in place to protect the public interest. As ever, all would depend upon the circumstances.

187 Finally, I should add that I am not persuaded that there is anything in the CPR which prevents an appropriate process being developed. I respectfully doubt that the CPR require an adversarial process at every point. In the pursuit of the overriding principle of dealing with cases justly it may well be necessary to introduce inquisitorial elements, as for example where the judge looks at some evidence which both parties do not. Further, for my part, I would not accept the argument that there is no significant difference in this context between a criminal case and a civil case. The decision in *R v Davis* [2008] AC 1128 is of importance but it was a criminal case, where I well understand that the importance of the defendant being able to confront his accusers may be critical. The same may be much less important in a civil case, especially where the state is the defendant and not the accuser.

Conclusion

188 In all the circumstances I would allow the appeal and set aside the declaration granted by the Court of Appeal. I would do so because I can envisage circumstances in which it might be appropriate to develop the

- A common law by directing that some form of closed material procedure take place. Such a development would, as I see it, be a further step in the courts' approach to PII which has already changed step by step without statutory assistance since *Duncan v Cammell Laird & Co Ltd* [1942] AC 624. For my part I would not replace the declaration granted by the Court of Appeal with the declaration granted by the judge. I would simply leave these issues to be further considered in the light of the facts of a specific case.
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LORD PHILLIPS OF WORTH MATRAVERS PSC

- 189 I have considered the judgments of Lord Clarke of Stone-cum-Ebony and Lord Dyson JJSC. I agree with Lord Brown of Eaton-Heywood JSC that each makes a compelling case. That case relates, however, to a general issue which did not arise on the facts of this case.
- C Could the common law ever permit a closed material procedure to be used in litigation involving a civil claim? That issue is now doubly academic as this litigation has now been settled. The preliminary issue with which the Court of Appeal was concerned was a narrower one.

- 190 Lord Clarke JSC has set out that issue at para 123 of his judgment. It is important to appreciate the full import of the issue. What was proposed was an alternative to the manner in which public interest immunity ("PII") is dealt with under the conventional process of discovery. What the conventional exercise involves is summarised by Lord Clarke JSC at para 145 of his judgment. What that conventional exercise was likely to involve on the facts of the case is set out by Lord Clarke JSC at para 135.
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- 191 The proposed scheme, as set out in the preliminary issue, was a procedure which was intended to replace the conventional exercise. It would not be necessary, in the case of each document, for the minister and the court to balance the damage that would be done to the public interest if the document were disclosed against the damage to the administration of justice if it were not. Instead, any documents disclosure of which would be contrary to the public interest, as broadly defined in the preliminary issue, would be dealt with by the "closed material procedure" as defined.
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- 192 Lord Clarke JSC comments at para 130 that he cannot conceive of circumstances in which the court could properly make an order for the use of "closed material procedure" as defined. And at para 152 he states that such a course would require Parliamentary intervention. I agree. The common law develops incrementally. The change envisaged by the preliminary issue would be fundamental. Only Parliament could bring about such a change.
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- 193 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. In the event the Court of Appeal, ante, pp 545–546, gave the following reasons of principle for giving a negative answer to the preliminary issue, at para 30:
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- "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
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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."

194 Later in its judgment the Court of Appeal ranged more widely. It considered, ante, p 550, para 51, the use of a closed material procedure *after* the conclusion of a conventional PII exercise, observing, at para 53, that this was "not the closed material procedure as defined in the preliminary issue".

195 It is not always easy to determine in some parts of the judgment of the Court of Appeal whether it was addressing the closed material procedure as defined in the preliminary issue, or a closed material procedure of some other description. This is particularly true of the last paragraph of its judgment, ante, p 555, para 71:

"We leave open the question of whether a closed material procedure can properly be adopted, in the absence of statutory sanction in an ordinary civil claim such as the present, where all the parties agree, or in a civil claim involving a substantial public interest dimension (i.e. where the judge is not simply sitting as an arbiter as between the parties). Both principle and the authorities relied on below seem to us to suggest that a different conclusion may well be justified in such cases, albeit only in exceptional circumstances, but that is an issue which should be considered as and when it arises."

196 I consider that the judgment of the Court of Appeal should be treated as applying only to the preliminary issue with which it was concerned. 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, just like the question left open by the last paragraph of the Court of Appeal's judgment.

197 It follows that I do not propose to go down the hypothetical road followed by Lord Clarke JSC in that part of his judgment that begins at para 154. Nor do I propose to consider the merits of Lord Dyson JSC's dissent from that part of Lord Clarke JSC's judgment. I would dismiss this appeal on the narrow ground set out in para 192 above.

198 Lord Rodger of Earlsferry JSC, who died before judgment was given in this case, had indicated that he would have dismissed the appeal.

Appeal dismissed.

DIANA PROCTER, Barrister

SC

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WHITEHOUSE v LORD ADVOCATE

No 35
9 May 2019
[2019] CSOH 38

OUTER HOUSE
Lord Brodie

DAVID JOHN WHITEHOUSE, Pursuer AJ McKinlay
LORD ADVOCATE, Defender DB Rose QC

*Evidence Admissibility Confidentiality Legal advice privilege Lord Advocate
Whether Lord Advocate was entitled to assert legal advice privilege*

*Process Commission and diligence Recovery of documents Legal advice privilege
Lord Advocate Whether Lord Advocate was entitled to assert legal advice privilege*

The pursuers, a husband and wife, raised an action for damages against the Lord Advocate on the basis that the operative averments of a restraint order petition he presented in terms of the Proceeds of Crime Act 2002 (cap 29) were false and unsupported by evidence. The pursuers obtained an order for recovery of documents from the Lord Advocate for, *inter alia*, documents showing or tending to show the basis upon which the Crown determined that an application for a restraint order should be made. The Lord Advocate produced copies of emails exchanged between Crown counsel and legally qualified officials of the Crown Office and Procurator Fiscal Service ('COPFS') in a sealed confidential envelope. He opposed the pursuers' motion to open up the confidential envelope on the basis that the emails were exempt from disclosure by virtue of legal advice privilege ('LAP').

The parties agreed that for LAP to exist: (1) there must be a client; (2) advice must have been given by a lawyer in that capacity; and (3) LAP must not have been waived, but the parties respectively maintained or denied that each requirement was met.

Held that: (1) the Lord Advocate and his deutes could be clients and that they were lawyers did not preclude this (paras 21, 24); (2) in presenting the petition for a restraint order, the Lord Advocate was not acting on anyone else's behalf and was acting in a client-like role in which he was entitled to be represented by an Advocate-depute who may require advice from legally qualified officials (para 25); (3) the prior extensive recovery of documents did not constitute a waiver of LAP for all documents (para 32); (4) the emails contained a private discussion of the application of the law to the available facts, and the Lord Advocate was entitled to assert LAP accordingly (paras 40, 41); and motion *refused*.

Three Rivers District Council and anr v Bank of England (No 6) [2005] 1 AC 610 applied.

DAVID JOHN WHITEHOUSE and another raised an action for damages against the Lord Advocate. A diet of proof was fixed for 18 June 2019. The pursuers sought and obtained an order for recovery of documents from the defender who produced certain documents within a sealed confidential envelope. The action called before the Lord Ordinary (Brodie) on the motion roll, on 9 April 2019, on the pursuers' opposed motion to open the confidential envelope and to allow its contents to be disclosed.

Cases referred to:

AB v Ministry of Justice [2014] EWHC 1847

Akzo Nobel Chemicals Ltd v European Commission (C-550/07P) EU:C:2010:512; [2010] ECR I-8301; [2011] 2 AC 338; [2011] 3 WLR 755; [2011] Bus LR 1458; [2010] 5 CMLR 19; [2011] All ER (EC) 1107; [2011] CEC 253

Argyll (Duke of) v Duchess of Argyll (No 2) 1962 SC (HL) 88; 1962 SLT 333
Australian Mining and Smelting Europe Ltd v European Commission (155/79) EU:C:1982:157; [1982] ECR 1575; [1983] QB 878; [1983] 3 WLR 17; [1983] 1 All ER 705; [1982] 2 CMLR 264; [1982] FSR 474
Auten v Rayner (No 2) [1960] 1 QB 669; [1960] 2 WLR 562; [1960] 1 All ER 692
B v Auckland District Law Society [2003] UKPC 38; [2003] 2 AC 736; [2003] 3 WLR 859; [2004] 4 All ER 269
Balabel v Air India [1988] Ch 317; [1988] 2 WLR 1036; [1988] 2 All ER 246; [1988] EG 38 (CS)
Crompton (Alfred) Amusement Machines Ltd v Customs and Excise Commissioners (No 2) [1972] 2 QB 102; [1972] 2 WLR 835; [1972] 2 All ER 353 and [1971] 2 All ER 843
Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd [2018] EWCA Civ 2006; [2019] 1 WLR 791; [2019] 1 All ER 1026; [2018] Lloyd's Rep FC 635; [2019] Crim. LR 44
Jennings v Crown Prosecution Service [2005] EWCA Civ 746; [2006] 1 WLR 182; [2005] 4 All ER 391
McCowan v Wright (1852) 15 D 229
Micosta SA v Shetland Islands Council (The Mihalis) 1983 SLT 483; [1984] ECC 227
Narden Services Ltd v Inverness Retail and Business Park Ltd [2008] CSIH 14; 2008 SC 335; 2008 SLT 621
R (on the application of Prudential plc) v Special Commissioner of Income Tax [2013] UKSC 1; [2013] 2 AC 185; [2013] 2 WLR 325; [2013] 2 All ER 247; [2013] STC 376; [2013] 2 Costs LR 275; [2013] 1 FCR 545; 82 TC 64; [2013] BTC 45; [2013] CILL 3309; [2013] STI 264
Scottish Lion Insurance Co Ltd v Goodrich Corp [2011] CSIH 18; 2011 SC 534; 2011 SLT 733; [2013] BCC 127
Somatra Ltd v Sinclair Roche and Temperley (No 1) [2000] 1 WLR 2453; [2000] 2 Lloyd's Rep 673; [2000] CPLR 601
Three Rivers District Council v Bank of England (No 5) [2003] EWCA Civ 474; [2003] QB 1556; [2003] 3 WLR 667; [2003] CPLR 349
Three Rivers District Council v Bank of England (No 6) [2004] UKHL 48; [2005] 1 AC 610; [2004] 3 WLR 1274; [2005] 4 All ER 948
Whitehouse v Gormley [2018] CSOH 93; 2018 GWD 31-388

Textbooks etc referred to:

Alison, AJ, *Principles and Practice of the Criminal Law of Scotland* (Blackwood, Edinburgh, 1833), vol 2, p 86
Crown Office and Procurator Fiscal Service, *Criminal Justice and Licensing (Scotland) Act 2010 (Section 164) Code of Practice Disclosure of Evidence in Criminal Proceedings* (COPFS, Edinburgh, June 2011) (Online: <https://www.copfs.gov.uk/images/Documents/Prosecution Policy Guidance/Guidelines and Policy/Code%20of%20Practice%20-%20Disclosure%20of%20Evidence%20in%20Criminal%20Proceedings.pdf>) (13 August 2019)
Davidson, FP, *Evidence* (W Green, Edinburgh, 2007), paras 13.18 et seq
Edward, DAO, *The Professional Secret, Confidentiality and Legal Professional Privilege in the Nine Member States of the European Community* (Consultative Committee of the Bars and Law Societies of the European Community, Brussels, October 1976), para 32 (Online: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/ccbe edward report /ccbe edward report en.pdf) (13 August 2019)
Hume, D, *Commentaries on the Law of Scotland Respecting Crimes* (4th Bell ed, Bell and Bradfute, Edinburgh, 1844), ii, 132
MacSporran, A, and Young, ARW, *Commission and Diligence* (W Green, Edinburgh, 1995), paras 5.1 5.21
Stefanelli, JN, "Expanding Akzo Nobel: In-house counsel, government lawyers, and independence" (2013) 62 (2) ICLQ 485
Walker, AG, and Walker, NML, *The Law of Evidence in Scotland* (4th Ross and Chalmers ed, Bloomsbury Professional, Haywards Heath, 2015), para 10.2

At advising, on 9 May 2019

LORD BRODIE

Introduction

[1] This is an unusual action. The pursuers, who are husband and wife, sue the Lord Advocate for damages on the basis that, on 4 December 2015, he made an *ex parte* application to a judge of the Court of Session in terms of sec 121(2) of the Proceeds of Crime Act 2002 (cap 29) by presenting a petition, the operative averments of which were false, with the result that the judge made a restraint order in terms of sec 120 of the Act. While the pursuers do not say in terms that the defender knew that the averments in his petition were false, they do have pleadings from which it could be inferred that the averments in the petition were, at the very least, made recklessly. The pursuers offer to prove that the averments in the petition ‘were entirely unsupported by evidence’ and that ‘[in] material respects, the defender had evidence which actively undermined the factual position set out in the petition’. Remarkable as these averments may be thought to be, equally remarkable is the fact that the defender effectively admits them. The restraint order was recalled by another judge on 17 December 2015 with that judge noting that the defender’s failure to aver the full factual position amounted to ‘a clear and very serious breach of the duty of disclosure and candour’ in relation to reasonable cause to believe that the first pursuer had benefited from criminal conduct (see sec 119(2)(b)) and fear of dissipation of assets (see *Jennings v Crown Prosecution Service*). He awarded expenses against the defender on an agent and client basis. At answer 8 of the record in the present action the defender admits that his actions ‘in applying for and securing a restraint order against the pursuers on 4 December, 2015 were wrongful in the respect of a failure to discharge the duty of disclosure and candour as found by the Judge when recalling the order.’

[2] The background to the defender’s application for a restraint order and accordingly this action, is the insolvency of Rangers Football Club plc (‘the club’), the history of which the courts have become familiar with. The first pursuer is an insolvency practitioner. On 14 February 2012 he was appointed joint administrator of the club along with his colleague Paul Clark. On 14 June 2012, following creditors’ rejection of a proposal for a voluntary arrangement the business and assets of the club were sold. On 31 October 2012 joint liquidators were appointed and the first pursuer and Mr Clark vacated office. On 14 November 2014 the first pursuer was arrested and charged with offences related to the acquisition of the club in 2011, prior to its administration. On 1 September 2015 he was arrested again and charged with offences relating to the administration period. On 15 September 2015 he was indicted in the High Court, together with six co-accused. At a preliminary hearing on 5 February 2016 it was argued on his behalf that all seven of the charges against him were irrelevant. The Advocate-depute, without offering a response, conceded the position in relation to five of the charges and withdrew them. On 22 February 2016 the court determined that the remaining two charges were irrelevant and dismissed them. In a separate action for damages, based on very extensive pleadings, the first pursuer sues, *inter alia*, the present defender, for a variety of sorts of allegedly wrongful conduct associated with the criminal proceedings against him. The pleadings in that action were the subject of Procedural Roll discussion before Lord Malcolm. Lord Malcolm’s opinion as to

the appropriate disposal of the pleas argued before him has been published as *Whitehouse v Gormley and ors* ([2018] CSOH 93). A reclaiming motion against Lord Malcolm's decision has been marked but has not yet been determined.

[3] Proof in the present action has been allowed and a diet fixed for 18 June 2019 and subsequent days. Given the defender's admission of wrongful conduct one might suppose that the scope of that proof would be limited to quantification of damages. That is not quite the case. The first pursuer sues for £130,000 and the second pursuer sues for £50,000. The first pursuer alleges specific direct patrimonial loss by reason of the loss of a particular investment opportunity. Otherwise the pursuers rely on very general averments of having had difficulty in their financial affairs, and having suffered loss of reputation, anxiety and distress. The first pursuer acknowledges that he cannot be compensated for the same loss in both this and the other action in which he is suing the defender. The extent to which these averments can support a substantial award of damages will be a matter for determination at the proof fixed for 18 June 2019 but it may be that something will turn on the nature of the wrong that the defender is found to have committed. The defender's admission of (uncharacterised) wrongful conduct does not extend to an admission of the pursuers' averments that they have suffered loss, injury and damage as a result of the defender's infringement of their rights under Art 8 of the European Convention on Human Rights and Fundamental Freedoms. That issue therefore remains live and with it the question of what, in the circumstances of the case, is necessary to afford the pursuers 'just satisfaction' in terms of sec 8(3) of the Human Rights Act 1998 (cap 42) and the jurisprudence of the Strasbourg court under Art 41 of the Convention.

Recovery of documents

[4] As I would understand it, it is because of what I have described as the live issue that the pursuers sought and obtained an order for recovery of documents from the defender in terms of calls 1 and 2 of the specification, number 12 of process, lodged on 31 January 2019. The calls are in the following terms:

'1. All documents held by or on behalf of the Lord Advocate, his deutes, procurators fiscal, or any member of staff of the Crown Office and Procurator Fiscal Service (collectively "the Crown") as at 4 December 2015 containing entries which showed or tended to show that:

- a) The first pursuer was an "active participant in the scheme, which resulted in the obtaining of over £28million from third parties";
- b) The first pursuer had "claimed fees of over £3.1million" for the administration;
- c) The first pursuer had "six months prior to the administration" entered into negotiations with an American financial services firm, Duff & Phelps, to acquire his business, a partnership known as MCR;
- d) There was "reasonable cause to believe that [the first pursuer] had benefitted from his criminal conduct"; and
- e) It was necessary that a restraint order be granted.

including witness statements, reports, memoranda, emails and other documents; in order that excerpts may be taken therefrom at the sight of the Commissioner of all such entries.

2. All minutes, notes, records, reports, memoranda, emails and other documents containing entries showing or tending to show the basis upon which the Crown determined that an application for a restraint order against

the pursuers should be made, in order that excerpts may be taken therefrom at the sight of the Commissioner of all such entries.

[5] The defender has obtempered that order subject to certain documents being produced within a sealed confidential envelope. It is the defender's position that these documents are inadmissible in evidence and exempt from disclosure to the pursuers by virtue of legal advice privilege ('LAP').

Motion

[6] The action called before me on the motion roll on 9 April 2019 on the pursuers' motion to open up the confidential envelope and to allow its contents to be disclosed to the pursuers. Mr McKinlay appeared on behalf of the pursuers. Mr Ross QC appeared on behalf of the defender. In the light of their submissions it appeared that my task was two-fold. First, to determine whether it was open to the Lord Advocate to claim LAP and second, in the light of how I had determined that first matter, whether any of the contents of the envelope should be disclosed to the pursuers with a view to their being made available as evidence in the forthcoming proof. The first matter is one of general principle as to which I was advised there was no authority. The second is one of applying the relevant principle to the particular contents of the envelope, regard being had to their apparent provenance and purpose.

Submissions

Pursuers

[7] Counsel for the pursuers began by indicating that he did not anticipate that there would be any difference between him and counsel for the defender as to what was meant by LAP. It existed where: (1) there was a client, whose right it was to assert or waive the privilege; (2) advice had been given by a lawyer in the capacity of a lawyer; and (3) privilege had not been waived. If legal privilege is found to exist, there is no second stage in the form of a public interest exemption or balancing exercise; the privilege makes the associated evidence inadmissible and irrecoverable by commission and diligence. The leading cases were *Three Rivers District Council and anr v Bank of England (No 6)* ('*Three Rivers (No 6)*'), *R (Prudential plc) v Special Commissioner of Income Tax* and (particularly in relation to waiver) *Scottish Lion Insurance v Goodrich Corp*. The applicable law was discussed in Walker and Walker, *The Law of Evidence in Scotland* (para 10.2) and in MacSporran and Young, *Commission and Diligence* (paras 5.1 5.21) (counsel for the defender was to add a reference to Davidson, *Evidence*, paras 13.18 *et seq*).

[8] Counsel for the pursuers accepted that the privilege can attach to an in-house lawyer (a salaried lawyer employed to provide legal services exclusively to his (non-lawyer) employer) but he was unaware of any authority specific to communications internal to Crown Office. Counsel for the pursuers did not know what was in the confidential envelope but he understood that it might be a printout of an email chain which included messages from or to an Advocate-depute and from or to officials of the Crown Office and Procurator Fiscal Service ('COPFS'). The question therefore was whether LAP could attach to communications between an Advocate-depute acting in the name of the Lord Advocate and COPFS officials. Counsel for the pursuers observed that when the order for recovery had been

applied for no assertion of privilege had been made (notwithstanding the quite specific terms of call 2) but he did not seek to make anything of that.

[9] Counsel for the pursuers turned to the three elements required for the privilege to exist, as applied to the circumstances of the present case. Who, he asked rhetorically, was the client here? An Advocate-depute was effectively one and the same person as the Lord Advocate. Is it suggested that the defender was advising himself? Advice must be given 'in the capacity of a lawyer'. It was not easy to see this as having happened here. The COPFS was not a creature of statute. It fulfilled a public legal function. Traditionally it is the Advocates-depute who give instructions to COPFS officials. Crown Office does not operate on an adversarial basis. When applying for a restraint order those acting for the Lord Advocate have a duty to provide all relevant information. Counsel for the pursuers suggested that the defender has waived any claim to privilege that he might have, given the extensive recovery of documents (albeit in some instances redacted) which there had been in this case. This was the first time the defender had claimed LAP. There was the oddity that if privilege attaches it attaches to material which is at the very heart of the case; that being the proposition, which had been put to the judge who recalled the restraint order, that there had at the material time been simply no evidence of a risk of dissipation of proceeds of crime and no evidence that the pursuers had benefited from the first pursuer's involvement with the club.

[10] It was for the defender, submitted counsel for the pursuers, to explain why he should be able to claim LAP separate from public interest immunity. If he could not do so (and it was submitted that he could not) then the material in the confidential envelope should be disclosed.

Defender

[11] Counsel for the defender moved me to hold that the defender could claim LAP and, accordingly, as privilege was asserted in respect of the contents of the confidential envelope, the court should open the envelope and, on confirming that the contents were *ex facie* privileged, refuse disclosure of them. Counsel for the defender accepted that there was little difference between him and counsel for the pursuers as to what was the applicable law and in particular what were the three pre-conditions for the existence of LAP. Turning to these pre-conditions, while readily acknowledging that the position of the Advocates-depute and Crown Office were *sui generis*, he explained that here the client was the defender. Although holding a commission as an Advocate-depute the specialist counsel who appeared in court on behalf of the defender in proceedings in connection with the proceeds of crime was not acting in the more typical role of prosecutor. The reality was that COPFS officials advised and instructed the specialist Advocate-depute in relation to restraint proceedings. Counsel for the defender accepted that to attract LAP the relevant advice must be given in the capacity of a lawyer. It would be apparent on examination of the material in the confidential envelope that the exchanges between COPFS officials and the Advocate-depute came within the description of the officials acting as lawyers. As to waiver, counsel for the pursuers had not said that there had actually been waiver. Much of the recovery had related to the other action (the 'main action') where a liberal approach had been taken to disclosure. An unusual feature of recovery in the main action was that the first pursuer had in fact already seen much of the material with recovery under commission and diligence being resorted to in order that he could use it in evidence. The present proceedings

were separate from the main action. What was in question here was material of a different character to that which had been previously recovered. The defender was not asserting legal privilege in relation to all communications between/among COPFS officials. A distinction fell to be made between, on the one hand, exchanges among COPFS officials or with the Advocate-depute for court, which do attract privilege and, on the other, general discussions between procurators fiscal and the police or COPFS officials which do not. The relevant points of difference were the people involved and whether the communications related directly to appearances in court.

[12] As to counsel for the pursuers' 'oddity' point, counsel for the defender adopted what counsel for the pursuers had said about there being no second stage or balancing exercise to be carried out after it had been determined that legal privilege applied. It might be an odd outcome but then so what?

[13] The underlying policy of the rule that communication between client and lawyer was privileged from being compelled as evidence lay in the general interest that parties should be able to communicate candidly with their legal advisers without being concerned that the communication may be made known to their opponents (Davidson, *Evidence*, para 13.18). That consideration applied to the situation of the defender in the context of proceedings in respect of the proceeds of crime. It was of significance that the present action concerned civil proceedings. In the event of attempts to recover documentation of communications within Crown Office and between Advocates-depute and COPFS officials or between COPFS officials or Advocates-depute and the police in relation to actual or possible criminal proceedings, it is likely that they would be opposed on the ground of public interest immunity. However, not all material is withheld. For example, the modern practice is to disclose police statements but it is not practice to disclose the products of internal Crown Office communications.

Decision

Legal advice privilege: The principle

[14] In *Narden Services Ltd v Inverness Retail and Business Park Ltd* (p 338), Lord Johnston, giving the opinion of the court identified:

'(in broad terms) a right of absolute privilege in respect to communications emanating between a solicitor and a client relating to advice and also in respect of any documents, including those coming from accountants, which were prepared in the contemplation of litigation.'

Lord Johnston described this right as legal professional privilege ('LPP'). Notwithstanding that description, the right is that of the client, not the lawyer. Its function is to prevent evidence of communications being compellable in court or documents relating to such communications being recoverable by commission and diligence. As Lord Reed explains in his opinion in *R (Prudential plc) v Special Commissioner of Income Tax* (paras 103–108) the privilege has been established as a principle of Scots law since at least the late seventeenth century, albeit that the term by reference to which it formerly was discussed was 'confidentiality'. Lord Reed quotes Lord Wood in *McCowan v Wright* (p 237) for a statement of the principle:

'The rule by which the communications between clients and their legal advisers are protected from discovery, is one of great value and importance, and, within its legitimate limits, ought to be strictly observed. According to the

law of Scotland, such communications are privileged although they may not relate to any suit depending or contemplated, or apprehended’.

Lord Rodger was to the same effect in *Three Rivers (No 6)* (para 50) when he adopted the formulation that LAP attaches to:

‘all communications made in confidence between solicitors and their clients for the purpose of giving or obtaining legal advice even at a stage when litigation is not in contemplation. It does not matter whether the communication is directly between the client and his legal adviser or is made through an intermediate agent of either.’

In his opinion in *Three Rivers (No 6)* Lord Scott of Foscote quotes a number of judicial statements of the policy underlying and justifying LAP. At para 34 he distils them as follows:

‘[T]he *dicta* to which I have referred all have in common the idea that it is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers’ legal skills in the management of their (the clients’) affairs, should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busybodies or anyone else (see also paras 15.8 to 15.10 of *Zuckerman’s Civil Procedure: Principles of Practice*] ([1st ed.] 2003) where the author refers to the rationale underlying legal advice privilege as “the rule of law rationale”). I, for my part, subscribe to this idea. It justifies, in my opinion, the retention of legal advice privilege in our law, notwithstanding that as a result cases may sometimes have to be decided in ignorance of relevant probative material.’

As can be seen from the above quotations from *Narden Services* and *McCowan v Wright* there are two aspects to LPP: first, as it relates to preparation for litigation (litigation privilege (‘LP’)) and, second, as it relates to more general legal advice (legal advice privilege (‘LAP’)). In *Three Rivers (No 6)* (para 65) Lord Carswell explained that the:

‘privilege is commonly classified in modern usage under the two sub-headings of legal advice privilege and litigation privilege The former covers communications passing between lawyer and client for the purpose of seeking and furnishing legal advice, whether or not in the context of litigation. The latter, which is available when legal proceedings are in existence or contemplated, embraces a wider class of communication, such as those passing between the legal adviser and potential witnesses.’

However, when noticing the distinction between LP, on the one hand, and LAP, on the other, one must also notice Lord Carswell’s characterisation of them as sub-headings of one concept. He puts the matter succinctly at para 105 of his speech:

‘[L]egal professional privilege is a single integrated privilege, whose sub-heads are legal advice privilege and litigation privilege, and . . . it is litigation privilege which is restricted to proceedings in a court of law’.

[15] In *R (Prudential plc) v Special Commissioner of Income Tax* Lord Reed explains that the law in this area has developed separately in Scotland from in England, although the two systems have developed in the same direction. He notes (para 103) that there are ‘a number of differences in the case law in relation to particular aspects of the law, but the general principle, its fundamental importance, and the

considerations of public policy which underlie it, are common to both systems.’ Actual and potential differences in detail as between Scots and English law on the subject have been noted elsewhere (eg Edward, *The Professional Secret, Confidentiality and Legal Professional Privilege in the Nine Member States of the European Community*, and the comment on the Edward report in the opinion of Advocate General Warner in *Australian Mining and Smelting Europe Ltd v European Commission*). Davidson notices a number of points of difference and at para 10.2.4 Walker and Walker goes the distance of stating that: ‘the Scottish and English rules of confidentially and legal privilege are not the same in many respects.’

[16] However, whatever scope there may be for divergence as between the law of Scotland and the law of England on what, post *Narden Services Ltd v Inverness Retail and Business Park Ltd*, may in both jurisdictions be described as LPP, parties in the present case did not encourage me to pursue it. Rather, their respective submissions proceeded on the implicit assumption that there were no material differences between the two systems, at least in relation to what I was being asked to consider. I was referred to two English decisions as the relevant leading cases and reminded that the policy considerations and the modern framing of LPP in terms of a human right and, in particular, as an aspect of the protection conferred by Art 8 of the European Convention, applied equally north and south of the border. For present purposes I shall therefore adopt what I have taken to be parties’ assumption that, in relation to LPP, Scots law and English law are the same.

[17] While not forgetting Lord Carswell’s analysis of LPP as a single integrated privilege, I understood the application before me to be concerned with LAP as opposed to LP. Counsel were agreed that the salient features of the circumstances in which LAP applies are summarised in paras 24 to 27 of Lord Scott’s speech in *Three Rivers (No 6)*. They disagreed as to whether they were to be found in the present case. Before addressing that question it is convenient first to set out the relevant passage from Lord Scott’s speech:

‘24. First, legal advice privilege arises out of a relationship of confidence between lawyer and client. Unless the communication or document for which privilege is sought is a confidential one, there can be no question of legal advice privilege arising. The confidential character of the communication or document is not by itself enough to enable privilege to be claimed but is an essential requirement.

25. Second, if a communication or document qualifies for legal professional privilege, the privilege is absolute. It cannot be overridden by some supposedly greater public interest. It can be waived by the person, the client, entitled to it and it can be overridden by statute . . . but it is otherwise absolute. There is no balancing exercise that has to be carried out . . . in this country legal professional privilege, if it is attracted by a particular communication between lawyer and client or attaches to a particular document, cannot be set aside on the ground that some other higher public interest requires that to be done.

26. Third, legal advice privilege gives the person entitled to it the right to decline to disclose or to allow to be disclosed the confidential communication or document in question. There has been some debate as to whether this right is a procedural right or a substantive right. In my respectful opinion the debate is sterile. Legal advice privilege is both. It may be used in legal proceedings to justify the refusal to answer certain questions or to produce for inspection certain documents. Its characterisation as procedural or substantive neither adds to nor detracts from its features.

27. Fourth, legal advice privilege has an undoubted relationship with litigation privilege. Legal advice is frequently sought or given in connection with current or contemplated litigation. But it may equally well be sought or

given in circumstances and for purposes that have nothing to do with litigation. If it is sought or given in connection with litigation, then the advice would fall into both of the two categories. But it is long settled that a connection with litigation is not a necessary condition for privilege to be attracted ... On the other hand it has been held that litigation privilege can extend to communications between a lawyer or the lawyer's client and a third party or to any document brought into existence for the dominant purpose of being used in litigation.'

Points focused on in argument

[18] Looking to Lord Scott's summary, for LAP to exist there must be a client and there must be a lawyer acting as such. By 'acting as such' I mean being engaged in the processes necessary for the giving of legal advice in confidence and in fact providing such advice. It is for the client to assert the right which it is open to him to waive. These were the points focused on by counsel in their submissions: (1) a client, whose right it was to assert or waive the privilege; (2) advice given by a lawyer in the capacity of a lawyer; and (3) absence of waiver. There was a fourth point: what counsel for the pursuers described as the oddity that LAP was being asserted in relation to communications which appeared to go to the very heart of the case. I will consider each of these points in turn. In doing so I recognise that there is a degree of overlap among them, particularly between points (1) and (2).

A client

[19] The client, submitted counsel for the defender, was the Lord Advocate. The current Lord Advocate, as defender in the action and haver of the material in the sealed envelope, was asserting the privilege which was originally that of his predecessor in office, the Lord Advocate in 2015. Counsel for the pursuers gently ridiculed the notion of a Scottish Law Officer being a client for legal advice. I will come to that, but it is not suggested that the Lord Advocate in 2015 was personally involved in the communications under consideration. As counsel for the defender explained, it was one of his Advocates-depute. That puts in question the status of the particular Advocate-depute.

[20] Following the hearing, the solicitor acting for the defender sent a letter dated 16 April 2019 addressed to the Principal Clerk of Session for my consideration. With the permission of those acting for the pursuer I read that letter. Its object was to affirm the proposition that, when acting as such, an Advocate-depute was effectively the same person as the Lord Advocate. The letter reproduced the following passage from the present Lord Advocate's royal warrant (italics added by the writer of the letter):

'We have made, constituted and ordained like as We by these Presents make, constitute and ordain the said Walter James Wolffe during Our Pleasure Lord Advocate giving and granting unto him said Office with all the liberties, fees, pensions, duties and emoluments whatsoever pertaining and belonging to the same *and such like power to the said Walter James Wolffe and his deputies for whom he shall be answerable, to use and exercise the aforesaid office of the Lord Advocate*'.

The letter continues by explaining that the words in italics reflect the privilege which the Lord Advocate has of naming deutes through which his powers may be exercised (Hume, *Commentaries* ii, 132; Alison, *Principles and Practice of the Criminal Law of Scotland*, vol 2, p 86). It is on that basis that the Lord Advocate grants

commissions to Advocates-depute to exercise the functions and powers attaching to his office. The letter goes on to confirm that the Lord Advocate takes the view that an Advocate-depute, whether appointed full time or ad hoc, when acting within the scope of his or her commission, exercises functions and powers which attach to the office of Lord Advocate.

[21] I had understood counsel for the pursuers to concede that an Advocate-depute could be taken to be one and the same person as the defender. The Lord Advocate's Warrant and the Advocate-depute's commission provide the basis for why this is so. They also bypass an issue which has exercised the English courts since the decision of the Court of Appeal in *Three Rivers District Council v Bank of England (No 5)* ('*Three Rivers (No 5)*') (see *Director of Serious Fraud Office v Eurasian Natural Resources Corp Ltd*) and that is where the client is a large organisation, and in particular a corporate organisation, who are the officers or employees who are authorised to seek and to provide confidential information for the purpose of receiving legal advice and to receive that legal advice? The Lord Advocate is neither an organisation nor a corporate body but he is an officer of state at the head of a substantial office. Some of the duties of that office will be carried out by the Lord Advocate personally and some by his Advocates-depute but other duties will be performed by COPFS officials. Given the decision in *Three Rivers (No 5)*, as confirmed in *Eurasian Natural Resources*, questions may arise as to the authority of COPFS officials to act for the Lord Advocate in the capacity of 'client' but I accept that such questions do not arise with an Advocate-depute. For most purposes and certainly for present purposes, he or she can be regarded as if he or she were the Lord Advocate, as counsel for the pursuers accepted. If the Lord Advocate can be a 'client' with the benefit of LAP, then it does not matter that he is not the personal recipient of the legal advice; he can be represented by his depute.

[22] I would accept that from some perspectives the Lord Advocate is an unlikely candidate for client status with the protection of LAP. For one, he is a qualified lawyer. He is more readily seen as someone who gives legal advice than as someone who receives it. Counsel for the pursuers raised, as a slightly ridiculous possibility, the prospect of the Lord Advocate advising himself.

[23] I would further accept that there are other respects in which the Lord Advocate, as represented by the Advocate-depute, does not fit the paradigm of the private citizen requiring the assurance that he can candidly disclose his affairs to his legal adviser without any risk of either the citizen or the legal adviser being compelled to reveal what information was disclosed and what advice was given, which may be said to be the original justification of LAP. That paradigm assumes that the client has confidential information to disclose. That would seem to be unlikely in the case of the Lord Advocate or his depute. The expectation is that it will be the COPFS officials, having instructed investigation by the police, who will have the information and that it will be the Advocate-depute who will advise or act or give instructions on the basis of that information. Neither does the justification of LAP in terms of human rights fit very well when the claim is made by the Lord Advocate. I rather doubt whether the office of Lord Advocate has any human rights, but even if that is too sweeping a dismissal of the possibility, it is difficult to suggest that the Lord Advocate requires protection from potentially oppressive state action.

[24] While that may be, given the variety of legal and natural persons who have been held to be 'clients' for the purpose of LAP, I do not consider that the defender can

be denied an equivalent status, at least in the circumstances of the present case. As appears from the case law, LAP has been successfully asserted by the Customs and Excise (*Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)*), the Bank of England (*Three Rivers (No 6)*), the coroners department of the Home Office (*AB v Ministry of Justice*) and the Director of Public Prosecutions (*Auten v Rayner (No 2)*). That the Lord Advocate and his depute are lawyers does not, of itself, mean that they cannot claim LAP. A lawyer may be a client for legal advice and have the protection of privilege (*B v Auckland District Law Society*). That is so even when effectively he is advising himself (*Somatra Ltd v Sinclair Roche and Temperley (No 1)*, para 44: one partner of a solicitor's firm acting as legal adviser to his partners in dispute with a client).

[25] Counsel for the defender described the position of the Lord Advocate and COPFS as '*sui generis*'. Accepting that to be so, at least in a purely Scottish context, it appears to me that it is possible to exaggerate its significance for present purposes. The Lord Advocate has a number of roles and a variety of duties. These include being head of the prosecution service and being a member of the Scottish Executive (Scotland Act 1998 (cap 46), secs 29(2)(e), 44(1)(c)). He is a Scottish Law Officer and, in that capacity, gives advice and appears in court. These are the hallmark activities of a lawyer, the appearance being of the Lord Advocate acting as counsel, with the government as his client. However, as I took counsel for the defender to emphasise at another point in his submissions, that is not the capacity in which the Lord Advocate is sued in the present action. In that it is averred that he misused his powers under sec 121 of the 2002 Act the relevant capacity is that of the person having title to prosecute on indictment and therefore the 'prosecutor' where that expression is used in the 2002 Act. He was therefore not acting on anyone else's behalf and thus, as the person in whose name the application was brought, he may be said to fill a client-like role in which he may be represented by an Advocate-depute (albeit that the Advocate-depute too is a qualified lawyer). This is reinforced when one considers the reality that the Advocate-depute like any other lawyer, even a specialist working within his own speciality, will benefit from and may very well require, the advice of legally qualified COPFS officials. If 'client' is thought to be an odd word to use of the defender then it can be substituted with 'recipient of legal advice'. There is no reason why the Lord Advocate or his depute should not be a recipient of legal advice. Where that is so and where the other conditions for the privilege apply, I see no reason why the Lord Advocate should not be able to assert LAP.

Advice given by a lawyer acting in the capacity of a lawyer

[26] Before one can be the recipient of legal advice which attracts LAP, the advice must be legal and it must be given by a lawyer acting in the capacity of a lawyer. That was counsel for the pursuers' submission and I accept it. As Lord Rodger put it in *Three Rivers (No 6)* (para 58):

'In relation to legal advice privilege what matters today remains the same as what mattered in the past: whether the lawyers are being asked *qua* lawyers to provide legal advice.'

It is the circumstance of a client seeking and then being provided with legal advice on the client's affairs from a lawyer which gives rise to the relationship of confidence between lawyer and client and the confidential character of their

communications which Lord Scott identifies as an essential requirement if LAP is to apply (*Three Rivers (No 6)*, para 24). Thus, for LAP to apply, just as there must be a 'client', so must there be a 'lawyer' acting 'qua lawyer'. What is the position in the present case?

[27] Counsel for the defender submitted that in their exchanges with an Advocate-depute, legally qualified COPFS officials were the lawyers acting in that capacity. Counsel for the pursuers conceded that, as a matter of generality, LAP can extend to in-house lawyers. He questioned, however, whether it could extend to COPFS officials. Crown Office does not act on an adversarial basis. The Crown is subject to an obligation to make full disclosure.

[28] The object of the Edward report of 1976 was to state the law as it related to legal privilege in the then Member States of the European Community. It says this about the position in the United Kingdom (para 32):

'Privilege attaches to communications, rather than to the information communicated, the person to or by whom it was communicated, or the method (oral or documentary) of communication. In a disputed case, therefore, the law will look at the relationship which existed between the parties concerned at the time when the communication was made. For this reason, the same principles of law apply to solicitors, barristers and advocates in private practice, salaried lawyers employed by government departments, salaried lawyers employed by commercial companies ("juristes d'entreprise"), foreign lawyers and their assistants and "stagiaires". The question in each case is whether the communication was made to or by a lawyer in his professional capacity as a legal adviser or advocate.' (Original emphasis.)

Thus, according to the report, privilege attached to 'salaried lawyers employed by government departments'. That had been affirmed by the Court of Appeal in *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* (Denning MR, p 129, Karminski LJ, p 136, Orr LJ, p 138) (there was a subsequent appeal to the House of Lords but there the proposition was not challenged). What was in issue in *Alfred Crompton Amusement Machines* was whether privilege attached to communications between the commissioners and their own legal department. At first instance Forbes J considered that '[by] no stretch of the imagination can the commissioners in this case be regarded as the lay clients of their own legal branch'. Lord Denning, with whom the other members of the Court of Appeal agreed, thought otherwise (p 129A):

'Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority. It may even be the government itself, like the Treasury Solicitor and his staff. In every case these legal advisers do legal work for their employer and for no one else. They are paid, ... by a fixed annual salary. They are, no doubt, servants or agents of the employer. For that reason Forbes J thought they were in a different position from other legal advisers who are in private practice. I do not think this is correct. They are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges.'

[29] It is true that Lord Denning's view of the position of in-house lawyers (at least in the commercial sector) is not universal in the member

states of the European Union and it has not been adopted as EU law: in *Australian Mining and Smelting Europe Ltd v European Commission*, affirmed in *Akzo Nobel v European Commission*, on the basis that in-house counsel are insufficiently independent of their employers to justify LAP in relation to communications between the two. Whether the Court of Justice of the European Union would apply that reasoning to government lawyers may be open to question (see Stefanelli, ‘*Expanding Akzo Nobel: In-house counsel, government lawyers, and independence*’) but it is Lord Denning’s view: that full-time salaried lawyers, including government lawyers, are required to, and do, uphold the same standards of honour and etiquette as other members of the profession which is the one taken in Scotland. I would expect legally qualified COPFS officials to be admitted solicitors and members of the Law Society of Scotland and therefore subject to all the associated professional duties. In that they are no different from any other practitioner.

[30] Perhaps paradoxically, it was not because COPFS officials have low standards that counsel for the pursuers would deny them the status of lawyers acting in that capacity but it is because they have high standards in the sense that their role is to act in the public interest and not simply in an adversarial manner; they have a duty of candour and they are subject to particular statutory obligations in relation to disclosure.

[31] I do not share counsel for the pursuers’ doubts as to whether a legally qualified COPFS official can be a lawyer acting in the capacity of a lawyer for the purposes of LAP. He or she has the same professional and ethical obligations in respect of the administration of justice as any other Scottish lawyer. It was these obligations that the European Court of Justice saw as the counterparts of and therefore the justification of legal privilege (*Australian Mining and Smelting Europe Ltd v European Commission*, para 24). These include an obligation to exercise independent judgement and to advise and to act in accordance with that judgement. It is true that a COPFS solicitor has a duty of candour, both to the court and in his or her dealings with other lawyers, but so does every other member of the profession. When acting as a prosecutor he or she will be under obligation to comply with the disclosure requirements contained in Pt 6 of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 13) and the code of practice issued under sec 164. These requirements may override LAP, as specific statutory provisions always can, but that possibility does not mean that LAP may not be asserted when it is applicable.

Waiver

[32] Counsel for the pursuers did not develop his argument on waiver beyond indicating that the defender had already provided extensive material without having previously taken any point on LAP. Counsel for the pursuers did not accept counsel for the defender’s description of the defender’s approach to disclosure as liberal. There had, counsel for the pursuers explained, been multiple hearings relating to recovery of documents. That is not suggestive of the defender having waived his rights but what I would see as more critical is that it was for the pursuers to demonstrate by reference to details that the defender had waived such right as he had to object to the recovery of all or any documents on the basis of LAP. With all respect to counsel for the pursuers he did not begin to do that. He did not found on the fact that the defender had not asserted LAP at the stage of the application for commission and diligence in respect of call 2 in the specification of documents. That

there has already been extensive recovery of documents, whether on a voluntary basis or by order of the court, is neither here nor there. Where it is suggested that there had been waiver of an entitlement to object to further recovery something specific is required in support. Here there was nothing.

Privilege covering the issue at the heart of the dispute

[33] Towards the end of his initial submissions counsel for the pursuers observed that it would be odd if LAP were to attach to material which was at the very heart of the dispute. I took it that what he had in mind was a document or a number of documents which demonstrated or from which it could be inferred that, at the relevant time, someone whose knowledge could be imputed to the defender knew that there was not a proper factual basis for making the application for a restraint order. My response was to inquire, perhaps somewhat abruptly, 'So what?', a question which counsel for the defender was to reiterate.

[34] The point as I would see it is this. As a principle LAP may be open to criticism but as Lady Hale observed in her speech in *Three Rivers (No 6)* (para 61), it is too well established in the common law for its existence to be doubted. When applicable, as counsel for the pursuers correctly explained, it is absolute; it is not subject to qualification or the making of an exception in the public interest. There is no balancing exercise to be carried out. That means that if LAP applies to what would otherwise be relevant evidence and is not waived, then the inevitable result is that the evidence is not compellable. LAP may thus, in the words of Lady Hale, 'impede the administration of justice in the individual case' but so be it. The point was made by Lord Rodger in his speech in *Three Rivers (No 6)* (para 54) when he quotes Lord Reid in *Duke of Argyll v Duchess of Argyll* (p 93):

'[T]he effect, and indeed the purpose, of the law of confidentiality is to prevent the court from ascertaining the truth so far as regards those matters which the law holds to be confidential.'

Counsel for the pursuers did not press his submission that it was odd that LAP should prevent recovery of material at the heart of the dispute beyond suggesting that it might weigh in the balance in what was a situation of some novelty. In my opinion it cannot go even that distance. A similar point was taken in *Micosta SA v Shetland Islands Council (The Mihalis)*. It failed.

[35] *Micosta* was an action of damages in respect of alleged abuse of statutory powers on the part of the defenders' harbour master (an allegation with some similarities to what is alleged here). The pursuers were granted commission and diligence in respect of documents in the defenders' hands relating to the cause. The defenders produced letters between themselves and their law agents in a sealed envelope and opposed a motion for the envelope to be opened up, claiming confidentiality. The pursuers contended that where the subject-matter of the action was an alleged illegal act on the part of the defenders, such communications were recoverable as directly relevant to the intention or state of mind of the defenders at the relevant time. In a reclaiming motion that contention was rejected. Lord President Emslie said this (p 485):

'So far as we can discover from the authorities the only circumstances in which the general rule [that correspondence between a party and his law agent are confidential and not recoverable] will be superseded are where fraud or some other illegal act is alleged against a party and where his law agent has been

directly concerned in the carrying out of the very transaction which is the subject-matter of inquiry. In this case it is not suggested that the defenders' solicitors were involved at all in the intimation of the alleged threat by the harbour master and any confidential correspondence as to the defenders' views at the relevant time for they were quite entitled to seek advice confidentially clearly falls under the general rule'.

[36] As I have already indicated, counsel for the pursuers did not press his point. He did not invoke the exception to LAP which the Lord President identified in *Micosta*. Had he done so, notwithstanding what he said about the material in question going to the heart of the dispute, I would have considered that the pursuers' averments in this case do not bring it within the *Micosta* exception.

Conclusion in principle on whether the defender can claim LAP

[37] In my opinion there is no reason in principle why the defender cannot assert LAP in relation to communications between an Advocate-depute and full-time salaried COPFS officials who are admitted solicitors and deployed in roles which require an application of their legal expertise.

Consideration of the contents of the confidential envelope

[38] I have considered the contents of the sealed envelope, as I was invited to do. counsel for the defender had explained during his submissions that what had been placed in the envelope was produced in response to call 2 in the specification of documents: 'emails ... showing or tending to show the basis upon which the Crown determined that an application for a restraint order ... should be made.'

[39] The sealed envelope contains 12 sheets in the form of a printout of what appear to be eight emails sent over a period of some 21 hours on 16 and 17 December 2015. The senders and recipients are one Advocate-depute and three COPFS officials who I assume to be admitted solicitors. The immediate context for this exchange of communications was the imminent hearing for recall of the restraint order on 17 December at which the Advocate-depute was to appear. The style of communication is relatively informal as is to be expected with emails. The content includes summaries of facts, statements relating to the law as it relates to restraint orders and evaluations of the facts in the light of the law. The exchange has the appearance of a review of the defender's position in relation to the forthcoming application for recall of the restraint order.

[40] A feature of the email exchange is that it does not present a picture of the Advocate-depute as client providing information and the officials as lawyers providing advice which is the basic paradigm of circumstances to which LAP attaches. Rather, information is provided by the officials and the Advocate-depute contributes to the discussion of the evaluation of that information in the light of the relevant law. Thus, as has already been touched on, what is revealed by the emails is what one would expect in an exchange between an Advocate-depute and COPFS officials. However, that this does not conform to the basic paradigm of a private client disclosing his confidential affairs to his legal adviser, does not seem to me to matter. What appears from the emails is an obviously private discussion of the application of the law to the available facts in an instant case, among four persons on whom the defender's predecessor in office relied for legal advice. That, in my opinion, gives the discussion and therefore the emails by which the discussion was carried out, a confidential character. The then Lord Advocate, as

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represented by his depute, was the recipient of legal advice, albeit that the Advocate-depute was familiar with the relevant law and contributed to the discussion. I accept that one does not find a formal request for specific legal advice in respect of particular facts followed by the giving of legal advice in response but, to use the expression originally employed by Taylor LJ in *Balabel v Air India* (p 330) and approved by Lord Scott in *Three Rivers (No 6)* (para 38), the communications related to what could 'prudently and sensibly be done in the relevant legal context'.

Disposal

[41] In my opinion the defender is entitled to assert LAP in respect of the contents of the sealed envelope. It follows that they should not be made available to the pursuers and, subject to any further procedure, may be returned to the defender. In his letter of 16 April 2019 addressed to the Principal Clerk of Session, the solicitor acting for the defender suggested that while the parties were in agreement that there is no necessary additional stage of procedure to be followed consequent on the motion I might deem it appropriate to issue my opinion before taking any action in respect of the sealed envelope in order to allow parties the opportunity to consider whether they would wish to seek leave to reclaim. I am content to do that and will therefore bring the case out by order shortly thereafter to allow parties to make such representations as they wish.

[42] There is an additional reason to issue this opinion before making any order and that is that while I have endeavoured to follow the decision-making process suggested by parties' submissions, I have thought it appropriate to acquaint myself not only with the authorities cited by parties but with some other authorities in the extensive jurisprudence on legal privilege. I do not consider that these additional authorities have distracted me from the path delineated by parties' submissions but, as is apparent from my opinion, I have looked at materials which were not referred to by the parties. I do not invite re-argument of the motion but if either party consider that they have been unfairly prejudiced by my reliance on any authority to which they did not refer I will consider their representations. If either party wishes to take up this opportunity they should, prior to the by order hearing, lodge a written statement in the form of a note of argument focusing on any concerns that they may have.

THE COURT refused the motion.

A & WM Urquhart Scottish Government Legal Directorate

REPORTS

GREATER GLASGOW HEALTH BOARD v CHAIRMAN OF THE SCOTTISH HOSPITALS INQUIRY

COURT OF SESSION (OUTER HOUSE)

Lady Wise: 4 February 2025

[2025] CSOH 12; 2025 S.L.T. 205

Administrative law—Judicial review—Scottish hospitals inquiry—Health board challenging refusal by Chairman of inquiry to admit its expert report into evidence—Whether refusal to admit report unfair—Inquiries Act 2005 (c.12), s.17.

The Scottish hospitals inquiry was established under the Inquiries Act 2005 to consider the planning, design, construction, commissioning and maintenance of *inter alia* two hospitals in Glasgow. The inquiry sought to determine whether issues relating to ventilation and water adversely impacted on patient safety and care, and whether one of the hospitals was “unsafe”, which was defined by the inquiry as “present[ing] an additional risk of avoidable infection to patients”. The tenor of the expert evidence heard during the inquiry was that the hospital’s ventilation and water systems posed an increased risk of avoidable infections to patients and were unsafe. The health board which owned and operated the hospital, and was a designated core participant in the inquiry, denied the allegations made against it and commissioned a further expert report on the risk of infection from the water and ventilation systems at the hospitals, which advanced different conclusions on those matters to the other expert evidence. The health board applied to the chair to have the report considered in evidence and for its authors to give oral evidence. The chair considered that admitting the report would abandon the inquisitorial procedure controlled by him and turn it into an adversarial litigation, which was inconsistent with his duties under s.17 of the 2005 Act. He could resolve the

issue at the level of principle. The chair further considered that the reasons for refusing the report were underlined by the practical difficulties which would arise were it to be admitted, namely not being able to conduct a hearing which met the requirements of procedural fairness. The health board petitioned for judicial review, seeking declarator that the chair’s decision was unlawful and reduction thereof. The chair maintained that he was entitled to refuse the report on the basis of principle, and even if that was wrongly decided, the decision on the practical difficulties involved in admitting the report remained.

Held, (1) that fairness included the obligation, by those exercising an investigative jurisdiction, to listen to any relevant argument and evidence that might conflict with a possible or proposed finding (para.33); (2) that while the requirement to hear both sides, expressed by the *maxim audi alteram partem*, had to be followed by those exercising an investigative jurisdiction, fairness would not always require the admission of evidence tendered by an inquiry participant (para.34); (3) that the existence of contradictory expert evidence should have been regarded as a significant development when considering the need for balance, and the issue of principle was wrongly decided and consequently unfair, in breach of s.17(3) of the 2005 Act (paras 34–35); (4) that where a different conclusion on matters about which key findings would require to be made was advanced for consideration, the first question ought to be whether the evidence was likely to assist determination of those issues; it was not a question of the process transmuting into an adversarial one, but of assisting the chair in making robust and defensible findings (para.36); (5) that the decision was not to admit the report on the basis of principle, and the underscoring of an erroneous decision by reference to practical considerations could not rectify it (para.37); (6) that it was not currently open to the respondent to reach a different view and there was no other mechanism to correct the error; reduction would be unnecessary and inappropriate given recent developments, and declarator would be granted to the effect that the respondent’s decision was wrong in principle and unfair to the extent that it concluded that receiving the expert report tendered by a core participant and hearing evidence from the report’s authors would result in the abandonment of the inquiry’s inquisitorial procedure (paras 39–40); and petition *sustained in part*.

Petition for judicial review

Greater Glasgow Health Board petitioned for judicial review seeking declarator that the Chairman of the Scottish Hospitals Inquiry's refusal to admit the petitioner's expert report in the Scottish hospitals inquiry was unlawful and reduction thereof.

The petition came before the Lord Ordinary (Lady Wise).

Cases referred to

BBC v Chair of the Scottish Child Abuse Inquiry [2022] CSIH 5; 2022 S.C. 184; 2022 S.L.T. 385
Columbia Steam Navigation Co v G&J Burns (sub nom Owners of the Nerano v Owners of the Dromedary) (1895) 22 R. 237; (1895) 2 S.L.T. 449
Connelly (Peter) v HMA Advocate 1990 J.C. 349; 1991 S.L.T. 397; 1990 S.C.C.R. 504
Conway v Secretary of State for Scotland 1996 S.L.T. 689
F Hoffmann La Roche & Co AG v Secretary of State for Trade and Industry [1975] A.C. 295; [1974] 3 W.L.R. 104; (1973) 117 S.J. 713
Griffiths v TUI UK Ltd [2023] UKSC 48; [2023] 3 W.L.R. 1204; [2024] P.I.Q.R. P6
Honisz v Lothian Health Board [2006] CSOH 24; 2008 S.C. 235
Mahon v Air New Zealand [1984] A.C. 808; [1984] 3 W.L.R. 884; (1984) 81 L.S.G. 3336
R v Deputy Industrial Injuries Commissioner Ex p Moore [1965] 1 Q.B. 456; [1965] 2 W.L.R. 89; (1964) 108 S.J. 1030
R v Lord Saville of Newdigate Ex p B (No.2) [2000] 1 W.L.R. 1855; [1999] C.O.D. 436; (1999) 149 N.L.J. 1201
R v Secretary of State for the Home Department Ex p Doody [1994] 1 A.C. 531; [1993] 3 W.L.R. 154; (1995) 7 Admin. L.R. 1
R (on the application of Associated Newspapers Ltd) v Leveson [2012] EWHC 57 (Admin); [2012] A.C.D. 23
R (on the application of Cabinet Office) v Chair of the UK Covid-19 Inquiry [2023] EWHC 1702 (Admin); [2024] K.B. 319; [2024] 2 W.L.R. 485
R (on the application of EA) v Chairman of the Manchester Arena Inquiry [2020] EWHC 2053 (Admin); [2020] H.R.L.R. 23; [2020] Inquest L.R. 130
United States Shipping Board v Owners of The St Albans [1931] A.C. 632; (1931) 39 Ll. L. Rep. 23

Wightman v Secretary of State for Exiting the European Union [2018] CSIH 62; 2019 S.C. 111; 2018 S.L.T. 959

Legislation referred to
Inquiries Act 2005 (c.12)

On 4 February 2025, the Lord Ordinary *sustained* the petition *in part*.

LADY WISE.—**Introduction**

[1] This petition for judicial review raises a point about the application of the principle of fairness to an inquisitorial process. It concerns a decision of the Chair of the Scottish Hospitals Inquiry dated 1 August 2024 refusing an application by Greater Glasgow Health Board to have an expert report received into evidence and to hear from its authors.

[2] The Scottish Hospitals Inquiry was established under the Inquiries Act 2005 to consider the planning, design, construction, commissioning and maintenance of *inter alia* the Queen Elizabeth University Hospital and the Royal Hospital for Children, Glasgow. The relevant focus of the Inquiry is to determine whether issues relating to ventilation and water adversely impacted on patient safety and care and whether the QEUH is or was "unsafe". The term unsafe has been defined by the Inquiry as "present[ing] an additional risk of avoidable infection to patients".

[3] The Inquiry has held hearings in tranches. The first of these, "Glasgow I", reviewed the evidence and material involving patients and families. "Glasgow II" considered evidence from treating clinicians. This petition challenges a decision made during "Glasgow III". The Glasgow III phase has heard evidence from clinicians, members of the petitioner's management and estate teams and independent experts. Its focus is, *inter alia*, whether the ventilation and water systems in the QEUH are or were unsafe. The evidence stage of Glasgow III concluded on 13 November 2024 and a submissions hearing for that tranche is due to take place between 11 and 13 March 2025. It is anticipated that a fourth phase, Glasgow IV, will be held from the end of April to the end of May 2025 when all remaining evidence necessary for the Inquiry to address its remit and terms of reference will be heard.

[4] To date, the Inquiry has appointed six expert witnesses, all of whom gave evidence during Glasgow III. The tenor of all six experts was to the effect that the ventilation and water systems at QEUH posed an increased risk of avoidable infections to patients and accordingly were "unsafe". Greater Glasgow Health Board, which owns and operates the QEUH is a designated core participant in the Inquiry. The Board and some of its estates and management teams have been criticised by witnesses during the evidence in all three tranches of evidence to date. It denies allegations made against it during the Inquiry, including that there has been an institutional effort to conceal any environmental link with infections and that organisational reputation has been prioritised over patient safety. Many members of the Health Board's staff have given detailed witness statements on matters of fact and been subjected to examination in evidence.

[5] The present challenge relates to an independent expert report from three individuals, Professor Hawkey, a Dr Agrawal and a Dr Drumwright. It was instructed by the petitioner and finalised on 25 July 2024. The report addresses the core issue of the risk of infection from the water and ventilation systems at the two hospitals. It is accepted in these proceedings that each of the authors of the report is a recognised expert in their respective fields which are, in summary, bacteriology, haematology and clinical informatics.

[6] Greater Glasgow Health Board applied to the Chair of the Inquiry to have the report by these experts considered as part of the evidence at Glasgow III and for its authors to be called to give oral evidence. A number of core participants opposed the Board's motion, which led to a hearing after which the Chair made the decision of 1 August 2024 to refuse it.

The decision under challenge

[7] The Chair's decision and reasons for refusal of the petitioner's application runs to 22 pages. The introduction sets out some of the background and the terms of the Health Board's application that the independent expert report be included in the hearing bundles for Glasgow III and that the three named experts be called to give evidence. Reference is made to the terms of the letters of instruction sent to the experts and the fact that the instruction to the

first two experts had been requested so that those advising the Health Board could provide advice in respect of the associated police investigation, the Inquiry, and a defence to civil claims. The contents of the report are summarised between paragraphs 18 and 25 and the submissions made by counsel between paragraphs 26 and 52. The decision and reasons are set out between paragraphs 53 and 62 in the following terms:

"53. For inter-related reasons of principle and practicality, I have decided to refuse Mr Gray's motion and therefore the Inquiry will not consider the GGC Report as part of the evidence to be led at Glasgow III and will not call the authors of the GGC Report as witnesses.

54. I have already described the GGC Report and the circumstances in which it has come into existence. It should not be inferred from that description or anything I have to add that I have come to any view whatsoever as to the soundness or otherwise of its contents and apparent conclusions; I am not in a position to do so and I have not done so. Nor should it be inferred that I am in any way questioning the integrity, professionalism or good faith of its authors or those who instructed them. Mr Gray specifically stated that there was no question as to the impartiality of the experts instructed by NHS GGC and no question of them having been invited to adopt any position. For present purposes I accept that. The fact remains that the authors of the GGC Report were instructed by NHS GGC's legal advisers (CLO) in order for CLO to provide legal advice to NHS GGC in respect of the Inquiry, and also in respect of a police investigation and the defence to civil claims. The GGC Report was therefore a piece of work commissioned on behalf of NHS GGC for NHS GGC's purposes, entirely legitimate as these purposes may be, but with all the natural consequences of that. NHS GGC and its advisers had control over choice of author, scope of the work, the extent of information provided, and the use made of the eventual product. In short, the GGC Report is an NHS GGC document. In his submission Mr Gray characterised the terms of GGC Report as being to 'restore some degree of balance' in the face of the criticisms made by the Inquiry's Expert Reports. That is to confirm its purpose

is thus to advance an argument or arguments in favour of the position taken by NHS GGC in its Positioning Paper, and more generally. The GGC Report is an advocacy document prepared for a single core participant.

55. The GGC Report is also a very substantial document. I accept what was said by Counsel to the Inquiry and the representatives of core participants about what would be required properly to understand and evaluate it. National Services Scotland (NSS) have assessed that task as requiring five weeks for a team that is already assembled. Nothing in what was said about this by the legal representatives of the other core participants was challenged on behalf of NHS GGC.

56. At risk of repetition, I imply no criticism of what NHS GGC and its advisers have done, subject only to the qualification that the GGC Report must be seen for what it is and treated accordingly. I proceed on the basis that the GGC Report would be admissible as an expert report in adversarial court proceedings with a view to it being referred to and the authors led as witnesses by legal representatives acting for NHS GGC. However, the Inquiry is not a court. Its proceedings are not adversarial. It is not proposed that its authors be led by NHS GGC's legal representatives; that responsibility is to be left with Counsel to the Inquiry.

57. In adversarial proceedings, whether civil or criminal, it is for the parties to determine what evidence goes before the factfinder (the judge or the jury), subject only to that evidence being relevant to the matters of fact in issue. Moreover, it is for the parties to protect and advance their respective positions. While the judge has a duty to attempt to ensure that the procedure adopted is efficient and fair, that duty is informed by an expectation that parties have a responsibility to look after their own interests but only a very limited responsibility to look after other parties' interests. Thus, adversarial proceedings are of the nature of a contest in which all the parties are entitled to put such relevant evidence before the court as they wish. The court is bound to hear that competing evidence and make its decision solely on the basis of that evidence.

58. As Ms Connelly succinctly explained in her written and oral submissions, the procedure of inquiries under the 2005 Act, and in

particular this Inquiry, is not intended to be adversarial; it is inquisitorial. Ms Connelly cited what had been said by Lord Saville in making his opening statement to the Bloody Sunday Inquiry as illustrating the difference between an inquisitorial approach to be taken in an inquiry and an adversarial approach such as taken in litigation: 'An Inquiry like the present Inquiry is quite different. Here the Tribunal takes the initiative in trying to ascertain the truth. Unlike an adversarial contest, it is for the Tribunal to seek all the relevant material. Its task is not to decide the matter in favour of one party or side or another. Indeed, from the point of view of the Tribunal, there are no parties or sides. There will, of course, be those who have material evidence to give or who have a legitimate interest in challenging such evidence, but the Tribunal will not treat them as sides or parties in an adversarial contest, but rather as a means of seeking out the truth. (Volume X, A2.1 Opening Statement of the Tribunal (3rd April 1998) p.45).'

59. It was Ms Connelly's submission that to admit the GGC Report as part of the evidence to be considered by the Inquiry would be to make a fundamental change in the procedure adopted from an inquisitorial method to an adversarial method, with the consequence that fairness would require that what had been allowed to NHS GGC should be allowed to other core participants and all that would follow from that. I understood Ms Watts and Mr Love to associate themselves with Ms Connelly's submission. I heard nothing to contrary effect.

60. I accept Ms Connelly's reference to what was said by Lord Saville as entirely apposite and I accept her submission that to allow the GGC Report to become part of the evidence to the Inquiry would be to abandon the inquisitorial procedure controlled by the chair, which the Inquiry has adopted until now, and turn it into something like an adversarial litigation. I would see that as entirely inconsistent with my duties in terms of section 17 of the 2005 Act.

61. While what I require to decide can be resolved at the level of principle, the inevitable consequences of admitting the GGC Report narrated by Counsel to the Inquiry and the

legal representatives of core participants and not disputed by counsel for NHS GGC and which I accept would arise, underline why it should not be admitted. Put short, it would mean not being able to conduct a Glasgow III hearing beginning on 19 August 2024 which met the requirements of procedural fairness. That is something which should be avoided.

62. Counsel to the Inquiry and legal representatives of core participants made criticisms of the conduct of NHS GGC in this matter which Mr Gray was eager to refute. It is not necessary for my decision to express any view on what was said and I do not do so. I simply welcome Mr Gray's reaffirmation of NHS GGC's wish to adopt a wholly collaborative approach in its engagement with the Inquiry."

Submissions for the petitioner

[8] The decision of 1 August 2024 was irrational *et separatim* unfair. A declarator to that effect should be granted and the decision reduced. Any discretion afforded to the Chair of an Inquiry is subject to the duty of fairness – *R (Associated Newspapers Limited) v The Right Hon Lord Justice Leveson* [2012] EWHC 57 (Admin) at para [46]. It was not in dispute that the fairness of any decision in a Public Inquiry was ultimately for the court's determination – *R v Lord Saville of Newdigate* [2000] 1 WLR 1855 at para [38] and *Leveson* *supra* at paragraph 47. It had been noted in *Leveson* that a duty of fairness does not exist in a vacuum and is in that respect like a duty of care. The starting point for any consideration of a Chair's duty of fairness is the task which he was appointed to perform under his terms of reference – *Leveson* at para [35].

[9] The report that had been the subject of the application fell squarely within the terms of reference, which included an examination of the issues in relation to the adequacy of ventilation, water contamination and other matters adversely impacting on patient safety and care arising in the construction and delivery of the QEUH. The terms of reference also included an examination of what actions have been taken to remedy defects and the extent to which those have been adequate and effective. The position of Greater Glasgow Health Board was significant. It treats a large number of patients on a daily basis. Its haemato-oncology wards treat the most clinically vulnerable patients

in Scotland. The Royal Hospital for Children in Glasgow is a national centre for paediatric haemato-oncology treatment in which world leading experts care for a particularly vulnerable patient cohort. It is critical that public trust in the relevant hospitals and clinicians is maintained and the duty of the Health Board to its staff includes ensuring that their version of events was fully heard together with any relevant supporting (expert) evidence. Public confidence would be significantly undermined in the event that the Inquiry made any adverse comment about the safety of the QEUH. It was not just desirable but necessary for the Inquiry to have access to a range of views before making any such comment or criticism.

[10] As all of the experts appointed by the Inquiry had been critical of the Health Board, fairness demanded that where contradictory evidence was available it should be heard. While the Health Board had provided a detailed critique of all of the Inquiry's expert reports that was of limited utility without the alternative analysis presented by the three experts who had prepared the report. In essence, the report concludes, supported by significant data analysis and comparisons with other Glasgow hospitals, that the QEUH did not create any additional risk to patients. If the decision of 1 August was allowed to stand, the Inquiry would not hear highly pertinent evidence in relation to the safety of the hospital, which may result either in the petitioner receiving significant unjustified criticism or in the Inquiry Chair being unable to make any proper recommendation.

[11] It was accepted that in terms of section 17(1) of the Inquiries Act 2005 the procedure of the Inquiry is such as the Chair may direct. However, that discretion was fettered by an important provision in section 17(3) providing that the Chair is obliged to act with fairness. The requirements of natural justice continue to apply to an inquisitorial process. That is supported by the duty embodied in section 17(3). Those requirements were summarised in this context by the judicial committee of the privy council in *Mahon v Air NZ* [1984] A.C. 808. They include that an Inquiry Chair must listen fairly to any relevant evidence and rational argument that a person represented at the Inquiry and whose interest may be adversely affected by its findings may wish to place before him. Such a person must not be left in the dark as to the risk of an adverse finding being made, as that would deprive that person of an

opportunity to "adduce additional material of probative value which, had it been placed before the decision maker, might have deterred him from making the finding..." – *Mahon v Air NZ* at 820. The court was there relying on the decision of the Court of Appeal in *Reg v Deputy Industrial Injuries Commissioner, ex parte Moore* [1965] 1 QB 456.

[12] The requirement to observe the rules of natural justice applies to both adversarial and inquisitorial procedure – *F Hoffmann-La Roche and Co A.G. v Secretary of State for Trade and Industry* [1975] A.C. 295 at 368. Further, fairness is not an invariable or fixed matter and will be intensely fact dependant – *R v Secretary of State for the Home Department Ex parte Doody* [1994] 1 A.C. 531. It was also emphasised in *Associated Newspapers v Leveson* (at paragraph 53) that it is of the greatest importance that the Inquiry should be, and should be seen by the public to be, as thorough and balanced as is practically possible.

[13] While the Health Board had been afforded an opportunity, albeit limited, to submit questions to counsel to the Inquiry by way of Rule 9 of the Inquiry's process, those questions were necessarily in the abstract and of limited utility. The inability to put any alternative independent analysis to the witnesses such as that in the report, resulted in unfairness. The questions arising for the Inquiry's determination and which are considered in the report, are questions of a technical or scientific nature. Accordingly it was essential for the Inquiry to hear expert or skilled evidence before deciding thereon – *Walker and Walker on Evidence* (5th Ed), at 16.3.19, citing *inter alia Connelly v HMA Advocate* 1990 JC 349, *The "Nerano" v The "Dromedary"* [1895] 22 R 237 and *United States Shipping Board v The Ship St Albans* [1931] AC 632. In consequence of the Chair's decision of 1 August 2024, the Inquiry is faced with matters which require skilled evidence in order to be determined, yet the only skilled evidence permitted is "all one way", the Inquiry having deliberately excluded from consideration skilled evidence pointing in another direction. That was plainly unfair. The ability of the Chair himself, absent a contradictor, to discount the skilled evidence that has been led would be limited. He could do so only where that evidence simply did not stand up to rational analysis – *Honisz v Lothian Health Board* 2008 SC 235 at paragraph 39, or where it was mere *ipse dixit* or based on an incomplete understanding

of the facts – *Griffiths v Tui (UK) Limited* [2023] 3 WLR 1204 at paragraphs 62 – 66.

[14] Many of the authorities relied on by the respondent related to applications to limit the evidence available to an Inquiry either through anonymity or confidentiality. The present case was different in that the petitioner did not seek to exclude evidence but to present an additional independent analysis that would assist the respondent in addressing the terms of reference. The report utilised comparator data from other hospitals, both in-patient and out-patient, and reached the conclusion that there was no increased risk of infection. Such a conclusion went to the heart of the issues of whether the hospital was safe and whether there was any need for public concern in relation to risk. At the very least it would be rational to consider that evidence and use it to test the conclusions of the Inquiry's appointed experts. It was unfair and irrational to exclude it.

[15] Insofar as the other parties suggest that the decision of 1 August was limited to the Glasgow III tranche of hearings such that the petition was academic, that position was plainly flawed. When these proceedings were raised, the petitioner relied on the terms of Inquiry Direction 5, which provided that the respondent intended to issue an *interim* report following the Glasgow III hearings, including conclusions and recommendations in respect of the safety of the hospital. On 25 October 2024 the respondent issued Direction 8, stating that the Inquiry no longer intended to issue an *interim* report. Accordingly, as no recommendation in respect of safety will be made until after the fourth tranche of hearings the matter was not academic. A plain reading of the decision, in particular at paragraph 61, indicated that it was based on principle and so amounted to a refusal to admit the report into evidence at all. The Inquiry Chair could not retract a decision based on principle.

[16] The circumstances in which the court will refuse to entertain an academic question were explored in *Wightman v Secretary of State for exiting the European Union* 2019 S.C. 111. There the Lord President (Carloway) explained, at paragraph 21, that the default position was that "anyone who wishes to do so can apply to the court to determine what the law is in a given situation" and "the court must issue that determination publicly". Thus the exception to the general position

that the court does not answer academic questions is one of practicality. Where there is no petitionary conclusion the litigation must be capable of achieving some practical result. In the present case as the decision was one based on principle, namely that the proceedings were inquisitorial and admitting the report would render those proceedings adversarial, there was a live practical question. The decision should be declared unlawful and reduced.

Submissions for the respondent

[17] The focus should be on the specific question asked of the respondent and the specific answer provided. The application made had been to include the expert report in the hearing bundles for Glasgow III and call its authors to give evidence in that tranche of proceedings. The application had been made less than one month from the start of a 12 week evidential hearing. The report in question ran to over 200 pages and the application was tantamount to a demand that it be included and the witnesses called. It was accordingly unsurprising that as a matter of both principle and practicality the Chair refused the application.

[18] It was noteworthy that the petitioner's focus had been exclusively on the question of principle and an effective concession that the petition would not have been raised had the matter been decided purely as an exercise of the broad discretion available to the respondent. The decision on practicality still stood and there was nothing to indicate that the respondent had been in error in that regard. The subsequent issue of Directions 8 and 9 was relevant. Direction 8 provides a complete answer to the petitioner's challenge of fundamental unfairness on the basis that findings could be made without any opportunity to challenge the substance. Direction 9 provides that all core participants will be afforded the opportunity to highlight any issues, alleged gaps in evidence and advance arguments to challenge any evidence led. It was wrong to contend that findings would be made without the opportunity for comment or contradiction. Direction 9 also alerts parties that they will be able to make an application in the context of Glasgow IV to include any evidence they contend is relevant. It was clear from correspondence that at one stage the petitioner's side had suggested that the report could just be admitted for Glasgow IV but then without explanation that was not pursued and these proceedings were raised. What the petitioner was

seeking to do was render this court the primary decision maker in relation to a proposal made and withdrawn.

[19] It was accepted that the discretion of the Chair in the application that had been before him was not unfettered – section 17(3) of the 2005 Act and the decisions in *Ex Parte Moore* and *Mahon v Air NZ*. It was clear that a party must be given an opportunity to contradict evidence led. However, those opportunities still exist in the Inquiry such that fair procedure will be ensured. The respondent had not barred himself in all time coming from admitting the report under consideration. In any event no submission had been made to him at the time that it was fundamentally unfair to determine the matter as one of principle.

[20] While there was no dispute about the application of legal principle, there was a need to focus on what the Chair had been asked to address and the specific issue under review – *Cabinet Office v UK Covid Inquiry* [2024] KB 319. That case involved Notices under section 21 of the 2005 Act seeking to recover the WhatsApp messages of Boris Johnson, as Prime Minister during the pandemic. The court emphasised that an Inquiry does not determine issues between parties to a civil or criminal litigation but conducts a thorough investigation and has to follow leads rather than being bound by the rules of evidence (para [52]). It was not for parties to dictate to the Chair what is and is not relevant. While the expert report that had been tendered on behalf of the petitioner was relevant to the task of the Inquiry and the experts were on the face of it qualified to undertake the task they had been set, their instructions had come from one core participant. Those instructions were apparently for the combined purposes of a criminal investigation, civil proceedings and the Inquiry itself. The point had been made by the respondent in his decision that the report was effectively an advocacy document. In any event the data set underlying the authors' conclusions was still missing. There was no attempt to impugn the independence of these experts but they had been answering questions posed by their clients and not by the Inquiry.

[21] The petitioner had conceded that the Inquiry Chair had a broad discretion in relation to applications of the kind under dispute here. It could not be said that the only fair outcome was to allow

the report to be lodged as there were other ways of including any relevant material. The stage of the Inquiry at which the application had been made was highly relevant. The application had been restricted to the Glasgow III stage and the Inquiry would be moving to Glasgow IV when any further application could be considered. It would only be at the end of the Inquiry that a core participant such as the petitioner could contend that the respondent had failed to "hear the full story" in relation to relevant evidence.

[22] Fairness was an all-encompassing concept and the Inquiry Chair had required to consider the interests of a number of participants. There was nothing new or novel about the Inquiry instructing its own experts. That was standard practice and supported in the leading text *"The Practical Guide to Public Inquiries"* (Hart, 2020, at p 231). It was relatively rare for core participants to be permitted to instruct their own expert witnesses to give evidence, although they may be afforded the opportunity to comment on an intended expert appointment by the Inquiry. Accordingly, it was for the Inquiry Chair to decide what documents and evidence were to be heard and it was contrary to accepted procedure that core participants could force any lines of inquiry upon him. Fairness did not require the type and level of participation rights for which the petitioner contended. Far from being silenced, the petitioner had taken the opportunity to make trenchant criticisms of the Inquiry experts. It will have the further opportunity of making submissions on the evidence given by those experts. It was consistent with *Ex parte Moore* and *Mohan v Air NZ* that what a party must be given is an opportunity to comment or contradict evidence on issues with which it disagrees. The difference between the parties in this case is that the respondent contends that the petitioner has and will continue to have such opportunities such that in the round a fair procedure will have been adopted.

[23] The decision of the respondent should not be interpreted in the manner suggested on behalf of the petitioner. At paragraph 53 the reference to "inter-related reasons of principle and practicality" could be taken as meaning that both reasons would have to be wrong before there could be interference with the decision. While paragraph 61 does state that the argument can be resolved at the level of principle (that to allow the report to be part of the evidence would be to abandon the inquisitorial

procedure) the respondent had gone on to deal with the practical reasons to refuse it. Paragraph 61 should be interpreted as the respondent stating "esto I am wrong on the issue of principle, it would nonetheless be impracticable to allow the report to be lodged and so I exercise my discretion not to allow it". Absent a standalone legitimate expectation argument that would be enough to dispose of the petition.

[24] The circumstances in which the court might answer questions that may seem academic was summarised in *BBC v Scottish Child Abuse Inquiry Chair* 2022 SC 184 at paras [35] – [38]. In the present case the issue came to be one of remedy. In order to succeed, the petitioner would have to persuade the court that it could not now have a fair hearing. That could not be so as Direction 9 made clear that the application could be made of new. It would be sterile to reduce the decision when it was already known that the same motion could be made. The respondent had lodged the relevant correspondence and Directions 8 and 9, clarifying that there would be scope for seeking that additional evidence be led and that no findings in fact would be made until hearings were completed. It had clearly been the petitioner's original intention to make a fresh application but that had now been abandoned. As the Chair was open to a fresh application there was no practical purpose to be served by the petition. It was an attempt to interfere with a decision that had been made and implemented but where there was scope for a fresh decision. If any new application was made, the respondent would decide what should happen next in terms of whether the Inquiry should commission further expert reports, hear from the experts instructed by the petitioner or refuse the application. It was not for the court to micro manage the inordinately difficult task faced by the Inquiry Chair. The key point was that there were other ways of resolving the situation.

Submissions for the interested parties

[25] The interested parties, the "whistle-blowers" who had all worked for the petitioner were also core participants in the Inquiry. Each gave evidence during Glasgow III. They too had opposed the petitioner's application to have an expert report included and its authors called to give evidence. Insofar as the petitioner's approach seemed to be that the relationship between the petitioner and the

respondent was a purely bilateral one that was wrong. There were others with interests and the petitioner was just one of a number of core participants. The interested parties contend that the decision made was a reasonable one and within the exercise of the Chair's discretion. It would have been irrational to receive the report in question unless the hearings were discharged. That had been the context in which the application was made. It might have been different had the petitioner made an application to admit the report and call the witnesses but not under reference to the Glasgow III phase.

[26] The present proceedings had been conducted by the petitioner in a leisurely manner. Even if the argument on their behalf was well founded the remedy should be refused. They had not sought urgent consideration and the evidential stage of Glasgow III had taken place prior to the substantive hearing. The case was squarely in the territory of there being no practical consequences arising from success as outlined in *Conway v Secretary of State for Scotland* 1996 SLT 689 at 690. What the petitioner was seeking was effectively a reduction of an outstanding and undetermined application to admit a report and call witnesses to a tranche of hearings which have come and gone. To the extent that the petitioner also sought a declarator, the terms of that remained unclear. Accordingly the petition should simply be refused in the absence of any practical consequences arising from success. If the petitioner was correct on the issue of principle that there had been an error of law in relation to whether allowing the report would result in abandonment of the inquisitorial process, the respondent would have the benefit of the Opinion of the Court in dealing with any subsequent application.

[27] It could not possibly be fair to expect the other core participants, such as the interested parties, to have dealt with the expert report under discussion at hearings that were about to commence. The report cited many dozens of papers several of which had been written by the interested parties. The conclusions expressed therein would clearly affect the interested parties as core participants and they would have to be afforded the opportunity to take a view on those.

[28] Under reference to the decision in *Ex parte Moore* the situation here was analogous. If the decision of principle was an error of law there was

an alternative reason for refusal of the application that was not tainted by the same error. The situation in *Mahon v Air NZ* was different. Their problems had arisen from the piecemeal disclosure of evidence. In the present case the petitioners have been participants and know the argument against them. Their position has been that the argument against them is fundamentally flawed and there is no longer any argument that they have not been given advance notice of evidence. The absence of the underlying data on which all of the conclusions in the report are based should be taken into account. While it is said that this data can be immediately produced if the report is allowed one would need to consider that data in assessing whether it was relevant and material. It is not yet known whether the refusal to allow the report and associated evidence has resulted in unfairness. The Inquiry experts have not yet had an opportunity to examine the report and the underlying data. In any event, the petitioner's experts would not require to rely on their report to challenge or undermine the suggestion that the hospital was unsafe. Irrational analysis of the evidence led would not require separate expert evidence. Of course the expert evidence led was complicated but it was for the Chair to decide what else was required not the experts. The question of fairness extended not just to all participants but also to the public interest in the time taken with the Inquiry and its cost.

[29] Notwithstanding the use of the word "underline" in paragraph 61, the practicality reason was an independent one and was sufficient to allow the decision to stand. If that was wrong and the court was persuaded that there was a material error on the point of principle, the fact that there were separate good reasons based on practicality was sufficient to justify refusal of the introduction of the report at the time and so refusal of this petition.

Decision

[30] It is important to acknowledge the wide discretion bestowed on the Chair of any Inquiry operating under the Inquiries Act 2005. The procedure is designed to be flexible and inquisitorial in nature. The Chair has considerable scope to determine the nature and extent of the evidence received and witnesses led. He takes the initiative in the search for truth. The parameters of the Inquiry's work are framed by its terms of reference. The present dispute is concerned with a decision

about evidence relating to a central question for the Inquiry, namely the safety or otherwise of the Queen Elizabeth University Hospital. When the decision challenged was made on 1 August 2024, the expectation was that conclusions on that issue would be made in the Glasgow III phase of the Inquiry.

[31] Standing the wide discretion available to the Chair on procedural and evidential matters, the parties agree that, had the decision of 1 August been made exclusively in the proper exercise of discretion, it would be effectively unassailable. However, the dispute relates to the consequences of the issue of principle described in the decision. That issue was encapsulated in the submission by counsel for two of the families who are core participants. It was that to allow the report tendered by the Health Board to become part of the evidence to the Inquiry "... would be to abandon the inquisitorial procedure controlled by the chair...and turn it into something like an adversarial litigation". The Chair accepted that submission and recorded that he was able to resolve the issue before him at the level of principle. He added that the practical difficulties that would inevitably arise, which would prevent the Glasgow III hearings commencing on 19 August 2024, underlined the reason for not admitting the evidence.

[32] While there is reference in the decision to the report being an "advocacy document", this related only to the nature of the original instruction. It was no part of the arguments for the respondent and the interested parties that the authors of the report had failed in their duties as experts and were advocating for a participant. I have proceeded on the basis that those authors and proposed witnesses are skilled professionals who are qualified to give independent opinion evidence that would assist the Inquiry.

[33] There is no support in the authorities for the proposition that receiving evidence tendered by a core participant to an Inquiry would alter the form of procedure from inquisitorial to adversarial. The parties agree that the fundamental principles of natural justice apply to Inquiry proceedings. Fairness is a substantive requirement applicable to both adversarial and inquisitorial hearings. It includes the obligation, by those exercising an investigative jurisdiction, to listen to any relevant argument **and evidence** that may conflict with a

possible or proposed finding, "...that a person represented at the inquiry, whose interests (including in that terms career or reputation) may be adversely affected, may wish to place before him" – *Mahon v Air New Zealand Ltd and Others* [1984] A.C. 808, at 820. The requirement to hear both sides, traditionally expressed by the maxim *audi alteram partem*, requires to be followed by those exercising an investigative jurisdiction, such that principal parties must be able to contradict any information obtained – *Reg v Deputy Industrial Injuries' Commissioner, ex parte Moore* [1965] 1 Q.B. 456. In its application to modern statutory Inquires, fairness demands that they be "and be seen by the public to be, as thorough and balanced as possible" – *R (Associated Newspapers Limited) v The Right Hon Lord Justice Leveson* [2012] EWHC 57 (Admin), para [56]. That will include considering all material evidence on the core issues. Once it is known that there is expert evidence on technical and scientific matters available, the conclusions of which are contradictory to that led to date by Inquiry experts, it is difficult to regard its complete exclusion from consideration could be fair.

[34] Application of the principle of fairness will not always require allowing an Inquiry participant to have evidence tendered by them heard. Much depends on the context. It is not inconsistent with the principle of fairness that norms of procedure will be adopted that may generally discourage core participants from submitting their own expert evidence. A challenge of this type cannot be brought on the basis of disagreement with the Chair's conclusion on such matters – *R (on the application of EA) v Chairman of the Manchester Arena Inquiry* [2020] EWHC 2053 (Admin) per Sharp J, at paragraph 87. In the present case however, the application presented was by a core participant for whom the risks, including loss of public confidence, are incalculable in a situation where the expert evidence adduced to date had all been to the same effect. The existence of contradictory expert evidence should have been regarded as a significant development when considering the need for balance, albeit that it would have caused unpalatable disruption to planned hearings for it to be heard within Glasgow III, a point to which I will return. It is sufficient to record that, given the complexity and magnitude of the safety issue, there is considerable force in the Health Board's position that cross-examination of the Inquiry experts would be an inadequate method of challenge without a

basis in contradictory expert evidence heard by the respondent.

[35] I have reached the view that the issue of principle was wrongly decided and consequently unfair, in breach of section 17(3) of the 2005 Act. The conclusion that receiving the report would result in abandonment of the inquisitorial procedure was effectively determinative of the Health Board's application, or at least material. While the general concept of the safety of a hospital is easy to understand, the evidence relating to it in the circumstances of the Inquiry's terms of reference is highly complex and has been the subject already of extensive expert testimony. In getting to the heart of the issue of safety, the Inquiry has attempted to inform itself by eliciting evidence from no fewer than six expert witnesses, all of whom have reached the same conclusion. The Health Board, as a core participant who would indisputably be impacted severely by adverse findings on the matter, invited the Chair to receive additional expert evidence that reached conclusions contrary to those reached by the Inquiry experts. The act of doing so would not have the inevitable result of turning the process into an adversarial one. It is not for this court to direct the Inquiry as to management of its process. However, receiving the report and calling the authors to give evidence could all be achieved under the inquisitorial procedure adopted to date. Counsel for the Inquiry would take responsibility for leading the evidence, with core participants submitting questions in the usual way. There was no suggestion either to the respondent or to me that the witnesses would be led by one party (the Health Board) and be cross-examined by all others in a manner that would simulate a court process. A decision to receive evidence tendered by one participant can be perfectly consistent with a form of procedure that imposes an obligation on the Chair to do whatever is necessary to make fully informed findings on the central issues within the terms of reference.

[36] While it may be relatively unusual for a core participant to tender a document or witness to the Inquiry and suggest that the witness give evidence, it is competent. The approach to its inclusion will depend on the context. At the time of the Health Board's application, as indicated, the Inquiry had only one expert conclusion on the risk to safety issue, albeit from six different witnesses. Where a different conclusion on matters about which key

findings will require to be made is advanced for consideration, the first question ought to be whether the evidence is likely to assist determination of those issues. It is not a question of the process transmuting into an adversarial one, but of assisting the Inquiry Chair in making robust and defensible findings.

[37] I reject the submission that the conclusion on the practical obstacles to including the expert report tendered as part of the Glasgow III phase can amount to a stand-alone decision. Paragraph 61 of the decision states clearly that the contentious matter of the expert report can be resolved "at the level of principle". The decision was not to admit the report on that basis, something the respondent considered was underlined by the practical considerations. Thus, the practical considerations served to highlight or emphasise a decision reached by reference to principle. The underscoring of an erroneous decision by reference to practical considerations cannot rectify it. The suggestion that I should read into paragraph 61 that the practical considerations were included as a separate or alternative reason in the event that the respondent was wrong on the issue of principle, is contradicted both by the statement that the issue could be resolved at the level of principle and that the reasons were "interrelated".

[38] Counsel for the respondent and the interested parties placed considerable emphasis on both the fact that the application had been made only in the context of Glasgow III and the developments that have taken place since August 2024. It is clear from Directions 8 and 9, issued subsequent to the decision of 1 August, that no conclusions are now to be reached at this stage and that the respondent is open to receive any further application to receive the expert report and hear from further witnesses. I acknowledge that the respondent has adopted an entirely responsible approach in an attempt to resolve the consequences of the decision to exclude this evidence. Circumstances have changed since the Health Board made the application and there is now time to consider the merits of receiving the contradictory expert evidence.

[39] The difficulty is that, as the decision to refuse to receive it in August was, at least primarily, made as an issue of principle, it would not currently be open to the respondent to reach a different view. None of the correspondence shown to me impacts

on that as there is no agreement that the decision of principle was wrong. Even if there was, there is no other mechanism to correct the error. The effect of the decision is to exclude the report and related evidence from consideration completely. That is sufficient to dispose of the arguments that the petition is academic and/or premature. The petitioner has required to ask this court to invoke its supervisory jurisdiction to resolve the current impasse, so the petition has been capable of achieving a practical result (*BBC v Scottish Child Abuse Inquiry Chair* 2022 SC 184, Lord Carloway, at paragraph 36).

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[40] The question then becomes one of appropriate remedy. The Health Board seeks declarator and reduction, which failing declarator. I have concluded that reduction would be unnecessary and inappropriate given recent developments. Matters have moved on since the decision under challenge. The evidence stage of Glasgow III has concluded and the contradictory expert evidence was not led. Procedurally the respondent has made clear that he would accommodate a further application for this evidence to be included. In the absence of a declarator from this court in relation to the issue of principle, it seems likely that those who opposed the previous application as a matter of principle would do so again. They would be bound to succeed as the respondent has already expressed a view on that principle. Accordingly, I will sustain the petitioner's plea in law insofar as it seeks declarator and repel the pleas in law of the respondent and the interested parties. I will pronounce a declarator that the respondent's decision of 1 August 2024 was wrong in principle and unfair to the extent that it concluded that receiving the expert report tendered by a core participant and hearing evidence from the report's authors would result in the abandonment of the Inquiry's inquisitorial procedure. *Quoad ultra* I will repel the petitioner's plea in law. I will make no other orders. Any argument about whether the data accompanying the report should be produced before any future application is determined falls within the scope of Inquiry management and will be for the respondent to address. I will reserve all questions of expenses.

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