Neutral Citation Number: [2014] EWCA Crim 1861

Case No: 2014/02393C1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM MR JUSTICE NICOL
Mr Justice Nicol
T2013/7502

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 24th September 2014

Before :

LORD JUSTICE GROSS
MR JUSTICE SIMON
and
MR JUSTICE BURNETT

- -

Between :

GUARDIAN NEWS AND MEDIA LTD, ASSOCIATED NEWSPAPERS LIMITED, BBC, BSKYB LIMITED, EXPRESS NEWSPAPERS, INDEPENDENT PRINT LIMITED, ITN, MIRROR GROUP NEWSPAPERS LIMITED, NEWS GROUP NEWSPAPERS LIMITED, TELEGRAPH MEDIA GROUP, TIMES NEWSPAPERS LIMITED, PRESS ASSOCIATION	**Appellants**
- and -	
1. EROL INCEDAL **2. MOUNIR RARMOUL-BOUHADJAR**	**Defendants**

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
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Official Shorthand Writers to the Court)

Anthony Hudson and Ben Silverstone (instructed by **In-House Solicitor, Guardian News and Media Ltd**) for the **Appellants**
Henry Blaxland QC and Richard Thomas (instructed by **Birnberg Pierce and Partners**) for the **First Defendant**
Naeem Mian (instructed by **G T Steward Solicitors**) for the **Second Defendant**
R Whittam QC and Stuart Baker (instructed by **CPS**) for the **Prosecution**

Hearing date: 4 June 2014
Judgment

As Approved by the Court

The Rt Hon Lord Justice Gross:

INTRODUCTION

1. The Defendants, Erol Incedal and Mounir Rarmoul-Bouhadjar (hitherto AB and CD), face the following charges:

   i) Erol Incedal is charged with an offence contrary to s. 5, Terrorism Act 2006 ("TA 2006", preparation of terrorist acts) and an offence contrary to s.58, Terrorism Act 2000 ("TA 2000", collection of information).

   ii) Mounir Rarmoul-Bouhadjar is charged with an offence contrary to s.58 TA 2000 (collection of information) and an offence contrary to s.4, Identity Documents Act 2010 ("IDA 2010", possession of false identity documents etc with improper intention).

2. By order dated 19th May, 2014 ("the order"), Nicol J ruled:

   i) The entirety of the criminal trial of the Defendants should be in private (i.e., *"in camera"*, with the public and media excluded) and the publication of reports of the trial be prohibited.

   ii) The names and identities of the Defendants should be withheld from the public and publication of their names/identities in connection with the proceedings be prohibited.

   iii) The publication of reports of the hearing in open court on 19th May, 2014 and the open judgment handed down on that day be postponed until the conclusion of the trial or further order.

   The order was made by Nicol J pursuant to his common law powers, together with those contained in s.11 and s.4(2), Contempt of Court Act 1981 ("CCA 1981").

3. Pursuant to s.159, Criminal Justice Act 1988 ("the CJA 1988"), the Applicants (for convenience, "the media") sought leave to appeal from the order and contended that it should be set aside. We treated the hearing on the 4th June as if it were the hearing of the substantive appeal and, in the course of the subsequent hearing on 12th June (see below), formally gave leave. We make it plain that we did not treat the hearing as a review of the decision of Nicol J but have instead come to an independent conclusion on the material placed before us: see, *Ex p Telegraph Group* [2001] EWCA Crim 1075; [2001] 1 WLR 1983, at [3].

4. So far as concerns the procedure followed, Nicol J was dealing with an application by the Crown that the trial should be held in private in its entirety and that the Defendants should be anonymous. That application was supported by Certificates ("the Certificates"), setting out the reasons relied on in support, signed by the Secretary of State for the Home Department ("SSHD") and the Secretary of State for Foreign and Commonwealth Affairs ("SSFCA"). Further material was provided in Schedules to the Certificates ("the Schedules"). The Certificates but not the Schedules were provided to the Defendants and their legal representativeS and edited versions of the Certificates were shown to the legal representatives of the media, on terms as to confidentiality.

5. The Judge heard part of the application in open court. He then heard part of the application in private, i.e., in the presence of the Defendants, their legal representatives and the media's legal representatives. All had access to some secret material relied upon in support of the application. Finally, the Judge considered further material in the absence of all except the Prosecution ("the *ex parte* hearing").

6. We followed the same course – i.e., part of the hearing in open Court, part of the hearing in private and part (a very small part) *ex parte*.

7. As will be apparent from the order under appeal, the three principal issues are conveniently dealt with under the following headings:

   i) Issue (I): Trial *in camera*;

   ii) Issue (II): Anonymisation of the Defendants;

   iii) Issue (III): S.4(2), CCA 1981.

8. It had been indicated that the matter was urgent as the criminal trial was (then) due to commence on Monday 16th June at the Central Criminal Court. Accordingly, in the course of the 4th June hearing, we indicated that we would give our Decision as soon as possible, with fully reasoned Judgments to follow in due course. The reason for speaking of "Judgments" – plural – is that we are producing an Open Judgment, a Private Judgment and an *Ex Parte* Judgment, reflecting the procedure followed during the hearings and when giving our Decision. This is our Open Judgment.

9. We gave our Decision (in Open, Private and *Ex parte* versions) on the 12th June. All concerned were supplied with copies of our Open Decision ("the Decision"). For present purposes it suffices to repeat our overall conclusions:

   i) To the limited extent indicated in the Decision, we varied the order made by Nicol J for the trial to be *in camera*.

   ii) We allowed the media's appeal from the order made by Nicol J for anonymisation of the Defendants.

   iii) We allowed the media's appeal from the s.4(2), CCA 1981 order imposed by Nicol J in respect of that part of the 19th May hearing held in open Court, together with his open judgment of that date.

   iv) We had already indicated, on the 4th June, that anything said in the open hearing before us on that day could be reported.

THE FRAMEWORK OF PRINCIPLE

10. The Rule of Law is a priceless asset of our country and a foundation of our Constitution. One aspect of the Rule of Law – a hallmark and a safeguard - is open justice, which includes criminal trials being held in public and the publication of the names of defendants. Open justice is both a fundamental principle of the common law and a means of ensuring public confidence in our legal system; exceptions are rare and must be justified on the facts. Any such exceptions must be necessary and proportionate. No more than the minimum departure from open justice will be

countenanced. See: *Scott v Scott* [1913] AC 417; *Att.-Gen. v Leveller Magazine* [1979] AC 440, at pp. 449-45; *In re Trinity Mirror plc* [2008] EWCA Crim 50; [2008] QB 770; *R v Marine A* [2013] EWCA Crim 2367; [2014] 1 Cr App R 26, at [83] – [85].

11. These principles as to open justice were essentially not in dispute before us. However, it was also common ground that there are exceptions. For example, as rightly accepted by Mr. Hudson (for the media), the Court has a common law power to hear a trial (or part of a trial) in private ("*in camera*"): *Re A and Others* [2006] EWCA Crim 4; [2006] 2 Cr App R 2, esp., at [11], [41] and [42]; *R v Wang Yam* [2008] EWCA Crim 269, esp. at [6]; *Bank Mellat v HM Treasury (No. 2)* [2013] UKSC 38; [2013] UKSC 39; [2013] 3 WLR 179, esp. at [2] (judgments on jurisdiction issue). The Court does not require a party to destroy the right it is seeking to assert or protect as the price of its vindication. We detect no difference of substance in this regard between the common law and Art. 6 of the European Convention oN Human Rights ("ECHR").

12. It is important to underline that a hearing *in camera* involves a departure from the principle of *open* justice, not from *natural* justice. Concerns as to natural justice will or may arise under closed material procedures, where a party is excluded from the proceedings or full participation in the proceedings; such concerns do not arise when the hearing is *in camera*. The defendant in an *in camera* hearing has the right to know the full case against him and to test and challenge that case fully. In *Al Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 531, Lord Dyson JSC (as he then was) put it this way:

> " …..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….. "

13. National security is itself a national interest of the first importance and the *raison d' etre* of the Security and Intelligence Agencies ("the Agencies"), who themselves operate within a framework of law and oversight. For the Agencies to operate effectively, at least much of their work is secret and must remain so as a matter of necessity.

14. The policy of the United Kingdom, as is well-known, is to deal with terrorism (at least in part) through the Criminal Justice System ("CJS"). A necessary corollary, itself in the interests of justice (see, *Re A and Others*, *supra*, at [11]), is that the Crown should not be deterred from prosecuting cases of suspected terrorism by the risk of material, properly secret, becoming public through the trial process.

15. It is readily apparent that, from time to time, tensions between the principle of open justice and the needs of national security will be inevitable. All the more so, given the emergence of the Agencies from the shadows, their close cooperation with the Police in the CJS and the extension of the law's reach over the past decades.

16. It is well established in our law that these tensions are resolved along the following lines. First, considerations of national security will not *by themselves* justify a

departure from the principle of open justice: *Att.-Gen. v Leveller Magazine (supra)*, at p. 471.

17. Secondly, open justice must, however, give way to the yet more fundamental principle that the paramount object of the Court is to *do* justice: *Scott v Scott (supra)*, at pp. 437 – 439*; Att.-Gen. v Leveller Magazine (supra)*, at pp. 450 and 471; *Al Rawi (supra)*, at [27]; *Bank Mellat (supra)*, at [2]. Accordingly, where there is a serious possibility that an insistence on open justice in the national security context would frustrate the administration of justice, for example, by deterring the Crown from prosecuting a case where it otherwise should do so, a departure from open justice may be justified.

18. We take the "serious possibility" test from the authorities: *Re A and Others (supra)*, esp. at [11] and [42]; *Wang Yam (supra)*, esp. at [7]. In both these decisions, the test was expressed in terms of risk and possibility; neither suggests a balance of probability test – and, for our part, we can understand why not: (1) the inherent uncertainty at the stage when an *in camera* hearing is sought, emphasised by constitutional authority as to the power to discontinue a prosecution resting with the Attorney General and Director of Public Prosecutions while the concerns may very likely emanate from the Agencies; (2) the desirability of avoiding even the appearance of a "threat" or "blackmail" on the part of the Crown as to the discontinuance of the proceedings; (3) the fact that satisfaction of the test does not deprive the Court of decision-making power; the risk that the Crown might be deterred from prosecuting means the Court *may* (not *must*) permit a departure from the principle of open justice. At all events, it is unnecessary for us to go further. Given our view on the facts of this case (see below), further consideration of the desirability of some higher test (if indeed some higher test would be desirable) can be left for another day.

19. Thirdly, the question of whether to give effect to a Ministerial Certificate (asserting, for instance, the need for privacy) such as those relied upon by the Crown here is ultimately for the Court, not a Minister. However, in the field of national security, a Court will not lightly depart from the assessment made by a Minister. See, generally: *The Secretary of State for Foreign and Commonwealth Affairs v Assistant Deputy Coroner for Inner North London* [2013] EWHC 3724 (Admin), at [28] – [36].

A QUESTION OF JURISDICTION

20. As already indicated, a very small part of the hearing before us was *ex parte*. Before proceeding *ex parte*, we rejected an argument advanced by Mr. Hudson that, unlike Nicol J, we were not entitled to have regard to such material. Our reasons follow.

21. The Crown's application for the trial to be *in camera* was brought before Nicol J pursuant to Rule 16.6 of the Criminal Procedure Rules ("CPR"). That Rule makes provision for material to be adduced and for the Court to proceed on an *ex parte* basis: see, esp., CPR, Rule 16.6 (4) and (6).

22. The media appealed to this Court pursuant to s.159, CJA 1988, which provides, so far as material, as follows:

> " (1) A person aggrieved may appeal to the Court of Appeal, if that court grants leave, against –

(a) an order under section 4 or 11 of the …[CCA 1981]….made in relation to a trial on indictment;

….

(b) any order restricting the access of the public to the whole or any part of a trial on indictment or to any proceedings ancillary to such a trial; and

(c) any order restricting the publication of any report of the whole or any part of a trial on indictment or any such ancillary proceedings;

and the decision of the Court of Appeal shall be final.

……

(4) Subject to Rules of Court made by virtue of subsection (6) below, any party to an appeal under this section may give evidence before the Court of Appeal orally or in writing.

(5) On the hearing of an appeal under this section the Court of Appeal shall have power –

……

(b) to confirm, reverse or vary the order complained of; …..

(6) ….Rules of Court may make in relation to trials satisfying specified conditions special provision as to the practice and procedure to be followed in relation to hearings in camera and appeals from orders for such hearings and may in particular, but without prejudice to the generality of this subsection, provide that subsection (4) shall not have effect. ”

23. Rule 65, CPR contains the general rules for appeals to the Court of Appeal. So far as relevant, Rule 65.6 provides as follows:

“ (1) The general rule is that the Court of Appeal must hear in public –

(a) an application, including an application for permission to appeal; and

(b) an appeal….

but it may order any hearing to be in private.

….

(3) Where the appellant wants to appeal against an order restricting public access to a trial, the court –

(a) may decide without a hearing –

(i) an application, including an application for permission to appeal; and

(ii) an appeal; but

(b) must announce its decision on such an appeal at a hearing in public."

24. Rule 69, CPR deals specifically with the procedure on an appeal against an order restricting public access to a trial and includes the following provisions:

" **Duty of applicant for order restricting public access**

69.5 (1) This rule applies where the appellant wants to appeal against an order restricting public access to a trial.

(2) The party who applied for the order must serve on the Registrar –

(a) a transcript or note of the application for the order; and

(b) any other document or thing that that party thinks the court will need to decide the appeal…….

Respondent's notice on appeal against reporting restrictions

69.6 (1) This rule applies where the appellant wants to appeal against an order restricting the reporting of a trial.

…..

(6) The respondent's notice must –

…..

(f) identify any other document or thing that the respondent thinks the court will need to decide the appeal. "

25. Mr. Hudson's submission can be shortly summarised. Without explicit statutory permission, the Court lacked jurisdiction to operate a closed material procedure. Our consideration of material not seen by the Defendants or the media would contravene the principles of natural justice. This was a fresh hearing, not a review of the decision of Nicol J. As this was a fresh hearing, the Court could (and should) refuse permission to a party to adduce evidence if that evidence was proffered on an *ex parte* basis only.

26. We cannot agree. First, the submission would lead to absurd results. There is no appeal against the decision of Nicol J to receive and consider *ex parte* materials, on the face of it, something he was clearly entitled to do. It would be curious in the

extreme if, when considering whether to confirm, reverse or vary the order, we should be precluded from considering some of the materials which contributed or may have contributed to the Judge making the order.

27. In *Bank Mellat (supra)*, the Supreme Court held that it was entitled to conduct a closed material procedure if such a procedure had been lawfully conducted in the court/s below from which it was entertaining an appeal: see, esp., at [35] – [47] and [62] of the judgments on the jurisdiction issue. Were it otherwise, as Lord Neuberger of Abbotsbury PSC observed (*ibid)* at [44]:

> " ….for this court to entertain an appeal without considering the closed material would, at least in many cases, not be doing justice, either in the sense of fairly determining the appeal or in the sense of being seen fairly to determine the appeal, notwithstanding that the material will be considered in a closed hearing."

28. In our judgment, the same or similar considerations are applicable here. No Court utilises a closed procedure (or its equivalent) without anxious thought. But, as it seems to us, we are and must be empowered to receive and consider the *ex parte* materials and to sit *ex parte* to do so, if we are to do justice to the appeal. The source of our power is derived by necessary implication from our power to deal with appeals under s.159(5)(b) of the CJA 1988, augmented by CPR, Rule 69.5(2) and 6(f). It would make no sense to require the Respondent to such an appeal to identify and furnish us with the documents it thinks the Court will need to decide the appeal, for us then to decline to consider them. Further and, if need be, we would be prepared to hold that CPR, Rules 16.6 (4) and (6) – which expressly empowered Nicol J to consider information and to proceed *ex parte* when dealing with the application – applied by analogy to the hearing and disposal of the appeal.

29. Secondly, the fact that the appeal under s.159, CJA 1988 involves a fresh hearing rather than a review of Nicol J's decision furnishes a wholly insufficient foundation for the argument that, therefore, we should decline to receive materials only available to us *ex parte*. The nature of the appeal does have an important bearing on the scope of our inquiry; it neither permits nor obliges this Court to decline receipt or consideration of materials which will or may assist in the fair disposal of the appeal.

30. Thirdly, the background to the enactment of s.159, CJA 1988 was explained by this Court in *Ex p Telegraph Group (supra)*, at [2]. The intention was to make statutory provision for a right of appeal by "persons aggrieved" – primarily the media – against orders restricting or preventing reports of, or restricting public access to, court proceedings. S.159 thus recognised that, in Nicol J's words, the interests of the media were not simply their private concerns: Judgment, 3rd March, 2014, at [17]. The section did not, however, have the effect of making the media parties to the criminal prosecution, as the Judge correctly held: *ibid*, at [16] – [18]. The position of the media is thus distinguishable from that of parties to ordinary civil litigation, considered in *Al Rawi (supra)* or the parties to the application for a production order, dealt with in *R (BSkyB Ltd) v Central Criminal Court* [2014] UKSC 17; [2014] 2 WLR 558. That said, as already underlined, we reached our decision to consider materials and to proceed *ex parte* only after careful consideration and with a view to

doing justice to the appeal; our decision was not based on any narrow or technical view as to the true status of the media parties.

ISSUE (I): TRIAL *IN CAMERA*

31. We have already outlined the Court's power to hear a trial or part of a trial *in camera*. This case is exceptional. We are persuaded on the evidence before us that there is a significant risk – at the very least, a serious possibility – that the administration of justice would be frustrated were the trial to be conducted in open Court. For good reason on the material we have seen, the Crown might be deterred from continuing with the prosecution. The relevant test is thus satisfied. Indeed, we go further: on all the material, the case for the core of the trial to be heard *in camera* is compelling and we accede to it.

32. In his open judgment, dated 19th May, Nicol J referred to the witness statement dated 12th May, 2014, made by Ms Mari Reid, the Unit Head of the Counter Terrorism team in the Special Crime and Counter Terrorism Division of the Crown Prosecution Service. Ms Reid there made reference to both the Certificates and the Schedules. She explained that should the factors of concern to the Secretaries of State be ventilated in a public trial, she was "likely to be presented with representations" to the effect that the case should not continue. Against that background, Ms Reid confirmed that there was a "serious possibility" that the trial may not be able to go ahead if (so far as immediately relevant) the application for an *in camera* hearing was not granted.

33. A short additional witness statement from Ms Reid, dated 16th May, 2014 ("the second statement"), was placed before the Judge but only in the *ex parte* hearing. Having considered its content, we formed the preliminary view that much of its substance might be provided to those involved in the private hearing and that a gist might be produced for reference in our open judgment. We raised the matter with the prosecution who were receptive to these suggestions. Accordingly, we are able to say that the second statement explained further the position of the relevant interested parties in respect of a small number of discrete matters. It was likely that representations would be made that the case should not continue if evidence of any of these matters were to be disclosed publicly, and inevitable as regards one of those discrete matters.

34. We are well able to understand the difficulty about the factors of concern – both those in the Certificates and the discrete matters in the Schedules – being ventilated in a public hearing. The phraseology of Ms Reid is understandably cautious (see above). However, appreciating as we do, the potential consequences of public disclosure, the risk that the administration of justice would be frustrated if the core of the case was heard in open Court is overwhelming. We are further satisfied that the discrete matters dealt with in the Schedules require the additional protection given in the Order made following our Decision.

35. With a view to minimising any departure from the principle of open justice, we have obviously considered a split trial – i.e., with the core of the trial split into open and *in camera* hearings. We are, however, of the clear view, for reasons upon which we cannot elaborate in our Open Judgment, that in this case it is unreal to contemplate a split trial. It follows, as a matter of necessity, that the core of the trial must be heard *in camera*.

36. It is important to reiterate that a defendant's rights are unchanged whether a criminal trial is heard in open Court or *in camera* and whether or not the proceedings may be reported by the media: thus the defendant in such a hearing has the right to know the full case against him and to test and challenge that case fully. This is a very proper consideration but it does not, in any way, lessen the need for close scrutiny of any suggested departure from the principle of open justice.

37. As already underlined, no departure from the principle of open justice must be greater than necessary. While we are driven to conclude that the core of the trial must be *in camera*, on the material before us, we are not persuaded that there would be a risk to the administration of justice were the following elements of the trial heard in open Court:

    i) Swearing in of the jury.

    ii) Reading the charges to the jury.

    iii) At least a part of the Judge's introductory remarks to the jury.

    iv) At least a part of the Prosecution opening.

    v) The verdicts.

    vi) If any convictions result, sentencing (subject to any further argument before the trial Judge as to the need for a confidential annexe).

    Our Order has been drawn up accordingly.

38. We were further of the view – and so directed – that the position as to publication is to be reviewed at the conclusion of the trial, thus permitting (if need be) a further application for leave to appeal under s.159, CJA 1988. For the avoidance of doubt, as trials are dynamic processes, our Order does not preclude a review by the Crown and the Judge in the course of the trial, in the event of a substantial change of circumstances.

39. Still further, one issue canvassed before the Judge in open Court was whether a small number of "accredited journalists" might be invited to attend the bulk of the trial (subject to being excluded when the few discrete matters are discussed in accordance with the Certificates and the Crown's submissions), on terms which compelled confidentiality until review at the conclusion of the trial and any further order. Notably, this issue as to the attendance of accredited journalists was raised in the Certificates and supported by the SSHD and SSFCA. The Judge was not persuaded, essentially on grounds of practicality. We respectfully disagree, for the reasons which follow.

40. First, the proposal emanates from the SSHD and SSFCA. Departures from the principle of open justice are to be kept to a minimum. It is accordingly difficult to see on what basis this proposal should be rejected – once supported by the Secretaries of State – unless it is either objectionable in principle or unworkable.

41. Secondly, in our view, the proposal is not objectionable in principle. Importantly:

i) The selection of the journalists in question is not in the hands of the Secretaries of State. Instead, as provided in our Order, up to ten accredited journalists (as defined in the Order) may attend the trial subject to the terms as to confidentiality there set out. As further provided in our Order, any disagreement about which accredited journalists should be permitted to attend the private parts of the trial is to be resolved by the Appellants amongst themselves or, failing such resolution, is to be referred back to this Court.

ii) Journalistic presence at a criminal trial fulfils two distinct but related purposes: public scrutiny of the proceedings, coupled with contemporaneous reporting. We acknowledge that what will be lost is contemporaneous reporting – but that is an inevitable corollary of an order for an *in camera* hearing and will, in any event, be reviewed at the conclusion of the trial. However, the proposal for the attendance of accredited journalists means that the scrutiny function of the media will be preserved throughout the trial (save for the discrete *ex parte* aspects).

42. Thirdly, we do not think the proposal is unworkable. The practical arrangements can be and have been dealt with in our Order. Any breach would obviously carry the likelihood of severe sanctions and, as has been observed on previous occasions, reliance must be placed on the responsibility of the media. Further and in particular, any doubts with regard to policing are resolved by the fact that this is a proposal emanating from the SSHD and SSFCA, serving to minimise the extent of the departure from the principle of open justice.

43. We do not repeat here the full terms of our Order. We do, however, wish to emphasise that a transcript of the public and private proceedings (excluding the specific and discrete *ex parte* matters) will be available for review by any of the accredited journalists at the conclusion of the trial. Practical arrangements in this regard should be made in good time, so that the interests of all concerned can be accommodated, subject to the direction/s of the trial Judge. The *ex parte* segment of the trial will be recorded but, for obvious reasons, the transcript will not be made available for review by any of the accredited journalists at the conclusion of the trial.

44. Any decision to hold a criminal trial *in camera* is troubling. However, for the reasons given, we are persuaded that there is a compelling case for doing so. We are further satisfied that the solution arrived at in this Court means that everything possible has been done to minimise the departure from the principle of open justice.

ISSUE (II): ANONYMISATION OF THE DEFENDANTS

45. This issue is to be approached on the footing that the core of the trial is to be conducted *in camera*, as set out above. On this footing, we were not persuaded, on the material before us, that there was a risk to the administration of justice warranting anonymisation of the Defendants; nor did we think that, properly understood, the Crown's material supported that outcome, provided the bulk of the trial was *in camera*. In this regard, we respectfully parted company with the Judge and permitted the Defendants to be named. We are unable to expand on these reasons in this Open judgment but will do so in the Private and *Ex Parte* judgments.

46. Mr. Whittam QC for the Crown submitted that the preservation of anonymisation might serve to protect flexibility at the end of the trial: the anonymity of the Defendants might (we underline *might*) turn out to permit more to be published at that stage than might otherwise be the case. We were not persuaded and thought that the nettle needed to be grasped. For our part, we regarded the preservation of flexibility until the conclusion of the trial as an inadequate foundation upon which to base this significant departure from the principle of open justice in the absence of a clear justification at the stage when the issue arose before us.

47. We add only this. We express grave concern as to the cumulative effects of (1) holding a criminal trial *in camera* and (2) anonymising the Defendants. We find it difficult to conceive of a situation where both departures from open justice will be justified. Suffice to say, we were not persuaded of any such justification in the present case.

ISSUE (III): S.4(2), CCA 1981

48. S.4(2) of the CCA 1981 provides as follows:

> " In any such proceedings [i.e., legal proceedings held in public] the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose. "

49. *The hearing before us:* For the duration of the hearing before us, we "held the ring" by imposing an order under s.4(2), CCA 1981. At the conclusion of the hearing, we indicated that the order would not be continued in respect of the hearing in open Court before us on the 4th June. We could not see any good reason to postpone publication of any open part of that hearing. The effect of our order was that the ordinary reporting restrictions applying to appeals from preparatory hearings (strictly so called) should not apply to the extent that anything said in the open hearing before us could be reported: see, s.37(4), Criminal Procedure and Investigations Act 1996 ("CPIA 1996").

50. *The hearing before Nicol J on the 19th May:* We were likewise not persuaded of the justification for a s.4(2) order in respect of that part of the 19th May hearing before Nicol J which took place in open Court and the open judgment given by the Judge on that day. That said, we underline that the hearing before Nicol J was a preparatory hearing and therefore subject to reporting restrictions contained in s.37, CPIA 1996. The media's success in this regard may therefore be limited, at least so far as it relates to the open proceedings before Nicol J. However, our conclusion also means that the open judgment of the 19th May given by the Judge ceased to be subject to any s.4(2) order because its material parts were referred to before us.